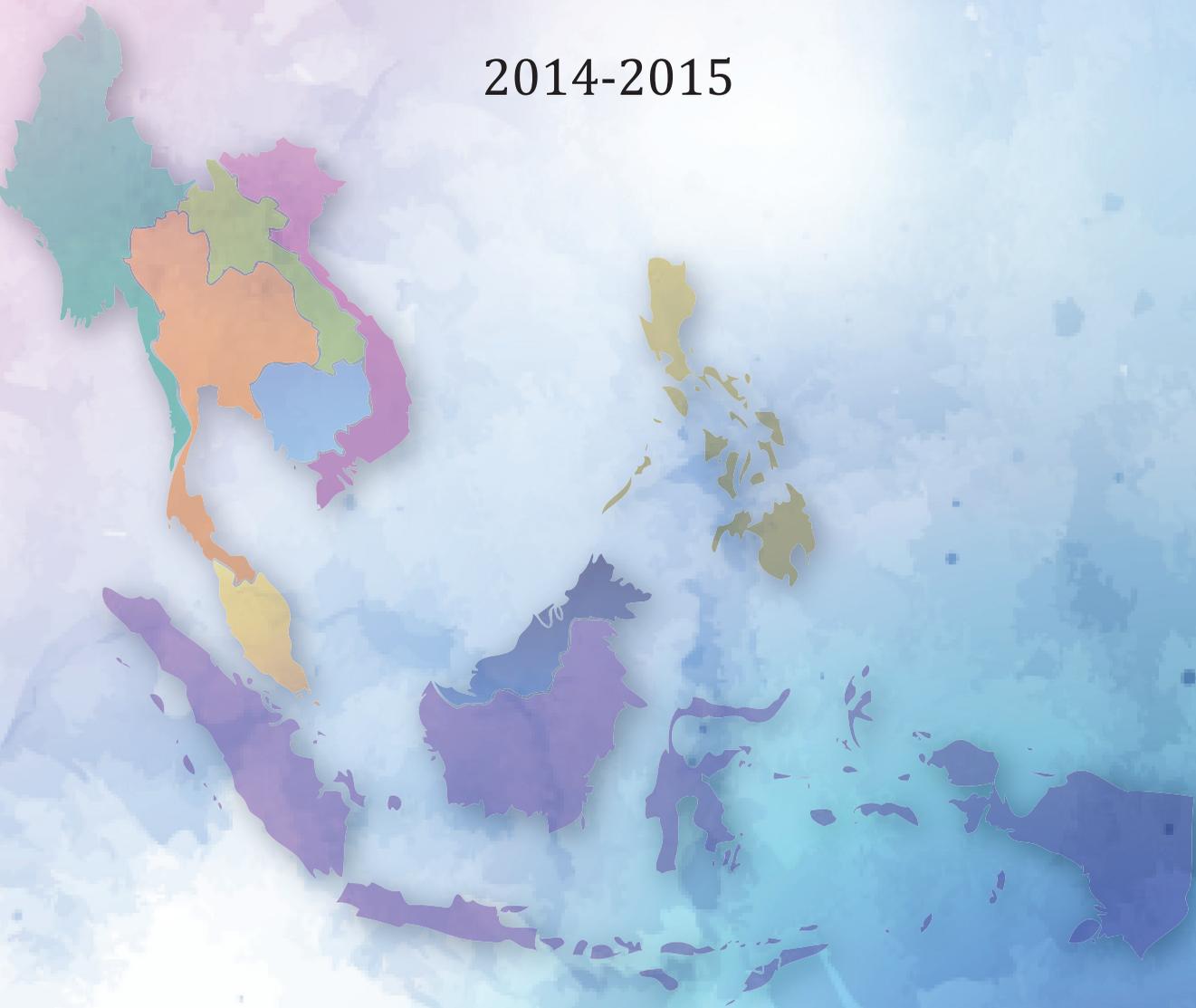




# Human Rights Outlook in Southeast Asia

2014-2015







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Strengthening Human Rights and Peace Research and Education in ASEAN–Southeast Asia project (SHAPE–SEA) is a collaboration between two regional networks, the ASEAN University Network–Human Rights Education (AUN–HRE) and the Southeast Asian Human Rights Studies Network (SEAHRN). This programme is supported by the Swedish International Development Cooperation Agency (SIDA), and the Norwegian Centre for Human Rights (NCHR).

## **Human Rights Outlook in Southeast Asia : 2014-2015**

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# Foreword

In November 2015, the ten leaders of ASEAN adopted the ‘ASEAN Community Vision 2025; which

*resolved to consolidate our Community, building upon and deepening the integration process to realise a rules-based, people-oriented, people-centred ASEAN Community, where our people will enjoy human rights and fundamental freedoms, a higher quality of life and the benefits of community building, reinforcing our sense of togetherness and common identity, guided by the purposes and principles of the ASEAN Charter.*

Indeed, since 2009, ASEAN leaders have established two ASEAN human rights mechanisms, the ASEAN Intergovernmental Commission on Human Rights and the ASEAN Commission on the Promotion and the Protection of the Rights of Women and Children, to promote and protect the rights of all ASEAN peoples. In addition, the adoption of the ASEAN Human Rights Declaration in November 2012 further raised expectations of ASEAN peoples that their human rights situation, in one way or another, would be addressed. Consequently, the people now expect human rights issues will be dealt with; at the very least, that a human rights situation (assessment) report will be regularly released to inform the authorities and public, but ...

Under the Strengthening Human Rights and Peace Research and Education in Southeast Asia/ASEAN or SHAPE SEA Program run by a network of academic institutions, members of the ASEAN University Network–Human Rights Education (AUN–HRE) and the Southeast Asian Human Rights Studies Network (SEAHRN)—all of which have the ultimate goal to ensure better promotion and protection of human rights through research and education—a number of activities have been initiated and implemented since 2015. One of the activities identified as part of our priorities is to produce a Human Rights Outlook in Southeast Asia, the first human rights assessment report ever produced by scholars within the region. Although the first edition focuses on 2014-2015, it could not cover all eleven Southeast Asian countries; but the seven under assessment were examined using solid methodological and objective regional human rights reporting under an international and regional legal framework.

The intention of the report is not only to inform the public of Southeast Asia, but also to encourage decision makers to pay attention to particular human rights issues critical to peoples in the region. We hope our efforts to prepare an indigenous human rights situation report will contribute to raising awareness and draw more attention to the human rights of peoples in the region.

A handwritten signature in black ink, appearing to read 'Petchara P.', with a large, stylized flourish at the end.

**Sriprapha Petcharamesree**  
**Chair, SHAPE-SEA**  
Bangkok, December 2016

# Introduction

**Azmi Sharom**

This book is the first in what we hope will be a continuing series examining human rights in the Southeast Asian region. A product of the Strengthening Human Rights and Peace Research and Education in ASEAN/Southeast Asia project (SHAPE-SEA), which, in turn, is a collaboration between two regional networks, the ASEAN Universities Network–Human Rights Education (AUN–HRE) and the Southeast Asian Human Rights Studies Network (SEAHRN), this programme is supported by the Swedish International Development Cooperation Agency (SIDA), and the Norwegian Centre for Human Rights (NCHR).

One of SHAPE-SEA's main objectives is to publish works to further disseminate human rights research to a wider audience. This book aims to achieve that goal by providing not only an objective analysis of international and national legal human rights obligations in Southeast Asian countries, but also by offering more subjective expert opinions on key human rights issues particular to their respective nations.

Because each volume of the Outlook will focus on a specific time period, such an exercise will also provide a valuable insight into the evolution or even devolution of human rights protection in the region, and over time should offer a useful and structured record. Covering seven countries (Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam), this first volume will examine the period, 2014-2015. Future volumes should include more, if not all countries in Southeast Asia.

All the above-mentioned countries are party to international human rights treaties, although some have deliberately kept their international obligations to a minimum (see chart below). There is, however, one document which all are party to – the ASEAN Human Rights Declaration 2012 (see Appendix). Although merely soft law and therefore not legally binding, the Declaration does lay down aspirational obligations which signatories should strive to achieve.

The Declaration covers civil and political rights, economic, social and cultural rights, the right to development, and the right to peace. As such, it is relatively thorough, with some particularly encouraging elements. For example, under the heading, 'General Principles' which asserts the right to equality, non-discrimination, the rights of vulnerable communities, and the right to access remedies in the event one's freedoms are infringed, distinctions on the basis of nationality were deliberately omitted. All

persons are entitled to these rights, a distinction sometimes lacking in individual national constitutions. However, loopholes are provided in sections 7 and 8 which read respectively:

*At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal social, cultural, historical, and religious backgrounds.*

and

*The exercise of human rights and fundamental freedoms shall be subject to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedom of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.*

## Major Human Rights Treaties and Parties

	Indonesia	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
International Covenant on the Elimination of all Forms of Racial Discrimination	X			X		X	X
International Covenant on Civil and Political Rights	X			X		X	X
International Covenant on Economic, Social and Cultural Rights	X		X	X		X	X
Convention on the Elimination of All Forms of Discrimination Against Women	X	X	X	X	X	X	X
Convention Against Torture	X			X		X	X
Convention on the Rights of The Child	X	X	X	X	X	X	X
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	X			X			
Convention on the Rights of Persons with Disabilities	X	X	X	X	X	X	X

It would appear that even in a non-binding document, the Member-States of ASEAN still felt it necessary to expressly insert an escape clause to circumnavigate the aspirational standards within. Furthermore, when it comes to civil and political rights, no express mention of aspiring to achieve said standards (such as can be found in the section on economic, social and cultural rights) is mentioned.

It is perhaps no surprise then, that civil and political rights, such as freedom of expression, are the common thread tying all seven chapters together. For example, concerns were raised in Singapore when teenager, Amos Lee was charged under the Penal Code and the Protection from Harassment Act for an expletive-laden video diatribe against former premier, Lee Kuan Yew; not least because Amos Lee was treated in a mental hospital for two weeks, raising the implication that dissenting views must be the result of madness. However, a report from his doctors affirmed the opposite; that he was not mad, that he was actually intelligent but had used his intelligence ‘incorrectly,’ a statement which cannot help but invoke shades of George Orwell’s 1984 and its idea of ‘thoughtcrimes.’

Orwell’s dystopian novel made a more tangible appearance in Thailand when a university student was arrested for reading the book whilst enjoying a sandwich in front of a department store. As farcical as this may sound, it is only one incident amongst many experienced by Thais under the rule of the military junta which considers any discussion of politics a threat to stability and national security. In Indonesia, although the Press Law of 1999 prohibits the censorship, banning and licensing of the press, extra-legal actions continue to pose a threat to free journalism. In fact, scores of press personnel have been physically attacked in the course of their profession. Moreover, the police, in contravention of the law protecting press freedom, still take it upon themselves to ban publications.

Discrimination is particularly an issue in countries with a multi ethnic make-up. In Malaysia, the constitutionally permitted affirmative action for ethnic Malays and natives of the states of Sabah and Sarawak has ceased to be merely a measure to enforce economic equity, having long since morphed into a justification for conservative and racist groups to espouse a philosophy of racial superiority. This thinking has been compounded by the fanning of racial incidents by groups and individuals, thereby threatening the rights of all ethnic groups to live in peace whilst normalising racist behaviour and language. Sadly, the situation in Myanmar is even more desperate with its blatantly racist laws aimed at ensuring racial and religious segregation, as well as outright prosecution of the Rohingya ethnic group. Indeed, such treatment has encouraged large segments of the Rohingya population to flee the country which in turn has led to other human rights abuses as a result of human trafficking.

In Vietnam and Singapore, economic issues are more the bone of contention, although from slightly different perspectives. In Vietnam, local workers frustrated with poor working conditions and faced with government limitations on 'lawful' union activities, often find themselves with no choice but to organise wildcat strikes. In addition, government efforts to improve worker conditions have been beset with problems of compliance and enforcement. In Singapore, it is the treatment of migrant workers, principally those involved in blue collar occupations who are granted work permits as opposed to the employment passes offered to professional and technical classes, which is a cause for concern. For this group, the law is heavily skewed in favour of the employer, leaving workers very much at their mercy, not the least because any change of employment requires the consent of the current employer. At the root of this treatment is the notion that migrant workers are of a 'lower' class, mere commodities in a capital driven economy, which to some, justifies denying them basic human dignity.

An interesting fact about this region is that although human rights issues are common, especially civil and political rights, some are very nation specific. Due to its Catholic nature, the Philippines is the only nation in Southeast Asia where the right to reproductive health has always been a contentious issue. Indeed, by encouraging street protests which denounced the Act as evil, and threatening to excommunicate the then President Aquino, the Church was influential in watering down the Responsible Parenthood and Reproductive Health Act 2012. As such, the separation of State and Church is blurred in this country, particularly as regards divisive matters.

Despite the above issues, it must be reiterated that all countries in this volume have acknowledged human rights. Consequently, as parties to human rights treaties, national laws have been introduced which appear to offer at least rudimentary rights protection. However, the level of protection differs from country to country for a variety of reasons. Thus, when analysing human rights in Southeast Asia, it would be wise to avoid generalisation, even in matters where a common thread seems obvious. Freedom of expression problems in Indonesia, for example, differ significantly from those in Thailand. Whereas the latter has specific laws restricting expression, the former does not, yet it also experiences a host of similarly serious extra-legal problems.

One underlying theme across much of the region concerns the threat to freedom of religion. In some cases, this is due to the acts of individuals and associations with the tacit support of government (Malaysia); in others, discrimination is actually enshrined in legislation (as in Myanmar where laws are expressly aimed against specific ethnic and religious groups). Freedom of religion is not usually covered in great depth in the field of international human rights, yet the problem many considered side-lined since the European Enlightenment is, unfortunately, alive and well in 21st century Southeast Asia.

It is hoped that this book and the ones to follow will paint a detailed picture of human rights in the region with analyses of the laws protecting and hindering human rights, as well as the valuable opinion of writers on the ground. Like the region itself, the human rights experience in Southeast Asia is varied; as such, any study purporting to understand its complex issues must also reflect this diversity.



**Indonesia**

A decorative graphic consisting of several parallel diagonal stripes in shades of gray, located on the right side of the dark horizontal band.

# Indonesia

*Herlambang P Wiratraman\**

## Part 1: Overview of Indonesia

### A. Country Background

Indonesia Facts	
Geographical size	1,919,440 sq km
Population	237.64 million <sup>1</sup>
Ethnic breakdown <sup>2</sup>	Main ethnic groups: Javanese (40.2%) Sudanese (15.5%) Malay (2.3%) Batak (3.6% ) Madurese (3%)
Official language	Indonesian (Bahasa Indonesian)
Literacy rate (aged 15 and above)	90.4% <sup>3</sup>
Life expectancy	68.9 <sup>4</sup>
GDP	US\$2,312.4 billion (per capita est US\$9,254) <sup>5</sup>
Government	A republic with a unitary system of government
Political and social situation	By decentralising political authority, Indonesia's post Suharto regime is more democratic with direct elections choosing the President and Vice-President, as well as local governments. Governmental power is also limited by a newly established Constitutional Court.

\* Lecturer, Airlangga University, Indonesia

1 Taken from the 2010 Census, available at [http://www.bps.go.id/website/pdf\\_publicasi/watermark%20Kewarganegaraan,%20Suku%20Bangsa,%20Agama%20dan%20Bahasa\\_281211.pdf](http://www.bps.go.id/website/pdf_publicasi/watermark%20Kewarganegaraan,%20Suku%20Bangsa,%20Agama%20dan%20Bahasa_281211.pdf), accessed on 15 October 2016.

2 Taken from the 2010 Census, available at [http://www.bps.go.id/website/pdf\\_publicasi/watermark%20Kewarganegaraan,%20Suku%20Bangsa,%20Agama%20dan%20Bahasa\\_281211.pdf](http://www.bps.go.id/website/pdf_publicasi/watermark%20Kewarganegaraan,%20Suku%20Bangsa,%20Agama%20dan%20Bahasa_281211.pdf), accessed on 15 October 2016.

3 United Nations Development Program (UNDP), 'Human Development Report 2007/2008' 2007, available at [http://hdr.undp.org/sites/default/files/reports/268/hdr\\_20072008\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf). This means 9.6% of the population were illiterate in 2007.

4 UNDP, 'Human Development Report 2015' available at [http://hdr.undp.org/sites/default/files/2015\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf), accessed on 15 October 2016.

5 UNDP, 'Human Development Report 2015' available at [http://hdr.undp.org/sites/default/files/2015\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf), accessed on 15 October 2016.

The Republic of Indonesia is the world's fifteenth largest country in terms of land mass, and the seventh largest country in terms of combined sea and land area. According to the 2010 national census, the population was 237.64 million, and it is estimated to reach 255.4 million in 2015. Of this number, 58% live on Java, the world's most populous island.

Indonesian or Bahasa Indonesia is the official language and is a standardized register of Malay, an Austronesian language that has been used as a lingua franca in the Indonesian archipelago for centuries. Interestingly, most Indonesians also speak one of more than 700 indigenous languages.

From 2005, GDP in Indonesia averaged about 1.46% but contracted 2.06% in the last quarter of 2014 which amounts to 1.43% of the world economy. GDP in Indonesia averaged US\$214.72 billion from 1967 until 2014.

### *System of governance*

Indonesia is a republic with a unitary system of government led by a president who appoints all members of the cabinet and/or ministers. Following President Suharto's fall in 1998, the executive, judicial, and legislative branches were revamped by four amendments to the 1945 Constitution which expanded it from 37 articles to 73.<sup>6</sup> As a result, the People's Consultative Assembly (MPR) is now the highest national representative body and comprises two houses: the People's Representative Council (DPR) and the Regional Representative Council (DPD). Moreover, under the third amendment, parliament may even impeach a president through a process stipulated in Art 7A:

*The President and/or the Vice-President may be dismissed from his/her position during his/her term of office by the MPR on the proposal of [the DPR], both if it is proven that he/she has violated the law through an act of treason, corruption, bribery, or other act of a grave criminal nature, or through moral turpitude, and/or that the President and/or Vice-President no longer meets the qualifications to serve as President and/or Vice-President.*

Further, according to Art 7C of the Constitution, the President may not freeze and/or dissolve the DPR.

The Republic of Indonesia is divided into 34 provinces (provinsi) which are in turn divided into regencies (kabupaten) and municipalities or cities (kota), each of which are governed by separate regional authorities. The State recognises and respects each of

<sup>6</sup> Harijanti, SD, Lindsey, T, 'Indonesia: general elections test the amended Constitution and the new Constitutional Court' *International Journal of Constitutional Law*, 2006, Vol 4(1), pp 138-150.

these units which are considered special and distinct. However, it must also be noted that the State recognises and respects traditional communities and their customary rights too in so far as they are “still alive” and in accordance with the societal development and principles of the Unitary State of the Republic of Indonesia.<sup>7</sup>

#### *Political and social situation*

Following the demise of President Suharto’s authoritarian regime in 1998, Indonesians are now able to directly elect their President and Vice-President (as a pair). Moreover, members of administrative subdivisions in provinces (Provincial House of Representatives or DPRD I), and regencies and municipalities (Regional House of Representatives or DPRD II), are also elected by general elections.

Significantly, the present parliament attempted to alter the process by trying to hold representative elections for each authority of the provinces, regencies and municipalities but after widespread protests and petitions, the House of Representatives ratified into law an emergency government regulation restoring direct regional elections. The 2015 election will herald the introduction of a new system, especially those involving regional and local elections. As such, the Election Committee (KPU) must prepare for some 200 local elections, set to be held simultaneously this year, as nine of the ten factions at the House of Representatives now demand changes as outlined in the newly passed law.

Indonesia holds regular elections every five years; the last presidential election in 2014 saw a contest between Jokowi and Prabowo but was criticised by many human rights groups for the interference of military generals who supported both candidates. The most important issue that emerged related to impunity as Prabowo had long been suspected of playing a key role in the kidnapping of activists in 1997-1998.

Indonesia is a strongly patriarchal society, and although human rights violations are considered part of an important issue, they are frequently bartered as political commodities prior to and during presidential elections. At the local level, political and business elites are often seen as part and parcel of a predatory network, particularly in the excessive exploitation of natural resources. In fact, business elites are often accused of not only using officials to protect their vested interests, but also influencing judicial systems by, e.g. hiring gangsters.

Following an era of limited freedom under Suharto (during which censorship was rife, publications were banned, and news portals were subject to strict licensing regimes), in general, the quality of professional journalism in Indonesia is extremely poor. In particular, the role of the media, either traditional print/broadcast media or electronic, has been significant only in the shaping of political partisanship with individuals using available portals more to push political propaganda than to encourage reasoned debate.

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7 Second amendment of the 1945 Constitution, Art 18B(2).

## B. International Human Rights Commitments and Obligations

**Table 1: Ratification Status of International Instruments – Indonesia<sup>8</sup>**

Treaty	Signature Date	Ratification Date, Accession (a), Succession (d) Date
Convention against Torture and Other Cruel Inhuman or Degrading Punishment	23 Oct 1985	28 Oct 1998
Optional Protocol of the Convention against Torture		
International Covenant on Civil and Political Rights		23 Feb 2006 (a)
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
Convention for the Protection of All Persons from Enforced Disappearance	27 Sep 2010	
Convention on the Elimination of All Forms of Discrimination against Women	29 Jul 1980	13 Sep 1984
International Convention on the Elimination of All Forms of Racial Discrimination		25 Jun 1999 (a)
International Covenant on Economic, Social and Cultural Rights		23 Feb 2006 (a)
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	22 Sep 2004	31 May 2012
Convention on the Rights of the Child	26 Jan 1990	5 Sep 1990
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	24 Sep 2001	24 Sep 2012
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	24 Sep 2001	24 Sep 2012
Convention on the Rights of Persons with Disabilities	30 Mar 2007	30 Nov 2011

<sup>8</sup> United Nations Human Rights, Office of the High Commissioner, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx), accessed on 1 November 2016.

In addition to the international instruments listed above, several national laws were also introduced to either protect human rights or to enforce international obligations (although these do not necessarily specifically deal with human rights, e.g. the Constitution):

1945 Constitution, Arts 28A-J: essentially follows the Universal Declaration of Human Rights with a particular focus on individual rights, covering fundamental human rights from the right to live (Art 28A) to equality before the law (Art 28D), to an obligation to respect the rights of others (Art 28J(1))<sup>9</sup>

System of Social Security Act, Law No 40/2004 and Social Security Agency Act, Law No 24/2011: contains social security provisions and specific labour rights. Protects health care and workers.

Human Rights Act, Law No 39/1999: contains a long list of internationally recognized breaches of human rights including ‘crimes of omission.’ Human rights courts were also set up to by-pass inadequacies in the Penal Code and overcome delays and poor performance in ordinary courts.<sup>10</sup>

## **Part 2: Outstanding Human Rights Issues**

### ***A. National Laws Threatening Human Rights***

#### *Electronic Information and Transactions Act (2008)*

Several recently enacted laws in Indonesia threaten human rights. An especially serious one relates to freedom of expression. Since the Electronic Information and Transactions Act (EITA) was passed in 2008, 73 cases (most involving cyber defamation) have been filed under its auspices. According to the Institute for Policy Research and Advocacy (ELSAM), criminalization of freedom of expression through EITA, on the one hand, indicates the sophistication of modern technology and the high number of internet users in the country, whilst clearly pointing to an accompanying low public awareness around freedom of expression and rights to privacy.

EITA’s most controversial provisions include Arts 27 and 28 which allow criminal defamation suits to be brought against the public, including journalists. Article 27(3) determines that, “Any person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of insult and/or defamation” will be subject to criminal

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9 Chapter XA, as introduced by the Second Amendment of 18 August 2000.

10 Eldridge, P, ‘Human rights in post-Suharto Indonesia’ *Brown Journal of World Affairs*, 2002, Vol 9(1), p 127 at 133.

punishment that could, as laid out in Art 45(1), include imprisonment not exceeding six years and/or a fine not exceeding Rp 1,000,000,000.

Likewise, in 2008, the Prita Mulyasari case made clear that the EITA threatened ordinary citizens merely expressing opinions on the internet.<sup>11</sup> According to Press Council member, Agus Sudibyo, “the EIT Law is strange. Other countries really wish to regulate cyber-crime, but in Indonesia, the purpose of this law is merely restricting the freedom to information and criminalising citizens.”<sup>12</sup> Thus, it appears clear that online media will have the most to fear from the EITA.

As regards press freedom, 2008 also witnessed the promulgation of other laws introducing new criminal sanctions against the press: the General Election Law (10/2008), the Presidential Election Law (42/2008) and the Pornography Law (44/2008). For example, Art 99(1) of the General Election Law lists the following sanctions for press not providing fair and equal pages and time to all election contestants covering election campaign news: (a) a written warning; (b) temporary suspension of a problematic programme; (c) reducing time and duration of election campaign news, broadcasting, and advertisements; (d) fines; (e) termination of activities regarding election campaign news, broadcasting, and advertisement for a certain period; (f) revoking the broadcasting license or publication permit.

### *Penal Code*

Similarly, the colonial era’s Penal Code has also been applied to the press. The culmination of all these measures effectively results in a muzzled press, either voluntarily or by sanction, which constrains press oversight, directly undermining the vitality of democratic governance. Criminalising the press obviously impacts negatively on press freedom. It could be argued that even if the outcome is favourable, a criminal trial in and of itself is detrimental to journalism. For example, in the Tempo case,<sup>13</sup> public prosecutor, Bastian Hutabarat, used Art XIV(2) of Law 1/1946 juncto Art 55 (1)-(1) (e) of the Penal Code to indict Tempo’s chief editor, Bambang Harymurti for ‘libel’ and intentionally creating “a chaotic situation in society” for publishing an article questioning Tomy Winata’s involvement in a market fire in the Jarkarta district of Tanah Abang. Originally sentenced to nine years in prison on 16 September 2004, the Central Jakarta District Court re-sentenced the editor to one year, a verdict that was also confirmed by the Jakarta High Court on 14 April 2005. However, the Supreme

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11 Wiratraman, HP, ‘New media and human rights: the legal battle of freedom of expression in Indonesia’ paper presented at 11th Annual Student Human Rights Law Conference, Nottingham, 20-21 March 2010. Prita Mulyasari was a 32 year old mother who was imprisoned on criminal charges for writing a private email criticizing medical treatment she had received at a hospital. When the email went viral, she was jailed after losing a civil defamation suit taken by the hospital in 2009.

12 ‘Kebebasan berpendapat janganlah direduksi’ (‘Never reduce freedom of opinion’), Kompas, 4 June 2009.

13 ‘Court orders Tempo to pay Rp500 million to Tommy Wina’ LKBN Antara, 18 March 2004.

Court later overturned the decision on 9 February 2006 on the basis that the Press Law should take precedence over the Penal Code.

An important milestone in favour of press freedom occurred in 2007 when the Constitutional Court decided that *haatzaai artikelen* (hatred sowing articles), i.e. Arts 154 and 155 of the Penal Code which criminalized “public expression of feelings of hostility, hatred or contempt toward the government” and prohibited “the expression of such feelings or views through the public media,” were contradictory to the constitution and, hence, no longer legally binding.<sup>14</sup> Thus, more than 90 years after the enactment of the Penal Code (or *Wetboek van Strafrecht voor Nederlandsch-Indië*) in 1914, this decision abolished a symbolic marker of suppression against freedom of expression and press freedom in Indonesia.

#### *Pornography Law (2008)*

Another law/legislative amendment that curbs online freedom of speech can be found in the 2008 Law on Pornography. Article 1.1 defines pornography as:

*any pictures, drawings, illustrations, photographs, writings, voices, sounds, moving pictures, animation, cartoons, conversation, bodily movements, or any other form of message through the media of communication and/or demonstrations in public, which depict lewdness or sexual exploitation which violates the moral norms of society.*

Not only is this definition highly moralistic, it also sets no clear standard or method for evaluating ‘lewdness.’ Furthermore, it is difficult to establish “the moral norms of society” in such a normatively pluralistic country as Indonesia. For example, depicting some traditional common daily activities such as a painting of someone wearing a *kebaya* (a lace top with a low neckline) in Bali could very well be categorised as pornography on the basis of this law. Such unclear standards lend themselves to arbitrary interpretation by State or non-State actors and can easily be used pressure particular social groups.<sup>15</sup> Moreover, the sanctions of the law are extremely serious and can include no less than six months up to twelve years imprisonment and/or a fine of at least Rp 250,000,000 to a maximum of Rp 6,000,000,000.<sup>16</sup>

14 Number 6/PUU-V/2007 (Panji), 17 July 2007.

15 Wiratraman, HP, ‘In search of constitutionality, freedom of expression, and Indonesia’s anti-pornography law’ *Jurnal Ilmu Hukum YURIDIKA*, Fakultas Hukum Universitas Airlangga, 2012, Vol 27(2) Mei-Agustus, pp 111-120.

16 Article 29 reads: “Anyone who produces, makes, reproduces, duplicates, disseminates, broadcasts, imports, exports, offers, sells, leases, and provides pornography as stipulated in Article 4, Section 1 shall be punished with imprisonment of no less than 6 months and not exceeding twelve years and/or a fine of at least Rp 250,000,000 (two hundred and fifty million rupiahs) and a maximum of Rp 6,000,000,000 (six billion rupiahs).”

The danger is evident from the conviction of Erwin Arnada (chief editor of Playboy Indonesia) who was convicted for crimes against decency on the basis of Penal Code, Art 282(3).<sup>17</sup> In 2007, despite the Press Council explicitly stating that Playboy Indonesia was not a pornographic magazine according to the Press Law, Arnada was sentenced to two years in prison. Although eventually cleared on appeal in 2010, it can be seen that the far greater leeway offered by the Pornography Law may be deemed dangerous indeed.

### ***B. Recent Court Cases Relating to Human Rights***

Since the EITA of 2008 was passed, at least 20 court decisions having permanent legal force (*inkracht*) relating to internet users (under Art 27(3)) have occurred. In 2014, an average of four cases was reported every month, meaning 53% of all cases occurred in 2014 alone. As many as 92% of complaints were reported under defamation articles (either Art 27(3) of the EITA, or Arts 210-311 of the Penal Code). Of these cases, comments made on Facebook were the most targeted; however, messages on SMS and BBM have also been singled out under EITA.

Interestingly, some legal developments (referring to group freedom of expression) have also occurred on the basis of court rulings. Three elements are of particular note.<sup>18</sup>

First, the legal reasoning emphasizes that Art 27(3) of the EITA only covers absolute complaint offences meaning that any offence based on it can only be reported or filed by the so-called “direct victims” of the offence in question.<sup>19</sup> As such, the panel of judges declared Mr Ali to be not guilty of any criminal offence because a statement without a direct mention of a name lacks a crucial element of defamation.

The second element relates to legal disputes involving the validation of digital evidence. Article 6 of the EITA stipulates that digital evidence can be considered a legitimate form of evidence, provided it is both accessible and displayable, is of valid integrity (or possesses ‘wholeness,’ i.e. it is undamaged or has not been tampered or modified in any way), and can be accounted for in its entirety.<sup>20</sup> As such, the Institute for Criminal Justice Reform (ICJR) noted two cases where the judges displayed a proper thoroughness when examining digital evidence to ensure its validation.

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17 ‘The chief editor of Playboy requests review and suspension of his sentence’ Primair Online, 6 September 2010; ‘Mantan pemimpin redaksi Playboy dibebaskan’ (‘Former chief editor of Playboy freed’) Tempo.co.id, 24 June 2011; ‘Indonesia: court acquits Playboy editor, Erwin Arnada’ BBC, 23 June 2011.

18 ‘ITE online defamation law under review’ Hukum Online, available at <http://en.hukumonline.com/pages/lt56c1c40791c99/ite-online-defamation-law-under-review>, accessed on 16 February 2016.

19 See Bantul District Court Ruling No 196/Pid.Sus/2014/PN BTL and Raba Bima District Court Ruling No 292/Pid B/2014/PN Rbi Khairudin M Ali.

20 See South Jakarta District Court Ruling No 1832/Pid B/2012/PN Jkt Sel and Makasar District Court Ruling No 390/Pid B/2014/PN Mks.

The third legal element concerns the notion of legal justification (*alasan pembenar*) as stipulated under Art 27(3) through the use of the term “intentional and unlawful (*tanpa hak*).” This issue was raised in Prita Mulyasari's case when she was accused of defaming a hospital and its staff, but because she actually brought the complaint in the public interest, the Supreme Court judges declared that her email did not constitute defamation. Thus, in some cases, the law will allow individuals to lawfully distribute, transmit, and make accessible electronic information, even though the nature of its contents may otherwise be deemed defamatory.

These court rulings are important for defending freedom of expression, since more than 120 victims have been accused of breaching Art 27(3) EITA since its enactment in 2008.

### ***C. Other Human Rights Issues***

#### *Religious freedom*

In 2015, Indonesians were shocked by two incidents: (1) in Tolikara, Papua, when Muslims who were holding an Idul Fitri prayer service in a local mosque were disrupted by a violent Christian mob affiliated with the Evangelical Church of Indonesia (GIDI); and (2) in Aceh Singkil, when a mob calling itself the Aceh Singkil Islamic Youth Movement, allegedly burned down the HKI Indonesian Christian Church which had allegedly been built without the proper permits. Together, these two incidents have raised serious questions about Indonesia's religious freedom.

As regards the second incident, following a protest on 6 October 2015 in Aceh Singkil, the local administration was called upon to tear down the building. “The burning of the church that has claimed a life should not happen in a country where religious freedom is protected by the law,” Indonesian Communion of Churches (PGI) chairwoman, Henriette Lebang said in the aftermath. She went on to explain that because obtaining building permits for houses of worship was such a complicated issue, some churches were built without them. Of all issues, this seemed to be the most conflict-inducing, leading, in this case, to the shooting death of one of the attackers and other injuries. Indeed, the conflict remains a real one as some 2,500 people fled to North Sumatra as a result of the violence.<sup>21</sup>

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21 ‘2500 flee to North Sumatra after church burning in Aceh Singkil’ The Jakarta Post, 14 October 2015, available at <http://www.thejakartapost.com/news/2015/10/14/2500-flee-north-sumatra-after-church-burning-aceh-singkil.html>, accessed on 16 October 2016.

**Table 2: Disturbance and Problems at Houses of Worship in Indonesia**

Year	Disturbances at Houses of Worship	Number of Violations Related to the Establishment of Houses of Worship
2014	26	10
2013	63	8
2012	47	9
2011	58	12
2010	28	16
2009	28	12
2008	35	1
2007	22	0
<b>Total</b>	<b>307</b>	<b>68</b>

To date, the police are still questioning some 45 people. However, it has had the effect of bringing some religious community groups together in a peace process. For example, the PGI and Nahdlatul Ulama (NU), the country's largest Muslim organization, both said they regretted the incident and lamented the government's inability to anticipate the incident. Indeed, NU chairman, Said Aqil Siradj, said burning down houses of worship was unacceptable, no matter the reason.

The first incident in Tolikara was even more shocking to most Indonesians, since Muslims (the majority faith in Indonesia) were the victims, even though they are a minority in Papua. Unsurprisingly, in predominantly Muslim regions, Christians and other religious minorities are usually the target of such attacks. In this case, members of the Christian GIDI allegedly protesting the use of loudspeakers at the mosque, attacked Muslims celebrating Idul Fitri, leading to the burning of several buildings and a death by shooting.

According to Al Khanif, a researcher in the post-reformasi era, repression of minorities is increasing in Indonesia despite significant development regarding religious freedom in the Constitution, indicating that social norms and cultures have yet to include respect of minorities. Whatever the reason, we must realize that similar incidents have already occurred and will potentially occur in other regions. Until recently, the segregation of intra and inter-religious public spheres in Indonesia often caused social and religious disharmony, usually resulting in the alienation of religious minorities. In conclusion, he observed that minority groups are threatened not only by the State, but also by the social majority that renders minorities vulnerable to significant injustice at the hands of the majority.<sup>22</sup>

<sup>22</sup> Khanif, A, 'Tolikara: majority-minority ties and its discontent' The Jakarta Post, 25 July 2015.

During President Yudhoyono's administration, Indonesia was repeatedly called "a moderate Muslim democracy." Indeed, on 31 May 2013, Yudhoyono said his government "would not tolerate any act of senseless violence committed by any group in the name of religion." Similarly, on 16 August, he claimed to be "very concerned" about rising religious intolerance and related violence. However, such words seem mere rhetoric while his administration maintains dozens of regulations, including ministerial decrees on building houses of worship and a decree against religious practice by the Ahmadiyah community, which blatantly discriminates against religious minorities and fosters intolerance.<sup>23</sup>

As can be seen, many attacks on religious minorities in Indonesia have been orchestrated by many different perpetrators from Sunni militants to the State, while the targets mostly comprise of Christians, Ahmadiyah, Shia, and Sufis. In 2012, the SETARA Institute noted 264 violations against freedom of religion/belief with 371 forms of action, spreading across 28 provinces.<sup>24</sup> These events and violations befell four main groups: Christians (50 events), minority religious cults (42 events), Syiah (34 events) and Ahmadiyah (31 events). About 42 individuals also suffered violations of freedom of religion/belief. Furthermore, the institute also noted that 37 houses of worship had been damaged by various attacks: Christian (25), Ahmadiyah (5), Islamic Cult (3), Buddhist (2), Sy'ah (1), and Konghucu (1).

In 2013, the SETARA Institute issued another report entitled 'Stagnation on Freedom of Religion: The Report of Conditions of Freedom of Religion/Belief in 2013.' This recorded about 222 violations of freedom of religion/belief with 292 forms of action spread across 20 provinces – demonstrating a worrying degree of discrimination and intolerance. Although the increase of events and actions is small compared to previous years, more monitoring may help researchers understand the depths of deeply rooted intolerance in society.

Finally, the 2014 SETARA Institute report noted 134 violation events on freedom of religion/belief with 177 forms of actions spreading into 26 provinces.<sup>25</sup>

### *Papua/West Papua*

The most outrageous structural violence in the country is confined to Papua which has had to deal with daily occurrences of violence. So much so, the situation has been deemed a "slow motion genocide."<sup>26</sup>

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23 Kine, P, 'Peeling off Indonesia's veneer of tolerance' Human Rights Watch, available at <https://www.hrw.org/news/2013/10/04/peeling-indonesias-veneer-tolerance>, accessed on 16 October 2016.

24 Halili, Naipospos, Bonar Tigor, *From Stagnation to Pick the New Hopes: The Condition of Freedom of Religion/Belief in Indonesia*, SETARA Institute, 2015, Publikasi Masyarakat Setara: Jakarta.

25 Halili, Naipospos, Bonar Tigor, *From Stagnation to Pick the New Hopes: The Condition of Freedom of Religion/Belief in Indonesia*, SETARA Institute, 2015, Publikasi Masyarakat Setara: Jakarta.

26 Elmslie, J, Webb-Gannon, C, 'A slow motion genocide: Indonesian rule in West Papua' *Griffith Journal of Law and Human Dignity*, 2013, Vol 1(2), p 142.

Many continue to report ongoing State brutality in Papua. In addition to a recent spate of killings, a group of young protesters was beaten by police, then had their wounds stitched in hospital without anaesthetic. Similarly, attacks on the West Papua National Committee (KNPB) offices outside Dekai led to the arrest of 66 political prisoners who now languish in Indonesian jails, including Filep Karma who is serving 15 years for simply raising a flag. Another local activist, Areki Wanimbo, was jailed for conspiracy to commit treason merely for talking to French journalists.

In 2013, tensions heightened even further when on February 21, Indonesian military forces were attacked by suspected Free Papua Movement rebels, killing eight soldiers. As a result, many Papuans were imprisoned for peacefully advocating for independence. Despite this, Indonesia denies holding any political prisoners.

Such events led the International Coalition for Papua (ICP) to release an urgent call to action to counteract the violence. On 20 May 2015, four political activists from the West Papua National Committee (Nopinus Humawak or KNPB, also known as Narko Murib) including Alex Nekenem, Maikel Asso and Yoram Magai, were arrested with around 70 others at a peaceful rally in Manokwari, West Papua province. The protest was in support of a pro-independence umbrella group, the United Liberation Movement for West Papua (ULMWP). According to witnesses, dozens of protesters were beaten by police with rifle butts during the rally. While the majority were subsequently released, the four men charged with ‘incitement’ under Art 160 of Indonesia’s Penal Code could face up to six years imprisonment.<sup>27</sup>

Notwithstanding the above, President Jokowi has promoted the need for press freedom in West Papua/Papua – indeed, during an interview with Victor Mambor, he reiterated his policy of allowing foreign journalists unfettered access to the region. Further, when giving a press conference to a number of print and electronic media journalists in Kampung Wapeko, Kurik District, Merauke, he even stated, “Starting today, Sunday May 10, 2015, the Central Government has opened the widest access to foreign journalists to enter the territory of Papua to conduct their journalistic duties.”<sup>28</sup>

However, despite the President’s pronouncements, in practice, this policy is restricted by the constant presence of the Indonesian military. According to Armed Forces chief, General Moeldoko, soldiers should accompany foreign journalists covering Papua to

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27 ‘Al urgent action: Papuan activists detained and charged’ Human Rights and Peace for Papua, 24 June 2015, available at <http://www.humanrightspapua.org/news/136-ai-urgent-action-papuan-activists-detained-and-charged>, accessed on 10 September 2015.

28 ‘We must have mutual trust as foreign journalists enter Papua, President says’ West Papua Daily, 12 May 2015, available at <http://tabloidjubi.com/eng/we-must-have-mutual-trust-as-foreign-journalists-enter-papua-president-says/>, accessed on 25 August 2015.

protect them from harm. As he told reporters on 23 June, “I consider that the foreign journalists might need guards.”<sup>29</sup>

The above shows that, compared to other regions in Indonesia, press freedom in Papua is extremely restricted.<sup>30</sup> In latest developments, authorities have also begun to restrict the freedom of local journalists. For example, Abeth You, a reporter for the *TabloidJubi.com* website, was bundled into a truck, had his camera seized, and his photos deleted at gunpoint by police on 8 October 2015 while covering a demonstration in Jayapura, West Papua’s biggest city. Organized by Solidarity for Victims of Human Rights Violations in Papua, the attack was obviously designed to silence press coverage of this protest and others like it.

In conclusion, the violence in Papua and West Papua is still at perilous levels and continues from day to day. Increasing numbers of violent attacks show that Papuans are still discriminated against and continue to be controlled by suppressive State apparatuses.

#### *Freedom of expression*

On 2 July 2013, Indonesia’s parliament enacted the Law on Mass Organizations (17/2013) that placed a variety of vague obligations and prohibitions on NGO activities, severely limiting their foreign funding,<sup>31</sup> and forbidding NGOs from espousing “prohibited ideolog[ies] or philosoph[ies]”<sup>32</sup> such as atheism, communism, and Marxist-Leninism which are deemed contrary to Pancasila or the five pillars of Indonesian state philosophy. As such, this law infringed on NGOs’ freedom of association, expression, and religion.

#### *Freedom of the press*

As regards freedom of the press, it can be said that the situation has not improved. Although the Press Law (40/1999) expanded press freedom and safeguarded freedom of expression by prohibiting censorship and the banning of newspapers and licensing, the facts show otherwise. For example according to the Alliance of Independent Journalists (AJI), 51 journalists were subjected to violence in 2012, dropping slightly to 40 in 2013, and remaining constant at 40 in 2014.<sup>33</sup> The majority of cases were not followed up by the police and most of the perpetrators remain unknown.

On 2 March 2013, Normila Sari Wahyuni of Paser TV was attacked while covering a land dispute in Rantau Panjang village in East Kalimantan. The assailants repeatedly

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29 “TNI chief considers enlisting soldiers to guard foreign journalists in Papua” *West Papua Daily*, 23 June 2015, available at <http://tabloidjubi.com/eng/tni-chief-considers-enlisting-soldiers-to-guard-to-foreign-journalists-in-papua/>, accessed on 26 August 2015.

30 Wiratraman, HP, *Press Freedom, Law and Politics: A Socio-Legal Study*, 2014, EM Meijers Institute, Woehrmann: Zutphen.

31 Law on Mass Organizations, Art 59, Sec 3(a).

32 Law on Mass Organizations, Art 59, Secs 3 and 4.

33 Manan, A, *Di Bawah Bayang-Byang Krisis: Laporan Tahunan AJI 2015*, 2015, Aliansi Jurnalis Independen: Jakarta.

kicked her stomach, prompting a miscarriage. On 27 March 2013, supporters of Gorontalo mayor, Adnan Dhambea, burned down the office of the local TV station, TVRI Gorontalo, following his defeat in local elections. Two TVRI journalists were also assaulted during the arson attack. Other cases included threats, anonymous phone calls, harassment, beatings, expulsion, the banning of coverage, destruction of offices and the seizure of cameras.

In a press release, the Chairman of AJI, Suwarjono, revealed that the most prominent case took place in Makassar, South Sulawesi, on 13 November 2014, and concerned coverage of increasing fuel price demonstrations at the State University of Makassar. A number of journalists reported on police attacks against the student demonstrators which led to ten reporters being injured as the police tried to prevent them covering the attack by confiscating their equipment. Although four journalists made police reports, so far no one has been brought to justice.<sup>34</sup>

In a shock move, on 16 October 2015, the police imposed a banning order on *Lentera*, a student magazine in Salatiga, Central Java. The magazine's editor, Bima Satria Putra, stated that the police asked it be withdrawn from circulation after the magazine published a 50th anniversary report on the massacre of alleged members of the defunct Indonesian Communist Party (PKI) in 1965. After the edition circulated, negative responses from the mayor, police and army led to a police interrogation of the student press leaders on 18 October 2015, following which they were asked to halt distribution and burn all remaining copies.<sup>35</sup> It can therefore be seen that despite the Press Law, press censorship and banning is still a common occurrence in Indonesia.

Another important issue relates to the system of impunity in the current government. In one such case, the AJI urged the government to seriously investigate the 1996 death of journalist, Fuad Muhammad Syafruddin (popularly known as 'Udin') after he reported on the alleged corruption of the Regent of Bantul. Although the police deny they are ignoring the case, little progress has been made since the trial of a suspect many believe to be a scapegoat. Eko Maryadi, a chairperson of AJI, said he hoped resolution of the Udin case would help solve seven other cases of murder and violence towards journalists in 2013, but he also worried that if Udin's case were ignored until expiration (August 2014), then the other cases would also be forgotten.<sup>36</sup>

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34 Galhotra, S, 'Mission journal: window of opportunity to advance press freedom in Indonesia' Committee to Protect Journalists, available at <https://www.cpj.org/blog/2014/12/mission-journal-window-of-opportunity-to-advance-p.php>, accessed on 17 October 2016.

35 'Beritakan kasus 1965, majalah *Lentera* ditarik lalu dibakar' *Tempo*, 18 October 2015, available at <http://nasional.tempo.co/read/news/2015/10/18/063710644/beritakan-kasus-1965-majalah-lentera-ditarik-lalu-dibakar>, accessed on 17 October 2016.

36 'Time running out in seeking justice for slain journalist' Southeast Asian Press Alliance, 21 November 2012, available at <https://www.seapa.org/time-running-out-in-seeking-justice-for-slain-journalist-in-indonesia/>, accessed on 17 October 2015.

In conclusion, a scheduled visit by Frank La Rue (the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression) in January 2013 might have helped the situation as a visit by a Special Rapporteur is an important means by which to ensure compliance with a country's international obligations, but due to the Indonesian government's unilateral decision to restrict his activities by preventing him from visiting Papua, the visit was postponed. To date, the visit has not been rescheduled.

### **Part 3: Conclusion**

Although President Jokowi's administration seems determined to adopt human rights into the nation's legal system, in practice, little has changed from previous governments. In reality, the government has taken no serious action to promote democratization or prevent violations of freedom of expression. In particular, many are still charged by the notorious cyber defamation articles under EITA. The impact of such attacks on freedom of expression has led to an uncertain situation where individuals may feel reluctant to express dissatisfaction or criticize policies.

In the early days of his government, many were hopeful that Jokowi's presidency would support press freedom. However, problems relating to media ownership and political alliances continue to moderate the news room. At the local level, issues of impunity abound – although often the victim of assaults, journalists rarely see their attackers prosecuted or even brought before the justice system.

As regards Papua, both freedom of expression and the press are easily ignored. Although fundamental to Papuan protest movements where institutional violence is a daily occurrence, the many instances targeted at its people are rarely broadcasted through the national or international media.

Other rights also under serious threat include freedom of religion of which only a weak guarantee exists. In addition, many minority communities have been marginalized, violated or stigmatized in recent years by hardline groups, often accommodated by the State which, by neglecting to prevent or prosecute such activities is by omission, violating the rights of these minorities.

In conclusion, it could be argued that politically and even legally, President Jokowi's regime is falling short of its duty to protect its citizens. Moreover, it appears the government prefers to compromise and cooperate with capital owners and/or business groups rather than meet the needs of the vulnerable. As a result, it can therefore be seen that human rights can be shaped by the configuration of a country's political economy; unsurprisingly, in this context, such rights will more often than not take a back seat.

**Malaysia**

A decorative graphic consisting of several parallel diagonal stripes in shades of gray, located on the right side of the dark horizontal band.

# Malaysia

*Jerald Joseph\**

## Part 1: Overview of Malaysia

### A. Country Background

Malaysia Facts	
Geographical size	329,758 sq km
Population	30.4 million
Ethnic breakdown	Main ethnic groups: Bumiputera (Malays and other non-Malay indigenous peoples) – 61.9% Chinese – 22.6% Indian – 6.7%
Official language	Bahasa Malaysia
Literacy rate	93.1%
Life expectancy	73.8
GDP	US\$336.913 billion (per capita est US\$11,062.04)
Government	Federal representative democratic constitutional monarchy modelled on the Westminster parliamentary system. Bicameral parliament consists of the House of Representatives and the Senate.
Political and social situation	Supposed separation of powers of the executive, judicial, and legislative branches is counteracted by executive influence over the appointment of court judges and the Election Commission, thus precluding free and fair elections.

Malaysia is the only federation in Southeast Asia and consists of the Peninsular and East Malaysia, separated by the South China Sea. Established in 1963, it is made up of eleven states in the former and Sabah and Sarawak in the latter. Nowadays, the nation still comprises thirteen states but within are three federal territories occupying a total landmass of 329,758 square kilometres.<sup>1</sup>

\* Commissioner, Human Rights Commission of Malaysia (SUHAKAM)

<sup>1</sup> 'Malaysia' Nations Encyclopedia, available at <http://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Malaysia.html>, accessed on 20 August 2015.

Malaysia's population grew from a mere 8.2 million in 1960 to the current estimate of 30.4 million in 2014, an increase of 271% in the last 55 years. Population growth rate was recorded at a high of 3.29% in 1961 but has since dipped to 1.58% in 2015. As of the beginning of 2015, 29.6% of the total population is below 15 years old, 5% are above 64, with the rest falling within the 15-64 age range.<sup>2</sup>

Malaysia's population is made up of more than 70 identified ethnic groups, generally categorized into four main groups: 'Bumiputera' (61.9%), Chinese (22.6%), Indian (6.7%), and 'Others'.<sup>3</sup> Bumiputera is a status accorded to Malays and other non-Malay indigenous peoples, the members of which enjoy special benefits under various government-implemented policies and the Constitution. Malays and non-Malay Bumiputeras account for 50.1% and about 11.8% of the current total population respectively. The latter are predominantly natives making up two-thirds of Sabah and over half the total population of Sarawak. This sector continues to experience an upward trend due primarily to high fertility and birth rates. Aboriginal groups, collectively known as the 'Orang Asli,' account for much smaller numbers in Peninsular Malaysia. Finally, the annual growth rate of the 'Others' category (comprised of other minority ethnic and non-citizens) has increased from 1.5% in 1970 to 10.0% in 2010, mainly due to an influx of migrant workers.<sup>4</sup>

The national and official language of Malaysia is Bahasa Malaysia, a compulsory subject in primary and secondary schools. Some of the other languages or dialects spoken include English, Mandarin, Cantonese, Hakka, Hainan, Foochow, Tamil, Telugu, Malayalam, and Panjabi. In addition, other languages are used by the indigenous populations of Orang Asli and the natives of Sabah and Sarawak. For example, among the Dayaks of Sarawak and the Kadazans of Sabah, the most widely spoken language in East Malaysia is actually Iban.

Gross Domestic Product (GDP) for 2014 was US\$336.913 billion due to the country's reported growth rate of 6.0%, while the GDP per capita in 2014 was US\$11,062.04. According to the Malaysian Department of Statistics, the unemployment rate was reported to be 3.1% as of June 2015 while current Prime Minister (PM), Najib Razak, puts the number of those living below the poverty line at only 1% of the total population.<sup>5</sup>

2 'Malaysia population clock' Country Meters, available at <http://countrymeters.info/en/Malaysia>, accessed on 20 August 2015.

3 'Malaysia population' Trading Economics, available at <http://www.tradingeconomics.com/malaysia/population>, accessed on 20 August 2016.

4 'Malaysia demographics profile 2014' Index Mundi, available at [http://www.indexmundi.com/malaysia/demographics\\_profile.html](http://www.indexmundi.com/malaysia/demographics_profile.html), accessed on 20 August 2015; Madam Zarinah Mahari, Demographic Transition in Malaysia: The Changing Roles of Women, Department of Statistics, available at [http://www.cwsc2011.gov.in/papers/demographic\\_transitions/Paper\\_1.pdf](http://www.cwsc2011.gov.in/papers/demographic_transitions/Paper_1.pdf), accessed on 20 August 2015.

5 Report for selected country: Malaysia' International Monetary Fund, available at <http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/weorept.aspx?sy=2012&ey=2019&scsm=1&ssd=1&sort=country&ds=.&br=1&pr1.x=15&pr1.y=5&c=548&s=NGDPD%2CNGDPDPC%2CPPPDP%2CPPPDP%2CPPPDP&grp=0&a=>, accessed on 20 August 2015; 'Najib's TV interview: the full transcript' Astro Awani, available at <http://english.astroawani.com/malaysia-news/najibs-tv-interview-full-transcript-57512>, accessed on 20 August 2015.

### *System of governance*

Malaysia practices a federal representative democratic constitutional monarchy where the King (Yang di Pertuan Agong) is the head of state and the Prime Minister is the head of government.<sup>6</sup> As a legacy of British colonial rule, the system of governance is closely modelled on the Westminster parliamentary system. The bicameral parliament consists of the House of Representatives and the Senate. Following a general election in 2013, the current House of Representatives is comprised of 222 members elected from single member constituencies, using a first-past-the-post system. General elections are held every five years.

### *Political and social situation*

Although according to the Federal Constitution, the government has supposedly adopted the principle of separation of powers (consisting of the executive, the judiciary and the legislative), in practice, the executive maintains a disturbing level of influence over the appointment of court judges. Accordingly, the Judicial Appointments Commission assists the Prime Minister in advising the King on such matters. Furthermore, it is the Prime Minister (as part of the executive) who holds the ultimate power to decide or approve appointment of every Superior Court judge, the Chief Justice, the President of the Court of Appeal, and the Chief Judge.<sup>7</sup>

Executive power extends even to the likes of the Election Commission. Supposed to be free and independent, its members are appointed by the King upon advice of the Prime Minister, leading some to argue the Commission is necessarily biased, thus tainting the electoral system and leaving it unable to conduct free and fair elections.<sup>8</sup>

## ***B. International Human Rights Commitments and Obligations***

Malaysia is an active member of many intergovernmental processes but its commitment to international treaties has been dismal. Presently a member of the UN Security Council, it has been active in the UN Human Rights Council for several terms in the last few years. Despite many calls by member nations for Malaysia to ratify more core treaties during the UN Universal Periodic Review (UPR), it has acceded to only three of the core human rights treaties and accepted only two out of the three optional protocols under the Convention on the Rights of the Child (see Table 1 below).

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6 'Comment: the Yang DI-Pertuan Agong's prerogative in the appointment of the Prime Minister' The Malaysian Bar, available at [http://www.malaysianbar.org.my/constitutional\\_law/comment\\_the\\_yang\\_di\\_pertuan\\_agongs\\_prerogative\\_in\\_the\\_appointment\\_of\\_the\\_prime\\_minister.html](http://www.malaysianbar.org.my/constitutional_law/comment_the_yang_di_pertuan_agongs_prerogative_in_the_appointment_of_the_prime_minister.html), accessed on 20 August 2015; 'Malaysia' The Federation of International Trade Associations, available at [http://www.fita.org/countries/malaysia.html?ma\\_rubrique=cadre](http://www.fita.org/countries/malaysia.html?ma_rubrique=cadre), accessed on 20 August 2015.

7 'My constitution: judges and judiciary' The Malaysian Bar, available at [http://www.malaysianbar.org.my/constitutional\\_law\\_committee/my\\_constitution\\_judges\\_and\\_the\\_judiciary.html](http://www.malaysianbar.org.my/constitutional_law_committee/my_constitution_judges_and_the_judiciary.html), accessed on 21 August 2015.

8 'Executive summary: human rights and election' The Malaysian Bar, available at [http://www.malaysianbar.org.my/index.php?option=com\\_docman&task=doc\\_view&gid=3314](http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=3314), accessed on 21 August 2015; 'A brief history of elections in Malaysia' General Election Network for Disability Access, available at <http://www2.agendaasia.org/index.php/articles/news/216-a-brief-history-of-elections-in-malaysia>, accessed on 21 August 2015.

**Table 1: Ratification Status of International Instruments – Malaysia<sup>9</sup>**

Treaty	Signature Date	Ratification Date, Accession (a), Succession (d) Date
Convention against Torture and Other Cruel Inhuman or Degrading Punishment		
Optional Protocol of the Convention against Torture		
International Covenant on Civil and Political Rights		
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
Convention for the Protection of All Persons from Enforced Disappearance		
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)		5 Jul 1995 (a)
International Convention on the Elimination of All Forms of Racial Discrimination		
International Covenant on Economic, Social and Cultural Rights		
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)		
Convention on the Rights of the Child (CRC)		17 Feb 1995 (a)
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict		12 Apr 2012 (a)
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography		12 Apr 2012 (a)
Convention on the Rights of Persons with Disabilities	8 Apr 2008	19 Jul 2010

Only reviewed once by the CEDAW and CRC Committees despite having ratified these treaties since 1995, Malaysia has filed no further reports.<sup>10</sup> The CRC Committee put

9 United Nations Human Rights, Office of the High Commissioner, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx), accessed on 22 October 2016.

10 UN General Assembly, A/HRC/WG.6/4/MYS/1/Rev1, 19 November 2008.

forward two very important recommendations which have yet to be implemented: that Malaysia should undertake a review and reform of its plural legal systems to resolve inconsistencies in the contradictory definitions of the child under civil and Sharia law; and that it should accede to other human rights instruments including the ICRMW and the Convention relating to the Status of Refugees in order to provide a framework for the protection of migrants and refugee children.

### ***C. National Laws and Legal Cases Threatening Human Rights***

In the last eight years since the 12th general election, it appears Malaysian people have finally awakened and are now pressing for the ruling coalition, the Barisan Nasional or the National Front (BN), to respond to demands from the electorate, mainly as a result of the ruling party losing its absolute two thirds parliamentary majority twice in the last two general elections (in 2008 and 2013 respectively). As a result, for the first time in the political history of Malaysia, demands to amend unsatisfactory laws and address racism gained traction in the BN leading to the abolition of laws which allowed for detention without trial such as the infamous Internal Security Act (ISA), the Emergency Ordinances (EO) and the Restricted Residences Act.

#### *Important court cases (2014)*

*The persecution of Dato Seri Anwar Ibrahim:* The ongoing saga of the persecution of former Deputy Prime Minister and current opposition party leader, Anwar Ibrahim, continues to this day. Jailed after his sodomy case was fast tracked in 2014, he was finally imprisoned after all legal remedies before the Federal Court were exhausted. Accordingly, he was found guilty and imprisoned for five years, automatically disqualifying him as a Member of Parliament (MP). To this day, many questions pertaining to his guilty verdict and the entire litigation process surrounding it, including the quality of the evidence presented, remain unanswered.<sup>11</sup>

*Freedom of expression and speech cases:* The government arbitrarily uses its arsenal of laws to stifle free speech, especially the Sedition Act and the Communications and Multimedia Act of 1998. Malaysian human rights NGO, SUARAM, in their 2014 Annual Report, documents the following:

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<sup>11</sup> Doherty, B, 'Anwar Ibrahim guilty in sodomy case' *The Guardian*, 10 February 2015, available at <https://www.theguardian.com/world/2015/feb/10/anwar-ibrahim-guilty-in-sodomy-case>, accessed on 2 November 2016.

Table 2: Individuals Convicted for Making Alleged Offensive Statements in 2014

Individual	Offence	Sentence	Date
Karpal Singh	Sedition Act (1948)	RM400 fine	21 Feb 2014
Safwan Anang	Sedition Act (1948)	10 month imprisonment	9 May 2014
Adam Adli	Sedition Act (1948)	12 month imprisonment	20 Sep 2014
Chow Mun Fai	Communications and Multimedia Act (1998)	12 month imprisonment	9 Sep 2014

As indicated by the SUARAM report, such laws permit unjust judgments to be carried out. In particular, the “disproportionality of the sentences given by the Sessions Court in the cases of Safwan Anang, Adam Adli, and Chow Mun Fai was incongruous given that no actual harm was caused and none of the accused had attempted to incite violence or instigate disorder.”<sup>12</sup>

*Abuse of the rule of law under the Sedition Act and the Penal Code, Sec 124B*

The Sedition Act was enacted in 1948 by the British colonial government to counter communist insurgency. Not long after the so-called race riots of 1969, it was amended to criminalize any questions regarding Part III (citizenship), Art 152 (national language), Art 153 (special position of Malays and natives of Sabah and Sarawak, and the rights of other races), and Art 181 (ruler’s sovereignty) of the Federal Constitution. Historically, the Sedition Act has mainly been used on government critics, including MPs, and applies to any form of act, speech, words or publications. Moreover, because ‘seditious’ is only loosely defined, its use is easily abused.<sup>13</sup>

In addition, under the exception stated in Art 63(4) which was inserted via an Emergency Ordinance, parliamentary immunity can be suspended. For instance, MP Nurul Izzah, was arrested and detained under the Sedition Act in March 2015 for reading a speech in parliament written by her father, Datuk Seri Anwar Ibrahim. Many viewed the arrest as unconstitutional especially as all declared ‘emergencies’ had been lifted in 2011, rendering Art 63(4) void. Other notable figures who have been victimised include Penang Chief Minister, Lim Guan Eng, and former National Chairman of the Democratic Action Party (DAP), the late Karpal Singh, both of whom were members of the opposition political party.<sup>14</sup>

12 Suara Rakyat Malaysia (SUARAM), Malaysia: Human Rights Report 2014, SUARAM, 2014, at p 173.

13 Jumadi, AQ, ‘Seven things to know about the Sedition Act’ POSTKOD.MY, available at <http://poskod.my/cheat-sheets/seven-things-to-know-about-the-sedition-act/>, accessed on 22 August 2015.

14 ‘The Sedition Act 1948’ CIJ (Center for Independent Journalism), available at <http://cijmalaysia.org/miniportal/2010/09/the-sedition-act-1948/>, accessed on 22 August 2015.

Significantly, PM Najib Razak had initially promised to replace the Sedition Act with a National Harmony Act to nurture a spirit of harmony and respect among Malaysians in 2012.<sup>15</sup> Despite UN human rights officials warning that the series of amendments would seriously undermine freedom of expression and opinion in Malaysia,<sup>16</sup> PM Najib succumbed to pressure from his own party, UMNO, and reneged on his promise, saying instead that the Sedition Act would actually be strengthened. While the new proposed amendments removed the component making criticism of the government or judiciary seditious, it also increased the penalties from 3 to 7 years imprisonment, and up to 20 years for acts or statements leading to physical harm. Further, the new amendments removed leniency for first time offenders, and allowed the sharing of internet materials to be considered seditious, even empowering the court to remove internet materials deemed as such.<sup>17</sup>

A crisis point was reached in 2014 when the government initiated a campaign labelled by the mass media as the Malaysian sedition dragnet during which several prominent figures and citizens were arrested and charged for committing sedition. The list included politicians, law professors, political activists, bloggers, journalists, student activists, and ordinary citizens. Most were critical of the government and the judiciary while others were charged for making racial or religious comments.<sup>18</sup> Ong Kian Ming, an opposition MP, claimed the purpose of the crackdown was to show doubters that PM Najib was not weak as suggested by former PM, Mahathir Mohamad.<sup>19</sup>

Another dangerous ‘weapon’ utilized by the current government is Chapter 6, Sec 124B of the Penal Code which deals with offences against the State such as waging war against the King. This section was designed to prosecute anyone carrying out, by any means, directly or indirectly, any “activity detrimental to parliament democracy.”<sup>20</sup> Further, the police may also enforce the Security Offences Special Measures Act (2012) for Chapter 6 offences. Drafted originally to combat terrorism, this Act allows authorities to violate human rights by detaining suspects up to 28 days for investigation, refusing bail after

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15 Jumadi, AQ, ‘Seven things to know about the Sedition Act’ POSTKOD.MY, available at <http://poskod.my/cheat-sheets/seven-things-to-know-about-the-sedition-act/>, accessed on 22 August 2015.

16 ‘Malaysia’s anti-terror and sedition laws ‘curtail’ human rights, warn UN Rights Chief’ UN News Center, available at <http://www.un.org/apps/news/story.asp?NewsID=50536#.VdiSSfmqqkq>, accessed on 22 August 2015.

17 ‘Sedition Act amendments restrict freedom of expression, says US’ The Malaysian Insider, available at <http://www.theedgemarkets.com/my/article/sedition-act-amendments-restrict-freedom-expression-says-us>; ‘Malaysia’s anti-terror and sedition laws ‘curtail’ human rights, warn UN human rights chief’ available at <http://www.un.org/apps/news/story.asp?NewsID=50536#.VdiSSfmqqkq>, all accessed on 22 August 2015.

18 ‘Sedition Act 2015: who have been arrested, investigated, and charged so far?’ SAYS, available at <http://says.com/my/news/sedition-act-2015-who-have-been-arrested-investigated-and-charged-so-far>, accessed on 22 August 2015.

19 Grudgings, S, ‘With sedition dragnet, Malaysia takes step back to Mahathir era’ Reuters, available at <http://www.reuters.com/article/us-malaysia-sedition-idUSKBN0H203S20140907>, accessed on 22 August 2015.

20 ‘LKS: Nazri said section 124B only for terrorists’ Free Malaysia Today, available at <http://www.freemalaysiatoday.com/category/nation/2015/08/15/lks-nazri-said-section-124b-only-for-terrorists/>, accessed on 22 August 2015.

they have been charged, and by using secret witnesses without the need to tender exhibits during court proceedings.<sup>21</sup>

During a parliamentary session in 2012, the Minister of Law and Parliamentary Affairs made assurances that the new Sec 124B would only be used to tackle terrorist activities. However, such assurances turned out to be worthless when three activists were arrested and remanded under Sec 124B for planning to organize a rally demanding the arrest of PM Najib for abuse of power and corruption. Several other prominent figures, including parliamentarians, have challenged these arrests claiming they were unconstitutional as none of the cases involved violence or unconstitutional means.<sup>22</sup>

## Part 2: Outstanding Human Rights Issues

### A. Corruption

Corruption contributes to instability and poverty and is a dominant factor driving developing countries towards catastrophe. Malaysia is particularly vulnerable to this scourge after decades of a system cloaked in cronyism and secrecy, resulting in the undermining of the rule of law, a weakening of trust in democratic institutions, and an erosion of the principles of transparency and accountability. Repeated surveys in recent years have highlighted Malaysia's poor governance and its culture of bribery and corruption which has resulted in illicit capital outflows and crony capitalism. A recent survey by Ernst & Young (a London-based professional audit firm) reported that "Malaysia has been ranked as one of the most corrupt nations and is listed as a country which is most likely to take shortcuts to meet targets when economic times are tough."<sup>23</sup>

Confidence levels in government administration are further eroded each time the country's Auditor General reports to Parliament, time and again, exposing outrageous and controversial information on Malaysia's public administration. Furthermore, real time audits on government wastage and mismanagement of public funds surfaced too, causing embarrassment, anger, and disbelief among the populace.

Despite the federal government prioritising the fight against corruption as a top National Key Result Area (NKRA) and despite the introduction of a new ministry on governance, public dissatisfaction continues to mount around the government's

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21 'Police can use anti-terror on those detained under Section 124B, lawyer warns' The Malaysian Insider, available at <http://www.theedgemarkets.com/my/article/police-can-use-anti-terror-act-those-detained-under-section-124b-lawyer-warns>, accessed on 22 August 2015.

22 'Courts must define the ambit of Section 124B, says Gobind' The Malaysian Insider, available at <https://sg.news.yahoo.com/courts-must-define-ambit-section-091142468.html>, accessed on 22 August 2015.

23 'Malaysia one of the most corrupt nations, survey shows' C4, available at <http://www.c4center.org/malaysia-one-most-corrupt-nations-survey-shows>, accessed on 2 November 2015.

apparent lack of political will to achieve this task. Unresolved high profile corruption cases and the overwhelming culture of secrecy and incompetence compounded by archaic secrecy laws have created an urgent need to advocate for reforms protecting the rights and interests of the people.

Ironically, Malaysia ratified the UN Convention Against Corruption (UNCAC) on 24 September 2008 which compels it to promote practices of good governance, fight corruption, and enhance transparency. Embodying elements of prevention, criminalisation, international cooperation, and asset recovery, the Convention provides a comprehensive guide for member states to holistically fight corruption. Despite this, a published survey by Transparency International (TI) in 2014 found a majority of surveyed households perceived Malaysian political parties to be extremely corrupt. In the same report, respondents also considered government efforts to battle corruption as ineffective. However, the Corruption Perceptions Index (CPI) did credit Malaysia with slight improvement, from a ranking of 53 in 2013 to 50 out of 100 countries in 2014.<sup>24</sup>

Likewise, established in 2009, the current Malaysian Anti-Corruption Commission (MACC) was touted to be an independent body but has fallen far short of such high expectations.<sup>25</sup> In fact, the MACC has only managed to prosecute a handful of major personalities such as former Selangor Chief Minister (Menteri Besar), Khir Toyo;<sup>26</sup> positive results in other investigations have yet to be forthcoming. Moreover, it was also mired in controversy following the death in custody cases of Teoh Beng Hock and Ahmad Sarbaini Mohamed. A Royal Commission of Inquiry found that Teoh Beng Hock had committed suicide, a verdict rejected by both his family and the public.<sup>27</sup> Similarly, the coroner's court ruled Ahmad Sarbaini's death had been accidental. Again, his family disagreed and brought a civil suit against MACC on grounds of negligence which was eventually dismissed by the High Court.<sup>28</sup>

One of the most high profile and controversial corruption issues in the country can be found in the ongoing 1MDB scandal. Current PM, Najib Razak, was accused of receiving a total of US\$700 million in his personal account from a 1MDB joint venture

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24 'Malaysia's rank in Corruption Perceptions Index improves slightly' National Key Result Areas, available at <http://www.nkracorruption.gov.my/index.php/en/19-frontpage-articles/662-malaysia-s-rank-in-corruption-perceptions-index-improves-slightly>, accessed on 21 August 2015.

25 Prime Minister's Department, 'Commissions', available at [http://www.jpm.gov.my/post/modules/pajpm/vbulletin.php?lang=en&bulletin\\_id=18&page=](http://www.jpm.gov.my/post/modules/pajpm/vbulletin.php?lang=en&bulletin_id=18&page=), accessed on 21 August 2015.

26 'Khir Toyo trial: prosecution closes case' Free Malaysia Today, 22 June 2011, available at <http://www.freemalaysiatoday.com/category/nation/2011/06/22/khir-toyo-trial-prosecution-closes-case/>, accessed on 2 November 2016.

27 'Teoh's family rejects findings; mum adamant he was murdered' The Star Online, available at <http://www.thestar.com.my/story/?file=%2f2011%2f7%2f22%2fnation%2f9153184&sec=nation>, accessed on 21 August 2015.

28 'Court tosses Ahmad Sarbaini family's suit against MACC' Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/court-tosses-ahmad-sarbaini-familys-suit-against-macc>, accessed on 21 August 2015.

with PetroSaudi.<sup>29</sup> Unsurprisingly, this controversy has engulfed the whole nation in heated debate and anger. The issue also forced PM Najib to sack and replace government ministers and high ranking officials not aligned with him, including, amongst others, his deputy, another senior minister, and the Attorney General.

In a twist of events, UMNO ministers close to the PM now claim he'd previously explained the money was donated by a Saudi Arabian benefactor in appreciation of his help combatting Islamic State (IS).<sup>30</sup> However, many believe intimidation tactics were used to delay the investigation including the sudden removal of the Attorney General, disbandment of the MACC special task force on 1MDB, investigation of Bank Negara officials, and the appointment of four Parliamentary Public Accounts Committee (PAC) members as cabinet members in a recent reshuffle which had the effect of postponing the PAC hearings further.<sup>31</sup>

Another scandal came to light when it was revealed that the former Chief Minister of Sarawak, Abdul Taib Mahmud (who ruled the state for 33 years) and his family, were involved in logging operations on Borneo Island. It is believed Sarawak lost a total of RM41 million (US\$13 million) in 2014 alone due to illegal logging, leaving a mere 5% of the state's lush rainforests intact today.<sup>32</sup> Although MACC initiated investigations into this case, it has yet to yield productive results. Taib Mahmud refused to cooperate with MACC officials who are also investigating him for other graft charges since 2011, all of which remain unresolved.<sup>33</sup>

Corruption charges have not only been alleged against current PM Najib. His predecessor, Mahathir Mohamad, was also accused of reclaiming ten islands off Kedah State, wastefully spending RM100 billion (US\$33 billion) during his tenure, and turning

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29 'Investigators believe money flowed to Malaysian leader Najib's accounts amid 1MDB probe' The Wall Street Journal, available at <http://www.wsj.com/articles/SB10130211234592774869404581083700187014570>, accessed on 21 August 2015.

30 'Najib's RM2.6b donation from Saudi Arabia a sign of thanks for combating IS, UMNO leader says' The Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/najibs-rm2.6b-donation-from-saudi-arabia-a-sign-of-thanks-for-combating-is>, accessed on 21 August 2015.

31 'Najib responsible for 1MDB's task force end, crackdown at MACC, says group' The Malaysian Insider, available at <http://www.theedgemarkets.com/my/article/najib-responsible-1mdb-task-force%E2%80%99s-end-crackdown-macc-says-group>, accessed on 21 August 2015; 'Nur Jazlan: PAC 1MDB probe now on hold' Malaysiakini, available at <http://www.malaysiakini.com/news/306487>, accessed on 21 August 2015; 'Bank Negara officials investigated over 1MDB: Zeti' New Strait Times Online, available at <http://www.nst.com.my/node/95984>, accessed on 21 August 2015.

32 'Sarawak lost RM41mil due to illegal logging last year' The Star Online, available at <http://www.thestar.com.my/News/Nation/2015/05/14/sarawak-loses-rm41mil-due-to-illegal-logging/>, accessed on 21 August 2015; 'Inside Malaysia's shadow state' Global Witness, available at <https://www.globalwitness.org/campaigns/forests/inside-malaysias-shadow-state/>, accessed on 21 August 2015.

33 'Progress on the investigation pertaining to the Chief Minister of Sarawak' Malaysian Anti-Corruption Commission, available at <http://www.sprm.gov.my/taib-mahmud.html?&lang=en>, accessed on 21 August 2015; 'Get on with Taib's graft probe, DAP MP tells MACC' The Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/get-on-with-taibs-graft-probe-dap-mp-tells-macc>, accessed on 21 August 2015.

UMNO into a vast conglomerate of nepotism, thus allowing his three sons to amass a fortune of more than US\$8 billion.<sup>34</sup>

## ***B. Unfair Elections***

The ruling Barisan National (BN) government has been in power for thirteen terms since 1957 following independence, winning the last general election in 2013. Despite having garnered only an estimated 47.38% of the popular vote, BN won 133 out of 222 parliamentary seats, thereby enabling it to remain in power. The fact that a party with only a minority of the popular vote was able to form a government is a strong indicator that the voting system was skewed in BN's favour.<sup>35</sup>

Indeed, Malaysia's electoral processes show strong indications of not being free and fair. One major issue is unjust and ridiculous constituency delineations which, it has been argued, mocks the democratic principle of 'one-person, one-vote.'<sup>36</sup> For instance, Kapar, the largest constituency with 144,000 voters has about ten times more voters than Putrajaya which can only count 15,700 voters. Despite this, the allowable constituent voter density difference increased from 15% to 50% in 1962 until eleven years later in 1973 when limitations were completely removed.<sup>37</sup>

SUARAM's *Malaysian Human Rights Report 2014* revealed that the relative value of BN votes were as high as 126% compared to a low 66% and 64% for Parti Keadilan Rakyat (PKR) and Pan-Malaysian Islamic Party (PAS) respectively. Such a disparity probably explains why BN were able to win 59.91% of contested parliamentary seats from only 47.38% of the total votes compared to the opposition who won 50.87% of the total vote, but only managed to secure 40.09% of contested seats.<sup>38</sup>

Based on reports released by the Election Commission, the relative value of votes was more balanced in the 2013 election (as compared to previous elections) but has yet to reach the 'fair mark.' As it stands, each BN vote is equal to 1.91 votes for PKR, 1.19 votes

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34 'Dr M, are you ready to answer for your corrupt ways too?' Free Malaysia Today, available at <http://www.freemalaysiatoday.com/category/opinion/2015/03/14/dr-m-are-you-ready-to-answer-for-your-corrupt-ways-too/>, accessed on 21 August 2015.

35 'Poll observers: GE13 unfair, partially free' Free Malaysia Today, available at <http://www.freemalaysiatoday.com/category/nation/2013/05/08/ideas-ge13-only-partially-free-not-fair/>, accessed on 21 August 2015; 'A tawdry victory' The Economist, available at <http://www.economist.com/blogs/banyan/2013/05/malaysias-election-0>, accessed on 21 August 2015.

36 Suara Rakyat Malaysia (SUARAM), 'Chapter 9: Free and fair elections' in *Malaysia Human Rights Report 2014*, SUARAM, 2014 at pp 148-150.

37 'Malaysia's compromised electoral system' The Nut Graph, available at <http://www.thenutgraph.com/malaysias-compromised-electoral-system/>, accessed on 21 August 2015; Tey Tsun Hang, 'Malaysia's electoral system: government of the people?' *Asian Journal of Comparative Law*, 2010, Vol 5(1), Art 11, p 12.

38 Suara Rakyat Malaysia (SUARAM), 'Chapter 9: Free and fair elections' in *Malaysia Human Rights Report 2014*, SUARAM, 2014 at p 149.

for DAP, and 1.98 votes for PAS.<sup>39</sup> Similarly, in state elections, each BN vote was worth more than 100% in nine out of the twelve states contested in the 13th general election.<sup>40</sup> In other words, this disparity in constituency sizes makes it extremely difficult for opposition parties to win contested seats at the federal and state levels.

Voter registration irregularities are also common phenomena, e.g. absentee voters, non-voters appearing in voter rolls, legitimate voters being registered in the wrong constituencies, and foreigners being registered as voters.<sup>41</sup> Further, amendments to the Election Offences Act (1958) in 2002 removed the electoral roll from judicial oversight once certified and gazetted.<sup>42</sup> Consequently, courts lack the authority to act even when presented with strong evidence of fraud in the registration of voters. Other issues include postal and advance voting, involving the risk of lost ballot papers, and ballots attributed to the wrong constituencies which may be substituted during custody periods.<sup>43</sup>

Furthermore, the Election Commission's independence has been seriously questioned despite being appointed by the King, mainly because the appointment is also made under the PM's advice. Moreover, the ruling party has also been known to pass laws to assert control over the Election Commission.<sup>44</sup> Similarly, government machinery, especially the State-controlled mass media, is readily and regularly deployed to favour the ruling party.<sup>45</sup> Other concerns include fraud in polling, and the counting and tabulation of votes; selective restrictions imposed on campaign freedom; inadequate regulations on election expenses and funding; limitations as regards judiciary remedies; bribery and vote buying; and the abuse of power by police and administrators alike.<sup>46</sup>

39 Suara Rakyat Malaysia (SUARAM), 'Chapter 9: Free and fair elections' in Malaysia Human Rights Report 2014, SUARAM, 2014 at p 150.

40 Suara Rakyat Malaysia (SUARAM), 'Chapter 9: Free and fair elections' in Malaysia Human Rights Report 2014, SUARAM, 2014 at p 150.

41 'The People's Tribunal on Malaysia's 13th general elections: summary of the report' Global Bersih, available at <https://www.globalbersih.org/2014/04/08/the-peoples-tribunal-on-malaysias-13th-general-elections-summary-of-the-report/>, accessed on 21 August 2015.

42 'The People's Tribunal on Malaysia's 13th general elections: summary of the report' Global Bersih, available at <https://www.globalbersih.org/2014/04/08/the-peoples-tribunal-on-malaysias-13th-general-elections-summary-of-the-report/>, accessed on 21 August 2015.

43 'The People's Tribunal on Malaysia's 13th general elections: summary of the report' Global Bersih, available at <https://www.globalbersih.org/2014/04/08/the-peoples-tribunal-on-malaysias-13th-general-elections-summary-of-the-report/>, accessed on 21 August 2015.

44 'Malaysia's compromised electoral system' The Nut Graph, 30 September 2013, available at <http://www.thenutgraph.com/malaysias-compromised-electoral-system/>; Global Bersih. 'Findings of the People's Tribunal on Malaysia's 13th general elections: summary of the report' available at [www.bersih.org/wp-content/uploads/2014/03/Summary-of-Report-Final.docx](http://www.bersih.org/wp-content/uploads/2014/03/Summary-of-Report-Final.docx), all accessed on 7 November 2016.

45 'A tawdry victory' The Economist, available at <http://www.economist.com/blogs/banyan/2013/05/malaysias-election-0>, accessed on 21 August 2015; Tey Tsun Hang, 'Malaysia's electoral system: government of the people?' Asian Journal of Comparative Law, 2010, Vol 5(1), Art 11, p 12.

46 'Malaysia's electoral process' Aliran, available at <http://aliran.com/aliran-monthly/2011-issues/2011-6/malaysias-electoral-system/>; 'Malaysia's compromised electoral system' The Nut Graph, 30 September 2013, available at <http://www.thenutgraph.com/malaysias-compromised-electoral-system/>; Global Bersih. 'Findings of the People's Tribunal on Malaysia's 13th general elections: summary of the report' available at [www.bersih.org/wp-content/uploads/2014/03/Summary-of-Report-Final.docx](http://www.bersih.org/wp-content/uploads/2014/03/Summary-of-Report-Final.docx), accessed on 7 November 2016; 'Academic consensus on unfair elections' Aliran, available at <http://aliran.com/aliran-monthly/2011-issues/2011-6/academic-consensus-on-unfair-elections/>, accessed on 21 August 2015.

### *C. Encroachments Upon the Land Rights of Indigenous People*

There are more than 180,000 Orang Asli (indigenous people) in Peninsular Malaysia, making up 0.6% of the total national population. In addition, indigenous ethnic groups also constitute about 45.5% of Sarawak's population and about 60.5% of Sabah's total population. Collectively known as the Orang Asli of Malaysia, this group has long struggled with rights issues, especially as regards defending their ancestral lands from encroachment by outsiders. Introduced by the British colonial government, laws recognizing customary land rights and indigenous people in Sabah and Sarawak, are now no longer properly implemented. Indeed, the government seems to prioritise large scale resource extraction and the plantations of private companies over the rights of indigenous communities, often forcing them to relocate without proper planning and assistance (for example, one community in Perak was relocated from a settlement of wooden houses to government supplied concrete structures 6km away).<sup>47</sup> Such enforced relocations generally do not benefit indigenous communities in the slightest. Additionally, companies often discriminate against them (in the hiring process) and relocation sites are often without proper basic infrastructure and amenities such as pipe water and electricity.<sup>48</sup>

Over the years, the Sarawak Land Code has been amended several times to make it even more difficult for indigenous people to protect their lands. Similarly, the National Land Code in Peninsula Malaysia makes very little reference to Orang Asli land rights. According to the Department of Orang Asli Affairs, only 0.02% have title to their land. In Sabah, about 12% of the total area has been allocated to government statutory bodies for commercial plantations.<sup>49</sup>

Sarawak's Bakun Dam is another long-standing controversy involving indigenous people's right to land. The mega dam relocated about 10,000 indigenous people from fifteen different longhouses. Although the size and capacity of the dam was downsized later, the relocation plan continued to involve the same number of residents.<sup>50</sup> Moreover, another twelve mega hydroelectric dams have been planned with electricity producing potential far exceeding current consumption, implying the relocation of more indigenous peoples from their home and lands.<sup>51</sup>

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47 'Indigenous peoples in Malaysia' International Work Group for Indigenous Affairs, available at <http://www.iwgia.org/regions/asia/Malaysia>, accessed on 22 August 2015.

48 'Displaced indigenous Malaysians face uncertain future' Our World, available at <http://ourworld.unu.edu/en/displaced-indigenous-malaysians-face-uncertain-future>, accessed on 22 August 2015.

49 'Indigenous peoples' Aliran, available at <http://aliran.com/oldsite/hr/js7.html>, accessed on 22 August 2015.

50 'Malaysia: conflict caused by Bakun dam continues in Sarawak' World Rainforest Movement, available at <http://wrm.org.uy/oldsite/bulletin/24/Malaysia.html>, accessed on 22 August 2015.

51 'Revisiting the Bakun Dam controversy' Hornbill Unleashed, available at <https://hornbillunleashed.wordpress.com/2011/01/17/13703/>, accessed on 22 August 2015.

In what was considered one of the worst floods in Malaysia's recent history, the extent to which deforestation had already affected indigenous people's communities quickly became evident. Home to the Temiar community, Kuala Wok in Kelantan state was one of the most badly hit areas. Logging had already made their traditional way of life harder but although the development company promised them 3,000 hectares of land, no official contracts were signed. When most of the areas surrounding the villages were cleared, the community pleaded to the state government but were not effectively aided by the authorities.<sup>52</sup>

Land rights aside, it is also difficult for indigenous people to gain proper access to education. Although primary education is compulsory for every Malaysian child, little has been done to ensure indigenous children attend school, especially those from interior areas.<sup>53</sup> In particular, constant relocation makes regular attendance almost an impossibility. In addition, the use of the national language, Bahasa Malaysia, as the medium of instruction in schools and in government offices, has also resulted in the gradual erosion of indigenous languages. In Sarawak, Iban is only taught as a subject in one school in Kuching, and in less than half of state primary schools even where the student population is 50% Iban. As such, language discrimination in Sarawak has further marginalised indigenous communities, thus depriving them of employment.<sup>54</sup>

#### ***D. Police Abuse of Power***

Notably, the Royal Malaysia Police has regularly been accused of abuses of power, including excessive use of force, custodial deaths, and intimidation tactics. Established in 2009, the Enforcement Agency Integrity Commission (EAIC) is currently the only independent body overseeing police power. However, to date, the EAIC has proven ineffective as it has yet to prosecute or refer any of the over 1,000 complaints received, to the Attorney-General's chambers. In fact, the EAIC has only commenced two investigations out of 70 recorded cases of custody death.<sup>55</sup> Recommended by Royal Commission findings in 2005, an Independent Police Complaints and Misconduct Commission (IPCMC) was proposed to investigate misconducts and reprimand,

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52 'Malaysia's indigenous hit hard by deforestation' Al Jazeera, available at <http://www.aljazeera.com/indepth/features/2015/03/malaysia-indigenous-hit-hard-deforestation-150329101349832.html>, accessed on 22 August 2015.

53 'Indigenous peoples' Human Rights Commission of Malaysia, available at <http://www.suhakam.org.my/indigenous-people/>, accessed on 22 August 2015.

54 'Indigenous peoples and ethnic minorities in Sarawak' World Directory of Minorities and Indigenous People, available at <http://www.minorityrights.org/4540/malaysia/indigenous-peoples-and-ethnic-minorities-in-sarawak.html>, accessed on 22 August 2015.

55 'Four years and 1,000 complaints later, EAIC says nobody prosecuted yet' Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/four-years-and-1000-complaints-later-eaic-says-nobody-prosecuted-yet>, accessed on 2 September 2015.

dismiss, and demote police officers but despite many calls for its establishment over the course of a decade, it has yet to be formed.<sup>56</sup>

From 2011 to 2014, 63 cases of custodial deaths were reported without a single successful prosecution against any officer involved despite the landmark ruling on the unlawful killing of Teoh Beng Hock (which concluded that the victim's death had been caused by unlawful acts by unknown persons inclusive of MACC's officers).<sup>57</sup> Other examples include two deaths reported to be caused by blunt force or assault, and several other custodial deaths categorized as medical despite suspicious post mortem reports.<sup>58</sup> For example, in the case of Murugan Muniandy, despite being heavily bruised, the post mortem results indicated he died of severe sepsis secondary to pneumonia (lung inflammation).<sup>59</sup>

High-handed police tactics are also commonly used to intimidate crowds during public assemblies. Some significant incidents have included the violent crackdowns of BERSIH (national NGO for free and fair elections) rallies, Himpunan Hijau (NGO coalition combating environmental hazards), and intimidation against the Baram community for protesting against the construction of Baram Dam. Not only did the police fail to protect participants of the rally from unidentified attackers, they also used physical violence to apprehend protesters. At the Baram blockade, witnesses reported that police officers armed with machine guns were deployed to intimidate the indigenous community.<sup>60</sup> In another case, police detained, intimidated, and tortured social activist, Ali Abdul Jalil, who was remanded a total of four times and charged three times under the Sedition Act in a one-month period. Denied visitation access by his family and friends, he was also verbally and physically tortured while in detention.<sup>61</sup>

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56 'Almost a decade on, lawyers continue to push for IPCMC' Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/almost-a-decade-on-lawyers-continue-push-for-ipcmc>, accessed on 2 September 2015.

57 Suara Rakyat Malaysia (SUARAM), 'Chapter 2: Police abuse of power' in Malaysia Human Rights Report 2014, SUARAM, 2014, pp 10-25; 'Almost a decade on, lawyers continue to push for IPCMC' Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/almost-a-decade-on-lawyers-continue-push-for-ipcmc>, accessed on 2 September 2015.

58 Suara Rakyat Malaysia (SUARAM), 'Chapter 2: Police abuse of power' in Malaysia Human Rights Report 2014, SUARAM, 2014, pp 10-28.

59 'Son who died in custody was badly bruised, says mum' fz.com, available at <http://www.fz.com/content/son-who-died-custody-was-badly-bruised-says-mum>, accessed on 2 September 2015.

60 Suara Rakyat Malaysia (SUARAM), 'Chapter 2: Police abuse of power' in Malaysia Human Rights Report 2014, SUARAM, 2014 at pp 25-26; 'Police must protect Himpunan Hijau protesters' Free Malaysia Today, available at <http://www.freemalaysiatoday.com/category/nation/2014/06/24/police-must-protect-himpunan-hijau-protestors/>, accessed on 7 November 2016.

61 Suara Rakyat Malaysia (SUARAM), 'Chapter 2: police abuse of power' in Malaysia Human Rights Report 2014, SUARAM, 2014 at pp 23-24; 'Repeal Sedition Act Movement condemns torture of Ali Abd Jalil' Aliran, available at <http://aliran.com/civil-society-voices/2014-civil-society-voices/torture-ali-abd-jalil-condemned-must-investigated/>, accessed on 2 September 2015.

## *E. People's Resistance*

On 29-30 August 2015, 500,000 Malaysians staged a 34 hour protest popularly called the 'Bersih 4.0' rally in the heart of Kuala Lumpur city. The organisers, 'Bersih 2.0,' a coalition of about 90 NGOs seeking reform of Malaysia's current electoral system to ensure free, fair, and clean elections, have to date, organised four mega rallies in 2007, 2011, 2012 and the latest in 2015. Aside from asking for the resignation of PM Najib, the rally demanded free and fair elections, transparency in governance, the right to demonstrate, a strengthening of the parliamentary democracy system, and for the government to save Malaysia's economy.<sup>62</sup>

The recent Bersih 4.0 rally achieved a great milestone in terms of freedom of speech; it was the first time in the recent history of the civil society movement that protesters participated in a 34 hour rally, including spending overnight in the heart of capital city, Kuala Lumpur.<sup>63</sup> It was also the first mega Bersih rally which saw no violent police crackdown, unlike the previous three rallies which had been forced to disperse when the police tear-gassed, shot water cannons, and physically attacked participants.<sup>64</sup>

However, thousands were arrested and the government also deployed the Federal Reserve Unit (anti-riot police). In addition to local support, the rally was also supported by a global Bersih movement, consisting of a network of different Bersih cells managed by overseas Malaysians and local supporters in different cities and countries who also conducted peaceful gatherings in the same 34 hour period. Bersih 2.0 also organized a Bersih People's Tribunal in 2013 to collect evidence and testimonies on alleged irregularities and frauds committed during the election.<sup>65</sup> The five-person tribunal led by Professor Yash Ghai of Kenya concluded that that the 2013 elections were clearly not free and fair.

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62 'Bersih calls for August rallies in 3 states to demand PM Najib's resignation' Channel NewsAsia, available at <http://www.channelnewsasia.com/news/asiapacific/bersih-calls-for-august/2014792.html>, accessed on 2 September 2015; 'Ahead of new rally, Bersih 2.0 expands list of demands' Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/ahead-of-new-rally-bersih-2.0-expands-list-of-demands>, accessed on 2 September 2015.

63 'NGO: 500,000 people at Bersih 4 in KL alone' Free Malaysia Today, available at <http://www.freemalaysiatoday.com/category/nation/2015/08/31/ngo-500000-people-at-bersih-4-in-kl-alone/>, accessed on 2 September 2015.

64 'No violent crackdown as government perceives Bersih 4 harmless, analysts say' Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/no-violent-crackdown-as-government-perceives-bersih-4-harmless-analysts-say>, accessed on 2 September 2015.

65 Global Bersih. 'Findings of the People's Tribunal on Malaysia's 13th general elections: summary of the report' available at [www.bersih.org/wp-content/uploads/2014/03/Summary-of-Report-Final.docx](http://www.bersih.org/wp-content/uploads/2014/03/Summary-of-Report-Final.docx), accessed on 7 November 2016.

## *F. Race and Religious Issues in Malaysia*

The politics of race and religion have long been used to divide and rule Malaysian society in the name of political stability. Since colonial times, this concept has been exploited time and again for the benefit of government parties. The country's constitution formulated in 1957 after independence provided for affirmative action in favour of the majority race-group, "the Malaya and Natives of Sabah and Sarawak." Article 153 states the following:

*It shall be the responsibility of the Yang di-Pertuan Agong (King) to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.<sup>66</sup>*

While this provision was supposed to be temporary, as per all legitimate affirmative action policies, the Constitution was never revised, thus, this policy became embedded in Malaysian society. As such, conservative, racist, and right wing groups, including the ruling UMNO political party, were able to fan the extremist and racist ideology that the nation belonged only to Malaysians, others considered mere migrants in their land.

### *Deliberate fanning of racial issues*

Throughout the years, several groups and individuals have consistently and actively provoked and fanned conflict among the different races. Clearly reluctant to acknowledge the importance of diversity, these groups have continuously championed their own racial rights as can be seen in the following section.

*The Low Yat Plaza issue:* Clearly a case of theft and thuggery, the incident at Low Yat Plaza (during which a man allegedly suspected of theft instigated a brawl in retaliation) was spun into a racial issue.

- (a). Non-governmental groups such as Perkida (Persatuan Kebajikan Islam dan Dakwah Islamiah) and Isma (Ikatan Muslimin Malaysia) were amongst the groups fanning the flames.<sup>67</sup> For example, members of Perkida protested for fairness and justice in front of Low Yat Plaza to support the shopkeeper who had been beaten up by the suspected thief and his friends in the mall.<sup>68</sup>

66 'Constitution of Malaysia' Constitution Finder, available at [http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf), accessed on 7 November 2016.

67 Razak, R, 'Police cordon off Low Yat Plaza' Malaysiakini, 12 July 2015, available at <http://www.malaysiakini.com/news/304916>, accessed on 7 November 2016.

68 'Police seal off access to Low Yat Plaza' Malay Mail Online, 12 July 2015, available at <http://www.themalaymailonline.com/malaysia/article/police-seal-off-access-to-low-yat-plaza>, accessed on 7 November 2016.

- (b). Individuals such as Wan Muhammad Azri Wan Deris or ‘Papagomo’ (his internet blog name) and Ali Tinju from the Malay Armed Forces Veterans Association also turned the incident into a racial issue. Indeed, Papagomo was arrested by the police for spreading false information about the brawls, and Ali Tinju was taken in for making a racially-charged speech outside the plaza during the protest.<sup>69</sup>

*Pro-Bumiputera policies and platforms disregarding cultural sensitivity:* NGO, Perkasa (Pertubuhan Pribumi Perkasa Malaysia), has continuously pushed the government to create or amend policies catering specifically to Bumiputeras.

- (a). Perkasa president, Ibrahim Ali, urged it to create a master policy to manage Bumiputera economic development policies, stating that such rights should be highlighted in ‘every chapter’ of the 11 Malaysia Plan.<sup>70</sup>
- (b). Ridhuan Tee, continues to issue statements which are culturally and racially insensitive. For example, he welcomed the Terengganu state government’s move to tighten Islamic regulations such as prohibiting women from riding pillion on motorcycles, introducing sanctions for skipping Friday prayers and banning so-called ‘provocative’ dressing in public. Furthermore, he also suggested that some of these rules should be applied to non-Muslims as well (e.g. the modest attire rule). Indeed, when Kinrara state assembly person, Ng Sze Han, said his office was open to people wearing any attire, Ridhuan Tee sarcastically suggested people should be allowed to enter churches or temples in their underwear.<sup>71</sup>

*Politicians, lawmakers, and policy makers issuing racially sensitive remarks:* Politicians, lawmakers, and policy makers who are supposed to be impartial regardless of a citizen’s race, religion, and culture have also been guilty of provoking and fanning conflict among different races by making insensitive remarks.

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69 Razak, R, and Lu, WH, ‘Papagomo, Ali Tinju and four Low Yat traders held’ Malaysiakini. 15 July 2015, available at <http://www.malaysiakini.com/news/305193>, accessed on 7 November 2016.

70 ‘Perkasa urges government to create master policy to manage Bumi economic development policies’ Bernama, available at <http://www.bernama.com/bernama/v8/bu/newsbusiness.php?id=1157035>, accessed on 30 July 2015; Yap, TG, ‘Perkasa wants Bumi rights mentioned in ‘every chapter’ of the 11MP’ Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/perkasa-wants-bumi-rights-mentioned-in-every-chapter-of-11mp>, accessed on 28 May 2015.

71 ‘Extend modest attire rule to non-Muslims’ Malaysiakini, available at <http://www.malaysiakini.com/news/291430>, accessed on 9 March 2015; ‘Ridhuan Tee: Why not just don underwear to church?’ Malaysiakini, available at <http://www.malaysiakini.com/news/303716>, accessed on 1 July 2015.

- (a). Prime Minister Najib Razak actively champions for ‘1 Malaysia’ but has consistently contradicted himself by highlighting that UMNO will continue to defend the rights of, and do the best for, Malays to the detriment of other races. Indeed, he has been recorded as telling other races not to dispute the special rights of Malays, rulers, and Islam.<sup>72</sup>
- (b). A former deputy minister incited hatred in a recent UMNO annual general meeting by falsely accusing a Chinese man in Kedah of burning pages of the Quran during a ritual.<sup>73</sup>

### ***G. Culturally Insensitive Actions in the Community***

The nation was recently shocked when some civil servants implemented a code of conduct on the treatment of other ethnic groups. For example, at the Road Transport Department, a Chinese woman was forced to wear a Malay sarong (deemed the appropriate dress code) before entering the government department despite the fact she was dressed in knee length pants and a regular ladies blouse.<sup>74</sup> Likewise, a woman wearing shorts was barred from visiting her sick relative at Sungai Buloh Hospital.<sup>75</sup>

Before entering, she was instructed to wrap a towel around her waist to cover her legs. Finally, some Muslim parents and teachers absurdly pressured the headmaster of St Mary’s primary school in Labuk, Sandakan, Sabah, to remove a Christian cross hanging in a new building because it made them ‘uncomfortable.’<sup>76</sup>

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72 ‘Do not dispute anymore the rights of the Malays, rulers and Islam – Najib’ Bernama, Astro Awani, available at <http://english.astroawani.com/politics-news/do-not-dispute-anymore-rights-malays-rulers-and-islam-najib-49426>, accessed on 30 November 2014; ‘Najib: UMNO will continue to fight for rights of Malays’ The Star Online, available on <http://www.thestar.com.my/News/Nation/2014/11/28/Najib-Umno-will-continue-to-fight-for-rights-of-Malays/>, accessed on 28 November 2014.

73 Melati, AJ, ‘5 more police reports lodged against Mashitah over ‘Chinese-burning Quran’ remark’ available at <http://www.themalaysianinsider.com/malaysia/article/5-more-police-reports-lodged-against-against-mashitah-over-chinese-burning>, accessed on 2 December 2014.

74 Avineshwaran, T, ‘JPJ tells woman to ‘cover up’ with sarong or be refused service’ The Star Online, available at <http://www.thestar.com.my/News/Nation/2015/06/08/RTD-forces-woman-to-use-sarong-over-skirt/>, accessed on 8 June 2015.

75 Syed, JZ, ‘Woman in shorts claims barred entry at Sungai Buloh hospital’ Malay Mail Online, available at <http://www.themalaymailonline.com/malaysia/article/woman-in-shorts-claims-barred-entry-at-sungai-buloh-hospital>, accessed on 23 June 2015.

76 ‘Yap says ‘no’ to bid to remove cross at school’ Malaysiakini, available at <http://www.malaysiakini.com/news/302916>, accessed on 24 June 2015.

## Part 3: Conclusion

It could be argued that Malaysia is about to enter the last stretch in its journey to become a fully mature nation; however, this leg may not be an easy one. For too long, power has been entrenched in the hands of a few who have done their utmost to preserve a special position for the political majority while sacrificing human rights at the altar of political convenience and the power centralisation of ruling elites.

Since the 2008 general election, a majority of Malaysians have clamoured for a break from a past of systemic race-based politics and centralised autocratic rule. One hopes that oppressive amendments to existing laws such as the Sedition Act and the introduction of new security laws enabling easy abuse by the authorities will constitute a last desperate attempt by the ruling government to stifle the rise of a different generation of Malaysians; one that demands a more equal and just society, and that respects a person's dignity and rights, irrespective of race or religion.

In order for this to occur, human rights will need to feature much more visibly through education and advocacy as regards all pockets of society to drive home the point that society can only meaningfully move forward when greater respect for the dignity and rights of all people becomes the norm.



**Myanmar**

A decorative graphic consisting of several parallel diagonal stripes in shades of gray, located on the right side of the dark horizontal band.

# Myanmar

Sanam Amin\*

## Part 1: Overview of Myanmar

### A. Country Background

Myanmar Facts	
Geographical size	676,578 sq km <sup>1</sup>
Population	51.5 million (Men: 48.22%; Women: 51.78%)* <sup>2</sup> <i>*Does not include an estimated 1.2 million comprising the entire Rohingya population and some Kachin</i>
Ethnic breakdown	Highly disputed as the government lists 135 ethnic groups, breaking 8 major ethnic groups into sub-categories of clans and dialects. <sup>3</sup>
Official language: Recognized regional languages:	Burmese/Myanmar Most ethnic languages are not recognized or formally taught
Literacy rate	89.5% (Men: 92.6%; Women: 86.9%) <sup>4</sup>
Life expectancy	66.8 (Men: 63.9; Women: 69.9) <sup>5</sup>
GDP	US\$56.8 billion (per capita est US\$1,105) <sup>6</sup>
Government	Unitary presidential republic since 2011
Political and social situation	Ruling party consists of previous members of military regime, several of whom were actively involved in military operations against ethnic groups in northern and southeastern Myanmar. The military retains control of the Ministries of Defence, Home Affairs and Border Affairs, and 25% of parliamentary seats. Although Myanmar gained independence in 1948, it was ruled by successive military juntas between 1962 and 2010. A nationwide uprising in 1988 led to general elections in 1990, the results of which were revoked when the opposing National League for Democracy won by a landslide. Adoption of a military-dominated constitution in 2008 eventually led to general elections in 2010, but were widely considered to lack fairness and credibility. <sup>7</sup> The next general election is scheduled to take place on 8 November 2015.

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1 'Myanmar publishes census, but Rohingya minority not recognized' Reuters, 29 May 2015, available at <http://in.reuters.com/article/2015/05/29/asia-migrants-myanmar-idINKBN0OE1SJ20150529>, accessed on 6 May 2015.

2 Republic of the Union of Myanmar, 'The 2014 Myanmar Population and Housing Census: The Union Report' 29 May 2015.

3 'Myanmar publishes census, but Rohingya minority not recognized' Reuters, 29 May 2015, available at <http://in.reuters.com/article/2015/05/29/asia-migrants-myanmar-idINKBN0OE1SJ20150529>, accessed on 6 May 2015.

4 Republic of the Union of Myanmar, 'The 2014 Myanmar Population and Housing Census: The Union Report' 29 May 2015.

5 Republic of the Union of Myanmar, 'The 2014 Myanmar Population and Housing Census: The Union Report' 29 May 2015.

6 'Country Overview: Myanmar' The World Bank, October 2014, available at <http://www.worldbank.org/en/country/myanmar/overview>, accessed on 1 August 2015.

7 'UN doubts fairness of election in Myanmar' New York Times, 21 October 2010, available at <http://www.nytimes.com/2010/10/22/world/asia/22nations.html>, accessed on 5 Aug 2015.

## ***B. International Human Rights Commitments and Obligations***

Myanmar has ratified three core human rights instruments: (1) the Convention on the Rights of the Child (CRC), (2) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and (3) the Convention on the Rights of Persons with Disabilities (CRPD). In July 2015, it also signed the International Covenant on Economic, Social and Cultural Rights (ICESCR). Further, Myanmar is party to a number of other conventions relating to disarmament, terrorism, transnational crime, and conditions during warfare (details are fully listed in the table below). Reservations mostly reject articles covering arbitration for disputes with other States and referral to the International Court of Justice.<sup>8</sup> However, Myanmar invariably submits its country reports late, and many concerns raised in the Committee's lists of issues remain unaddressed by the government, such as the recommendation to raise the minimum age of marriage for girls, or to raise the minimum age for employment. Moreover, Myanmar's 2008 Constitution is mired with provisions that contradict its international obligations; for instance, although almost two decades have passed since the CEDAW was ratified, Art 352 still stipulates that while the State will not discriminate against applicants for civil service posts, "nothing in this Section shall prevent the appointment of men to positions that are suitable for men only."

Broadly, Myanmar has shown little desire to implement the provisions of any international treaties it is party to. For instance, despite ratifying the CRC in 1991, acceding to the ILO Convention 29 on Forced Labor in 1955 and the ILO Convention 182 on the Worst Forms of Child Labor in 2013, forced labour and child soldier recruitment remain prevalent. Since signing a joint action plan with UNICEF in 2012, Myanmar's army periodically releases batches of child soldiers but has yet to prosecute anyone for recruiting them. Recruitment deploys coercion and misrepresentation and takes advantage of gaps in age verification protocols, recruitment procedures, and accountability mechanisms.<sup>9</sup> In many cases, military officials systematically falsified

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8 Myanmar reservations do not recognize Art 15 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime Preamble, supplementing the United Nations Convention Against Transnational Organized Crime, and Art 29 of the Convention on the Elimination of All Forms of Discrimination against Women.

9 "Tatmadaw hands over 42 child soldiers to parents, guardians" *Global New Light of Myanmar*, 24 January 2015; 'Child soldiers: an ongoing battle in Burma' *The Irrawaddy*, 23 January 2015, available at <http://www.irrawaddy.org/contributor/child-soldiers-ongoing-battle-burma.html>, accessed on 14 August 2015; 'Child soldiers and Burma's long road to reform' *Democratic Voice of Burma*, 25 January 2015, available at <https://www.dvb.no/analysis/child-soldiers-and-burmas-long-road-to-reform-children-human-rights-unicef-burma-myanmar/47651>, accessed on 14 August 2015; 'Under the radar: ongoing recruitment and use of children by the Myanmar army' *Child Soldiers International*, 23 January 2015, available at [http://www.child-soldiers.org/user\\_uploads/pdf/undertheradarongoingrecruitmentanduseofchildrenbythemyanmararmy23jan1525065.pdf](http://www.child-soldiers.org/user_uploads/pdf/undertheradarongoingrecruitmentanduseofchildrenbythemyanmararmy23jan1525065.pdf), accessed on 14 August 2015.

official documents and forced parents to sign blank forms, which were later presented as formal consent.<sup>10</sup>

In addition, a July 2015 Reuters investigative report found that the military still regularly subjects Rohingya living in Rakhine State near the Bangladesh border to forced labour, threatening or physically abusing them if they refuse to cooperate. Villagers interviewed anonymously revealed they were often forced to work as porters, tend fields, or maintain infrastructure for the military for little or no pay and under threat of violence. According to the Arakan Project in 2014, 8,000 Rohingya, including hundreds of children, were driven into forced labour by the military.<sup>11</sup>

**Table 1: Ratification Status of International Instruments – Myanmar<sup>12</sup>**

Treaty	Signature Date	Ratification Date, Accession (a), Succession (d) Date
Convention against Torture and Other Cruel Inhuman or Degrading Punishment		
Optional Protocol of the Convention against Torture		
International Covenant on Civil and Political Rights		
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
Convention for the Protection of All Persons from Enforced Disappearance		
Convention on the Elimination of All Forms of Discrimination against Women		22 Jul 1997 (a)
International Convention on the Elimination of All Forms of Racial Discrimination		
International Covenant on Economic, Social and Cultural Rights	16 Jul 2015	

10 'Child soldiers and Burma's long road to reform' Democratic Voice of Burma, 25 January 2015, available at <https://www.dvb.no/analysis/child-soldiers-and-burmas-long-road-to-reform-children-human-rights-unicef-burma-myanmar/47651>, accessed on 14 August 2015; 'Under the radar: ongoing recruitment and use of children by the Myanmar army' Child Soldiers International, 23 January 2015, available at [http://www.child-soldiers.org/user\\_uploads/pdf/undertheradarongoingrecruitmentanduseofchildrenbythemyanmararmy23jan1525065.pdf](http://www.child-soldiers.org/user_uploads/pdf/undertheradarongoingrecruitmentanduseofchildrenbythemyanmararmy23jan1525065.pdf), accessed on 14 August 2015.

11 'Forced labor shows back-breaking lack of reform in Myanmar military' Reuters, 2 July 2015, available at <http://www.reuters.com/article/2015/07/02/us-myanmar-rohingya-forcedlabour-idUSKCN0PC2L720150702>, accessed on 14 August 2015.

12 United Nations Human Rights, Office of the High Commissioner, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx), accessed on 1 November 2016.

Treaty	Signature Date	Ratification Date, Accession (a), Succession (d) Date
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		
Convention on the Rights of the Child		15 Jul 1991 (a)
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	28 Sep 2015	
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography		16 Jan 2012 (a)
Convention on the Rights of Persons with Disabilities		7 Dec 2011 (a)

### ***C. National Laws Protecting Human Rights***

The 2008 Constitution provides for non-discrimination on the basis of race, birth, religion, official position, status, culture, sex, and wealth. It also proclaims that the State will guarantee every person equal rights before the law and provide legal protection. However, these provisions are not enforced; by and large, ethnic and religious minorities face discrimination and lack legal recourse, especially as regards land rights. Likewise, women continue to be excluded from the political arena and from Myanmar's peace process.

The 1898 Code of Criminal Procedure outlines standard rules for arrest and trial for criminal offences but these procedures are routinely sidestepped, both in the context of handling human rights defenders and in conflict zones. Security forces often charge detainees with offences even before a hearing is scheduled. The detention and extrajudicial killing of freelance journalist, Aung Kyaw Naing (aka Par Gyi), in military custody demonstrates how little attention is paid to due process.<sup>13</sup>

<sup>13</sup> 'Case closed in Par Gyi inquiry, widow vows to appeal' *The Irrawaddy*, 23 June 2015, available at <http://www.irrawaddy.org/case-closed-in-par-gyi-inquiry-widow-vows-to-appeal.html>, accessed on 14 August 2015.

## Par Gyi Murder and Trial

In October 2014, Myanmar army soldiers killed Aung Kyaw Naing (also known as 'Par Gyi'), a freelance journalist who was covering the conflict in Mon State where fighting had broken out in September 2014.<sup>14</sup>

On 23 October, in a letter to the interim Myanmar Press Council, the Myanmar army said that their soldiers had detained Aung Kyaw Naing in Kyaikmaraw Township, Mon State, on 30 September after he returned from covering an outbreak of heavy fighting between the Myanmar army and the Democratic Karen Benevolent Army (DKBA) in a DKBA-controlled area.<sup>15</sup> The letter went on to say that soldiers from LIB 208 had shot and killed Aung Kyaw Naing on 4 October after he allegedly tried to steal a gun from a soldier and escape.<sup>16</sup> However, exhumation of his body revealed signs of torture.<sup>17</sup>

On 8 May 2015, the National Human Rights Commission (NHRC) released a statement disclosing that a secret military tribunal had acquitted two Myanmar army soldiers for the killing.<sup>18</sup> The tribunal reached their verdict on 27 November 2014 before the NHRC recommended the case be tried in civilian court in December.<sup>19</sup>

On 23 June 2015, Kyaikmaraw Township Court, Mon State, issued its verdict in the civilian investigation of Aung Kyaw Naing's killing. The verdict determined that he had died of a gunshot wound, but did not specify who was responsible.<sup>20</sup> His widow expressed dissatisfaction with the verdict and stated an intention to appeal to a higher court.<sup>21</sup> Previously, on 10 June, military officials had already ignored a summons to appear as witnesses.<sup>22</sup>

14 'Missing reporter killed in custody of Burma army: report' The Irrawaddy, 24 October 2014, available at <http://www.irrawaddy.org/burma/missing-reporter-killed-custody-burma-army-report.html>, accessed on 18 August 2015.

15 'Army detains journalist who covered fighting with rebels, wife alleges' The Irrawaddy, 21 October 2014, available at <http://www.irrawaddy.org/burma/army-detains-journalist-covered-fighting-rebels-wife-alleges.html>, accessed on 18 August 2015; 'Missing reporter killed in custody of Burma army: report' The Irrawaddy, 24 October 2014, available at <http://www.irrawaddy.org/burma/missing-reporter-killed-custody-burma-army-report.html>, accessed on 18 August 2015; 'Police open investigation into journalist's killing, wife says' The Irrawaddy, 27 October 2014, available at <http://www.irrawaddy.org/burma/police-open-investigation-journalists-killing-wife-says.html>, accessed on 18 August 2015.

16 'Demonstration to call for investigation into journalist's killing' The Irrawaddy, 24 October 2014, available at <http://www.irrawaddy.org/burma/demonstration-call-investigation-journalists-killing.html>, accessed on 18 August 2015.

17 'Myanmar activists demand independent probe into journalist's killing' Reuters, 29 October 2014, available at <http://uk.reuters.com/article/2014/10/29/uk-myanmar-journalist-idUKKBN0III0120141029>, accessed on 18 August 2015.

18 Statement of the Myanmar National Human Rights Commission with regard to the case involving the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi Statement No (6 /2015), Myanmar National Human Rights Commission, 8 May 2015.

19 'Military acquittal raises fresh doubts about civilian inquest' Myanmar Times, 12 May 2015, available at <http://www.mmtimes.com/index.php/national-news/14402-military-acquittal-raises-fresh-doubts-about-civilian-inquest.html>, accessed on 18 August 2015; Statement No 3/2014 of Myanmar National Human Rights Commission on death of Aung Kyaw Naing (aka Par Gyi), Myanmar National Human Rights Commission, 2 December 2014.

20 'Army witnesses spurn court summons over journalist's killing' The Irrawaddy, 12 June 2015, available at <http://www.irrawaddy.org/burma/army-witnesses-spurn-court-summons-over-journalists-killing.html>, accessed on 18 August 2015.

21 'Army witnesses spurn court summons over journalist's killing' The Irrawaddy, 12 June 2015, available at <http://www.irrawaddy.org/burma/army-witnesses-spurn-court-summons-over-journalists-killing.html>, accessed on 18 August 2015.

22 'Army witnesses spurn court summons over journalist's killing' The Irrawaddy, 12 June 2015, available at <http://www.irrawaddy.org/burma/army-witnesses-spurn-court-summons-over-journalists-killing.html>, accessed on 18 August 2015.

Established in September 2011, the Myanmar National Human Rights Commission claims to follow the Paris Principles.<sup>23</sup> However, the Commission lacks financial independence from the government, making its neutrality questionable. So far, its main response to complaints has been to forward them to the subject of the complaint, leading to dangerous consequences for anyone registering a grievance against the military. For instance, in February 2015, a court in Hpakant Township, Kachin State, fined a Kachin man, Brang Shawng, 50,000 kyat (US\$50) for defamation under Art 211 of the Criminal Code. The sentence came in apparent retaliation for a complaint he'd filed with the Commission stating that Ja Seng In (his 14-year-old daughter) had been fatally shot by military forces on September 2012. It was not clear how the military came to know of his complaint to the Commission; meanwhile, no investigation into his daughter's death has been conducted.<sup>24</sup>

#### ***D. National Laws Threatening Human Rights***

##### *The Constitution (2008)*

The 2008 Constitution itself comprises the chief threat to civil and political rights as it is structured to ensure the military's power remains intact. Some problematic articles are:

**Article 37:** identifies the State as the ultimate owner of all lands and all natural resources above and below the ground, water, and in the atmosphere, undoing the provisions of Art 372, which allowed the right to property ownership "if it is not contrary to the provisions of this Constitution."

**Article 59(e):** requires presidential or vice-presidential candidates to have lived continuously in the country for at least 20 years, meaning political exiles or activists who left Myanmar to avoid persecution cannot be considered. 59(f) bars anyone who has a parent, spouse or child with foreign citizenship. (This clause is widely thought to have been framed specifically to bar Aung San Suu Kyi, whose husband was British, and who has children with British citizenship.)

**Articles 109, 141, and 161:** guarantees unelected military personnel 25% of the seats in each legislative body (110 out of 440 seats in the People's Assembly, 56 out of 224 seats in the National Assembly, and an equivalent number of representatives to one third of the elected state and divisional parliamentary representatives).

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23 "We won't be influenced by the gov't" *Myanmar Times*, 19 September 2011, available at <http://www.mmmtimes.com/index.php/national-news/2090-we-won-t-be-influenced-by-the-govt.html>, accessed on 14 August 2015.

24 'Brang Shawng found guilty of defamation' *Democratic Voice of Burma*, 17 February 2015, available at <https://www.dvb.no/news/brang-shawng-found-guilty-of-defamation-burma-myanmar/48375>, accessed on 14 August 2015; 'Kachin man accusing army of killing daughter found guilty of defamation' *The Irrawaddy*, 17 February 2015, available at <http://www.irrawaddy.org/kachin-man-accusing-army-killing-daughter-found-guilty-defamation.html>, accessed on 14 August 2015.

**Article 121:** outlines disqualifying conditions for a People’s Assembly representative including “having committed an offence relating to disqualification” or a “person serving [a] prison term.” In 2010, this combined with the Political Parties Registration Law effectively barred many from running in the general election, at a time when Aung San Suu Kyi was under house arrest and a further 2,203 were incarcerated as political prisoners.<sup>25</sup>

**Article 232:** requires the Defence, Home Affairs, and Border Affairs Ministers to be selected by the military.

**Articles 299, 302, 308, and 311:** allows the President to appoint or impeach the Chief Justices of the Supreme Court and High Court, meaning the judiciary has no independence from the executive branch.

**Article 436(a):** requires over 75% parliamentary support for any constitutional amendment to be approved. Since Arts 109, 141, and 161 reserve 25% of parliamentary seats for military appointees, this grants the army effective veto power.

**Article 445:** bars any proceedings against previous military juntas, granting them effective immunity from prosecution.

Aside from these glaring flaws in the Constitution, several national laws are also detrimental to human rights. The government frequently uses Art 505(b) of the Criminal Code and Arts 18 and 19 of the Peaceful Gathering and Demonstration Law to detain human rights defenders, and at times, also charges protesters with trespass under Art 447 of the Criminal Code. Further, in two separate cases in 2014, colonial era laws such as the 1923 Official Secrets Act and the 1950 Emergency Act were used to charge and sentence journalists. In the seven states inhabited by non-Burmese minorities, the 1908 Unlawful Association Act is still used by the military and the police to detain individuals suspected to have links with ethnic armed groups.<sup>26</sup>

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<sup>25</sup> Monthly Chronology, November 2010, Assistance Association for Political Prisoners; ‘Party registration laws set NLD a deadline’ The Irrawaddy, 9 March 2010, available at [http://www2.irrawaddy.org/article.php?art\\_id=17995](http://www2.irrawaddy.org/article.php?art_id=17995), accessed on 30 August 2015.

<sup>26</sup> Asian Legal Resource Centre & Asian Human Rights Commission, ‘Special dossier: cases under the Unlawful Associations Act 1908 brought against people accused of contact with Kachin Independence Army’ January 2013.

### *The Citizenship Law (1982)*

By denying all Rohingya access to nationality or citizenship rights, the 1982 Citizenship Law is a stark example of legislation that threatens human rights. The government also maintains marriage, travel, and family restrictions on Rohingya in Rakhine State via Regional Order 1/2005 (the two-child policy) and Regional Order 1/2009 (requiring Rohingya to acquire official permission to marry or travel).<sup>27</sup>

The 1982 Citizenship Law outlines three categories of citizenship (see the box on the 1982 Citizenship Law below).<sup>28</sup> Drafted by former dictator, Gen Ne Win, the 1982 Citizenship Law remains the key obstacle to Rohingya receiving full rights. It was designed to address the problem of ‘foreigners or aliens’ entering Myanmar in the period between British annexation in 1824 and Myanmar’s independence in 1948.<sup>29</sup> Despite repeated assurances to the international community that the government would address Rohingya statelessness, the majority of Rohingya within Myanmar continue to be denied citizenship because of strict adherence to this law.<sup>30</sup>

#### **Types of Citizenship Under the 1982 Citizenship Law**

**Full citizenship:** only for the eight ethnicities (Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine, and Shan) residing in Myanmar prior to 1823.

**Associate citizenship:** for anyone who entered Myanmar before 1948 and claimed citizenship while not belonging to any of the eight recognized races. This category gives holders the right to live in Myanmar, but not the right to participate in politics.

**Naturalized citizenship:** for anyone who entered Myanmar before 1948 but did not apply for citizenship.

In addition, the law contains a provision allowing the State to revoke the associate or naturalized citizenships of any person, except a citizen by birth.

27 Fortify Rights, *Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar*, 25 February 2014.

28 Working People’s Daily, meeting held in the Central Meeting Hall, President House, Ahlone Road, 8 October 1982, translation of the speech by General Ne Win, 9 Oct 1982.

29 Working People’s Daily, meeting held in the Central Meeting Hall, President House, Ahlone Road, 8 October 1982, translation of the speech by General Ne Win, 9 Oct 1982.

30 ‘Citizenship only for Myanmar’s ‘legal’ Rohingyas’ Radio Free Asia, 12 July 2013, available at <http://www.rfa.org/english/news/myanmar/citizenship-07122013182036.html/>, accessed on 14 August 2015.

The law denies Rohingya full citizenship as they do not belong to one of the eight ethnic groups who settled in Myanmar prior to 1823. Rohingya only qualify for ‘associate’ or ‘naturalized’ citizenship, although the law has a provision allowing a central body of members from the Home Affairs, Defence, and Foreign Ministries to decide if an individual qualifies for full citizenship.<sup>31</sup> However, most members of this community do not have the documentation needed to prove their presence in Myanmar prior to 1948, as officials seized many Rohingya families’ existing identification documents when the 1982 Citizenship Law was enacted.<sup>32</sup> Others lost their documents during outbreaks of sectarian violence in 2012.<sup>33</sup>

### ***E. More Discriminatory Legislation in the Pipeline***

In 2014 and 2015, the government of Myanmar fast-tracked discriminatory legislation first proposed in June 2013 by extremist Buddhist monk, U Wirathu, and the Organization for the Protection of National Race and Religion (OPNRR), also known as ‘Ma Ba Tha.’<sup>34</sup> The proposed set of four bills, known as the ‘National Race and Religion Protection’ package, consists of: the Religious Conversion Bill, the Interfaith Marriage Bill, the Monogamy Bill, and the Population Control Bill.<sup>35</sup> Together, the proposed laws violate international human rights standards, including freedoms relating to religion, marriage, and reproduction. Despite domestic and international criticism, all four bills were passed by the final parliamentary session before the 2015 general election, and signed into law by the President.

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31 Burma Citizenship Law, Chapter IV – Central Body, 15 October 1982.

32 Zarni, M, and Cowley, A, ‘The slow-burning genocide of Myanmar’s Rohingya’ *Pacific Rim Law and Policy Journal*, 2014, Vol 23(3), p 683.

33 ‘Arakanese leaders to propose detention camps for undocumented Rohingya’ *The Irrawaddy*, 22 August 2014, available at <http://www.irrawaddy.org/arakanese-leaders-propose-detention-camps-undocumented-rohingya.html>, accessed on 14 August 2015.

34 ‘Monks’ convention in Burma calls for restricting Buddhist-Muslim marriage’ *The Irrawaddy*, 13 June 2013, available at <http://www.irrawaddy.org/conflict/monks-convention-in-burma-calls-for-restricting-buddhist-muslim-marriage.html>, accessed on 14 August 2015; ‘U Wirathu to propose interfaith marriage law again at Monks’ Conference’ *The Irrawaddy*, 9 January 2014, available at <http://www.irrawaddy.org/wirathu-discuss-interfaith-marriage-restrictions-monks-conference.html>, accessed on 14 August 2015.

35 ‘Protection laws’ submitted to Burma’s parliament’ *The Irrawaddy*, 2 December 2014, available at <http://www.irrawaddy.org/protection-laws-submitted-burmas-parliament.html>, accessed on 14 August 2015.

## The 'National Race and Religion Protection' Package

The **Religious Conversion Bill** would require anyone wishing to convert to another religion to submit an application giving reasons for the conversion and submit to an interview by a township registration board. Anyone found guilty of violating the law would be subject to a maximum of two years' imprisonment and a 200,000 kyat (US\$200) fine.<sup>36</sup>

Status: On 26 August 2015, President Thein Sein signed the Religious Conversion Bill into law.<sup>37</sup>

The **Interfaith Marriage Bill**, also known as the 'Special Marriage Law', would require Buddhist women and men of other faiths to apply for permission to marry from local authorities, and for existing interfaith couples to register their marriages. Failure to do so could result in up to three years' imprisonment and a 50,000 kyat (US\$50) fine.<sup>38</sup>

Status: On 26 August 2015, President Thein Sein signed the Interfaith Marriage Bill into law.<sup>39</sup>

The **Monogamy Bill** would impose a ten-year prison sentence and a fine for any act of polygamy or infidelity under Art 494 of the Criminal Code. Any spouse found guilty of polygamy or infidelity would also forfeit all property rights.<sup>40</sup>

Status: On 21 August 2015, President Thein Sein signed the Monogamy Bill into law.<sup>41</sup>

The **Population Control Law** allows authorities to designate areas or groups, based on socio-economic indicators, to force women to observe birth spacing of three years.<sup>42</sup> Methods of enforcement and penalties for those violating the law have not yet been specified.<sup>43</sup>

Status: On 19 May 2015, President Thein Sein signed the Population Control Bill into law.<sup>44</sup>

36 'Myanmar mulls religious conversion curbs' Agence France-Presse, 27 May 2014, available at <http://reliefweb.int/report/myanmar/legislating-love-myanmar-mulls-religious-marriage-curbs>, accessed on 14 August 2015; 'Burma invites public to review faith conversion bill' Democratic Voice of Burma, 28 May 2014, available at <https://www.dvb.no/news/burma-invites-public-to-review-faith-conversion-bill-burma-myanmar/41069>, accessed on 14 August 2015.

37 'Myanmar's president signs off on law seen as targeting Muslims' Reuters, 26 August 2015, available at <http://www.reuters.com/article/2015/08/31/us-myanmar-politics-idUSKCN0R011W20150831>, accessed on 7 September 2015.

38 'Myanmar parliament to debate controversial religion laws' Agence France-Presse, 3 December 2014, available at <http://www.freemalaysiatoday.com/category/world/2014/12/03/myanmar-parliament-to-debate-controversial-religion-laws/>, accessed on 14 August 2015; 'President signs off on religious bills' Myanmar Times, 5 December 2014, available at <http://www.mmmtimes.com/index.php/national-news/14648-president-signs-off-on-population-control-law.html>, accessed on 14 August 2015.

39 'Myanmar's president signs off on law seen as targeting Muslims' Reuters, 26 August 2015, available at <http://www.reuters.com/article/2015/08/31/us-myanmar-politics-idUSKCN0R011W20150831>, accessed on 7 September 2015.

40 'Parliament considers bill to criminalize polygamy, infidelity' The Irrawaddy, 5 December 2014, available at <http://www.irrawaddy.org/parliament-considers-bill-criminalize-polygamy-infidelity.html>, accessed on 14 August 2015.

41 'Myanmar's president signs off on law seen as targeting Muslims' Reuters, 26 August 2015, available at <http://www.reuters.com/article/2015/08/31/us-myanmar-politics-idUSKCN0R011W20150831>, accessed on 7 September 2015.

42 Population Control Bill, 1 December 2014.

43 'Rights groups slam Myanmar birth law as anti-Muslim' Reuters, 25 May 2015, available at <http://www.reuters.com/article/2015/05/25/us-myanmar-birth-law-idUSKBN0OA0U420150525>, accessed on 14 August 2015.

44 'Myanmar president signs off on contested population law' Associated Press, 24 May 2015, available at [http://www.nytimes.com/aponline/2015/05/23/world/asia/ap-as-myanmar-population-law.html?\\_r=0](http://www.nytimes.com/aponline/2015/05/23/world/asia/ap-as-myanmar-population-law.html?_r=0), accessed on 14 August 2015.

## ***F. Important Court Cases in the Past Year Relating to Human Rights***

*Writer sentenced to two years with hard labour for “insulting religion”* On 2 June 2015, Chaung U Township Court, Sagaing Division, sentenced writer and former NLD information officer, Htin Lin Oo, to two years in prison with hard labour under Art 295(a) of the Criminal Code, for “insulting religion.”<sup>45</sup> The court acquitted him on a separate charge under Art 298 for “hurting religious feelings.”<sup>46</sup> Both charges related to a speech he made in Chaung U Township on 23 October 2014, criticizing the ‘Ma Ba Tha’ and stating that Buddhism was not compatible with extreme nationalism.<sup>47</sup>

### *The Letpadan student trial*

In March 2015, police in Letpadan, Bago Division, violently cracked down on and detained students protesting against the National Education Law, while supporters around the country also faced arrests and violence.<sup>48</sup> On 25 March, Letpadan Township Court charged sixty-nine of the arrested under Arts 143, 145, 147, 332, and 505(b) of the Criminal Code, and eleven under Arts 143, 145, and 332, but released the latter on bail.<sup>49</sup> Police and hired thugs also attacked and intimidated journalists covering protests around Myanmar. In June 2015, Tharawaddy District Court, Bago Division, continued the trial of sixty-eight students as well as eleven activists arrested for donating food to the student protesters.<sup>50</sup> Many of the students suffered injuries at the time of arrest and

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45 ‘Htin Lin Oo sentenced to two years with labour’ Democratic Voice of Burma, 2 June 2015, available at <https://www.dvb.no/news/htin-lin-oo-sentenced-to-two-years-with-labour-burma-myanmar/51679>, accessed on 18 August 2015; ‘2 years hard labor for Htin Lin Oo in religious offense case’ *The Irrawaddy*, 2 June 2015, available at <http://www.irrawaddy.org/burma/2-years-hard-labor-for-htin-lin-oo-in-religious-offense-case.html>, accessed on 18 August 2015.

46 ‘Htin Lin Oo sentenced to two years with labour’ Democratic Voice of Burma, 2 June 2015, available at <https://www.dvb.no/news/htin-lin-oo-sentenced-to-two-years-with-labour-burma-myanmar/51679>, accessed on 18 August 2015; ‘2 years hard labor for Htin Lin Oo in religious offense case’ *The Irrawaddy*, 2 June 2015, available at <http://www.irrawaddy.org/burma/2-years-hard-labor-for-htin-lin-oo-in-religious-offense-case.html>, accessed on 18 August 2015.

47 ‘NLD member prosecuted for ‘wounding religious feelings’ *The Irrawaddy*, 8 December 2014, available at <http://www.irrawaddy.org/burma/nld-member-prosecuted-wounding-religious-feelings.html>, accessed on 18 August 2014; ‘Former NLD official sued for ‘insulting religion’ Democratic Voice of Burma, 25 December 2014, available at <http://www.dvb.no/news/fundamentalist-buddhist-group-sue-former-nld-official-burma-myanmar/46905>, accessed on 18 August 2015.

48 Press briefing notes on ‘Myanmar and the abolition of the death penalty in Suriname and Côte d’Ivoire’ Office of the High Commissioner for Human Rights, 13 March 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15694&LangID=E>, accessed on 18 August 2015; Daily press briefing, US Department of State, 6 March 2015, 10 March 2015; ‘Myanmar/Burma: brutal crackdown against a student protest’ France Diplomatie, 5 March 2015.

49 ‘Myanmar court charges nearly 70 students under penal law for Letpadan protest’ Radio Free Asia, 25 March 2015, available at <http://www.rfa.org/english/news/myanmar/court-charges-nearly-70-students-03252015154957.html>; ‘Myanmar charges 69 protesters with rioting after police crackdown’ Reuters, 25 March 2015, available at <http://www.reuters.com/article/2015/03/25/us-myanmar-students-idUSKBN0ML18420150325>; ‘80 Letpadan detainees appear in court’ *The Irrawaddy*, 25 March 2015, available at <http://www.irrawaddy.org/burma/80-letpadan-detainees-appear-in-court.html>, all accessed on 18 August 2015.

50 ‘Education activists make fifth court appearance’ Eleven Media Group, 11 June 2015.

were denied treatment in prison.<sup>51</sup> At least two students lost consciousness at hearings and had to be hospitalized.<sup>52</sup> At the time of writing, the trials continue.

### *Rohingya community leaders re-sentenced for 2013 protest*

In a presidential amnesty on 30 July, four Rohingya men were released for the second time. They had been re-sentenced by Rakhine State Divisional Court in March 2015 to between five and eight years in prison, after they were released in October 2014 by presidential amnesty. The men were involved in an April 2013 protest against attempts by immigration officials to register Rohingya IDPs as ‘Bengali.’<sup>53</sup>

## **Part 2: Outstanding Human Rights Issues**

### ***A. Continued Persecution of Human Rights Defenders and Journalists***

Since President Thein Sein took office in 2011, the government has used both colonial and more recent laws to target human rights defenders and journalists. Despite a public commitment by the President to release all political prisoners by the end of 2013, authorities continue to detain a number of activists, farmers, and media workers. Some activists, such as Htin Kyaw and Sein Than, are periodically imprisoned and released in the now regular presidential amnesties, which release thousands of prisoners at a time. Activists report being subjected to routine surveillance by the Special Branch. Significantly, the government continues to treat civil society and human rights defenders as enemies and does not engage constructively with either. In contrast, the OPNRR remains influential enough to push for legislative changes, not just for the package of discriminatory laws mentioned in Part I, but also for the recent ban of high-rise construction in proximity to the Shwedagon Pagoda.

To date, hundreds of farmers have been detained for demonstrating against land confiscation by the military and its crony companies.<sup>54</sup> In February 2014, it was reported that the Parliamentary Commission on Land Confiscation found the military responsible for 688 out of 745 cases investigated, involving over 500,000 acres of land confiscated in the last five decades.<sup>55</sup>

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51 ‘AAPP calls for adequate healthcare for political prisoners in Burma’ Assistance Association for Political Prisoners, 11 June 2015, available at <http://aappb.org/2015/06/aapp-calls-for-adequate-healthcare-for-political-prisoners-in-burma/>, accessed on 18 August 2015.

52 ‘AAPP calls for adequate healthcare for political prisoners in Burma’ Assistance Association for Political Prisoners, 11 June 2015, available at <http://aappb.org/2015/06/aapp-calls-for-adequate-healthcare-for-political-prisoners-in-burma/>, accessed 18 August 2015; ‘2 jailed activists hospitalized for Letpadan injuries’ *The Irrawaddy*, 11 June 2015, available at <http://www.irrawaddy.org/burma/2-jailed-activists-hospitalized-for-letpadan-injuries.html>, accessed on 18 August 2015.

53 ‘Rohingya community leaders imprisoned’ Amnesty International, 27 March 2015.

54 Asian Human Rights Commission, Urgent Appeals Programme: Urgent Appeal Case AHRC-UAU-001-2015, ‘Myanmar: villagers still without remedy for police attack on protestors’ 13 February 2015.

55 ‘745 land grabbing cases happened in 5 decades as successive governments implemented projects in interests of country and people in accordance with rules, regulations’ *New Light of Myanmar*, 21 February 2014.

## B. Ethnic Conflict Continues, Ceasefire Negotiations Hit Snag

Myanmar has been in a state of conflict with one or more ethnic groups since its independence, making it home to one of the longest running civil wars in the world. The government has at different times signed bilateral ceasefire agreements with individual ethnic armed groups, which have not been respected by the State army. In June 2011, the conflict in Kachin State, originally begun in 1961, resumed with the Kachin Independence Army (KIA), after a 17-year ceasefire. Ongoing fighting has displaced more than 100,000 civilians.

In November 2013, the government and sixteen ethnic armed groups began negotiating a nationwide ceasefire agreement via mediation teams.<sup>56</sup> The negotiations faced several hurdles as they took place against a backdrop of active offensives in northern Myanmar. The military also stalled dialogue by presenting six prerequisites (see Table 2 below). After protracted negotiations, the two sides completed the draft in March 2015, choosing to drop key clauses neither could compromise upon.<sup>57</sup>

**Table 2: Government and Ethnic Armed Groups' Demands for Ceasefire Accord**

Ethnic Armed Groups' Demands for Ceasefire Accord <sup>58</sup>	Military Demands Prior to Ceasefire Accord <sup>59</sup>
<ul style="list-style-type: none"> <li>• The formation of a genuine federal union</li> <li>• All ethnic armed groups must sign the accord, i.e. including the Ta'ang National Liberation Army, Arakan Army, and Myanmar National Democratic Alliance Army, all of whom are still currently fighting the State military</li> <li>• Equal rights and autonomy for all states</li> <li>• The resolution of political issues politically</li> <li>• The formation of a political dialogue framework with the government within 30 days of signing the ceasefire agreement</li> <li>• The continuation of political dialogue outside parliament in accordance with the agreed framework</li> <li>• The formation of a federal army</li> </ul>	<ul style="list-style-type: none"> <li>• That ethnic armed groups:</li> <li>• Possess a 'true will' to seek peace</li> <li>• Abide by the agreements reached</li> <li>• Do not exploit the peace agreements</li> <li>• Do not burden civilians*</li> <li>• Follow the law and regulations issued by government**</li> <li>• Follow the 2008 Constitution</li> </ul> <p><i>*This effectively blames ethnic groups for any clashes with the Myanmar army</i>  <i>**This effectively requires all ethnic armed groups to disarm</i></p>

56 Republic of the Union of Myanmar, Press Release Team, press release no 17/2013, 3rd waxing of Tazaungmon, 1375 ME (5 November 2013), New Light of Myanmar, 6 November 2013.

57 'National ceasefire talks end with agreement on draft accord' Global New Light of Myanmar, 31 March 2015, available at <http://globalnewlightofmyanmar.com/national-ceasefire-talks-end-with-agreement-on-draft-accord/>, accessed on 18 August 2015.

58 'Government and ethnic armed groups disagree over the timeframe to start political dialogue' Eleven Media Group, 2 November 2013.

59 'Stakeholders: NCCT' Burma News International, available at <http://www.mmpeacemonitor.org/stakeholders/ncct>.

The government pushed for an immediate signing. However, some of the groups hesitated, wary over renewed assaults on KIA posts and the new conflict against the Myanmar National Democratic Alliance Army (MNDAA) in Kokang Self-Administered Zone, which began in February 2015, displacing at least 40,000 civilians. After discussion amongst themselves, the ethnic armed groups requested the government reopen dialogue, asking for additional amendments, more international observers, and the inclusion of three groups: the Ta'ang National Liberation Army, the Arakan Army, and the MNDAA. To date, the government continues to refuse to include these three groups even though all have indicated a wish to sign the agreement.

The conflict with ethnic armed groups has had a devastating impact on civilians. The UN High Commissioner for Refugees 2014 report found that the total number of refugees, asylum seekers, and internally displaced persons originating from Myanmar in 2014 (not counting stateless persons in Rakhine State) comprised 907,249, making it the thirteenth largest source country in the world. Exacerbating the situation, landmine use and threats of violence stand in the way of safe and voluntary return. Further, the Women's League of Burma (WLB) has documented the military's consistent use of sexual violence against women in conflict zones, stating that the Myanmar army uses rape as "a weapon of war."<sup>60</sup>

### ***C. Persecution of Rohingya and ASEAN Collusion With Traffickers Leads to Migrant Crisis***

In November 2014, the Associated Press and Fortify Rights revealed that Myanmar security forces were profiting from the Rohingya exodus from Rakhine State by colluding with human traffickers.<sup>61</sup> Rohingya would pay approximately US\$15 each to government officials or security personnel in exchange for transfer to human smuggling or trafficking ships, some with Navy escorts. (A December 2014 UNHCR report said individuals paid between US\$50 to US\$300 to board the boats.)<sup>62</sup> Despite allegations against security forces and the scale of the exodus in the 2014 sailing season, on 20 November 2014, President Thein Sein said concern over Rohingya boat people was

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60 'Same impunity, same patterns' Women's League of Burma, 14 January 2014; 'If they had hope, they would speak' Women's League of Burma, 25 November 2014.

61 'AP exclusive: Myanmar profits off Rohingya exodus' Associated Press, 6 November 2014, available at <http://news.yahoo.com/ap-exclusive-myanmar-aiding-rohingya-trafficking-110832613.html>, accessed on 18 August 15; 'Myanmar: authorities complicit in Rohingya trafficking, smuggling' Fortify Rights, 7 November 2014, available at <http://www.fortifyrights.org/publication-20141107.html>, accessed on 18 August 2015.

62 'Irregular maritime movements' UN High Commissioner for Refugees, 5 December 2014, available at <http://www.unhcr.org/53f1c5fc9.html>, accessed on 18 August 2015; 'AP exclusive: Myanmar profits off Rohingya exodus' Associated Press, 6 November 2014, available at <http://news.yahoo.com/ap-exclusive-myanmar-aiding-rohingya-trafficking-110832613.html>, accessed on 18 August 15; 'Myanmar: authorities complicit in Rohingya trafficking, smuggling' Fortify Rights, 7 November 2014, available at <http://www.fortifyrights.org/publication-20141107.html>, accessed on 18 August 2015.

exaggerated, and that the reports were a “media fabrication” designed to undermine the government of Myanmar.<sup>63</sup>

Thai authorities also supplied trafficking networks with Rohingya. Since October 2013, Thai immigration officials have sold hundreds of Rohingya to human traffickers operating secret jungle camps in Southern Thailand.<sup>64</sup> Armed guards in the camps beat and killed many Rohingya, and traffickers demanded ransoms of US\$1,500 to US\$2,200 from friends or relatives in exchange for victims’ release over the border to Malaysia.<sup>65</sup> In 2013, a record 40,000 Rohingya passed through Thai jungle camps, according to the Arakan Project.<sup>66</sup>

In the first week of May 2015, Thai authorities discovered the remains of 32 bodies at two abandoned human trafficking camps and a series of mass graves in other camps close to the Malaysian border in Songkhla Province.<sup>67</sup> The discovery of the camps, used as transit stations until victims could be transferred to Malaysia, led to a crackdown by Thai authorities on traffickers.<sup>68</sup> Later that month, Malaysian authorities also discovered

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63 ‘VOA exclusive: interview with Myanmar president, Thein Sein’ Voice of America, 20 November 2014, available at <http://www.voanews.com/content/voa-exclusive-interview-myanmar-president-thein-sein/2527766.html>, accessed on 18 August 2015; ‘Myanmar says plight of Rohingya minority a media fabrication’ Reuters, 21 November 2014, available at <http://www.reuters.com/article/2014/11/21/us-myanmar-rohingya-idUSKCN0J516T20141121>, accessed on 18 August 2015.

64 ‘Special report: Thailand secretly dumps Myanmar refugees into trafficking rings’ Reuters, 4 December 2013, available at <http://uk.reuters.com/article/2013/12/05/uk-thailand-rohingya-special-report-idUKBRE9B400920131205>, accessed on 18 August 2015; ‘Special report: traffickers use abductions, prison ships to feed Asian slave trade’ Reuters, 22 October 2014, available at <http://www.reuters.com/article/2014/10/22/us-thailand-trafficking-specialreport-idUSKCN0IB0A320141022>, accessed on 18 August 2015.

65 ‘Special report: Thailand secretly dumps Myanmar refugees into trafficking rings’ Reuters, 4 December 2013, available at <http://uk.reuters.com/article/2013/12/05/uk-thailand-rohingya-special-report-idUKBRE9B400920131205>, accessed on 18 August 2015; ‘More than 20,000 people risk all on Indian Ocean to reach safety: UNHCR report’ UN High Commissioner for Refugees, 22 August 2014, available at <http://www.unhcr.org/53f741fc9.html>, accessed on 18 August 2015.

66 ‘Special report: traffickers use abductions, prison ships to feed Asian slave trade’ Reuters, 22 October 2014, available at <http://www.reuters.com/article/2014/10/22/us-thailand-trafficking-specialreport-idUSKCN0IB0A320141022>, accessed on 17 August 2015.

67 ‘Second grave site uncovered in southern Thailand’ Democratic Voice of Burma, 5 May 2015, available at <https://youtu.be/aSSOZQnF4Sk>, accessed on 17 August 2015; ‘Six more bodies found as smuggling investigation continues’ Agence France-Presse, 6 May 2015, available at <http://www.msn.com/en-sg/news/other/thai-authorities-find-six-more-bodies-in-people-smuggling-probe/ar-BBjhcOd>, accessed on 17 August 2015; ‘Thai army finds six more bodies near suspected human trafficking camp’ Reuters, 6 May 2015, available at <http://www.reuters.com/article/2015/05/06/us-thailand-rohingya-trafficking-idUSKBN0NR0OZ20150506>, accessed on 17 August 2015; ‘Thirty more graves unearthed in Thailand’ *Bangkok Post*, 7 May 2015, available at <http://www.bangkokpost.com/news/general/554323/30-more-migrant-graves-discovered-in-south>, accessed on 17 August 2015.

68 ‘Thai police seek local help in people smuggling crackdown’ Agence France-Presse, 28 May 2015, available at <http://www.bangkokpost.com/news/asia/574767/thai-police-seek-local-help-in-people-smuggling-crackdown>, accessed on 17 August 2015; ‘Thirty more graves unearthed in Thailand’ *Bangkok Post*, 7 May 2015, available at <http://www.bangkokpost.com/news/general/554323/30-more-migrant-graves-discovered-in-south>, accessed on 17 August 2015.

at least 139 mass graves in 28 similar camps, where they found several partial remains and at least 35 heavily decomposed bodies in Perlis State, bordering Thailand.<sup>69</sup>

As a result of the crackdown, human traffickers fled the camps, leaving at least 276 Rohingya and Bangladeshi survivors stranded in the forest.<sup>70</sup> Traffickers also abandoned boats in the Andaman Sea, the Malacca Strait, and nearby international waters, leaving a further estimated 7,000-8,000 Rohingya and Bangladeshi boat people stranded at sea.<sup>71</sup> The International Organization for Migration (IOM) found that the boat people were stranded without adequate food, water, or sanitation. They had also faced significant abuse: traffickers starved, constrained, and beat the victims, while women and girls were particularly at risk of sexual violence.<sup>72</sup> After an initial influx of over a thousand boat people on their shores, Indonesia, Malaysia, and Thailand pushed back several boats, citing an inability to accommodate so many people.<sup>73</sup> International condemnation and domestic pressure compelled both Malaysia and Indonesia to announce on 20 May 2015 that they would no longer turn away boats, and ordered search and rescue operations.<sup>74</sup> A few days later, on 27 May 2015, Thailand began air missions looking for boats in the Andaman Sea.<sup>75</sup>

### Part 3: Conclusion

Myanmar is still suffering from the effects of generations of autocratic rule, and while it has seen remarkable changes since the shift to a quasi-civilian government, it has a long way to go to alter its human rights record. Its military has initiated broadly superficial reforms in order to take its place in the international community and participate in the global free market. The upcoming general election scheduled for 8 November 2015 is widely seen as the starting point for a second phase of reform,

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69 Another 22 skeletons exhumed, post-mortem begins June 7' Bernama, 29 May 2015, available at <http://www.msn.com/en-my/news/other/another-22-skeletons-exhumed-post-mortem-begins-june-7/ar-BBkohS0>, accessed on 17 August; 'Malaysian police exhume bodies from mass grave' Al Jazeera, 26 May 2015, available at <http://www.aljazeera.com/news/2015/05/malaysian-police-exhume-bodies-mass-grave-150526173800672.html>, accessed on 17 August 2015.

70 'Thailand announces summit to tackle migrant crisis' Radio Free Asia, 13 May 2015, available at <http://www.rfa.org/english/news/myanmar/thailand-boat-05132015105337.html>, accessed on 17 August 2015.

71 '1,600 Rohingyas, others land in Indonesia and Malaysia' Associated Press, 11 May 2015, available at [http://www.nytimes.com/aponline/2015/05/11/world/asia/ap-as-malaysia-rohingya.html?\\_r=0](http://www.nytimes.com/aponline/2015/05/11/world/asia/ap-as-malaysia-rohingya.html?_r=0), accessed on 17 August 2015.

72 'IOM regional appeal: Bay of Bengal and Andaman Sea crisis' International Organization for Migration, 25 May 2015, available at <https://www.iom.int/iom-regional-appeal-bay-bengal-and-andaman-sea-crisis>, accessed on 17 August 2015.

73 'Asia boat migrants: UN despair over lack of rescues' BBC, 18 May 2015, available at <http://www.bbc.com/news/world-asia-32776647>, accessed on 7 September 2015.

74 'Malaysia orders rescue of migrants, Myanmar to attend conference' Reuters, 21 May 2015, available at <http://www.reuters.com/article/2015/05/21/us-asia-migrants-idUSKBN0O60UF20150521>, accessed on 7 September 2015.

75 'Malaysians clear graves as Thais comb seas for more boat people' Agence France-Presse, 27 May 2015, available at <https://www.dvb.no/?p=51389>, accessed on 7 September 2015.

despite the disenfranchisement of the Rohingya, serious flaws in voter registration, and the military-dominated ousting of Shwe Mann from his post as chairman of the Union Solidarity and Development Party (USDP), the ruling party. To conclude, the military has shown an unwillingness to compromise or reduce its political presence and power in government, and the authorities still treat civil society and human rights defenders as threats. Instead of engaging with them or taking concrete action to address concerns, in the past year, it has actually increased surveillance and threats, and detained more human rights defenders. Since leadership of the current government is largely made up of former generals focused on commercial partnerships with local and international entrepreneurs keen to exploit Myanmar's natural resources, it is unsurprising that public trust in its reform agenda remains extremely low.

**Philippines**

A decorative graphic consisting of several parallel diagonal stripes in shades of gray, located on the right side of the dark horizontal band.

# Philippines

Ray Paolo Santiago and Cecille Corpuz\*

## Part 1: Overview of the Philippines

### A. Country Background

Philippines Facts	
Geographical size	300,000 sq km
Population	92,337.9 million
Ethnic breakdown	The majority of people are of Austronesian descent and include the Moros, the Aetas, the Ibaloi, the Ifugao, the Ilonggo, Ilocano, and the Tagalog
Official language: Recognized regional languages:	Filipino/English 110 recognized ethno-linguistic groups using 8 major dialects: Bikol, Cebuano, Hiligaynon (Ilonggo), Ilocano, Kapampangan, Pangasinan, Tagalog, and Waray
Literacy rate	97.5%
Life expectancy	68.27 (Men: 64.91; Women: 71.79)
GDP	US\$284.8 billion
Government	Democratic and republican state. Presidential form of government where power is divided amongst legislative, executive, and judicial branches. Follows the principle of separation of powers.
Political and social situation	Despite regular elections, problems include corruption leading to vote buying and selling and the undue influence of political dynasties.

The Philippines is an archipelagic state in Southeast Asia with an area of 300,000 square kilometres.<sup>1</sup> It is made up of over 7,107 islands, out of which 3,144 are named. Luzon, Visayas, and Mindanao are the three largest groups of islands which are further subdivided into 17 regions, 80 provinces, 143 cities, 1,491 municipalities, and 42,028 barangays as of 2013.

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1 'Philippines in Figures 2014' National Statistics Office, available at <https://psa.gov.ph/sites/default/files/2014%20PIF.pdf>, accessed on 18 August 2016.

The total population of the Philippines is 92,337.9 million based on the 2010 Census of Population and Housing conducted by the National Statistics Office.<sup>2</sup> It has an average population growth rate of 1.72 (2010-2015)<sup>3</sup> which is estimated to reach 99.14 million as of 2014.<sup>4</sup> Filipinos have a life expectancy of 68.27 years: women can expect to live to 71.79 years while men can only anticipate 64.91 years.<sup>5</sup> Also regarding life expectancy, out of 191 countries, the Philippines dropped from 129th in 2013 to 130th in 2014.<sup>6</sup> The Philippines has a literacy rate of 97.5% as of 2013, which is an improvement over previous years.<sup>7</sup>

The Philippines has a population of over 14 million people belonging to 110 recognized ethno-linguistic groups.<sup>8</sup> These are mainly concentrated in Northern Luzon (Cordillera administrative region) and Mindanao, with some groups in the Visayas area.<sup>9</sup> Among these groups are the Moros, the Aetas, the Ibaloi, the Ifugao, the Ilonggo, the Ilocano, and the Tagalog. Amongst the many languages used in the country, the two official ones are Filipino and English. The Philippines has 8 major dialects: Bikol, Cebuano, Hiligaynon (Ilonggo), Ilocano, Kapampangan, Pangasinan, Tagalog, and Waray.<sup>10</sup> According to a report by Ethnologue, the number of individual languages listed for Philippines is 187, out of which 183 are living and 4 are extinct. Of the living languages, 175 are indigenous and 8 are non-indigenous. Furthermore, 41 are institutional, 73 are developing, 45 are vigorous, 13 are in trouble, and 11 are dying.<sup>11</sup>

As of 2014, the gross domestic product of the Philippines is US\$284.8 billion representing 0.46 percent of the world economy. From 1960 to 2014, it averaged US\$64.96 billion, reaching an all-time high of US\$284.78 billion in 2014 and a record low of US\$4.40 billion in 1962.<sup>12</sup>

2 'Philippines in Figures 2014' National Statistics Office, available at <https://psa.gov.ph/sites/default/files/2014%20PIF.pdf>, accessed on 18 August 2016.

3 'Philippines in Figures 2014' National Statistics Office, available at <https://psa.gov.ph/sites/default/files/2014%20PIF.pdf>, accessed on 18 August 2016.

4 'Data, Philippines' The World Bank, available at <http://data.worldbank.org/country/philippines>, accessed on 7 April 2016.

5 'Life expectancy increases in Philippines' CountryEconomy.com, available at <http://countryeconomy.com/demography/life-expectancy/philippines>, accessed on 7 April 2016.

6 'Life expectancy increases in Philippines' CountryEconomy.com, available at <http://countryeconomy.com/demography/life-expectancy/philippines>, accessed on 7 April 2016.

7 Desiderio, L, 'Phl literacy rate improves to 97.5% - NSO' PhilStar, available at <http://www.philstar.com/business/2013/12/31/1273515/phl-literacy-rate-improves-97.5-nso>, accessed on 7 April 2016.

8 'Indigenous peoples in the Philippines' United Nations Development Programme, available at <http://www.ph.undp.org/content/dam/philippines/docs/Governance/fastFacts6%20-%20Indigenous%20Peoples%20in%20the%20Philippines%20rev%201.5.pdf>, accessed on 7 April 2016.

9 'Indigenous peoples in the Philippines' United Nations Development Programme, available at <http://www.ph.undp.org/content/dam/philippines/docs/Governance/fastFacts6%20-%20Indigenous%20Peoples%20in%20the%20Philippines%20rev%201.5.pdf>, accessed on 7 April 2016.

10 'Major languages of the Philippines' available at <http://www.csun.edu/~lan56728/majorlanguages.htm>, accessed on 7 April 2016.

11 'Philippines' Ethnologue: Languages of the World, available at <http://www.ethnologue.com/country/PH>, accessed on 7 April 2016.

12 'Philippines GDP' Trading Economics, available at <http://www.tradingeconomics.com/philippines/gdp>, accessed on 7 April 2016.

### *System of governance*

The 1987 Philippine Constitution provides that “[t]he Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.”<sup>13</sup> It has a presidential form of government where power is divided amongst three major branches: legislative, executive, and judicial, following the principle of separation of powers.<sup>14</sup>

The executive department is composed of the President and the Vice President who are elected by direct popular vote, each serving a term of six years. The Constitution grants the President authority to appoint a cabinet, which forms a large portion of the country’s bureaucracy.<sup>15</sup> The cabinet is composed of secretaries who advise the President on issues important for the development of the State.<sup>16</sup> These sectors include education, agriculture, finance, foreign policy, national defence, social welfare, health, transportation and communication, and the environment.<sup>17</sup>

In 2011, incumbent President Benigno S Aquino III issued an order establishing the Cabinet Cluster System which identified five key result areas, namely: (1) good governance and anti-corruption; (2) human development and poverty reduction; (3) economic development; (4) security, justice and peace; and (5) climate change adaptation and mitigation.<sup>18</sup> The cluster system was established to help the President effectively implement the Philippine Development Plan (essentially a blueprint for achieving presidential development targets).

The legislative department makes laws, alters, and repeals them through the power vested in the Philippine Congress.<sup>19</sup> The Congress is made up of the Senate, composed of 24 senators who are elected at large by qualified voters<sup>20</sup> and the House of Representatives, which shall be composed of not more than 250 members, representing each district around the country (unless otherwise fixed by law), 20% of whom must be party-list representatives.<sup>21</sup>

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13 1987 Philippine Constitution, Art II, Sec 1.

14 Philippine Government, Official Gazette, available at <http://www.gov.ph/about/gov/>, accessed on 7 April 2016.

15 Philippine Government, Official Gazette, available at <http://www.gov.ph/about/gov/>, accessed on 7 April 2016.

16 Philippine Government, Official Gazette, available at <http://www.gov.ph/about/gov/>, accessed on 7 April 2016.

17 List of current members of the Cabinet, Official Gazette, available at <http://www.gov.ph/lists/members-of-the-cabinet/>, accessed on 7 April 2016.

18 ‘Pursuing Our Social Contract with the Filipino through the Reorganization of the Cabinet Clusters’ Executive Order No 43 (series of 2011).

19 ‘The Legislative Branch’ Official Gazette, available at <http://www.gov.ph/about/gov/the-legislative-branch/>, accessed on 21 August 2016.

20 1987 Constitution, Art VI, Sec 2.

21 1987 Constitution, Art VI, Sec 5.

Under the Philippine legislative system, the law-making process begins with the introduction of a bill from either the Senate or the House of Representatives. Final drafts of bills are submitted to the President after undergoing separate procedures in the two chambers, and on certain occasions, a Joint Committee, wherein both houses would be duly represented.<sup>22</sup>

A Legislative Executive Development Advisory Council serves as a consultative and advisory body to the President on programs and policies essential to the realization of the goals of the national economy.<sup>23</sup> The Council is responsible for the Common Legislative Agenda which is a listing of bills from both Houses of Congress that have been certified as presidential priority measures.

The judicial department holds the power to settle controversies involving rights that are legally demandable and enforceable. This branch determines whether or not there has been a grave abuse of discretion amounting to a lack or an excess of jurisdiction on the part and instrumentality of government. It consists of a Supreme Court and lower courts.<sup>24</sup> The Constitution expressly grants the Supreme Court the power of judicial review to declare a treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance or regulation, unconstitutional.<sup>25</sup> Appointments to the judiciary are made by the President based on a list submitted by the Judicial and Bar Council under supervision of the Supreme Court.<sup>26</sup>

### *Political and social situation*

The Philippines holds elections to choose future leaders. However, vote buying and selling pervades and disrupts the process,<sup>27</sup> as does the problem of political dynasties. Many candidates, and eventual winners of election contests in certain districts, or even national posts, often belong to the same family or clan.<sup>28</sup> Although the Philippines has a constitutional clause against political dynasties, Congress has not yet acted upon it.<sup>29</sup>

The Philippines continues to be riddled with corruption although poverty alleviation plans are slowly taking effect. The Philippines is the 95th least corrupt nation out

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22 'The Legislative Branch' Official Gazette, available at <http://www.gov.ph/about/gov/the-legislative-branch/>, accessed on 21 August 2016.

23 'An Act Constituting the Legislative-Executive Development Advisory Council' Republic Act 7640.

24 Philippine Government, Official Gazette, available at <http://www.gov.ph/about/gov/>, accessed on 7 April 2016.

25 Philippine Government, Official Gazette, available at <http://www.gov.ph/about/gov/>, accessed on 7 April 2016.

26 1987 Constitution, Art VIII, Sec 8.

27 'The vicious cycle of vote-buying and vote-selling' Philippines Today, 24 February 2007, available at <http://www.philippinestoday.net/archives/249>, accessed on 7 April 2016.

28 'Political dynasties in the Philippines' CNN, 21 September 2014, available at <http://ireport.cnn.com/docs/DOC-1172336>, accessed on 7 April 2015.

29 1987 Constitution, Art II, Sec 26.

of 175 countries, according to the 2015 Corruption Perceptions Index reported by Transparency International, an organization that reports on corruption levels of countries around the world.<sup>30</sup> Its corruption rank averaged at 91.67 from 1995 until 2015, reaching an all-time high of 141 in 2008 and a record low of 36 in 1995.<sup>31</sup>

According to a study entitled ‘Economic and political challenges in the Philippines’ published by the Carnegie Endowment for International Peace, the Philippines has a “system designed against development” noting the following:

- **Structural problems:** the roots of underdevelopment lie in the underlying structure of the Philippines’ economy, which is mostly rural, agricultural, and suffering from low productivity, Nye claimed. He added that China, the greatest developmental success story in recent decades, owes much of its growth to the migration of workers from the rural inland to highly productive coastal regions.
- **Regulations:** commercial, regulatory, and labour market distortions have prevented a similar transition from taking place in the Philippines, Nye argued. High minimum wages and ‘regularization’ policies that prevent companies from firing employees, apply only to the formal commercial sector, hobbling its growth. This has resulted in two classes of workers: the privileged few enjoying the benefits of such regulations in the modern sector, and the vast majority stuck in low productivity jobs in the informal and agricultural sectors.
- **Land reforms:** while the government has transferred land to poor Filipinos, the recipients are prohibited from selling it or buying additional land, explained Nye. As a result, most beneficiaries resell their land to agricultural elites through shadowy arrangements, further entrenching inequality.
- **‘Legalism’ not the answer:** additional laws and regulations would do little to solve the paradox of the Philippine government, which does both too much and too little to promote growth, concluded Nye. Instead, policymakers should identify which rules are productive and crucial to development and jettison those that are not.<sup>32</sup>

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30 ‘Corruptions Perceptions Index 2014: results’ Transparency International, available at <https://www.transparency.org/cpi2014/results#myAnchor1>, accessed on 7 April 2016.

31 ‘Philippines corruption rank’ Trading Economics, available at <http://www.tradingeconomics.com/philippines/corruption-rank>, accessed on 7 April 2016.

32 Hofman, Nye, Rood, and Nehru, Economic and Political Challenges in the Philippines, Carnegie Endowment for International Peace, available at <http://carnegieendowment.org/2012/04/27/economic-and-political-challenges-in-philippines>, accessed on 7 April 2016.

## ***B. International Human Rights Commitments and Obligations***

The 1987 Philippine Constitution declares as a matter of principle that “[t]he State values the dignity of every human person and guarantees full respect for human rights.”<sup>33</sup> It further provides that the Philippines adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations.<sup>34</sup>

Following the internationally accepted principle of *pacta sunt servanda*, the Philippines, in adhering to the Universal Declaration on Human Rights and having ratified eight core human rights treaties, six optional protocols, and many other key human rights and humanitarian conventions and treaties, is bound to bring its laws and practices into accord with the accepted international obligations and is prevented from introducing new laws or practices at variance with such obligations. Table 1 (below) provides an overview of the international instruments the Philippines has ratified.

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33 1987 Constitution, Art II, Sec 11.

34 1987 Constitution, Art II, Sec 2.

**Table 1: Ratification Status of International Instruments – Philippines<sup>35</sup>**

Treaty	Signature Date	Ratification Date, Accession (a), Succession (d) Date
Convention against Torture and Other Cruel Inhuman or Degrading Punishment		18 Jun 1986 (a)
Optional Protocol of the Convention against Torture		17 Apr 2012 (a)
International Covenant on Civil and Political Rights	19 Dec 1966	23 Oct 1986
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty	20 Sep 2006	20 Nov 2007
Convention for the Protection of All Persons from Enforced Disappearance		
Convention on the Elimination of All Forms of Discrimination against Women	15 Jul 1980	5 Aug 1981
International Convention on the Elimination of All Forms of Racial Discrimination	7 Mar 1966	15 Sep 1967
International Covenant on Economic, Social and Cultural Rights	19 Dec 1966	7 Jun 1974
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	15 Nov 1993	5 Jul 1995
Convention on the Rights of the Child	26 Jan 1990	21 Aug 1990
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	8 Sep 2000	26 Aug 2003
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	8 Sep 2000	28 May 2002
Convention on the Rights of Persons with Disabilities	25 Sep 2007	15 Apr 2008

<sup>35</sup> United Nations Human Rights, Office of the High Commissioner, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx), accessed on 22 October 2016.

**Table 2: Reporting Dates to Conventions – Philippines**

Treaty	Reports	
	Reporting Cycle	Session (Year)
Convention against Torture and Other Cruel, Inhuman or Degrading Punishment	III	57 (2016)
	II	42 (2009)
	I	2 (1986)
International Covenant on Civil and Political Rights	V	106 (2012)
	IV	104 (2012)
	IV	79 (2003)
	II-III	35 (1989)
International Covenant on Economic, Social and Cultural Rights	I	
	V-VI	59 (2016)
	II	WG (1984)
	II-IV	(1984)
	I	41 (2008)
Convention on the Rights of the Child	I	WG (1980)
	I	(1980)
	I	4 (1990)
	I	12 (1995)
	V-VI	
Convention on the Elimination of All Forms of Discrimination against Women	III-IV	52 (2009)
	II	39 (2005)
	I	8 (1995)
	VII-VIII	64 (2016)
International Convention on the Elimination of All Forms of Racial Discrimination	V-VI	36 (2006)
	IV	16 (1997)
	III	16 (1997)
	II	10 (1991)
	I	3 (1984)
	XXI-XXII	
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	XV-XX	75 (2009)
	XI-XIV	51 (1997)
	VIII-X	37 (1989)
	VII	26 (1982)
	VI	22 (1980)
	V	19 (1979)
	IV	15 (1977)
	III	9 (1974)
	II	7 (1973)
	I	2 (1970)
Convention on the Rights of Persons with Disabilities	III	
	II	20 (2014)
	II	16 (2012)
Convention for the Protection of All Persons from Enforced Disappearance	I	10 (2009)
	I	
	n/a	n/a

## Part 2: Outstanding Human Rights Issues

### A. Trafficking in Persons

The Philippine Statistics Authority's 2014 Survey on Overseas Filipinos shows the number of Filipinos working abroad increasing to 2.32 million.<sup>36</sup>

The 2014 Trafficking in Persons Report (TIPR), released annually by the US Department of State, shows that the Philippines remains at Tier 2 under the three-tier ranking system.<sup>37</sup> The TIPR noted that while the Philippines has made significant efforts to combat trafficking, the government has not yet fully complied with the minimum standards required to eliminate trafficking.<sup>38</sup> However, the US did commend its efforts to implement anti-trafficking laws and policies nationwide and noted that funding for the Agency Council Against Trafficking (IACAT) nearly doubled to the equivalent of approximately US\$2.4 million dollars in 2013. It also recognized government efforts to prevent the trafficking of overseas workers, proactively identify and rescue victims exploited within the country, and convict 31 trafficking offenders as compared with only 25 the previous year.<sup>39</sup>

However, despite government efforts and partnerships with civil society, the Philippines remains a source country and, to a much lesser extent, a destination and transit country for men, women, and children subjected to sex trafficking and forced labour.<sup>40</sup> The 2014 TIPR noted the following challenges:

- **“Low conviction rates”** The overall number of convictions remained low compared to the size of the problem. The Philippines prohibits sex and labour trafficking through its 2003 Anti-Trafficking in Persons Act and the Expanded Anti-Trafficking in Persons Act of 2012, which prescribe penalties sufficiently stringent and commensurate with those prescribed for other serious crimes, such as rape. During the reporting year, 317 new cases of trafficking were filed at the Department of Justice and prosecutors' offices nationwide, and of the 190 filed in various courts, 663 defendants were prosecuted. The government convicted 31 sex trafficking offenders,

36 '2010-2014 overseas employment statistics' Philippine Overseas Employment Administration, available at <http://www.poea.gov.ph/stats/2014%20POEA%20Stats.pdf>, accessed on 7 April 2016.

37 '2014 TIP report: Philippines' US Department of State, available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226799.htm>, accessed on 21 August 2016.

38 '2014 TIP report: Philippines' US Department of State, available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226799.htm>, accessed on 21 August 2016.

39 '2014 TIP report: Philippines' US Department of State, available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226799.htm>, accessed on 21 August 2016.

40 '2014 TIP report: Philippines' US Department of State, available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226799.htm>, accessed on 21 August 2016.

compared with 25 in the previous year but there were no convictions for labour trafficking with government and NGO observers estimating the average length of trafficking cases to be between 3½ and 5 years.

- **“Complicity of law enforcement officials”** Government corruption enabled traffickers to operate with impunity. Corrupt officials in government units and agencies assigned to enforce laws against human trafficking reportedly accepted payments or sexual services from establishments where trafficking was known to occur, facilitated illegal departures for overseas workers, and accepted bribes to downgrade charges.

In particular, the government investigated allegations that personnel working in Philippine embassies in the Middle East mistreated and re-victimized Filipina victims of domestic servitude by sexually harassing them, failing to pursue their legal cases, withholding back wages procured for them, re-trafficking them into domestic servitude, and coercing sexual acts in exchange for government protection services. As a result, the government formed a taskforce to investigate the allegations, recalled twelve high-level officials, including ambassadors, to participate in the investigation, and filed administrative charges against three labour officials involved in the case, but to date, no criminal charges have been filed.

- **“Limited service to victims”** The government continued to proactively identify and provide limited services to victims, but efforts were inadequate to serve the large number of victims in the country. Comprehensive statistics for the total number of victims identified and assisted were not available. IACAT taskforces and law enforcement agencies conducted 178 joint rescue operations and the Department of Social Welfare and Development (DSWD) reported assisting 1,824 trafficking victims. The majority received some shelter, medical services, legal assistance, and limited skills training from the government; an unknown number also received financial assistance to seek employment or start their own businesses.
- **“Negligible preventive measures”** The government’s efforts to reduce the demand for commercial sex acts in the Philippines were negligible. Victims continue to be trafficked each day in well-known, highly visible establishments, most of which have never been the target of anti-trafficking law enforcement action.<sup>41</sup>

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<sup>41</sup> ‘2014 TIP report: Philippines’ US Department of State, available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226799.htm>, accessed on 21 August 2016.

## ***B. Extra-Judicial Killings, Enforced or Involuntary Disappearances, and Torture***

The Philippines, while not yet a party to the Convention for the Protection of All Persons from Enforced Disappearance, is the first country in Asia to pass a law that criminalizes the practice of “enforced or involuntary disappearance,” defined as:

the arrest, detention, abduction or any other form of deprivation of liberty committed by government authorities or by persons or groups of persons acting with the authorization, support or acquiescence of such persons in authority, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law.<sup>42</sup>

In 2012, President Benigno S Aquino III issued Administrative Order No 35 (AO 35) to create a high level inter-agency committee, chaired by the Secretary of Justice for the resolution of cases of extra-judicial killings, enforced or involuntary disappearances, torture and other grave violations of the right to life, liberty and the security of persons. In addition, the Ombudsman and the Commission on Human Rights participate as independent observers of the Committee.

The Committee, supported by its technical working group and Secretariat, conducted an inventory of unresolved cases, adding to the list new cases referred by government and non-government entities. But over the past few years, the role of the Committee has transcended into a mechanism, not just to inventory and monitor cases, but also to identify patterns of impunity, vulnerabilities and areas for improvement, which has led to important policy changes.

Recognizing the sense of urgency in resolving cases involving extra-judicial killings, enforced disappearances, and torture, the AO 35 mechanism also allowed for the creation of composite teams of prosecutors and investigators to encourage collaboration, cooperation, and coordination in the investigation and build-up of cases.<sup>43</sup> It should be noted that due to certain considerations (such as possible conflicts of interest), prosecutors do not generally participate in investigations and case build-ups. To this end, a series of three-day orientation workshops on collaborative case handling for AO 35 investigators and prosecutors primarily focused on strengthening the linkage between the two groups as well as on improving legal and forensic capabilities.

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<sup>42</sup> Anti-Enforced or Involuntary Disappearance Act of 2012, Republic Act 10350.

<sup>43</sup> ‘Inter-Agency Committee on extra-legal killings and enforced disappearance meet to adopt guidelines for investigation and prosecution’ Republic of the Philippines, Department of Justice, available at <http://www.doj.gov.ph/news.html?title=Inter-Agency+Committee+on+Extra-Legal+Killings+and+Enforced+Disappearance+Meet+to+Adopt+Guidelines+for+Investigation+and+Prosecution&newsid=178>, accessed on 22 August 2016.

As part of its stakeholder engagement program, the Department of Justice, through the AO 35 Committee, is now in the process of finalizing a Memorandum of Agreement with the National Monitoring Mechanism (NMM), a tripartite committee that will bring together government agencies, non-government organizations, and civil society organizations in a credible and inclusive forum to monitor the nation's progress on the resolution of human rights violations or cases prioritizing extra-judicial killings, enforced disappearances, and torture in the immediate. Collaborative efforts on the development of information and education materials have likewise been undertaken; the primary objective being to engage communities and facilitate reporting of cases while providing support to victims and their families with the end aim of securing the cooperation of witnesses until cases have been successfully resolved.

The 2014 Country Reports on Human Rights Practices (also known as 'the Human Rights Report') released by the US Secretary of State, highlighted that extrajudicial killings remain foremost amongst human rights challenges in the Philippines.<sup>44</sup> While significant efforts have been undertaken to address the issue of impunity, this has not led to a successful resolution of cases.

Some positive developments involving high-profile extra-judicial killings and work-related media killings resulted in the conviction of Marlon Recamata in 2013, the gunman in the 2011 murder of Gerardo 'Doc Gerry' Ortega, an environmentalist and radio broadcaster of RMN Palawan who exposed corruption in Palawan by accusing former governor, Mayor Joel Reyes, of misusing the Malampaya fund;<sup>45</sup> and the arrest of retired Major General Jovito Palparan, infamously tagged as 'berdugo' (butcher) by human rights activists in August 2014. It should be noted that the government raised a P2-million bounty for the capture of the retired general who is hailed by military peers for his relentless campaign against communism and assailed by human rights groups for allegedly killing innocent civilians, among them, University of the Philippines students, Sherlyn Cadapan and Karen Empeno.<sup>46</sup>

Furthermore, despite the passage of an anti-torture law in 2009, to date it has not been applied to find any police personnel guilty of torture.

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44 'Despite gains, challenges remain according to the 2014 United States human rights report on the Philippines' US Embassy in the Philippines, available at <https://ph.usembassy.gov/u-s-embassy-manila-press-statement-despite-gains-challenges-remains-according-to-the-2014-united-states-human-rights-report-on-the-philippines/>, accessed on 22 August 2016.

45 'Timeline: Gerry Ortega murder case' Rappler, available at <http://www.rappler.com/newsbreak/iq/106638-timeline-gerry-ortega-murder-case>, accessed on 22 August 2016.

46 'General Palparan, 'The Butcher,' arrested in Manila' Rappler, available at <http://www.rappler.com/nation/65942-palparan-arrested-manila>, accessed on 22 August 2016.

### *C. Internally Displaced Persons (IDPs)*

In recent years, the importance of enacting legislation to outline and protect the rights of IDPs was highlighted by natural hazard-related disasters such as Typhoon Bopha (2012), the Bohol earthquake (2013), Typhoon Haiyan (2013), and the Zamboanga siege. Moreover, an estimated 123,800 people were displaced in 2014 mostly due to armed conflicts (71,800), crime and violence (32,000), and clan-related violence (20,000). Based on government reports, it is estimated that a further 5.8 million people were displaced by natural hazard-related disasters in 2014.<sup>47</sup>

Correlatively, the 2015 TIPR states that women and children from impoverished families, typhoon-stricken communities, and conflict-affected areas in Mindanao are subject to domestic servitude, forced begging, forced labour in small factories, and sex trafficking in Manila, Cebu, Angeles, and urbanized cities in Mindanao.<sup>48</sup>

Despite the increasing numbers of IDPs, the draft bill for their protection submitted under the 15th Congress was vetoed by the President for being in conflict with the Constitution on the following grounds:<sup>49</sup>

- The provision on damages unlawfully differentiates between displacements caused by security agents of the State and other entities;
- The power granted to the CHRP to determine damages incurred against IDPs and to facilitate the award of such claims belongs exclusively to the judiciary, thus impinging on the latter's exclusive constitutional power;
- The additional powers granted to the CHRP exceed its constitutional mandate as an investigative and recommendatory agency exercising limited powers; and
- The provision allowing individuals to claim assistance and compensation from the government opens the door to a slew of claims or cases and goes against the 'non-suability' character of the State.

Furthermore, the bill which incorporates the United Nations Guiding Principles on Internal Displacement will again have to undergo the legislative process upon refile. Under the Guiding Principles, competent authorities, at the minimum, shall provide IDPs with, and ensure safe access to: (a) essential food and potable water; (b) basic shelter and housing; (c) appropriate clothing; and (d) essential medical services and

47 'Philippines IDP figures analysis' Internal Displacement Monitoring Centre, available at <http://www.internal-displacement.org/south-and-south-east-asia/philippines/figures-analysis>, accessed on 22 August 2016.

48 '2015 trafficking in persons report: Philippines' US Department of State, available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243514.htm>, accessed on 21 August 2016.

49 'Veto message of President Aquino on Senate Bill No 3317 and House Bill No 5627' Official Gazette, available at <http://www.gov.ph/2013/05/24/veto-message-of-president-aquino-on-senate-bill-no-3317-and-house-bill-no-5627/>, accessed on 22 August 2016.

sanitation.<sup>50</sup> Essentially, the bill states that national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to displaced persons within their jurisdiction, without discrimination of any kind.

The Philippines is a member of the Steering Group of the Nansen Initiative, a state-led consultative process that strives to build consensus on a global protection agenda addressing the needs of people displaced across borders in the context of natural disasters, including the effects of climate change. On 15-17 October 2014, the Philippine government co-sponsored the Regional Consultation on Disasters and Displacement in South Asia. Through interventions from both government and non-government sectors, significant provisions were included in the Outcome Document, such as the importance of receiving States acceding to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>51</sup>

#### ***D. Reproductive Health (RH)***

In December 2012, President Benigno Aquino III, despite pressure from the Catholic Church, signed Republic Act 10354 or the ‘The Responsible Parenthood and Reproductive Health Act of 2012.’ The law which took 13 years and 4 months to pass in Congress seeks to control population through effective sex education, especially of women. However, the Supreme Court suspended the implementation of the same after church groups filed petitions arguing it was unconstitutional. In a unanimous decision, the Court eventually declared the reproductive health law constitutional but voted to strike down the following eight provisions, partially or in full:<sup>52</sup>

- Section 7, only insofar as it: (a) requires private health facilities, non-maternity specialty hospitals, and hospitals owned by religious groups to refer patients not in an emergency or life-threatening situation to another health facility which is conveniently accessible; (b) provides access to family planning and RH services to minors who have been pregnant or had a miscarriage without parental consent.

The rest of Sec 7, however, which provides access to family planning, was upheld by the court, notably this line: “All accredited public health facilities shall provide a full range of modern family planning methods, which shall also include medical consultations, supplies, and necessary and reasonable

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50 United Nations Guiding Principles on Internal Displacement, available at <http://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>, accessed on 22 August 2016.

51 ‘Outcome report: Southeast Asia regional consultation’ The Nansen Initiative, available at <https://www.nanseninitiative.org/south-east-asia-consultation-intergovernmental/>, accessed on 22 August 2016.

52 ‘SC declares RH law constitutional’ Rappler, available at <http://www.rappler.com/nation/54946-supreme-court-rh-law-constitutional>, accessed on 21 August 2016.

procedures for poor and marginalized couples having infertility issues who desire to have children.”

- Section 23-A-1, which punishes RH providers, regardless of their religious beliefs, who fail or refuse to disseminate information regarding RH services and programs.
- Section 23-A-2-i, which allows a married individual not in a life-threatening case to access RH procedures without their spouse’s consent.
- Section 23-A-2-ii, which prohibits RH service providers from refusing to perform legal and medically-safe reproductive health procedures on minors in non-life-threatening situations without parental consent.
- Section 23-A-3, insofar as it punishes an RH provider who fails to refer any non-life-threatening cases to another RH provider.
- Section 23-B, insofar as it punishes any public officer who refuses to support RH programs.
- Section 17, which mandates a 40-hour pro bono service by private and non-government RH service providers, including gynaecologists and obstetricians, as a prerequisite for PhilHealth accreditation.
- Sections 3.01-A and J of the RH law Implementing Rules and Regulations (IRR), which defines abortifacients as ‘primarily’ inducing abortion instead of simply inducing abortion.

While the struck-down provisions do not diminish the law, according to former and incumbent lawmakers who helped craft it, it is evident that the issue of reproductive health remains a divisive one.<sup>53</sup> More significantly, the events that transpired reflect the enormous influence of the Catholic Church. With over 80% of the country’s 100 million population among its members, street protests denouncing the law as ‘evil’ were rife and President Aquino was even threatened with excommunication.<sup>54</sup>

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53 ‘SC declares RH law constitutional’ Rappler, available at <http://www.rappler.com/nation/54946-supreme-court-rh-law-constitutional>, accessed on 21 August 2016.

54 ‘SC declares RH law constitutional’ Rappler, available at <http://www.rappler.com/nation/54946-supreme-court-rh-law-constitutional>, accessed on 21 August 2016.

## *E. Peace in Mindanao*

The problem of Mindanao aptly illustrates a disconnect felt by some Filipinos. In an area where many indigenous groups reside, armed groups such as the Moro Islamic Liberation Front (MILF) and the New People's Army (NPA) to name but a few, frequently disrupt the peace. Such disturbances began for many reasons including discrimination, Islamic revivalism, opposition to the Marcos dictatorship, and the Jabidah massacre of Muslim soldiers during their military service.<sup>55</sup> These armed groups strive for Mindanao to become an independent state, even reaching a point where the government formed an agreement with the MILF to create the Bangsamoro Law. However, talks ground to a halt following the death of forty-four Special Action Force soldiers at the hands of the MILF and the Bangsamoro Islamic Freedom Fighters (BIFF).<sup>56</sup>

## *F. Children*

In 2014, the Philippine Country Taskforce for Monitoring and Reporting recorded a total of 162 allegations of grave violations against children. This represents an increase compared to 2013, which recorded a total of 123 allegations. Such violations continue to be documented in 2015, including many against indigenous children.

## **Part 3: Conclusion**

The Philippines has made real progress in the development of human rights. With increased access to education and social media, and the continued cooperation and tireless efforts of all stakeholders from both government and non-government sectors, there is a growing awareness of the subject, be it misplaced at times. Consequently, the value of incorporating human dignity into every aspect of government policy, programs, and activities in order to ensure inclusive growth, has highlighted the need for more human rights advocates in government.

However, myriad challenges to achieving a just and humane Philippine society include the existence of weak institutional and legal human rights frameworks. To counteract this, a national institution, the Commission on Human Rights of the Philippines (CHRP), was created under the 1987 Constitution to, e.g. investigate human rights violations, monitor government compliance with international human rights obligations, and provide human rights education and training. The CHRP has also been

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<sup>55</sup> 'Struggle for self-determination in Mindanao' Conciliation Resources, available at <http://www.c-r.org/where-we-work/southeast-asia/history-mindanao-conflict-and-moro-islamic-liberation-front>, accessed on 7 April 2016.

<sup>56</sup> Cupin, B, 'The SAF 44: our sons, our heroes' Rappler, available at <http://www.rappler.com/nation/82286-nnp-saf-slain-maguindanao-clash>, accessed on 7 April 2016.

given additional substantive roles under the Magna Carta of Women, the Anti-Torture Law, and international humanitarian law. Notwithstanding this, the long overdue bill which aims to strengthen this organisation remains to be passed.

Further, a high-level Presidential Human Rights Committee (PHRC) chaired by the Executive Secretary and supported by a Secretariat, attached to no less than the Office of the President, has also been mandated to serve as a primary advisory body to the President. This seeks to effectively address all human rights concerns/issues in the country through the coordination of government agencies and the private sector, including national human rights institutions, non-governmental organizations, civil society organizations, and sectoral groups.<sup>57</sup> However, the role of the PHRC, as performed through the Secretariat, has been largely confined to rendering staff and technical support to the lead agencies monitoring Philippine compliance to the core human rights treaties it is a party to.

Lead government agencies have been designated for each of the international human rights treaties, to facilitate their implementation, follow-up, and reporting, and to review their progress and the challenges and lessons learned in consultation with relevant governmental agencies, non-governmental organizations, and the basic sector representatives making up Philippine society. However, clear indicators to measure the impact of policy changes and reforms are lacking.

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<sup>57</sup> 'Strengthening and Increasing the Membership of the Presidential Human Rights Committee, and Expanding Further the Functions of Said Committee' Administrative Order (AO) 163 (series of 2006).

**Singapore**

A decorative graphic consisting of several parallel diagonal stripes in shades of gray, located on the right side of the dark horizontal band.

# Singapore

*Chang Ya Lan\**

## **Introduction**

Singapore is a paradox of a modern city-state. It sits within a discordant clash of values and an uneasy mediation of seemingly contradictory impulses. It is one of the most open and developed countries in Asia and the third richest country in the world,<sup>1</sup> with a world-class infrastructure and a highly educated populace.

Yet, there are darker facets to Singapore's sprawling 'First World-ness' that gradually chip away at its image as a progressive modern city-state: the government continues to place restrictions on civil and political rights; it retains the use of the death penalty and caning; and in a country that relies heavily on foreign labour, the rights of migrant workers receive shockingly scant protection. Indeed, the Singapore government has long eschewed liberal human rights for a 'communitarian' approach.<sup>2</sup> However, without a clear articulation of how competing interests are to be negotiated, 'communitarian' human rights sacrifice some segments of Singapore society for little compelling reason. As this chapter will demonstrate, a more attractive approach to rights would be one that follows, in principle, the Dworkinian directive of treating people 'with equal concern and respect.'<sup>3</sup>

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1 'The 23 richest countries in the world' Business Insider, 13 July 2015, available at [http://www.businessinsider.sg/the-23-richest-countries-in-the-world-2015-7/#.VcBl1\\_mqpBd](http://www.businessinsider.sg/the-23-richest-countries-in-the-world-2015-7/#.VcBl1_mqpBd), accessed on 31 August 2015.

2 Thio, L, *A Treatise on Singapore Constitutional Law*, 2012, Academy Publishing, at p 621.

3 Dworkin, R, *What Rights Do We Have? Taking Rights Seriously*, 2011, Bloomsbury, at pp 272-273.

# Part 1: Overview of Singapore

## A. Country Background<sup>4</sup>

Singapore Facts <sup>5</sup>	
Geographical size	718.3 sq km
Population	5,469,700
Ethnic breakdown	Main ethnic groups: Chinese (74.3%) Malays (13.3%) Indians (9.1%) Others (3.3%)
Official language(s)	English (working language) Malay (national language) Chinese Tamil
Literacy rate (among residents aged 15 years and older)	96.7%
Life expectancy	82.8
GDP (at current market prices in SG\$)	SG\$98,743.3 million (first quarter of 2015) (per capita est SG\$71,318)
Government	A republic with a unitary, Westminster parliamentary system of government
Political and social situation	Elections have been held regularly in Singapore since 1948 with voting made compulsory in 1959. The People's Action Party (PAP) won the 1959 election by a landslide as it has won every general election ever since. Although the PAP's political hegemony appeared to be threatened in 2011 when it suffered its worst results since independence, <sup>6</sup> in the 2015 election, it captured nearly 70% of the votes and won 83 out of 89 seats. <sup>7</sup>

4 'Latest data' Department of Statistics, Singapore, available at <http://www.singstat.gov.sg/statistics/latest-data>, accessed on 31 August 2015.

5 Figures relate to 2014 unless otherwise stated.

6 The PAP captured 60.1% of valid votes, down from 66.6% in the 2006 general election. See <http://singapore-elections.com/political-parties/pap.html>, accessed on 31 August 2015.

7 'Singapore election: governing party secures decisive win' BBC, 12 September 2015, available at <http://www.bbc.co.uk/news/world-asia-34205869>, accessed on 26 November 2015.

## B. International Human Rights Commitments and Obligations<sup>8</sup>

Singapore has ratified three major international human rights instruments: (1) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), (2) the Convention on the Rights of the Child (CRC), and (3) the Convention on the Rights of Persons with Disabilities (CRPD).

**Table 1: Ratification Status of International Instruments – Singapore<sup>9</sup>**

Treaty	Signature Date	Ratification Date, Accession (a), Succession (d) Date
Convention against Torture and Other Cruel Inhuman or Degrading Punishment		
Optional Protocol of the Convention against Torture		
International Covenant on Civil and Political Rights		
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
Convention for the Protection of All Persons from Enforced Disappearance		
Convention on the Elimination of All Forms of Discrimination against Women		5 Oct 1995 (a)
International Convention on the Elimination of All Forms of Racial Discrimination	19 Oct 2015	
International Covenant on Economic, Social and Cultural Rights		
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		
Convention on the Rights of the Child		5 Oct 1995 (a)
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	7 Sep 2000	11 Dec 2008
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography		
Convention on the Rights of Persons with Disabilities		18 Jul 2013

<sup>8</sup> Singapore is notably not a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

<sup>9</sup> United Nations Human Rights, Office of the High Commissioner, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx), accessed on 14 November 2016.

Singapore adopts a dualist approach in implementing international legal obligations.<sup>10</sup> The government prefers to accede to treaties which are already in line with its domestic laws, thus enabling it to embed treaty obligations into existing legislation.<sup>11</sup>

*CEDAW: reservations and submission of country reports*

Singapore has lodged reservations to Arts 2(a) to (f); Arts 16(1)(a), 16(1)(c), and 16(2); Art 11; and Art 29(1). Its initial report was submitted on October 1999; a Second Periodic Report was submitted on May 2011; a Third Periodic Report in November 2004; and a Fourth Periodic Report in November 2008.

Singapore's reservations in respect of Arts 2 and 16<sup>12</sup> are targeted at the rights of minorities to observe personal or religious laws which would contravene the CEDAW provisions, such as Islamic marriage laws. One of the Singapore government's bedrock policies is the protection of minority rights to freedom of religion and religious practices. The government has a constitutional duty to "constantly ... care for the interests of racial and religious minorities,"<sup>13</sup> which specifically extends to protecting the special position of Malays.<sup>14</sup> Muslim marriages are therefore administered separately under the Administration of Muslim Law Act 1996 (AMLA).<sup>15</sup>

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10 See, for example, Thio, L, 'Singapore human rights practice and legal policy: of pragmatism and principle, rights, rhetoric and realism' Singapore Academy of Law Journal, 2009, Vol 21, p 326 at 345; Chen, S, 'The relationship between international law and domestic law' Singapore Academy of Law Journal, 2011, Vol 23, p 350 at 355-356; and Public Prosecutor v Tan Cheng Yew [2013] 1 SLR 1095 at 56: "It is trite law that Singapore follows a dualist position."

11 Thio, L, 'Singapore human rights practice and legal policy: of pragmatism and principle, rights, rhetoric and realism' Singapore Academy of Law Journal, 2009, Vol 21, p 326 at 346; and Tan, EKB, Keeping the Faith: A Study of Freedom of Thought, Conscience and Religion in ASEAN, Singapore Country Report Human Rights Resource Centre, p 5. The government has also stated that Singapore's non-ratification of a treaty does not mean that Singapore's "policies are not already largely in compliance with the substance of its provisions" (written answer by Minister for Law, K Shanmugam, to a parliamentary question on human rights treaties and conventions available at <https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/written-answer-by-minister-on-human-rights-treaties-conventions.html>, accessed on 31 August 2015).

12 Article 2 requires State Parties to condemn all forms of discrimination against women, and Art 16 requires State Parties to enact measures to eliminate discrimination against women as regards marriage and family relations.

13 Constitution of the Republic of Singapore (1999 Rev Ed), Art 152(1).

14 This duty is contained in Art 152(2) of the Constitution, and it includes the duty to "safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests, and the Malay language."

15 Cap 3 (Rev Ed 2009). The key AMLA provisions that are inconsistent with Art 16 are Sec 96(4) which provides that a child aged at least 16 years can legally marry and, in special circumstances, the Registrar of Muslim Marriages can solemnise the marriage of a girl under 16 who has attained puberty; and Sec 96(2), allowing Muslim men to enter into polygamous marriages in accordance with Islamic law. Unsurprisingly, the CEDAW Committee, in considering Singapore's Fourth Periodic Report, urged it to withdraw these reservations: 'Concluding observations of the Committee on the Elimination of Discrimination Against Women' CEDAW/C/SGP/CO/4/Rev 1, 5 January 2012, para 13. In response, the Singapore delegation to the 49th CEDAW session stated the reservations were necessary to preserve the "delicate balance of our multi-cultural, multi-religious society" (statement by Mdm Halimah Yacob, Minister of State for Community Development, Youth and Sports and leader of the Singapore delegation to the 49th CEDAW session, 22 July 2011).

Singapore's reservation to Art 11(1)<sup>16</sup> was entered in light of Art 4(2)<sup>17</sup> to "safeguard the welfare of women and their unborn children in certain hazardous occupations."<sup>18</sup> In addition, Art 11(2) requires State Parties to "take appropriate measures" to protect women from unfair maternity-related employment practices. Women who hold managerial, executive and confidential positions do not fall within the ambit of the Employment Act,<sup>19</sup> and Singapore has deemed it unnecessary to enact legislation to cover this category of women.<sup>20</sup>

*CRC: reservations, declarations and submission of country reports*

Singapore has entered interpretive declarations to Arts 12 to 17 (to be read in conjunction with Arts 3 and 5); and Arts 19 and 37. In addition, it has lodged reservations to Arts 28(1)(a)<sup>21</sup> and 32. Its initial country report was submitted in April 2002 and the Second and Third Periodic Reports in January 2009.

Articles 12 to 17 cover substantive rights.<sup>22</sup> Singapore considers that, at the minimum, these must be exercised in accordance with Arts 3 and 5.<sup>23</sup> Singapore goes beyond the obligation in Art 5 and asserts that these substantive rights must be "exercised with respect for the authority of parents, schools and other persons who are entrusted with the care of the child, and in accordance with the customs, values and religions of Singapore's ... society."<sup>24</sup> Singapore's declaration mirrors its recognition of the family as "the fundamental building block of society,"<sup>25</sup> although it is unclear why the authority of schools is elevated to the same status as that of parents.

16 Article 11 requires State Parties to eliminate discrimination against women in the field of employment to achieve equality between the sexes.

17 Article 4(2) states that special measures enacted by State Parties aimed at protecting maternity shall not be considered discriminatory.

18 Initial report of State Parties to the Committee on the Elimination of Discrimination Against Women – Singapore at p 55, para 12.1.

19 Cap 91 (Rev Ed 2009).

20 The government's reasoning is two-fold. First, the exclusion in the Act is not gender-based; all employees who hold such positions are not covered by the Act. Second, such employees are excluded because "they are in a better position to negotiate for their own terms and conditions of employment" (Initial report of State Parties to the Committee on the Elimination of Discrimination Against Women: Singapore at p 55, para 12.2). In the event of disputes between employer and employee, the Ministry of Manpower provides a free conciliation service to resolve salary disputes; alternatively, employees can seek redress through the courts.

21 Singapore's reservation to Art 28(1)(a) is made on two grounds: first, that this obligation is unnecessary in Singapore where "in practice virtually all children attend primary school" (Singapore Reservations and Declarations to the CRC); and second, that it reserves the right to provide free primary education to Singaporean citizens only. In any event, this issue is now moot; Parliament passed the Compulsory Education Bill in October 2000, making six-year primary education in national schools compulsory with effect from January 2003. However, there are four categories of pupils who are exempt from compulsory education. They are: (1) pupils of madrasahs; (2) pupils of San Yu Adventist School; (3) children receiving home schooling; and (4) children with special needs. See Singapore's Initial Report to the Committee on the Rights of the Child, para 421.

22 These rights include the right to express one's own views, the right to freedom of expression and thought, and the right to access information.

23 Article 3 mandates that the best interests of the child be a primary consideration in actions undertaken concerning children. Article 5 instructs the State to respect the responsibilities, rights and duties of parents and/or extended family members in guiding children to exercise their Convention rights.

24 See note 19 (Singapore's Reservations to the CRC); emphasis added.

25 See note 19 (Singapore's Initial Report to the Committee), para 115.

Singapore's declaration in respect of Arts 19 and 37<sup>26</sup> do not prohibit the application of prevailing laws and measures for maintaining law and order, and which are necessary for national security and public order. The key point of the declaration appears to be that Singapore does not consider these articles to prohibit the "judicious application of corporal punishment in the best interest of the child."<sup>27</sup> Corporal punishment is carried out against male children either in the juvenile justice system or in schools and is guided by the Regulations under the Children and Young Persons Act<sup>28</sup> in respect of the former; in schools, corporal punishment is carried out as a last resort by the principal or a teacher authorised by the principal.<sup>29</sup>

Finally, Singapore has reserved the right to apply Art 32<sup>30</sup> subject to existing employment legislation which prohibits the employment of children below 12 years of age, while giving special protection to employed children between the ages of 12 and 16.

*CRPD: reservations and submission of country reports*

Singapore has lodged reservations to Arts 12(4), 25(e) and 29(a)(iii)<sup>31</sup> but has yet to submit its initial country report.<sup>32</sup>

Singapore's reservation to Art 12(4)<sup>33</sup> stems from the fact that the Mental Capacity Act, which allows an individual with mental capacity to create a lasting power of attorney (LPA) to appoint a trusted person to make decisions for him if he loses mental capacity in the future, does not require a regular review of decisions. This is to "avoid undermining the assumption of trust and goodwill and to encourage reliance on the social bond between the person and his appointed proxy decision maker."<sup>34</sup>

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26 Article 19 protects the child against, inter alia, all forms of physical or mental violence, injury or abuse. Article 37 prohibits torture or other cruel, inhuman or degrading treatment or punishment, and unlawful or arbitrary deprivation of liberty.

27 See note 19 (Singapore's Reservations to the CRC).

28 Cap 38 (Rev Ed 2001). Under the juvenile justice system, the caning of children is sometimes carried out for serious offences such as murder, rape and drug trafficking, but is done with a "light rattan instead of the usual rattan used for adults" (SG CRC Initial Report, para 214). It can be carried out in juvenile homes, prisons, and drug rehabilitation centres. Solitary confinement is also used in detention centres and prisons: see note 19 (Singapore's Reservations to the CRC).

29 Education (Schools) Regulations (Rev Ed 2013), Reg 88.

30 Article 32 recognises the right of the child to be protected from economic exploitation and requires the State to regulate employment conditions for children.

31 Article 29(a)(iii) requires the State Party to "undertake to ... [allow disabled persons] assistance in voting by a person of their own choice." In Singapore's view, however, such assistance can only be provided by an election official, so as to "keep voting secret and safeguard the integrity of voting" ("Singapore ratifies UN Convention on the Rights of Persons with Disabilities (UNCPRD)" Ministry of Social and Family Development, 19 July 2013, available at <http://app.msf.gov.sg/Press-Room/Singapore-Ratifies-UNCPRD>, accessed on 28 August 2015).

32 Singapore is expected to submit its initial country report within two years of ratification. As Singapore ratified the CRPD on 18 July 2013, its initial country report is due this year.

33 Article 12(4) requires State Parties ensure that the exercise of legal capacity on behalf of a person with disabilities is "subject to regular review by a competent, independent and impartial authority or judicial body."

34 See note 29.

Article 25(e) requires State Parties to “[p]rohibit discrimination against persons with disabilities in the provision of health insurance.” However, this conflicts with the government’s policy of non-interference in private insurance: the government does not compel private insurers to extend coverage to persons with disabilities in order to avoid “[compelling] private insurers to accept risks beyond their risk appetite ... or to reduce the affordability of insurance premiums for the majority of the population.”<sup>35</sup> There appears to be no national insurance scheme that specifically caters to the need of the disabled; rather, disabled persons can “enjoy access to heavy Government subsidies at public hospitals.”<sup>36</sup>

### ***C. National Laws Protecting Human Rights***

Singapore has not enacted specific human rights legislation; instead, its international human rights obligations have been incorporated into existing domestic laws.<sup>37</sup> The only set of laws that deals specifically with human rights is contained in Part IV of the Constitution. The more contentious rights will be briefly explained below.<sup>38</sup>

#### *Article 9: Liberty of the person*

Article 9(1) states that “[no] person shall be deprived of his life or personal liberty save in accordance with law.” Unlike some jurisdictions that have adopted an expansive and substantive reading of their liberty clauses,<sup>39</sup> the Singapore courts prefer to narrow Art 9(1) to an austere “personal liberty of the person against unlawful incarceration or detention.”<sup>40</sup>

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35 See note 29.

36 See note 29.

37 The Children and Young Persons Act (Cap 38 (Rev Ed 2001)) and the Women’s Charter (Cap 353 (Rev Ed 2009)).

38 The other rights are:

- Article 10 prohibits slavery and forced labour, but allows Parliament to enact laws providing for compulsory national service and work undertaken as part of a prison sentence
- Article 11 prohibits the retroactive application of criminal laws (including any changes in the penalties for an existing offence) and trying a person for the same offence where he has been convicted or acquitted of the said offence
- Article 13 prohibits the banishment of a Singaporean citizen from Singapore and guarantees the freedom of movement of every citizen throughout Singapore
- Article 16 prohibits discrimination against any Singapore citizen on grounds of race, religion, descent or place of birth in respect of his educational rights

39 The most obvious example of an expansive reading of a right to liberty clause can be seen in the US Supreme Court’s interpretation of the 14th Amendment to include a wide array of rights such as the right to abortion (*Roe v Wade*; *Planned Parenthood v Casey* (505 US 833 (1992))), the right to contraceptives used in private (*Grisworld v Connecticut* 381 US 479 (1965)), and most recently, the right to gay marriage (*Obergefell v Hodges* 576 US \_\_\_ (2015)).

40 *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR(R) 754 at [6], affirmed in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [120]. A plain reading of Art 9 ostensibly supports this interpretation: the subsequent subsections of Art 9 set out the necessary procedural requirements to satisfy Art 9(1), such as the right of a person to be informed of the grounds of his arrest (Art 9(3)).

### *Article 12: Equal protection*

Article 12(1) states: “All persons are equal before the law and entitled to equal protection of the law.” This seemingly straightforward declaration has proven controversial in recent times, which will be explored in Part 2 below.

### *Article 14: Freedom of speech, assembly, and association*

Article 14 is the most controversial and restricted fundamental liberty. Unlike other articles that immediately establish a substantive right, Art 14 is limited straightaway by the first half of Art 14(1), which reads: “Subject to clauses (2) and (3) ...” Articles 14(2) and 14(3) confer upon Parliament broad powers to impose restrictions on Art 14(1) rights<sup>41</sup> “as it considers necessary or expedient in the interest of the security of Singapore, public order or morality.”<sup>42</sup> The controversies surrounding Art 14 will be explored in greater depth below.

### *Article 15: Freedom of religion*

Article 15(1) protects the right of every person to profess, practise and propagate his religion, and every religious group has the right to, inter alia, manage its own religious affairs.<sup>43</sup> The freedom of religion, however, is circumscribed by national security considerations: conscientious objection is not a valid ground to refuse to serve compulsory national service.<sup>44</sup> As such, the Jehovah’s Witnesses were de-registered as a society in 1972 due to their beliefs and practices, “which included the refusal ... to perform national service.”<sup>45</sup> The right to freedom of religion is also subject to policy considerations favouring the maintenance of religious and racial harmony and integration. As such, the tudung has been banned from public schools and public sector jobs.<sup>46</sup>

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41 Namely, the right to freedom of speech and expression, the right to assemble peaceably and without arms, and the right to form associations.

42 Articles 14(2)(a), (b) and (c).

43 Article 15(3)(a).

44 Chan Hiang Leng Colin v Public Prosecutor [1994] 3 SLR(R) 209, where a Jehovah’s Witness’s conscientious objection to compulsory military service was not characterised as conscientious objection at all, but as “conduct which was prejudicial to national security” (at [78]).

45 Thio, L, *A Treatise on Singapore Constitutional Law*, 2012, Academy Publishing, at p 906. The constitutionality of the ban was upheld in Chan Hiang Leng Colin, see note 42. The High Court (headed by ex-Chief Justice, Yong Pung How) described national service as a “fundamental tenet,” but this elevation of national service to a constitutional obligation was criticised by Thio as “contrary to the sensible canons of constitutional construction” (*A Treatise on Singapore Constitutional Law* at para 15.067).

46 Following the 2002 tudung controversy over whether Muslim students should be allowed to wear the headscarf to school (subsequently resolved in a private settlement), in 2013, the Singapore Islamic Scholars and Religious Teachers Association “called on the government to review their position on the issue and allow the tudung to be worn in uniformed public sector jobs.” The conflict was eventually resolved in a closed-door meeting between the Prime Minister and the Malay-Muslim community in January 2014 (see ‘Govt’s stance on tudung issue evolving, says PM Lee’ *Today*, 26 January 2014, available at <http://www.todayonline.com/singapore/govts-stance-tudung-issue-evolving-says-pm-lee>, accessed on 31 August 2015.)

## ***D. National Laws Threatening Human Rights***

### *Liberty and criminal justice*

Singapore continues to retain the Internal Security Act<sup>47</sup> (ISA) and the Criminal Law (Temporary Provisions) Act<sup>48</sup> (CLTPA) which allow detention without trial.<sup>49</sup> The ISA is typically used against international terror suspects while the CLTPA is used to combat domestic crimes such as gang violence and football match-fixing activities.<sup>50</sup>

Singapore also retains the death penalty and caning.<sup>51</sup> In 2012, legislative amendments to the Penal Code<sup>52</sup> and the Misuse of Drugs Act<sup>53</sup> (MDA) abolished the mandatory death penalty for most forms of murder and drug trafficking offences.<sup>54</sup> While this was a step in the right direction, the death penalty regime remains problematic. First, the death penalty is mandatory in cases of intentional murder.<sup>55</sup> Second, the courts' sentencing discretion in cases of drug trafficking arises only when specific conditions are met. The accused first has to prove that he acted merely as a drug courier.<sup>56</sup> Subsequently, the Public Prosecutor either has to certify that he rendered substantive assistance to police

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47 Cap 143 (Rev Ed 1985).

48 Cap 67 (Rev Ed 1985).

49 Section 8(1) of the ISA empowers the Minister for Home Affairs to order detention without trial for up to two years if necessary to prevent a person "from acting in any manner prejudicial to the security of Singapore ... or to the maintenance of public order," and Sec 8(2) authorises the President to extend the period of detention "for a further period or periods not exceeding two years at a time." Similarly, Sec 30 of the CLTPA empowers the Minister for Home Affairs to detain any person suspected of criminal activity for any period not exceeding one year, or to place the suspect under police supervision for up to three years. Police supervision comes with a list of restrictions set out in Sec 33, including requiring written permission from the police if the person under supervision wishes to leave Singapore.

50 'Law allowing detention without trial extended' Today, 12 November 2013, available at <http://www.todayonline.com/singapore/law-allowing-detention-without-trial-extended>, accessed on 31 August 2015.

51 Caning is a mandatory additional sentence for a range of crimes including drug trafficking, vandalism, armed robbery, and some immigration offences (e.g. illegal entry into Singapore: Sec 6(3) of the Immigration Act). Caning is imposed on medically fit males aged 16 to 50. The Court of Appeal recently ruled on the constitutionality of judicial caning; see Sec E below.

52 Cap 224 (Rev Ed 2008).

53 Cap 185 (Rev Ed 2008).

54 Penal Code (Amendment) Act 2012 and Misuse of Drugs (Amendment) Act 2012.

55 Section 300 of the Penal Code sets out the offence of murder, distinguishing four types:

Except in the cases hereinafter excepted, culpable homicide is murder —

- (a). if the act by which the death is caused is done with the intention of causing death;
- (b). if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- (c). if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d). if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

Section 300(a) attracts the mandatory death penalty.

56 The accused has to prove this on a balance of probabilities.

investigations, or the accused has to prove that he suffered from abnormality of mind at the time of the commission of the offence.<sup>57</sup>

### *Freedom of expression, assembly and association*

As freedom of expression, assembly and association is the most contested and controversial right in Singapore, a considerable number of laws regulate media content, artistic expression, and assembly and association.<sup>58</sup>

A perennial problem is the government's heavy regulation of the press and the general lack of press freedom.<sup>59</sup> The Newspaper and Printing Presses Act<sup>60</sup> allows newspapers to be published only if the proprietor or the chief editor of the newspaper has obtained a permit from the Minister to do so,<sup>61</sup> and newspapers can only be published by a newspaper company,<sup>62</sup> whose shareholdings and voting power can be controlled by the Minister.<sup>63</sup>

Further, the government has recently begun to regulate online media. Changes made to the Broadcasting Act<sup>64</sup> in 2013 require any online news website which receives at least 50,000 unique monthly visitors over a two-month period, and which contain one Singapore news programme<sup>65</sup> per week on average over the same period, to obtain a licence from the Media Development Authority.<sup>66</sup> To obtain a licence, news sites must

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57 Of particular concern here is the requirement of certification of substantive assistance from the Public Prosecutor. Section 33B(4) of the MDA provides that the determination of the Public Prosecutor in this regard is not open to judicial review "unless it is proved to the court that the determination was done in bad faith or with malice" (emphasis added), although there is a presumption that the Public Prosecutor's determination is also open to judicial review on grounds of unconstitutionality: see *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] SGHC 179 at [38]. The requirement of bad faith or malice on the part of the Public Prosecutor is an extremely high threshold to meet, and the rationale is the perceived danger of hampering the investigations of the Central Narcotics Bureau if the Public Prosecutor's refusal to grant a certificate of substantive assistance were to be more readily scrutinised: *Muhammad Ridzuan* at [51].

58 Freedom of association is regulated by the Societies Act (Cap 311 (Rev Ed 2014)) which requires "any club, company, partnership or association of 10 or more persons, whatever its nature or object" (Sec 2) to register with the government. The Registrar has the power to refuse to register a society if he is satisfied that the society is "likely to be used ... for purposes prejudicial to public peace, welfare or good order in Singapore" (Sec 4(2)(b)) or if "it would be contrary to the national interest for the specified society to be registered" (Sec 4(2)(d)).

59 See, e.g. Reporters Without Borders' Press Freedom Index; Singapore is ranked #153 out of 180 countries, available at <https://index.rsf.org/#!/index-details>, accessed on 28 August 2015.

60 Cap 206 (Rev Ed 2002).

61 Cap 206 (Rev Ed 2002), Sec 21.

62 Cap 206 (Rev Ed 2002), Sec 8.

63 Cap 206 (Rev Ed 2002), Secs 11 and 12.

64 Cap 28 (Rev Ed 2012).

65 'Singapore news programme' is defined broadly to include "any programme ... containing any news, intelligence, report of occurrence, or any matter of public interest, about any social, economic, political, cultural, artistic, sporting, scientific or any other aspect of Singapore in any language" but does not include programmes produced by or on behalf of the government: Broadcasting (Class Licence) Notification, Reg 3A(3).

66 Broadcasting (Class Licence) Notification, Reg 3A(1).

submit a bond of S\$50,000 and are required to remove prohibited content within 24 hours of notification from the Authority.<sup>67</sup>

Another pertinent issue is film censorship, particularly the banning of ‘politically sensitive’ films about Singapore.<sup>68</sup> It is an offence under Sec 33 of the Films Act<sup>69</sup> to import, make, distribute or exhibit ‘party political films.’ A ‘party political film’ is defined as inter alia a film directed with political ends in mind that contain references on political matters which, in the opinion of the Board of Film Censors, are either partisan or biased.<sup>70</sup> The Board itself is appointed by the Minister.

With respect to freedom of expression and assembly, Speakers’ Corner is the only designated area where citizens and permanent residents can give public speeches without a Public Entertainment licence<sup>71</sup> – provided that these speeches do not touch on matters of race and religion. The National Parks Board has to approve any use of the space, and the Commissioner of Parks and Recreation has the power to revoke approval of an event if, in his/her opinion, the event may “endanger or cause discomfort or inconvenience to other users of the ... public park.”<sup>72</sup>

### *Equality*

Section 377A<sup>73</sup> of the Penal Code exclusively criminalises sex between men, and the Court of Appeal upheld its constitutionality in 2014. This will be explored in Part 2 below.

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67 Fact sheet: online news sites to be placed on a more consistent licensing framework as traditional news platforms’ Media Development Authority, 28 May 2013, available at <http://www.mda.gov.sg/AboutMDA/NewsReleasesSpeechesAndAnnouncements/Pages/NewsDetail.aspx?news=4>, accessed on 31 August 2015. For a more detailed analysis of the changes, see ‘How should the Singapore government regulate online news sites?’ Lee Kuan Yew School of Public Policy, available at <http://lkyspp.nus.edu.sg/wp-content/uploads/2013/08/MDA-regulation-of-online-news-sites.pdf>, accessed on 31 August 2015.

68 The most recent Singapore political film to be banned is Tan Pin Pin’s *To Singapore, With Love*, which featured interviews with Singaporean political exiles on their feelings towards Singapore.

69 Cap 107 (Rev Ed 1998).

70 Cap 107 (Rev Ed 1998), Sec 2(2).

71 The Speakers’ Corner is also regulated by two other pieces of legislation that place further restrictions on the freedom of assembly: the Public Order Act (POA) (Cap 257A (Rev Ed 2012)) and the Public Entertainments and Meeting Act (PEMA) (Cap 257 (Rev Ed 2001)). The PEMA allows for those suspected of committing an offence under it to be arrested without a warrant: PEMA, Sec 18. The POA regulates assemblies and processions in public places and requires the organiser of an assembly or procession to apply for a police permit: POA, Sec 7(1). Section 7(2) sets out the instances where the Police Commissioner may refuse to grant a permit, such as when the Commissioner has “reasonable ground for apprehending” the proposed assembly or the procession may “cause feelings of enmity, hatred, ill-will or hostility between different groups in Singapore.”

72 Parks and Trees Regulations, Reg 4(2)(b). This power was exercised in October 2014 when activist, Han Hui Hui’s approval to demonstrate in the Speakers’ Corner was revoked after she was arrested for allegedly causing a public nuisance by disrupting a charity carnival held there: see ‘Six protesters, including activist, Han Hui Hui, and blogger, Roy Ngerng, charged with public nuisance’ *The Straits Times*, 27 October 2014, available at <http://www.straitstimes.com/singapore/courts-crime/six-protesters-including-activist-han-hui-hui-and-blogger-roy-ngerng-charged>, accessed on 29 August 2015.

73 Section 377A reads: “Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years” (hereinafter referred to as ‘377A’).

## *E. Important Human Rights Cases*

### *Yong Vui Kong v Public Prosecutor*<sup>74</sup>

In March 2015, the Court of Appeal ruled on the constitutionality of judicial caning as a form of punishment and held that caning does not violate Art 9(1) of the Constitution.<sup>75</sup> Adopting a strictly doctrinal analysis, the Court decided, first, that caning does not amount to a deprivation of “life or personal liberty;” and second, that the laws of Singapore do not necessarily prohibit torture simply on the basis that the prohibition against torture is a jus cogens norm, or that it is prohibited under common law; and third, that caning is not form of torture and its use is improperly understood. Although the Court’s decision is mostly doctrinally sound, it nevertheless had the effect of further entrenching caning as a legitimate form of punishment, which has obvious human rights ramifications.<sup>76</sup>

### *Attorney-General v Au Wai Pang*<sup>77</sup>

In January 2014, a prominent socio-political blogger, Alex Au, was found guilty of contempt of court by writing an article that commented on the composition of the bench hearing constitutional challenges to 377A and their hearing dates.<sup>78</sup> The High Court held that the contentious statements in the post were unfair comments, made without any rational basis and in the absence of good faith; further, the post “created a real risk of undermining public confidence in the administration of justice in Singapore.”<sup>79</sup>

### *Lee Hsien Loong v Roy Ngerng Yi Ling*<sup>80</sup>

In 2014, Prime Minister Lee Hsien Loong sued blogger Roy Ngerng for defamation for a post in which he compared the government’s handling of Central Provident Fund<sup>81</sup> money to the alleged mismanagement of funds by mega church, City Harvest, whose key personnel are undergoing corruption trials. Even though Ngerng later removed the post and offered S\$5,000 as compensation (which PM Lee’s lawyers dismissed

74 [2015] SGCA 11.

75 The appellant also mounted a challenge under Art 12(1), arguing that the exclusion of women and men over 50 years of age from receiving caning as a punishment violates the equal protection clause. The Court dealt with this issue swiftly, ruling that the differentiation measures satisfied the ‘reasonable classification’ test: at [110] (in relation to the exclusion of women from caning) and [116] (in relation to the exclusion of men aged 50 and over from caning). The ‘reasonable classification’ test will be explained in detail in Part 2.

76 What is significant about this case is the Court’s analysis of the status of jus cogens norms in domestic law where there is no domestic legislation giving effect to the norms. The Court adhered to Singapore’s dualist approach to international law and held that not only are jus cogens norms not automatically incorporated into domestic law, but in the event of conflict between domestic legislation and a jus cogens norm, domestic law will prevail (at [38]). Further, although the Court probably decided rightly at [91] that caning is not a form of torture, the question of whether it amounts to cruel and unusual punishment nevertheless persists (although it should also be noted that the appellant specifically argued that caning amounted to a form of torture and so the Court was not invited to consider whether caning constituted cruel and unusual punishment).

77 [2015] SGHC 16.

78 See [2015] SGHC 16 at [55] for the impugned article. Au was fined S\$8,000.

79 [2015] SGHC 16 at [80] and [81].

80 [2014] SGHC 230.

81 Singapore’s compulsory savings scheme.

as ‘derisory’<sup>82</sup>), PM Lee commenced legal action on 30 May 2014 and was awarded summary judgment against Ngerng.<sup>83</sup> This was the first case in Singapore where a defendant was found liable for defamation over a purely online article.<sup>84</sup>

## Part 2: Outstanding Human Rights Issues

### *A. Free Speech, Protecting Religious Feelings, and Amos Yee*

Arguably the most controversial human rights issue that has arisen over the past year is the furore surrounding 16-year-old blogger Amos Yee, who uploaded a video titled *Lee Kuan Yew is Finally Dead!* four days after the death of Singapore’s founding Prime Minister, Mr Lee Kuan Yew. In his profanity-laden diatribe, Yee compares Lee unfavourably to Jesus Christ, asserting that “[t]hey are both power hungry and malicious, but deceive others into thinking that they are compassionate and kind.”<sup>85</sup> After claiming that their legacies would not last, Yee concludes: “[Lee’s] followers are completely delusional and ignorant and have absolutely no sound logic or knowledge about him ... which [Lee] very easily manipulates, similar to the Christian knowledge of the Bible and the work of a multitude of priests.”<sup>86</sup>

Lee is arguably the most important figure in Singapore’s modern history, and his passing deeply affected many Singaporeans. Yee’s video thus provoked a tidal wave of outrage, including at least 20 police reports,<sup>87</sup> at a time when emotions were running high. Yee was eventually charged with two offences under the Penal Code and one under the Protection from Harassment Act.<sup>88</sup> The relevant charge here is Sec 298 of the Penal Code, which creates the offence of uttering words with the “deliberate intention

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82 ‘Blogger’s S\$5,000 offer for damages ‘derisory’: PM Lee’s lawyers’ Today, 27 May 2014, available at <http://www.todayonline.com/singapore/bloggers-s5000-offer-damages-derisory-pm-lees-lawyers>, accessed on 31 August 2015.

83 Ngerng was ordered to pay costs of S\$29,000 to PM Lee.

84 ‘Singapore PM wins defamation suit against activist’ AFP News, 7 November 2014, available at <https://sg.news.yahoo.com/singapore-pm-wins-defamation-suit-against-activist-092131139.html>, accessed on 31 August 2015.

85 Public Prosecutor v Amos Yee Pang Sang (MAC Nos 902694 & 902695 of 2015) at [27] (Amos Yee).

86 Amos Yee (MAC Nos 902694 & 902695 of 2015) at [27].

87 ‘Amos Yee: Singapore charges teen over anti-Lee Kuan Yew rant’ BBC, 31 March 2015, available at <http://www.bbc.com/news/world-asia-32115052>, accessed on 31 August 2015. One police report was lodged by a lawyer named Chia Book Teck because: “The individual had said many things against Mr Lee and the government that are defamatory under the [P]enal [C]ode as well as in violation of the [S]edition [A]ct. His utterances against Christians also amounted to a ‘deliberate intent to wound religious feelings’ under the [P]enal [C]ode. There is a limit to freedom of speech. If the line separating freedom and offence is crossed, the person will have to face the consequences” (‘Singapore police arrest 17-year-old over critical Lee Kuan Yew video’ The Guardian, 30 March 2015, available at <http://www.theguardian.com/world/2015/mar/30/singapore-police-arrest-17-year-old-amos-yee-critical-lee-kuan-yew-video>, accessed on 31 August 2015).

88 Cap 256A (Rev Ed 2015).

of wounding the religious or racial feelings of any person.”<sup>89</sup> He was found guilty of both Penal Code charges and given a four-week backdated jail term.<sup>90</sup>

Yee was simultaneously an easy target for the government and a crucial test case for the state of political freedom in Singapore. His unabashed use of vulgarity-infested invectives in expressing his opinion makes him the poster child for what an abuse of free speech would look like from the government’s point of view, and the resulting responses shore up the pubescent state of public discourse in Singapore and the difficulties of Singapore’s approach to free speech. Three broad observations may be made.

The first relates to the general response to offensive speech in Singapore. Although he was charged for wounding religious feelings, it is important to bear in mind the specific context of the controversy: Yee offended many Singaporeans with his disparaging tirades against Lee at a particularly emotional period. It would not be a stretch to posit that at least some of the 20 police reports were made because individuals were genuinely offended by his comments. What is troubling is that some members of the public felt it appropriate to respond to his offensive opinions by resorting to the brute force of the law. This reflects a deeply-ingrained inability to respond to offensive speech without trying to silence it with the law, which regrettably illustrates Singapore’s lack of democratic maturity.

The second observation relates to Singapore’s general intolerance of dissenting opinions. When Yee was remanded at the Institute for Mental Health (IMH) for two weeks,<sup>91</sup> questions were raised about his mental health. An IMH psychiatrist found that he did not suffer from any mental illness; curiously, the report also stated that Yee

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89 The other two charges are under Sec 292(1)(a) of the Penal Code (distributing an obscene image) for posting a picture of two stick figures engaged in anal sex with the superimposed images of Lee and Margaret Thatcher on the image; and under Sec 4(1)(b), punishable under Sec 4(2) of the Protection from Harassment Act for causing harassment, alarm or distress. The latter charge was stood down at trial.

90 ‘Amos Yee given 4-week backdated jail term; blogger is ‘remorseful,’ says lawyer’ Channel News Asia 6, July 2015, available at <http://www.channelnewsasia.com/news/singapore/amos-yee-given-4-week/1963292.html>, accessed on 31 August 2015. Yee’s criminal trial drew mixed responses from Singaporeans, with some expressing the view that he deserved it and others questioning the proportionality of bringing criminal charges against a 16-year-old boy over a YouTube video. A group of Christians started a petition for Yee’s release: ‘Release Amos Yee from your anger’ available at <https://www.change.org/p/the-government-of-singapore-release-amos-yee>, accessed on 20 August 2015. The case also received international coverage which provoked predictable (and ultimately unhelpful) chiding from the liberal West about Singapore’s “dire need for cultural education through intelligent dissent” (‘Amos Yee: YouTube star, teen-ager, dissident’ *The New Yorker*, 10 April 2015, available at <http://www.newyorker.com/culture/cultural-comment/the-arrest-of-a-teen-aged-youtube-star>, accessed on 18 August 2015). In a particularly dire overstretching of the imagination, Nathan Heller calls Yee a “cinematic prodigy” and compares him to Voltaire.

91 ‘Amos Yee to be remanded at IMH, assessed for treatment’ *Today*, 23 June 2015, available at <http://www.todayonline.com/singapore/amos-yee-be-remanded-two-weeks-imh?singlepage=true>, accessed on 31 August 2015. He was remanded for an assessment of his suitability for a mandatory treatment order (which requires an offender suffering from a psychiatric illness to undergo treatment in lieu of imprisonment) after a psychiatrist’s report suggested that he could be suffering from autism spectrum disorder.

admitted to using his intelligence in “the wrong ways.”<sup>92</sup> This suggests a hegemony of the prevailing majority opinion over those daring to go against the grain, and a disquieting tendency to colonise dissenters to make them fall in line with the dominant ideology. The speculation that Yee was mentally ill reveals a rigidity of thought that cannot accommodate even the possibility that someone may hold an opposing opinion; thus, if Yee dared to say all those things, he must be mentally ill. This is further underscored by the notion that Yee used his intelligence in the wrong way, which raises the question of who gets to dictate what is right or wrong,<sup>93</sup> which leaves little room for diverse opinions.

The third observation relates to the categorical restriction of free speech in favour of maintaining racial and religious harmony, such that the latter has been elevated to a ‘quasi-constitutional norm.’<sup>94</sup> That freedom of speech has to yield to religious harmony, however, is not axiomatic, and it would be a mistake not to interrogate this assumption because it carries serious consequences. Its legality notwithstanding,<sup>95</sup> Yee’s conviction captures the disproportionality of this approach. It shows that anyone who crosses the line can and will be taken to task, even if the culprit is a mere 16-year-old child. There is more at stake in this case than the protection of religious feelings: a child with his entire future ahead of him was convicted of two Penal Code offences for essentially uploading a YouTube video.<sup>96</sup> If the impulse driving Yee’s conviction was to protect religious harmony at all costs, then Singapore has sacrificed one of its own at the altar of religious harmony, and failed to treat him with equal concern and respect.<sup>97</sup>

Further, the categorical approach prevents circumspection on what exactly is required to maintain religious harmony, i.e. whether there should be a threshold of offensiveness before speech becomes criminally liable, and if so, what that threshold should be. Yee’s conviction reveals a startling paucity of thought on what constitutes speech so offensive

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92 ‘Amos Yee to be remanded at IMH, assessed for treatment’ Today, 23 June 2015, available at <http://www.todayonline.com/singapore/amos-yee-be-remanded-two-weeks-imh?singlepage=true>, accessed on 31 August 2015.

93 A possible rejoinder to this point is that Yee used his intelligence in the “wrong way” because he chose to make offensive remarks against Christians. This argument, however, wrongly suggests that offensive remarks against a religious group are wrong per se, even if this position appears to be the one adopted by the Singapore government. A more reasoned position would recognise a scale of severity under which offensive speech should fall. This will be explored in slightly more depth below.

94 Thio, L, *A Treatise on Singapore Constitutional Law*, Academy Publishing, 2012, at p 781. The government considers it crucial to good governance: see Thio, L, ‘The virtual and the real: Article 14, political speech and the calibrated management of deliberative democracy in Singapore’ *Singapore Journal of Legal Studies*, 2008, Vols 25-27, p 25 at 37.

95 As mentioned previously in Part 1, freedom of speech is the most heavily circumscribed fundamental liberty. On a technical reading of Art 14(2) of the Constitution, Sec 298 of the Penal Code falls under its purview because the prevention of speech that deliberately wounds religious feelings is a restriction that is necessary or expedient in the interests of the security of Singapore or public order: Arts 14(2)(a), (b) and (c). Therefore, Yee’s conviction is legally sound.

96 It is important to strip down the issue to its bare essence—and strip away the offensive content of his video, the deliberateness of his timing, and his general unlikable demeanour—to fully appreciate the disproportionality of the consequences that were foisted upon him.

97 He is considered a child under Art 1 to the CRC. Yee was eventually tried as an adult.

that the speaker is criminally liable for it. It is undeniable that Yee's words were offensive; but the crucial question is whether they were offensive enough to warrant a criminal conviction.<sup>98</sup> There is a qualitative difference between accusing Christians of having no real knowledge of the Bible and calling Jesus malicious, and calling for Christians to be eradicated: one is petulant criticism; the other an incitement to violence. It is no answer to simply treat all kinds of prima facie offensive statements about religion as threats to religious harmony, and then silence the speaker on that basis.<sup>99</sup>

### ***B. The Inequality of Enforcing Public Morality***

Perhaps the thorniest human rights issue that continues to plague Singapore is the lack of sexual equality for gay men.<sup>100</sup> In 2014, the Court of Appeal affirmed the constitutionality of 377A in *Lim Meng Suang v Attorney-General*<sup>101</sup> on the thinnest of justifications, hence raising serious questions about the protection of minority rights against the judgement of public morality. This section will first discuss the Court's unconvincing reasoning in holding that 377A does not violate Art 12,<sup>102</sup> and then argue that the enforcement of public morality is not a legitimate State interest that justifies the unequal treatment of gay men.

The Court used a two-stage reasonable classification test to determine the constitutionality of the impugned legislation, 377A: (a) whether the classification prescribed by statute is based on an intelligible differentia; and (b) whether the differentia bears a rational relation to the purpose or object of the statute.<sup>103</sup> The

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98 In Yee's case, a quasi-strict liability approach was adopted. The court ruled that once an utterance is made with the deliberate intention of wounding religious feelings, the offence is complete: *Amos Yee* at [37]. Liability is not dependant on proof that religious feelings were in fact wounded: *Amos Yee* at [40]. This outcome may have been required by the plain language of Sec 298, but it is nevertheless troubling that there was no deeper analysis of the degree of offensiveness of Yee's comments.

99 In some cases, it may be difficult to decide what kind of speech is so offensive that it should attract criminal liability, but this is precisely the kind of question of fact courts must decide. Further, it is a cause for concern that the courts have tended to treat cases of seditious speech that promote feelings of ill-will or hostility between races or religious groups as warranting general deterrence. As such, in both *Public Prosecutor v Koh Song Huat* [2005] SGDC 272 and *Public Prosecutor v Ong Kian Cheong* [2009] SGDC 163, the accused were given custodial sentences for posting anti-Muslim and anti-Malay remarks online, and sending Christian tracts to Malay recipients respectively. Although the courts passed down these sentences because "[c]ommunity or racial harmony form the bedrock upon which peace and progress in Singapore are founded" and that "the courts must remain ... vigilant in ensuring that all offences that jeopardise such a foundation be firmly ... dealt with" (*Ong Kian Cheong* at [74]), it begs the question whether the maintenance of racial and religious harmony should be elevated to such a status that it seems to always trump constitutional rights. While maintaining harmonious relations between Singaporeans is a legitimate and worthy goal, a more proportionate approach to delimiting free speech in favour of racial and religious harmony would be desirable; not only is a constitutional right at stake, but speech that threatens racial and religious harmony attracts custodial sentences. See Thio, L, *A Treatise on Singapore Constitutional Law*, 2012, Academy Publishing, at pp 789-790, paras 14.091-14.092.

100 Although the law technically extends to bisexual men as well, I will use 'gay men' for simplicity's sake to also cover bisexual men. See also note 71.

101 [2014] SGCA 53 (*Lim Meng Suang*).

102 377A was also alleged to violate Art 9, but the Court dismissed this argument rather swiftly by adopting a strict reading of it as explained in Part 1 above.

103 *Lim Meng Suang* at [60].

differentia in (a) needs only be intelligible, not perfect, meaning that it is capable of being apprehended by intellect.<sup>104</sup> This test serves a ‘minimal threshold function’ of requiring logic and coherence in the statute,<sup>105</sup> and it sits at a low threshold to avoid controversial moral, political, and ethical issues.<sup>106</sup> This is important because, as the Court was at pains to emphasise throughout the judgment, such issues were properly within the legislature’s purview; the court cannot act as a ‘mini-legislature’ to decide controversial issues.<sup>107</sup>

The Court then held that 377A satisfied the reasonable classification test: that the classification prescribed by 377A of ‘men who have sex with other men’ was based on a logical and coherent intelligible differentia;<sup>108</sup> and that there was a ‘complete coincidence’ in the relation between the differentia and the purpose of 377A, which is to criminalise sexual conduct between men.<sup>109</sup> The Court categorically rejected the suggestion that it could review the legitimacy of the purpose of 377A, stating that, under the doctrine of separation of powers, the issue of legitimacy was an extra-legal consideration that is exclusively within the legislature’s purview.<sup>110</sup>

First, limb (a) of the test sets too low a standard. It requires only that the classification, ‘gay men’ makes sense as a plain logical fact at a basic level. It requires no justification for the classification; and so it stands to reason that virtually any differentia which is not plainly absurd is capable of satisfying it. Granted, the Court attempted to introduce a substantive element to the test by stating that a differentia capable of being apprehended by intellect could nevertheless be unintelligible if extremely illogical and/or incoherent.<sup>111</sup> However, this qualification paradoxically sets the bar too high by requiring extreme illogicality and incoherence, a differentia so absurd it is implausible that a law would be passed on this basis in Singapore.<sup>112</sup> It is therefore difficult to see how this limited substantive element

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104 Lim Meng Suang at [60].

105 Lim Meng Suang at [66].

106 Lim Meng Suang at [65].

107 Lim Meng Suang at, e.g., [70] and [77].

108 Lim Meng Suang at [110] and [113].

109 Lim Meng Suang at [153]. The Court does not explicitly state that the object of 377A is to criminalise sexual conduct between men. It is implicit in its combing through of the legislative history of 377A, most of which point to the criminalisation of homosexual acts as the purpose of the law, and its rejection of the appellant’s argument that the original purpose of 377A was to criminalise male prostitution. For the Court’s analysis of the legislative history of 377A, see [116]-[152].

110 Lim Meng Suang at [76], [77] and [154]. The Court further held that 377A does not engage Art 12(2), which “furnishes specific legal criteria as to what constitutes discrimination” and is constitutionally prohibited, because Art 12(2) does not contain reference to gender or sexual orientation: at [90], [92] and [182].

111 Lim (n 7) [67], [86]. This recalls the classic English administrative law example of a teacher dismissed for having red hair as “something so absurd that no sensible person could ever dream that it lay within the powers of the authority” (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene MR), citing *Warrington LJ in Short v Poole Corporation* [1926] Ch 66).

112 Further, in response to the appellants’ argument that 377A is analogous to a law that bans women from driving, the Court stated that such a law would not satisfy the substantive element of limb (a), but failed to convincingly explain how it differs from 377A: [114].

would serve as a check against unconstitutional legislation save in the most extreme of circumstances, which are more improbable than not.

Second, the reasonable classification test could have been saved from being a mere logical threshold requirement if the Court had assumed some jurisdiction over the legitimacy of 377A.<sup>113</sup> The Court's argument that the doctrine of separation of powers prevented it from doing so is unconvincing because courts in other jurisdictions also operating under separation of powers frequently engage in such enquiries. The Court offered no extra justification why the doctrine of separation of powers is different in Singapore beyond asserting that it could not become a 'mini-legislature.'<sup>114</sup> Bearing in mind what was at stake in this case (i.e. the right to equality of gay men), it is disappointing that the Court declined to comment on whether 377A serves a legitimate purpose.

It is important to examine the underlying purpose of 377A in order to determine whether interfering with the right to equality is justifiable. One of the purposes of 377A is the enforcement of public morality<sup>115</sup> which revisits the question of whether it is ever legitimate for States to criminalise private acts between consenting adults that cause no harm to others in order to "preserve the moral fabric of society."<sup>116</sup> There are three points to be made for the argument that the enforcement of public morality is illegitimate per se because of its deleterious effects on the right to equality.

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113 It is incomprehensible that the Court rejected this, considering that the court below observed that a law which passes the reasonable classification test can still be unconstitutional if the purpose of the statute is illegitimate (see *Lim Meng Suang* at [76], referring to *Lim Meng Suang v Attorney-General* [2013] 4 LRC 473 at [114]-[116]) and that the respondent was willing to admit to a test of unreasonableness on this point (see *Lim Meng Suang* at [67]).

114 With respect, it appears that the Court committed a black-or-white fallacy here by presenting a menu of two extreme types of judicial review—judicial review à la the US Supreme Court that would allow it to strike down legislation, and a completely non-interference mode that the Court adopted here—and concluding that it can only choose one or the other. Judicial review is not necessarily confined to these two extremes. For instance, the United Kingdom Supreme Court issues a 'declaration of incompatibility' under Sec 4 of the Human Rights Act when it finds a piece of legislation is incompatible with the European Convention on Human Rights. However, Parliament is not bound by the declaration to amend or repeal the existing law. Nevertheless, the declaration of incompatibility "sends a clear message to legislators that they should change the law to make it compatible with the human rights set out in the Convention" ('Relationship with the European Court of Human Rights' The Supreme Court and Europe, available at <https://www.supremecourt.uk/about/the-supreme-court-and-europe.html>, accessed on 31 August 2015). Similarly, the Court could have commented in dicta on the legitimacy of the statute without necessarily overturning it, and fulfilled its role as the guardian of the Constitution without also becoming a 'mini-legislature.' Expressing a view on these 'extra-legal' issues does not necessarily lead to a usurpation of the legislature.

115 The Court uses the phrase 'societal morality' at [167] but it seems to be a matter of semantics. In addition, the Attorney-General relied on the argument that "section 377A gave effect to public morality" (at [167]). See also Chua, L, 'Rights mobilization and the campaign to decriminalize homosexuality in Singapore' *Asian Journal of Law and Society*, 2014, Vol 1, p 205 at 221: "... the legislative and executive reactions to repeal [377A] signalled that Parliament and the administration would not push through Section 377A's abolishment unless they perceived so-called mainstream values to have shifted in favour of doing so." This suggests that 377A was retained to give effect to public morality against homosexuality.

116 *Lim Meng Suang* at [164], summarising Lord Devlin's argument in the famous Hart-Devlin debate of the 1960s.

The idea that the State enforces ‘public morality’ when it criminalises sex between men suggests that the majority has adopted a ‘moral position’ against homosexuality. This assumption, however, cannot be taken at face value, because there is often a crucial

line separating morality from prejudice.<sup>117</sup> In fact, the government has stated that 377A will not be enforced in consensual, private situations; however, “their interests ... may not trump the majority who has yet to accept homosexuality.”<sup>118</sup> 377A’s non-enforcement substantiates Justice O’Connor’s observation in *Lawrence v Texas* that the lack of enforcement of a law means the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behaviour.<sup>119</sup> Indeed, if a criminally prohibited conduct has adverse consequences for society, it is hard to fathom why a law against it would not be enforced. It therefore stands to reason that 377A serves a symbolic purpose – to signal to the conservative majority that the State does not officially sanction homosexuality. That ‘public morality’ is really prejudice is even more apparent since 377A’s repeal tomorrow would have no practical effect, and no physical or obvious harm would befall society.<sup>120</sup>

If 377A enforces prejudice against homosexuals, then 377A is premised on an illegitimate purpose. As a matter of principle, the law must embody objective values, not reflect the majority’s dislike towards a segment of the population at a particular moment in time. Laws against murder reflect the value of the sanctity of life, and constitutional rights such as the right to equality uphold the inherent dignity of every person by treating them as equals; in contrast, laws that serve to enforce ‘public morality,’

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117 Ronald Dworkin’s analysis of what constitutes a true ‘moral position’ is insightful and instructive. In short, a ‘moral position’ must be backed by reasons, but these reasons must not be based on prejudice, a personal emotional reaction, a false and implausible proposition of fact, or a parroting of the beliefs of others. More crucially, a person’s moral reasoning has to be internally consistent: if one claims to be morally against a religious text which forbids sexual acts, then this suggests an acceptance of the moral principle one’s reasons presupposes (i.e. that the bible is not a source of moral authority) – and he is only internally consistent if the reasons he offers for other moral positions reflect this same acceptance. Therefore, a moral position based on biblical injunctions is only internally consistent (and a true moral position) if one rejects homosexuality as well as adultery, the use of contraceptives, etc; otherwise, ‘some ground rule of moral reasoning’ would be offended and as a result, such positions need not be respected. See ‘Liberty and Moralism’ in Dworkin, R, *What Rights Do We Have? Taking Rights Seriously*, 2011, Bloomsbury, at pp 248-253.

118 Chua, L, ‘Rights mobilization and the campaign to decriminalize homosexuality in Singapore’ *Asian Journal of Law and Society*, 2014, Vol 1, p 205 at 219 (emphasis added).

119 *Lawrence v Texas* 539 US 558 (2003) at 583.

120 The appellant relied on John Stuart Mill’s ‘harm’ principle to substantiate the argument that their homosexual conduct caused no harm to others. The Millian concept of ‘harm’ is complex and an adequate discussion of it is beyond the limited scope of this chapter. In short, the principle states that “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others” (Mill, JS, *On Liberty and Other Essays*, 2008, Oxford University Press, at p 14). The Court of Appeal observed, at [169], that the concept of ‘harm’ is not necessarily confined to physical harm but left the determination of how far its ambit should extend to the legislature. Nevertheless, it is worth pointing out that Mill took the view that mere offence does not constitute harm (at p 109), though his position was obfuscated by his view that public acts against decency that violate good manners came within the category of offences against others and may be rightfully prohibited (at p 109). For a contemporary and in-depth development of the ‘harm’ principle, see Feinberg, J, *The Moral Limits of the Criminal Law, Vol 1: Harm to Others*, 1987, Oxford University.

such as segregation and anti-miscegenation laws, legitimise societal prejudices, enable divisive worldviews, and perpetuate inequalities.

The effect of legitimising prejudices through 377A is not only that gay men are unfairly singled out for unequal treatment, but they are branded as criminals.<sup>121</sup> In *Lim Meng Suang*, the appellants correctly argued that 377A represented the tyranny of the majority,<sup>122</sup> which occurs when majority interests infringe upon minority rights. Quite alarmingly, the Court of Appeal contended that the majority could also argue that they ought not to be subject to the ‘tyranny of the minority.’<sup>123</sup> However, this idea is conceptually unsound because it implies that the majority has some rights that are at stake if 377A were repealed.<sup>124</sup> In fact, 377A’s repeal would involve no real interference with the rights of the majority; the mere knowledge that others do not adhere to one’s value system cannot be a legally cognisable interest.<sup>125</sup> Effectively, then, the law and the State have failed to treat gay men with equal concern and respect, sending a subliminal signal that their dignity is worth less than the prejudice of the majority.

### ***C. Treating the ‘Other’ with Dignity: the Rights of Migrant Workers***

Singapore’s infrastructure is built on the backs of its massive migrant labour work force.<sup>126</sup> As of December 2014, there are 991,300 migrant workers in Singapore, the majority of whom are male workers engaged in the construction industry.<sup>127</sup> These migrant workers make up about 18% of Singapore’s population and are regulated by the problematic pro-development work permit regime. Although amendments made

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121 *Lawrence v Texas* 539 US 558 (2003) at 581. The effect of the law branding homosexuals as criminals is that it makes “it more difficult for homosexuals to be treated in the same manner as everyone else” (per Justice O’Connor).

122 *Lim Meng Suang* at [159].

123 *Lim Meng Suang* at [159] (emphasis in original).

124 This is precisely what the Court suggested by saying that allowing gay men to triumph in this case would cause their rights to “trump those of the majority” (*Lim Meng Suang* at [159] at [160]).

125 *Bowers v Hardwick* 478 US 186 (1986) at 213, per Blackmun J (dissenting).

126 This workforce also includes live-in domestic workers, typically women hailing from countries like Indonesia and the Philippines. These foreign domestic workers make up about 20% of the migrant worker population. Singapore has a pervasive culture of hiring live-in foreign domestic workers, such that they sometimes occupy central roles in average Singaporean families; it is not at all uncommon for foreign domestic workers to develop strong bonds with the family’s children. Anthony Chen’s 2013 film, *Ilo Ilo*, is a good depiction of this phenomenon (available at <http://www.imdb.com/title/tt2901736/>). The darker side of the story, however, is that it is also not uncommon for employers to abuse their domestic workers, e.g. it was only in 2012, such workers were given a mandatory day off per week. While there are critical problems with the rights of domestic workers, these are structurally different from those faced by male migrant workers who typically work in construction; the limited scope of this chapter prevents a proper discussion of these issues.

127 ‘Foreign workforce numbers’ Ministry of Manpower (MOM), available at <http://www.mom.gov.sg/documents-and-publications/foreign-workforce-numbers>, accessed on 26 August 2015. Male construction workers typically originate from Bangladesh, India, China, and the Philippines.

in 2012 to the Employment of Foreign Manpower Act<sup>128</sup> were positive developments, NGOs have criticised them for not going far enough to rectify the structural problems of the work permit regime.<sup>129</sup> This section will begin by setting out the regime before exploring its conceptual and practical problems.

The government has deliberately pursued pro-foreign labour policies to “enable [Singapore] to grow beyond what [Singapore’s] indigenous resources can produce.”<sup>130</sup> However, the State makes a marked distinction between skilled foreign labour and low-skilled foreign labour, or migrant workers. This ‘bifurcated labour’<sup>131</sup> policy is manifest in the three different work pass regimes that govern the foreign workforce: the employment pass for highly skilled foreign ‘professionals,’<sup>132</sup> the S pass for mid-skilled ‘technical staff,’<sup>133</sup> and the work permit for foreign ‘workers’ in the construction sector, etc.<sup>134</sup>

The State’s strikingly different attitude towards work permit holders is evident from the fact that they are the only group of foreign workers to whom passes for family members are not available. This differentiating factor effectively signals that work permit holders are mere “economic actors”<sup>135</sup> in the overall “neoliberal-developmental,”<sup>136</sup> “pro-business”<sup>137</sup> State, “whose other human attributes could be suspended for the duration of their economic engagement in Singapore.”<sup>138</sup> Work permit holders fulfil the economic function of serving the developmental aspirations of the State; as such, the

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128 Cap 91A (Rev Ed 2009). Among other issues, these amendments criminalised the collection of employment kickbacks and gave MOM the power to prosecute the syndicates setting up shell companies to illegally bring in foreign workers: ‘MOM tightens Employment of Foreign Manpower Act’ Asian One, 11 September 2012, available at <http://news.asiaone.com/News/Latest+News/Singapore/Story/A1Story20120911-370994.html>, accessed on 31 August 2015. These amendments were also partly the result of labour rights advocacy by non-governmental organisations such as Transient Workers Count Too (TWC2) and the Humanitarian Organisation for Migration Economics (HOME). For an analysis of the impact of migrant labour advocacy in Singapore, see Bal, CS, ‘Production politics and migrant labour advocacy in Singapore’ *Journal of Contemporary Asia*, 2015, Vol 45(2), p 219.

129 See e.g. TWC2’s shadow report to the Human Rights Council as part of Singapore’s upcoming Universal Periodic Review, available at [http://twc2.org/wp-content/uploads/2015/06/UPR\\_submission\\_2015.pdf](http://twc2.org/wp-content/uploads/2015/06/UPR_submission_2015.pdf), accessed on 31 August 2015.

130 Ong, Y, ‘Singapore’s phantom workers’ *Journal of Contemporary Asia*, 2014, Vol 44(3), p 443, quoting the Singapore National Employers Federation, ‘Manpower 21’ at 445.

131 Yea, S, ‘Trafficked enough? Missing bodies, migrant labour exploitation, and the classification of trafficking victims in Singapore’ *Antipode*, 2015, Vol 47(4), p 1080.

132 ‘Key facts on Employment Pass’ MOM, available at <http://www.mom.gov.sg/passes-and-permits/employment-pass/key-facts>, accessed on 31 August 2015.

133 ‘Key facts on S Pass’ MOM, available at <http://www.mom.gov.sg/passes-and-permits/s-pass/key-facts>, accessed on 31 August 2015.

134 ‘Key facts on work permit for foreign worker’ MOM, available at <http://www.mom.gov.sg/passes-and-permits/work-permit-for-foreign-worker/key-facts>, accessed on 31 August 2015.

135 Neo, J, ‘Riots and rights: law and exclusion in Singapore’s migrant worker regime’ *Asian Journal of Law and Society*, 2015, p 1.

136 Yea, S, ‘Trafficked enough? Missing bodies, migrant labour exploitation, and the classification of trafficking victims in Singapore’ *Antipode*, 2015, Vol 47(4), p 1080 at 1083.

137 Ong, Y, ‘Singapore’s phantom workers’ *Journal of Contemporary Asia*, 2014, Vol 44(3), p 443 at 446.

138 Neo, J, ‘Riots and rights: law and exclusion in Singapore’s migrant worker regime’ *Asian Journal of Law and Society*, 2015, p 1 at 6.

“migrant workers’ issue” is not viewed from a human rights perspective, but on a “need basis,” i.e. “whatever factors would be able to help [Singapore] sustain the growth of the economy for the benefit of [Singapore].”<sup>139</sup>

Such a dehumanising view of work permit holders allows the State to enact regulations that restrict their rights with the *raison d'être* of “maximizing economic benefits whilst simultaneously minimizing economic costs.”<sup>140</sup> A work permit is issued to a worker only when he has a specific job offer from a company, and this ‘single-employer rule’<sup>141</sup> severely skews the balance of power in favour of the employer. This imbalance can be seen in two regulations which are particularly detrimental to the migrant workers’ employment security.<sup>142</sup> First, the foreign worker is only allowed to work for his work permit employer, and he has to obtain his employer’s consent if he wishes to switch jobs; the employer can withhold consent without giving any reasons.<sup>143</sup> This regulation unduly burdens the job mobility of the work permit holder and indirectly compels him to stay with an employer who does not pay his salary or foot his medical expenses.<sup>144</sup>

Second, employers have the power to unilaterally terminate a worker’s employment at any time, even without just cause.<sup>145</sup> This leaves workers vulnerable to the random whims of an unscrupulous employer who has little to no regard for the welfare of his

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139 Comment made by Yeo Guat Kwang, Member of Parliament and chairman of the Migrant Workers Centre, quoted in ‘Singapore’s exploited immigrant workers’ *The Daily Beast*, 11 August 2013, available at <http://www.thedailybeast.com/articles/2013/11/08/singapore-s-exploited-immigrant-workers.html>, accessed on 31 August 2015.

140 Yea, S, ‘Trafficked enough? Missing bodies, migrant labour exploitation, and the classification of trafficking victims in Singapore’ *Antipode*, 2015, Vol 47(4), p 1080 at 1083.

141 Neo, J, ‘Riots and rights: law and exclusion in Singapore’s migrant worker regime’ *Asian Journal of Law and Society*, 2015, p 1 at 7.

142 For an excellent analysis of the negative effects of the work permit regulatory framework, see Neo, J, ‘Riots and rights: law and exclusion in Singapore’s migrant worker regime’ *Asian Journal of Law and Society*, 2015, p 1. For a collection of stories on hardships and the problems faced by individual migrant workers, see TWC2’s website, <http://twc2.org.sg/category/articles/stories/>, accessed on 31 August 2015.

143 Employment of Foreign Manpower (Work Passes) Regulations 2012 (S569/2012), Fourth Schedule, Part IV, Reg 1, and Part VI, Reg 1.

144 Jolovan Wham, executive director of HOME, has said, “Whenever we talk to migrant workers and trafficked migrants, and whenever we try to encourage them to file complaints, one of the first things they ask us is, ‘Will I be able to switch employers or remain in Singapore to work?’ This is the main reason they have left their countries in the first place” (‘Comment: right to employment crucial in protecting migrant workers’ *Yahoo! Singapore*, 24 October 2014, available at <https://sg.news.yahoo.com/blogs/singaporescene/comment-right-to-employment-crucial-in-protecting-062201376.html>, accessed on 31 August 2015).

145 Employment of Foreign Manpower (Work Passes) Regulations 2012 (S569/2012), Fourth Schedule, Part III, Regs 12, 13 (which are silent on the conditions under which an employer can cancel a work permit). See also Ong, Y, ‘Singapore’s phantom workers’ *Journal of Contemporary Asia*, 2014, Vol 44(3), p 443, quoting the Singapore National Employers Federation, ‘Manpower 21’ at p 445 at 446: “Existing work permit conditions allow employers to terminate their foreign workers’ employment contracts or work permits unilaterally, without incurring liabilities such as retrenchment compensation” and TWC2 UPR report at para. 5.1: “A worker’s employment can be terminated by the employer for no just cause at any time.” The employer simply needs to log on to an online portal run by MOM and submit the cancellation request which will be processed within three working days: see MOM’s guidelines on cancelling a work permit available at <http://www.mom.gov.sg/passes-and-permits/work-permit-for-foreign-worker/cancel-a-work-permit>, accessed on 31 August 2015.

workers.<sup>146</sup> Further, most migrant workers usually pay an agent's fee when they secure a job meaning they are in debt the moment they arrive in Singapore. An employer's arbitrary cancellation of a work permit leaves these workers stranded in Singapore without a job and saddled with debts they are unable to repay.

There is a larger conceptual problem with the work permit regulatory regime which has contributed to, or reinforced, the prevalent negative perception of migrant workers. The work permit policies discussed so far also point to a concerted effort by the State to keep these workers transient and separate from mainstream society.<sup>147</sup> This is evident from the differentiating language used by the MOM—'professionals' and 'staff' in contrast to 'workers'—which casts these workers in opposition to Singaporean society as the 'other.' Various conditions attached to the work permit to regulate migrant workers' social lives reinforce the general perception of these workers as of a lower class and socially undesirable. Work permit holders who wish to marry a Singaporean citizen or a permanent resident must first obtain permission from the MOM's Controller of Work Passes;<sup>148</sup> whether permission would be granted depends on the applicants' economic contribution and their ability to support themselves without being a burden to the State.<sup>149</sup> Work permit holders are also not entitled to apply for permanent residency.<sup>150</sup>

These regulations effectively stymie integration between work permit holders and Singapore society, thereby reinforcing prejudice against these workers. They are tolerated in Singapore if they contribute to the economy and help build the necessary infrastructure – but only if they are out of sight. Construction workers are typically housed in workers' dormitories either on construction sites, or in remote areas of Singapore, including next to the cemetery.<sup>151</sup> The enforced lack of interaction between migrant workers and ordinary Singaporeans does little to dispel the perception that these workers are of a lower class because they are employed in dirty, dangerous, and demeaning manual labour jobs that Singaporeans avoid.<sup>152</sup> As such, a 2008 proposal to locate a workers' dormitory in a typical Singaporean neighbourhood was met with

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146 See, e.g. Chang, YL, 'Kibria asks for his overdue salary, immediately sacked' TWC2, 10 June 2015, available at <http://twc2.org.sg/2015/06/10/kibria-asks-for-his-overdue-salary-immediately-sacked/>, accessed on 31 August 2015.

147 Neo, J, 'Riots and rights: law and exclusion in Singapore's migrant worker regime' *Asian Journal of Law and Society*, 2015, p 1 at 10.

148 See note 126 (EFMA), Sec 3. There is no such requirement for employment and S pass holders.

149 Neo, J, 'Riots and rights: law and exclusion in Singapore's migrant worker regime' *Asian Journal of Law and Society*, 2015, p 1 at 10.

150 In contrast, both employment and S pass holders are eligible to apply for permanent residency after a certain number of years.

151 'Singapore is keeping an eye on its migrant workers' BBC, 14 April 2015, available at <http://www.bbc.com/news/business-32297860>, accessed on 26 August 2015. While the dormitory complex laudably contains amenities for workers to engage in social activities, the fact it is housed in Tuas (an industrial estate close to the causeway to Malaysia) shows that the intention is to keep these workers as far away from mainstream society as possible.

152 Neo, J, 'Riots and rights: law and exclusion in Singapore's migrant worker regime' *Asian Journal of Law and Society*, 2015, p 1 at 14.

resistance by residents.<sup>153</sup> Although the government eventually went ahead with the dormitory, it was not without modifications, such as assigning the space to workers from the manufacturing industry instead of the construction industry.<sup>154</sup>

To conclude, work permit holders are one of the most vulnerable groups in Singapore: they are vulnerable to exploitation<sup>155</sup> and their plight is under-appreciated by society at large because of their invisibility and a prejudice against them. The Singapore government's calculated narrowing of the definition of human trafficking also prevents migrant workers from harnessing the powerful language of human trafficking to bring these structural problems and exploitations to light.<sup>156</sup> Contrary to the government's position, at its core, the plight of migrant workers is a human rights issue: an official policy that sanctions the view that these workers are economic actors undermines their dignity, rendering them vulnerable to exploitation, unequal treatment, and disrespect. Such Third World treatment of fellow human beings is unbecoming of a First World country, and reform of the work permit regulatory regime is long overdue.

### Part 3: Conclusion

Singapore claims to adopt a 'communitarian' approach to human rights. As the foregoing discussion shows, however, this term must not be used to justify disproportionate incursions into fundamental liberties. Dworkin's principle of equal concern and respect serves as a persuasive guiding principle for any government in its treatment of rights. Unfortunately, what the three most pressing human rights issues in Singapore reveal is that the State has a tendency to adopt an instrumentalist view of those in the minority, who do not conform to prevailing social norms or fall outside of mainstream society, in service of a larger social good: Amos Yee was charged and convicted to preserve religious harmony; gay men continue to be singled out for unequal treatment to appease the conservative majority; and migrant workers are subjected to an inherently unequal regulatory framework because they are here to serve Singapore's economic interests.

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153 1,600 residents signed a petition against it. See, e.g. Neo, J, 'Riots and rights: law and exclusion in Singapore's migrant worker regime' *Asian Journal of Law and Society*, 2015, p 1 at 13, and 'Wake-up call from dorm issue' *The Straits Times*, 17 October 2008, reproduced in <https://progressgp.wordpress.com/2009/07/19/serangoon-gardens-dormitory-saga/>, accessed on 31 August 2015. Among some of the residents' concerns were worries that these workers would "violate their children and womenfolk," a clear indicator of racism.

154 Neo, J, 'Riots and rights: law and exclusion in Singapore's migrant worker regime' *Asian Journal of Law and Society*, 2015, p 1 at 13, footnote 75, citing 'the them and us divide,' *The Straits Times*, 12 October 2008. The reason for this change of heart is fairly obvious: construction workers are usually from Bangladesh and India, and unfortunately, most racist tendencies held by Singaporeans are towards people of a darker skin tone, i.e. Bangladeshi and Indians.

155 See, Ong, Y, 'Singapore's phantom workers' *Journal of Contemporary Asia*, 2014, Vol 44(3), p 443, quoting the Singapore National Employers Federation, 'Manpower 21' at p 445 especially at 457: 180 foreign workers who were brought to Singapore with no real employment prospects were abandoned by their purported employers and "housed in an unhygienic and severely over-crowded dormitory." An outbreak of chickenpox occurred leading to the death of one worker.

156 For an analysis of this point, see Yea, S, 'Trafficked enough? Missing bodies, migrant labour exploitation, and the classification of trafficking victims in Singapore' *Antipode*, 2015, Vol 47(4), p 1080.

When reduced to its very bare essence, what lies at the heart of the human rights enterprise is recognition of the ‘inherent dignity’<sup>157</sup> of every human being, which demands that people be treated as ends in themselves. The special normative value that a human being possesses makes it more imperative that, in carving out exceptions to rights, a robust, philosophically coherent and honest balancing exercise is carried out. It is not enough for the State to expect near-unconditional trust from its people, and neither should the State continue to view human rights with suspicion. In striving to treat everyone with equal concern and respect, Singapore will go a long way to build a more equal and just society.

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157 Universal Declaration of Human Rights, Preamble.

**Thailand**

A decorative graphic consisting of several parallel diagonal stripes in shades of gray, located on the right side of the dark horizontal band.

# Thailand

*Bencharat Sae Chua\**

## Part 1: Overview of Thailand

### A. Country Background

Thailand Facts	
Geographical size	513,000 sq km
Population	65,729 million
Ethnic breakdown	Main ethnic groups: Tai (94.6%) Malay (4.5%)
Official language	Thai
Literacy rate (aged 15 and above)	96.4%
Life expectancy	74.4
GDP	US\$395.282 billion (per capita est US\$13,323)
Government	Constitutional monarchy and parliamentary democracy until 2014 coup d'état by military junta. The country is now run by the National Council for Peace and Order.
Political and social situation	The military-run National Council for Peace and Order promulgated an Interim Constitution and formed a National Legislative Assembly, installing military personnel in some key roles; political opposition is strictly controlled.

Thailand is a mainland Southeast Asian country which borders Myanmar in the west, Laos and Cambodia in the east, and Malaysia in the south. At the end of 2015, the population was 65,729,098 with an approximately 51:49 female to male ratio. Of this number, 799,013 do not have Thai nationality.<sup>1</sup> Whilst it is unclear who is included in this 'without Thai nationality' category, the Ministry of Interior reports 487,483 stateless persons in Thailand.<sup>2</sup> The majority of the population hails from the Tai ethnic group

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1 Central Census Office's announcement on the number of citizens throughout the country, according to the Census Registration, as of 31 December 2015.

2 'The Ministry of Interior determines to solve statelessness' Royal Thai Government, 2016, available at <http://www.thaigov.go.th/index.php/th/news-ministry/2012-08-15-09-42-33/item/102956-id-102956>, accessed on 31 July 2016.

and is Buddhist (94.6%), but in the southern areas of Yala, Pattani, and Narathiwat provinces and some districts of Song Khla province, 85% of the 3.4 million population is Malay Muslim. In addition, Thailand is home to more than 50 other ethnic minorities,<sup>3</sup> many of whom form a major part of the stateless population mentioned earlier.

Thailand is categorized fairly highly (93 out of 188 countries) in the United Nations Development Programme (UNDP)'s Human Development Index 2015.<sup>4</sup> As such, Thai life expectancy at birth stands at 74.4 years, with an average of 11.3 infant mortalities per 1,000 live births, and 26 maternal mortalities per 100,000 live births. Moreover, the literacy rate among adults (aged 15 and older) stands at an impressive 96.4% with no significant difference between the two genders (although a discrepancy is discernible between rural and urban populations).

In terms of economic development, Thailand stands firmly in the upper middle-income level although its GDP decreased slightly in the past two years (from US\$419.889 billion in 2013 to US\$395.282 in 2015) despite a sustained rise since 2001.<sup>5</sup> In mid 2016, the National Economic and Social Development Board (NESDB) predicted a GDP growth rate of 3.5%.<sup>6</sup> Furthermore, the number of people living below the poverty line has decreased significantly since the 1980s, from 42.33% of the total population in 2000, to 16.37% in 2010, down to 10.84% in 2013.<sup>7</sup>

### *Political and social situation*

Thailand has been under military rule since a coup d'état on 22 May 2014. By no means a new phenomenon, dictatorial military control in Thailand has been the norm since the revolution of 1932 which transformed the country from an absolute monarchy to a western style constitutional monarchy. Since then, there have been at least 18 coups and attempted coups. Starting in the 1980s, the democratization process led eventually to the Black May uprising of 1992 which instigated more reform promulgating in the 1997 Constitution (by far, Thailand's most democratic constitution), but another military coup in September 2006 abrogated it, dissolved parliament, and introduced a new constitution. Prolonged political conflicts then led to frequent changes of government, culminating in the May 2014 coup.

After the 2014 coup, the military junta renamed itself the National Council for Peace and Order (NCPO) and revoked the 2007 Constitution, disposed of the Cabinet, and dissolved Parliament and the Senate Houses. In July 2014, the NCPO promulgated an

3 Excluding the Chinese ethnic group which has long been integrated into Thai society.

4 'Human Development Report' UNDP, available at <http://hdr.undp.org/en/composite/HDI>. Unless stated otherwise, information in this section comes from this report.

5 'Thailand' The World Bank, available at <http://data.worldbank.org/country/thailand?view=chart>, accessed on 30 October 2016.

6 See [http://www.nesdb.go.th/nesdb\\_th/ewt\\_dl\\_link.php?nid=5165](http://www.nesdb.go.th/nesdb_th/ewt_dl_link.php?nid=5165), accessed on 30 October 2016.

7 Office of the Permanent Secretary, Ministry of Social Development and Human Security, Poverty, Income and Household Expenses, Bangkok, 2015, p 1.

interim constitution and formed a National Legislative Assembly (NLA) to replace the two Houses. In the following month, the NLA appointed coup leader, General Prayut Chan-o-cha, as Prime Minister, and installed more military personnel as members of some key Ministries, including the Ministries of Defence, Justice, Interior, and Education.<sup>8</sup>

To restrict political rights, the NCPO suspended all elections, including the election of local administration offices. Prior to 2014, Thailand had decentralized administration, holding elections for representatives at the sub-district, district, municipal, and provincial levels throughout its 76 provinces, further comprised of 878 districts/municipalities and 7,255 sub-districts. While provincial governors were appointed by the Ministry of the Interior, as a special administration region, Bangkok held regular elections for its governor, but following the coup, the NCPO suspended all elections until further notice. If a representative's term ended during this period, the NCPO had the power to propose names to a Selection Committee comprised of high level provincial officials from the Ministry of the Interior.<sup>9</sup> Indeed, two thirds of local administration officers must be government officials or high level retired government officials.<sup>10</sup> Further, in cases where local councils were dissolved as per the order or proposal of the provincial governor, the Selection Committee of high level Ministry of Interior officers, must select new council members.<sup>11</sup>

### ***B. International Human Rights Commitments and Obligations***

Among Southeast Asian countries, Thailand is doing relatively well in terms of human rights commitments, ratifying most of the key international human rights treaties (see Table 1 below).

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8 As of November 2016, there have been at least four Cabinet reshuffles. Some ministries are now headed by civilians.

9 Order of the Head of the National Council for Peace and Order, No 85/2557, on The Process to Temporarily Acquire the Members or the Administrators of Local Administrations, 10 July 2014, para 5.

10 Order of the Head of the National Council for Peace and Order, No 85/2557, on The Process to Temporarily Acquire the Members or the Administrators of Local Administrations, 10 July 2014, para 2.

11 Order of the Head of the National Council for Peace and Order, No 22/2559, on The Process to Temporarily Acquire the Members of Local Representative Councils in Case of Dissolved Local Councils, 4 May 2016, para 2.

**Table 1: Ratification Status of International Instruments – Thailand<sup>12</sup>**

Treaty	Signature Date	Ratification Date, Accession (a), Succession (d) Date
Convention against Torture and Other Cruel Inhuman or Degrading Punishment (CAT)		2 Oct 2007 (a)
Optional Protocol of the Convention against Torture		
International Covenant on Civil and Political Rights (ICCPR)		29 Oct 1996 (a)
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
Convention for the Protection of All Persons from Enforced Disappearance (CED)	9 Jan 2012	
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)		9 Aug 1985 (a)
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)		28 Jan 2003 (a)
International Covenant on Economic, Social and Cultural Rights (ICESCR)		5 Sep 1999 (a)
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)		
Convention on the Rights of the Child (CRC)		27 Mar 1992 (a)
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict		27 Feb 2006 (a)
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography		11 Jan 2006 (a)
Convention on the Rights of Persons with Disabilities (CRPD)	30 Mar 2007	29 Jul 2008

However, Thailand has not ratified the ICRMW, the Second Optional Protocol to the ICCPR (which aims to abolish the death penalty), and the Optional Protocols on individual complaints as regards the ICCPR, the ICESCR and the CAT. Additionally,

<sup>12</sup> United Nations Human Rights, Office of the High Commissioner, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx), accessed on 22 October 2016.

it only accepts the individual complaints mechanisms of some international human rights laws, namely the Optional Protocol of the CRC (25 September 2002) and the CEDAW (14 June 2000).

During the Universal Periodic Review (UPR) process in 2016, Thailand pledged to become a party to the CED, the Optional Protocol to the ICCPR, the Optional Protocol to the CAT, the A/HRC/33/16 29 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, and the ILO Work in Fishing Convention, 2007 (No 188). It has also agreed to study the possibility of becoming a party to the ICRMW.

It should be noted, however, that Thailand has not promised to ratify other key ILO conventions espoused by civil society, but which were not raised by other States during the UPR process, namely, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No 98). Although the Ministry of Labour has looked at these issues since at least 2003, it has yet to submit a proposal to the Cabinet for approval. Another key ILO convention civil society campaigns for (as yet unsuccessfully) is the Domestic Workers Convention, 2011 (No 189). Similarly, Thailand has not ratified the Convention on the Status of Refugees, 1951, despite being host to large numbers of refugees from Myanmar for several decades. Since Thailand has a dualist legal system, it claims any decision to ratify an international law requires a thorough review of existing laws to avoid contradiction between international commitments and domestic laws.

As part of Thailand's pledges when running for candidature to the Human Rights Council for the term 2010-2013, and its pledges to the 2011 UPR, it withdrew interpretative declarations to Arts 6(5) and 9(3) of the ICCPR on the abolition of the death penalty for persons below 18 years of age, and the obligation to promptly charge arrested or detained persons before a judge or another authorized officer of the law. To this end, Thailand abolished the death penalty for persons below 18 years of age, and in cases of life imprisonment, also reduced such sentences to 50 years. In addition, Art 9(3) of the Criminal Procedure Code was amended to oblige inquiry officials to bring arrested persons before the court within 48 hours.

Furthermore, in 2012, Thailand also withdrew its reservation to Art 16 of the CEDAW, which guarantees the rights of women in all matters relating to marriage and family relations. Similarly, the Criminal Code Amendment Act (No19) of 2007 was introduced to expand the definition of rape to include marital rape. In addition, the Name Act (2005 Amendment) now permits married women to retain their family name, and the Female Title Act, BE 2551 (2008) similarly permits married or divorced women to freely choose how they'd like to be addressed, as Miss or Mrs.

For the term 2015-2017, Thailand made other voluntary pledges to become parties to the Optional Protocols of the CRPD and the CAT, as well as to withdraw an interpretative declaration to Art 18 of the CRPD on the liberty of movement and the nationality of persons with disabilities. It also pledged to study the possibility of abolishing the death penalty. However, it should be noted that Thailand still maintains its interpretative declaration of Arts 1, 4 and 5 of the CAT allowing it to define torture in line with its current Penal Code.

Although invariably late in submitting periodic reports to the relevant treaty bodies, Thailand has been making progress in recent years, especially during its campaign for a seat in the Human Rights Council (see Table 2).

**Table 2: Submission of Thailand’s Periodic Reports to Human Rights Treaty Bodies**

Year of Submission	Treaties	Noted	Major Concerns/ Recommendations Raised
2009	1st OP-CRC-AC report	1 year delayed; reviewed in 2012	Participation of children in village defence militias
	1st OP-CRC-SC report	1 year delayed; reviewed in 2012	Protection of child victims
2011	1st ICERD report	7 years delayed; reviewed in 2012	Citizenship and statelessness; exploitation of refugee and migrant workers
	Combined 3rd and 4th CRC reports	2 years delayed; reviewed in 2012	
2012	Combined 1st and 2nd ICESCR reports	10 years delayed; reviewed in 2015	Rights to access natural resources, especially under impact from NCPO Orders Nos 64/2557 and 66/2557 of 2014 on forest conservation; labour rights especially for migrant workers; trafficking; situation in Deep South region
	1st CRPD report	2 years delayed; reviewed in 2016	Discriminatory laws; protection of women and children with disabilities

Year of Submission	Treaties	Noted	Major Concerns/ Recommendations Raised
2013	Initial CAT report	5 years delayed; reviewed in 2014	Lack of legal definition of torture to cover all the elements according to CAT; alleged widespread use of torture and ill-treatment; situation in Deep South region; use of special laws, including the 1914 Martial Law Act, the 2005 Emergency Decree, and the 2008 Internal Security Act; enforced disappearances; impunity; people in detention (including detained migrants)
2015	2nd ICCPR report	6 years delayed; to be reviewed in 2017	From the first review in 2005: extrajudicial killings (war on drugs, situation in Deep South region); harassment of media and human rights defenders; excessive use of force by government officials; citizenship of ethnic minorities
	Combined 6th and 7th CEDAW reports	5 years delayed; to be reviewed in 2017	Low number of women in key decision-making positions and in parliament; situation of Muslim women in the Deep South region; citizenship of ethnic minority women; women's access to health information and services

### ***C. Human Rights Implications of National Laws***

Recently, a number of laws have been amended or drafted to promote the protection of human rights. Broadly speaking, much progress has been made in the economic and social rights of specific groups, at the expense of civil and political rights. However, without a working constitution (since the 2014 coup), Thailand's legal protection of human rights remains somewhat undetermined.

As mentioned in the previous section, a number of laws were enacted to enforce international human rights standards and to comply with the ratification and review process of treaty bodies. Examples of newly enacted laws include the Persons with

Disabilities Empowerment Act (2007), the Prevention and Suppression of Human Trafficking Act (2008), the Female Title Act (2008), and the Domestic Violence Victim Protection Act (2007). Likewise, significant amendments to existing laws include:

- Civil Registration Act No 2 (2008): allows all persons born in Thailand to be registered irrespective of the origin or status of their parents;
- Name Act (2005): grants married women the right to choose a family name; and
- Amendments to several articles of the Civil Code: improves criminal justice practices.

Among these new laws, two deserve further discussion. The first is the Gender Equality Act, a recent landmark law adopted in March 2015 which defines “unfair gender discrimination” as discrimination on grounds of sex by birth (female/male) or on grounds of the apparent sex of a person which may differ from her/his own sex by birth. While welcomed by LGBT communities as providing the first legal protection to this group, the Act has significant loopholes. For example, it allows discrimination on the basis of national security and the exercise of religious principles (Art 17). It should also be noted that this law does not criminalize discrimination or provide direct protection of a person from discriminatory violence. It merely establishes two commissions to act as monitoring bodies: a Gender Equality Promotion Commission, and a Gender-Based Discrimination Adjudication Commission. The latter may receive complaints from alleged victims of discrimination and order remedies and compensation if deemed appropriate or it may submit a law for constitutional review by the Constitutional Court if it views a law as potentially discriminatory.

Another crucial law in the field of human rights is the Public Assembly Act (2015). After years of heated debates, the Public Assembly Act was finally passed by the NCPO’s National Legislative Assembly. Thailand’s first ever law dealing specifically with public gatherings, the Act requires individuals to seek prior notification and permission when organizing public assembly activities or demonstrations. In addition, some areas, including a number of government offices, are barred from being used for such purposes. Thus, concerns have been raised over its potential to violate freedom of assembly rights; the rights exercised by most marginalized groups in the normal course of campaigning. As will be shown, together with several NCPO orders, it is this Act that has been utilised most to control political activities.

Despite significant developments in terms of international human rights commitments, Thailand has regressed significantly in terms of constitutional and legal guarantees of human rights. Following the May 2014 coup d’état, the military abolished the 2007 Constitution and introduced an interim one to replace it. As such, NCPO orders became de facto laws with lasting effect since the latest draft (put to referendum in August

2016) provided that any order and statement of the NCPO was legally legitimate and would remain in force until other laws are passed to revoke it.

Similarly, the junta also declared martial law throughout the country, violating a number of civil and political rights by allowing military officers full authority to monitor and control individual communications and media, search and occupy private properties, and prohibit public association. Worse still, any violation of martial law by civilians had to be brought before the military court, whose competency and impartiality remain in question. Further, the military court judges' rulings are final; there can be no appeal. As such, together with the NCPO's orders, martial law allows the military government free rein to repress any demands for democracy or dissenting voices over its policies.

After almost a year in power, the NCPO lifted martial law on 1 April 2015, but replaced it with NCPO Order No 3/2015, issued under Art 44 of the Interim Constitution which again awarded the junta similar sweeping powers. For example, Sec 44 permits the head of the NCPO absolute power to act or stop any act, whether that act has legislative, administrative or judicial basis, as the NCPO deems necessary to proceed with the country's reform process, or to prevent and suppress any act that may undermine national security or the stability of the nation, the monarchy, or national economics. Section 44 also grants impunity to the NCPO to prevent any legal accountability of those actions and orders.

Since its implementation in lieu of martial law, Sec 44 has been used to exercise the NCPO's power in ranges of issues from the shuffling of government officials, to the recruitment of local administrative councils, to fishing, the prevention of deforestation, human trafficking, to land confiscation for Special Economic Zones. In addition, civilians remain subject to the military court for violations of NCPO orders.

## **Part 2: Outstanding Human Rights Issues**

Given the political situation in Thailand where dictatorial military rule has been in effect for more than two years with no clear prospect of transitioning to democracy, civil and political rights encapsulate some of the many outstanding human rights issues in the country. For the purpose of this chapter, this section will highlight three major inter-related issues of concern if no significant democratic change is forthcoming. However, this does not mean other human rights issues, especially those raised by the treaty bodies in Table 2, are not equally significant, but only that they illustrate a particularly worrying trend.

### ***A. Suppression of Political Voices***

When the military junta came to power following the coup d'état, it claimed legitimacy by positioning itself as a 'good' ruler which would bring 'happiness' back to a land that

had suffered greatly from ongoing violent political conflicts between anti-ex-Prime Minister Thaksin Shinawatra groups and his supporters in the past decade. As such, the NCPO argued for the need to suppress dissenting voices to ensure a smooth reform process, thereby flushing out corrupt politicians. However, after more than two years in power, the NCPO continues to utilise a number of repressive laws and measures to restrict freedom of expression and association, thus, curtailing any demand for democracy. This violation of basic rights to political participation severely impacts the exercise of other rights. For example, two days before it staged the coup, the military junta introduced martial law, restricting the exercise of basic political rights such as the right to public assemblies of more than five people while vesting absolute authority in the military. Similarly, together with Order No 37/2557 (2014), it used martial law again to make any crime under Arts 107-112 of the Penal Code (including the notorious Art 112 on *lèse majesté*), any wrong-doing harming internal security (Arts 113-118), or any acts against the orders of the NCPO, subject to the jurisdiction of military courts. Those who do not show up as summoned will be charged with disobeying NCPO orders and will be prosecuted in military court. Even when martial law was replaced by Order No 3/2558, the absolute power of the NCPO remained unchallenged.

Thus, the NCPO effectively controls any political opposition through legal and extra-legal measures. As reported by iLaw (an NGO monitoring political rights after the coup), at least 988 people were summoned or were visited by soldiers (as of August 2016), including those called for informal meetings. Most had to sign a memorandum stating they would not engage in political activities while some were arbitrarily detained without charge for a few days.<sup>13</sup> iLaw's latest report of arrests and intimidation after two years of military rule shows that a total of 527 people have been arrested on political grounds. Of these, 225 were arrested for peaceful association.<sup>14</sup> Symbolic resistance to the junta—the most viable method of opposition allowing participants to disperse quickly and safely—is also strictly controlled with some participants being arrested after the event. Indeed, one university student was arrested for merely eating a sandwich alone while reading the book, 1984 by George Orwell in public<sup>15</sup> while other students were detained for raising a three fingered salute in front of a movie theatre screening *The Hunger Games: Mockingjay*,<sup>16</sup> to cite some further examples.

Freedom of expression and demands for democracy are not the only rights curtailed by the military. It also seems to perceive any political discussion and debate to be a threat

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13 'The development of summon and visits under martial law' iLaw, available at <http://freedom.ilaw.or.th/Getthereport2015>; 'Report of political charge after 2014 coup' iLaw, available at <http://ilaw.or.th/node/3119>, both accessed on 25 October 2015. Updated information may be found on iLaw's homepage, available at <http://freedom.ilaw.or.th/#>.

14 iLaw 2016, 24 Months Under NCPO: When the Military is Above Justice, 2016, Bangkok: iLaw at p 13.

15 'Protesting Thai reader of Orwell's 1984 dragged off by police in Bangkok' South China Morning Post, 23 June 2014.

16 'Three students arrested during Hunger Games premier' Khaosod English, 20 November 2014, available at <http://www.khaosodenglish.com/politics/2014/11/20/1416476484/>, accessed on 10 November 2016.

to stability and national security. Thus, monitoring, intimidation, and control is applied to any activity questioning the legitimacy of the junta, including public seminars on rights and liberties and the impact of State policies. As such, ILaw has reported finding at least 130 public seminars and activities which were either cancelled or suffered from military intervention. Of this number, at least 20 were unrelated to political issues, neither did they oppose the NCPO, while 76 were public seminars.<sup>17</sup>

Freedom of expression related to *lèse majesté* or crimes defaming or insulting the monarchy (commonly called Art 112 (of the Criminal Code) cases), are particularly disturbing as *lèse majesté* is commonly used to suppress political opponents of the State. Since the coup, at least 68 new *lèse majesté* cases have been brought to court.<sup>18</sup> Such defendants are usually denied bail and, in most cases, face harsh sentences. The use of *lèse majesté* is also heightened by the so-called ‘witch hunts’ of ultra-royalist groups. Fearing comments on the monarchy could damage the respected institution, some royalists have taken to monitoring comments on social media, either filing police charges against ‘inappropriate’ remarks, or even violently attacking individuals perpetrating such alleged crimes.<sup>19</sup>

Defamation on other grounds is another tool used by the military to suppress its critics. For example, in August 2014, the 41st Task Force military unit in Yala province filed defamation suits against the Cross Cultural Foundation and its partners for allegedly damaging the army’s reputation by publishing a report on torture cases in the Deep South area of the country.

### ***B. Right to Fair Trial and Criminal Justice***

To curb resistance to its rule, the NCPO does not respect the criminal justice rights of political defendants and detainees. As such, *lèse majesté* cases, violations of the ban on public gatherings of more than five people, failures to report to NCPO summonses, and firearm cases are now tried in military court.<sup>20</sup> As previously mentioned, military courts clearly cannot guarantee criminal justice, being neither impartial nor always composed of competent judges. For example, among the three judges presiding on a military court tribunal, only one is required to have legal knowledge. In some cases, especially those involving *lèse majesté*, the court also proceeds behind closed doors because of alleged issues of national security. In addition, because no system exists to

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17 iLaw 2016, 24 Months Under NCPO: When the Military is Above Justice, 2016, Bangkok: iLaw at p 39.

18 ‘The report of political charges after the coup’ iLaw, available at <https://freedom.ilaw.or.th/politically-charged>, accessed on 31 October 2016.

19 See Panu Wongcha-um’s report on Channel Newsasia, ‘Witch-hunts’ against *lèse majesté* offenders rise in Thailand after king’s death’ available at <http://www.channelnewsasia.com/news/asiapacific/witch-hunts-against-lese-majeste-offenders-rise-in-thailand/3222364.html>, accessed on 4 November 2016.

20 NCPO Order Nos 37/2557 and 38/2557.

facilitate fast trials, they usually take a while to complete. Furthermore, there is no right to appeal in military court. Finally, the Thai Lawyer for Human Rights has reported alleged cases of torture during detention under martial law with at least two individuals being detained longer than 7 days without charge as allowed by law.<sup>21</sup>

After martial law was lifted, the NCPO used its power under Sec 44 to issue Order No 3/2015 authorizing military officers to arbitrarily detain individuals and censor a variety of media, whilst criminalizing public political meetings of more than five people and unapproved peaceful assemblies. The situation worsened in September 2015 when the NCPO opened a temporary military detention facility in Bangkok for civilian detainees; since then, two detainees, facing *lèse majesté* charges, have died in detention.

On top of arbitrary arrest and detention, the military junta has continued to informally visit and intimidate those who question its authority for so-called ‘attitude adjustment,’ the term used to refer to situations where individuals agree not to engage in further political activities after meeting or being detained by the authorities.

### ***C. Self-Determination and Rights to Manage Natural Resources***

The NCPO’s absolute power also severely impacts areas beyond civil and political rights. In particular, its policies or measures impact the livelihood rights of local communities without also allowing room for political participation or space to voice public concerns. As such, the National Legislative Assembly has been very active in passing new laws; in only two years, it has considered and passed more than 180 new laws, mostly without public consultation, some of which have resulted in major violations of human rights.

Most affected in terms of natural resource management are the forest communities. While the extension of protected forest areas into already inhabited farmland and its consequent enforced eviction of forest dwellers is not new in Thailand, the NCPO’s swift and excessive use of its power to implement the new Forest Master Plan to “put things in order” has led to some grave abuses of human rights. The control and confiscation of forest land was facilitated by Order Nos 64/2557 and 66/2557 (2014). Order No 64 gives absolute authority to the Internal Security Operations Command (ISOC), a security organization under the lead of the military, to lead, control, and engage in the suppression of deforestation activities. While the latter order states that operations authorised under Order No 64 must not cause problems to former inhabitants of

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21 Thai Lawyer for Human Rights, In the Name of (In)Justice Under the NCPO, 2016, Thai Lawyer for Human Rights: Bangkok, p 35. See more details in Amnesty International’s recent report ‘Make him speak by tomorrow:’ torture and other ill-treatment in Thailand’ available at <https://www.amnesty.org/en/documents/asa39/4747/2016/en/>.

forests, actual implementation still seems to give precedence to State rights over the land. Land Watch, an NGO working on land right issues, documents at least 681 cases where Orders No 64 and 66 were enforced by threatening and evicting communities, destroying agricultural products in the forest, and/or arresting and legally charging forest dwellers; all this within one year of the coup.<sup>22</sup>

Moreover, the NCPO also issues policies and orders potentially impacting natural resources and environmental rights without attempting to procedurally guarantee those rights. A salient example can be seen in the use of an NCPO order to accelerate land confiscation in order to facilitate declaration of a Special Economic Zone. Thus, the NCPO used Order No 17/2558 (2015) to override at least six land-related laws claiming State rights over public land, forest reserve areas, and land reform areas, turning them into Special Economic Zones. It later issued two more orders, Nos 3/2559 and 4/2559 (2016), using the authority conferred under Sec 44 of the Interim Constitution, to cancel the use of town zoning laws in Special Economic Zones, and as regards some businesses, including power plants and waste management plants. In effect, environmental and livelihoods rights that used to be protected through town zoning (a process that involved public deliberation and hearings) are now consistently violated.

In the past few decades, these policies led to much contention and negotiation between affected communities and State authorities, but following the NCPO's swift exercise of power which allowed for only limited public participation, much potential now exists for increased violations of basic livelihood and national resource rights.

### **Part 3: Conclusion**

Through its use of legal and extra-legal means and its mobilization of public support for the sake of public order and peace, the National Council for Peace and Order has forced Thailand to take a giant step backwards as regards human rights and democracy. Although this chapter has only been able to skim the surface of human rights issues in Thailand, the military's authoritarian use of power means many more must also be affected. In other words, the future prospect of human rights in a country where democracy used to be cherished and civil society was vibrant now appears bleak. This chapter has also shown how different human rights are inter-related and how democracy provides a fertile soil for the exercise of such rights. With no clear path towards democracy, human rights in Thailand will depend largely on when the people reclaim democracy, thereby affirming the principles that such rights espouse.

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<sup>22</sup> For a summary of the report, see [https://tlhr2014.wordpress.com/2015/09/22/landwatch\\_report/](https://tlhr2014.wordpress.com/2015/09/22/landwatch_report/), accessed on 30 August 2015.

# Vietnam

# Vietnam

Bui Hai Thiem\*

## Part 1: Overview of Vietnam

### A. Country Background

Vietnam Facts	
Geographical size	332,698 sq km
Population	90.5 million
Ethnic breakdown	Main ethnic groups: Kinh (85.7%) Tay (1.9%) Tai (1.7%) Muong (1.5%)
Official language	Vietnamese
Literacy rate	94%
Life expectancy	75
GDP	US\$193.6 billion <sup>1</sup>
Government	A one-party socialist republic led by the Communist Party of Vietnam (CPV) which espouses Marxism–Leninism and Ho Chi Minh thought.
Political and social situation	Despite economic growth and progress on social indicators, Vietnam's record on political and civil rights remains dismal with the ruling CPV maintaining a monopoly on political power and allowing no challenge to its leadership. However, recent additions to the Constitution may lead to more civil rights and liberties re-emerging on the law-making agenda. <sup>2</sup>

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1 The World Bank, available at <http://data.worldbank.org/country/vietnam>, accessed on 18 October 2016.

2 'Vietnam: events of 2015' Human Rights Watch, available at <https://www.hrw.org/world-report/2016/country-chapters/vietnam>, accessed on 18 October 2016.

### *System of governance*

According to the 2013 Constitution, the National Assembly is the highest organ of State power with responsibility for law-making and the Constitution itself. A 500-member unicameral parliament, it also elects the President to a five-year term and has the procedural duty of appointing or proposing the appointment or dismissal of the Vice President, Prime Minister, deputy prime ministers, the Chief Judge of the Supreme People's Court (SPC) and the President of the Supreme People's Procuracy (SPP). The executive arm of the National Assembly and the highest administrative body in the land, the government is headed by the Prime Minister and consists of deputy prime ministers, ministers and other members. The SPC is the highest court of appeal while the SPP, with its local and military subdivisions, acts as a watchdog for the State by monitoring government agencies and acting as prosecutor before the People's Courts.<sup>3</sup> Local government consists of People's Councils and People's Committees at the provincial and municipality levels which are further divided into sub-levels.

### *Political and social situation*

Since reunification in 1975, CPV-led Vietnam has revised its constitution a number of times (in 1980, 1992, 2001 and 2013). Although the last revision basically only reinforced the existing political structure as dominated by the CPV, public debates over possible amendments were held in 2011-2013 – however, ultimately, no far-reaching reforms were considered.<sup>4</sup> On the other hand, the mere fact these debates took place, added to some encouraging sections of the final document, do seem to offer signs of a potential interest in human rights which could lead to a firmer foundation for an expanding civil society. As such, the 2013 Constitution made major changes to the law-making agenda in the National Assembly and as regards the legislative preparative work done by the government and relevant ministries. Besides the priority given to the adjusted legal mandates of State bodies (i.e. the National Assembly, government, local government, court and procuracy systems, and the election management agency), various legal projects covering civil rights and liberties have also re-emerged on the law-making agenda. These include draft laws on access to information, association, demonstrations, referendums, and proposed amendments of the Civil and Criminal Codes. The drafting and discussion of these laws will present a valuable opportunity for civil society engagement and advocacy which could result in increased civil liberties and an expansion of political space.

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3 'Vietnam' Encyclopaedia Britannica, available at <https://www.britannica.com/place/Vietnam/Government-and-society#ref509906>, accessed on 18 October 2016.

4 Malesky, E, 'Vietnam in 2013: single-party politics in the internet age' Asian Survey, 2014, Vol 54(1), pp 30-38, available at <https://sites.duke.edu/malesky/files/2014/07/Vietnam-in-2013.pdf>, accessed on 15 November 2016.

However, the slow and difficult process of drafting human rights laws is indicative of a lack of consistency and clear thinking in the CPV on how to move forward as regards society's demands for more political space. Indeed, the government has even asked the National Assembly to postpone the discussion and adoption of most of these laws. While there seems to be an apparent lack of preparedness to find legal solutions to the exercise of citizens' rights, potential for new initiatives has been included in the law-making agenda. In the meantime, interest groups can make use of these opportunities to advance their agendas until said draft laws are passed.

Meanwhile, the regulatory environment continues to be characterized by a widening gap between written rules/laws and their implementation. Key reasons for this long-standing problem can be found in the competing interests of parts of the bureaucracy and the discretionary power held by individual officials and factions within the CPV and the State. The number of legal documents promulgated by authorities has increased over time, but many remain just written words. In fact, it would probably be impossible for most State agencies to implement many of them given their limited manpower and financial capacity. Therefore, implementation has mostly focused on those parts viewed as beneficial to particular State bodies, individual officials, and factions. Such problems continue to make the regulatory environment opaque and awards too much discretion to officials and their business allies, creating too many opportunities for arbitrary decisions and rent-seeking activities.

### ***B. International Human Rights Commitments and Obligations***

Vietnam has been a party to most important international human rights treaties. As a member of the United Nations since 1977, it has agreed to adhere to international obligations under the UN Charter and the 1948 Universal Declaration of Human Rights. Furthermore, it has also accepted legal obligations to respect, protect and fulfil human rights and fundamental freedoms under the major international human rights treaties as outlined in the table below.

**Table 1: Ratification Status of International Instruments – Vietnam<sup>5</sup>**

Treaty	Signature Date	Ratification Date, Accession(a), Succession(d) Date
Convention against Torture and Other Cruel Inhuman or Degrading Punishment (CAT)	7 Nov 2013	5 Feb 2015
Optional Protocol of the Convention against Torture		
International Covenant on Civil and Political Rights (CCPR)		24 Sep 1982 (a)
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
Convention for the Protection of All Persons from Enforced Disappearance (CED)		
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	29 Jul 1980	17 Feb 1982
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)		9 Jun 1982 (a)
International Covenant on Economic, Social and Cultural Rights (CESCR)		24 Sep 1982 (a)
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)		
Convention on the Rights of the Child (CRC)	26 Jan 1990	28 Feb 1990
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	8 Sep 2000	20 Dec 2001
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	8 Sep 2000	20 Dec 2001
Convention on the Rights of Persons with Disabilities (CRPD)	22 Oct 2007	5 Feb 2015

However, Vietnam also made a number of reservations to the above treaties upon its accession. Regarding the CERD, reservations were made to Arts 17(1) and 18(1), relating to limitations on accession by a number of specific states, and Art 22 on the

<sup>5</sup> United Nations Human Rights, Office of the High Commissioner, available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx), accessed on 18 October 2016.

use of the International Court of Justice for dispute settlement. Vietnam also made reservations to: Art 48(1) of the CCPR; Art 26(1) of the CESC; Art 8(2), Arts 20 and 30(1) of the CAT; and Art 29(1) on the use of arbitration and the International Court of Justice in the CEDAW.

As regards the effect of Vietnam's commitments under international treaties in general, the 2005 Law on the Conclusion and Implementation of International Treaties stipulates the overriding effect of international obligations over national laws where conflict arises. A number of domestic laws also make specific and direct reference to international treaties and their effects, e.g. the Civil Code (Art 827), the Commercial Code (Art 4(1)), the Maritime Code (Art 23) and the Law on Environment Protection (Arts 24 and 25). Similarly, Art 827(2) of the Civil Code provides that international agreements should prevail over local laws.

However, Vietnam's State practice in this regard has not been clear and consistent. Concerning the issue of incorporation and transformation of concluded international agreements, the law does not "clearly specify whether a treaty that has been ratified is self-executing or requires the enactment of legislation to incorporate the treaty obligations into Vietnamese domestic law."<sup>6</sup> Vietnamese law enforcement and State practice suggests that treaty provisions contrary to pre-existing laws will need to be 'transformed' into domestic law, and will not be effective until the relevant laws have been amended or repealed. However, treaty provisions not yet included in existing laws will be automatically incorporated into domestic law when the treaty comes into effect.

Along with Vietnam's deepening integration into the world economy, the government has increased its engagement with international human rights mechanisms. Remarkably, in 2009, Vietnam subjected itself to the Human Rights Council's Universal Periodic Review (UPR), a peer-review process whereby a country undergoes a review of its human rights situation by other countries. Following this, Vietnam accepted as many as 93 out of a total of 123 recommendations made by other countries. Similarly, it accepted 182 out of 227 recommendations after the second UPR process in 2014. Of particular note was the first-time participation of NGOs in the process. In June 2013, after careful preparation and consultation, more than 60 local NGOs submitted a 'shadow report' under the UPR to the UN Human Rights Council.<sup>7</sup>

The government has made great efforts to codify international human rights norms and standards into national laws as demonstrated by Chapter II of the newly revised 2013 Constitution. Progress can also be seen in the increasing acceptance of international

<sup>6</sup> Bryant, T, Jessup, B, 'Fragmented pragmatism: the conclusion and adoption of international treaties in Vietnam' in J Gillespie and P Nicolson (eds), *Asian Socialism and Legal Change*, 2011, Canberra: ANU E Press, at p 299.

<sup>7</sup> Bui, T, 'Vietnam's civil society' *East Asia Forum*, 5 September 2013, available at <http://www.eastasiaforum.org/2013/09/05/vietnams-civil-society-undergoing-vital-changes/>, accessed on 18 October 2016.

norms as revealed by the number of revised and new laws incorporating such standards including the Penal Code, the Criminal Procedures Code, the Civil Code, the Civil Procedures Code, the Labour Law, the Law on the Protection and Care of Children, and the Land Law.

Moreover, the legal drafting process has involved more public and proactive consultation than ever before, particularly with non-State stakeholders, e.g. sex workers and drug users were offered a chance to meet with the drafting committee to discuss administrative sanctions. Likewise, during the Land Law amendment process, the Economic Committee of the National Assembly organized a workshop with Vietnamese NGOs to hear the voices of farmers. The 2013 revised Land Law placed tighter restrictions on compulsory land acquisition by the State and proposed more accountable ways to agree on compensation. It also increased the period of farmers' land use rights to 50 years. And during revisions to the Law on Marriage and Family, the drafting committee conducted surveys and workshops with lesbian, gay, bisexual and transgender groups to consider, e.g. the rights and issues of same-sex couples.

Despite tremendous efforts to develop legislation and strengthen the judicial system over recent decades, various loopholes in the formal legal rules guaranteeing human rights still exist. Further, considerable discrepancies between legal rules/practices and their enforcement can also be seen. Notably, limited access to justice and the relative weakness of the judicial system pose a large obstacle to the protection of human rights. It is also often noted that some important rules on human and citizens' rights in the Constitution, particularly such civil and political rights as freedom of speech, the press, assembly, and the right to form associations and to demonstrate, have not been institutionalized into laws.

An expert on Vietnam's legal and judicial system has commented that "courts lack powers to review complaints about civil rights abuses such as curbing freedom of association and speech and arbitrary arrest and detention."<sup>8</sup> Vu Cong Giao and Joel Ng<sup>9</sup> specifically list six articles in the Penal Code that in their analysis pose difficulties for the fair and equal enforcement of law due to ambiguous language on crimes relating to national security. These include Art 79 on "activities aimed at overthrowing the people's administration;" Art 80(1)(c) which defines spying as "collecting, supplying information and other materials for use by foreign countries against the Socialist Republic of Vietnam;" Art 86 on "undermining the implementation of socio-economic policies;" Art 87 on "undermining the unity policy;" Art 88 on "conducting propaganda against the Socialist Republic of Vietnam;" and Art 258 on "abusing democratic freedoms to

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8 Gillespie, J, 'The juridification of administrative complaints and review in Vietnam' in T Ginsburg and AHY Chen (eds), *Administrative Law and Governance in Asia*, 2009, London: Routledge, at p 218.

9 Giao, VC, Ng, J, 'Vietnam' in M Mohani, D Cohen and KTY Lee (eds), *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study*, 2011, Human Rights Resource Centre, University of Indonesia.

infringe upon the interests of the State.”<sup>10</sup> Article 88 criminalizes propaganda against the Socialist Republic of Vietnam and Art 258 bans the abuse of democratic freedoms that infringe upon the interests of the State. It reads:

- (1). Those who abuse the rights to freedom of speech, freedom of press, freedom of belief, religion, assembly, association and other democratic freedoms to infringe upon the interest of the State, the legitimate rights and interests of organizations and/or citizens shall be subject to warning, non-custodial reform for up to three years or a prison term of between six months and three years.
- (2). Serious offenses shall be subject to a prison term of between two and seven years.

These articles have been harshly criticised for their ambiguous language and their wide and vague formulation which gives authorities carte blanche to sanction people for a range of activities. Moreover, because they appear to conflate national security with the security of the political regime, the sanctions allowed under these articles have also garnered much criticism.

Human rights is arguably the most contentious issue between Vietnam and the US. While not seen as an impediment to short-term cooperation on various issues and the improved relations between the two countries in general, it appears to “have played a significant role in convincing the Administration to oppose a number of items desired by Hanoi.”<sup>11</sup> These include the types of arms US companies can sell to Vietnam and terms and conditions during the Trans-Pacific Partnership (TPP) negotiations.

## **Part 2: Outstanding Human Rights Issues**

In its self-evaluation UPR report of 2009, the Government of Vietnam recognized many challenges and problems to fulfilling its obligations under international human rights commitments and even within its domestic legal framework. These include inconsistencies and conflicts in the legal system itself, poor material conditions, externalities preventing the enjoyment of human rights, and the awareness of its public servants.<sup>12</sup> While human rights is a broad area, this chapter will focus on providing a critical analysis of two current and pertinent issues to Vietnam: the right to association

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<sup>10</sup> Article 258 reads: (1) Those who abuse the rights to freedom of speech, freedom of press, freedom of belief, religion, assembly, association and other democratic freedoms to infringe upon the interest of the State, the legitimate rights and interests of organizations and/or citizens shall be subject to warning, non-custodial reform for up to three years or a prison term of between six months and three years. (2) Serious offenses shall be subject to a prison term of between two and seven years.

<sup>11</sup> Manyin, ME, ‘US-Vietnam relations in 2014: current issues and implications for US policy’ CRS Report, 2014, Washington: Congressional Research Service, at p 16.

<sup>12</sup> Government of Vietnam, National Report submitted in accordance with Paragraph 15(A) of the Annex to Human Rights Council, Resolution 5.

and workers' rights, both of which require an integrative approach to make demonstrable progress.

### ***A. Right to Association***

Freedom of association is fundamental to the health of civil society in any country. In Vietnam, the Constitution stops at a mere declaration of this freedom without providing any meaningful protection to enforce it. Although the law on the right to form associations was promulgated in 1957, it is still considered to be in force.<sup>13</sup> However, it is almost outdated and fails to regulate the complex situation in Vietnam.<sup>14</sup> Numerous debates on new laws of association and thirteen drafts were produced before the Party-State blocked its adoption in 2006.

Instead, the Party-State now employs a number of executive decrees issued by the government and directives by the Party Secretariat to regulate associations and civil society organizations (CSOs) including the many voluntary groups in Vietnam. The voluntary or not-for-profit sector is broadly defined to include party-related mass organizations, trade unions, business, professional associations, scientific and technological organizations, policy research groups, social service groups, social relief establishments, religious organizations, clans, charities, private and semi-private universities, social and charitable funds, volunteer groups and other institutions. In addition, international NGOs with the appropriate permits to carry out activities in the areas of development and humanitarianism may also be considered part of the voluntary sector. However, the Party-State continues to maintain "strict control and management of the emerging Vietnamese non-profit community."<sup>15</sup> Thus, in practice, the legal framework places exclusive emphasis on retained State control rather than the protection and promotion of freedom of association.

With regards to the creation, registration, governance, operation and management of associations, various restrictions have been put in place. Decree No 88/2003/ND-CP on the organization, operation, and management of associations issued on 30 July 2003 was the first of its kind and serves as a guiding document for implementing the 1957 law on the right to form associations. Decree 88 was subsequently replaced by Decree No 45/2010/ND-CP on the organization, operation, and management of associations, issued 21 April 2010 with some minor changes. Decree 45 was amended with Decree No 33/2012/ND-CP, affecting only a small number of articles. An obvious problem

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13 See Decree No 102-SL/L-004, 20 May 1957, signed by President Ho Chi Minh promulgating the law on the right to form associations.

14 This comment is reflected in Report No 38/TTr-CP, 17 April 2006, by the Government to the National Assembly on the draft law on associations.

15 Sidel, M, 'Maintaining firm control: recent developments in non-profit law and regulation in Vietnam' International Center for Non-Profit Law, 2010, available at <http://www.icnl.org/research/library/files/Vietnam/MaintainingFirmControl.pdf>

with these decrees is the substantial curtailment on a fundamental civil and political liberty, freedom of association (stipulated by all Vietnam's constitutions, the 1966 International Covenant on Civil and Political Rights (to which it acceded in 1982), as well as the 1957 Law). Article 2 of Decree 88 and Decree 45 reads:

- (1). An association under this Decree means a voluntary organization of Vietnamese citizens or institutions with the same business or interest or in the same circle that unite for a common goal and operate regularly and disinterestedly to protect lawful rights and interests of the association, its members and the community; and support one another to operate effectively, contributing to national socio-economic development. Associations shall be organized and operate under this Decree and relevant legal documents.
- (1). Associations may be called differently as society, union of associations, general association, confederation, association, club with the legal entity status and other names under law (below collectively referred to as associations).

Strictly limiting the forms of associations allowed in Vietnam according to their purposes, the Decrees interpret Art 1 of the 1957 Law differently. It reads:

*The right to form associations by the people shall be respected and ensured. The purpose of establishing an association shall be legitimate, appropriate for the people's interests, uniting the people with a view to contributing to building a people's democratic regime in our country.*

As a commentator points out, the Decrees completely distort Art 1 of the 1957 Law.<sup>16</sup> Clearly the definition of associations and their purpose is extremely vague and ambiguous, giving the authorities carte blanche in interpretation and decision-making. While the Decrees recognize associations as legal persons, there is a significant deviation from the 2005 Civil Code on its purpose and legal entity status. According to the 2005 Civil Code (Arts 100-105), a legal person is categorized based on its operating purpose which can be political, social, economic, and/or professional. However, the Decrees are silent on which types of legal entity status associations may have. Furthermore, the Decrees explicitly exclude the VFF (a political organization) and five political-social organizations (namely, the Vietnam General Confederation of Labour, the Vietnam Women's Association, the Ho Chi Minh Communist Youth League, the Vietnam

<sup>16</sup> Lenh, N, 'Da co du can cu phap ly de thanh lap mot dang khac ngoai Dang Cong san Viet Nam?' ('Is there sufficient legal ground for establishing another political party besides the Communist Party of Vietnam?'), Commentary on basam.info, 29 August 2013.

Farmers Association, and the Vietnam War Veterans Association), collectively referred to as mass organizations, from the scope of regulation.<sup>17</sup>

Both Decrees 88 and 45 maintain firmly that the establishment of associations must be allowed by the Party-State, meaning that it is a formal requirement for associations/civic organizations to attain official registration status. This firm control is also reflected in the conditions imposed on registration procedures, monitoring, and in the operation of associations. As associations with special characteristics (*hoi co tinh chat dac thu*, in Arts 33-35, Decree 45), however, a small number of large State-affiliated umbrella groups enjoy some special privileges. Key constraints on the conditions and procedures for establishing associations, associational speech and advocacy rights, and other serious obstacles appear to be attributed to the dual management mechanism of associations set out in these decrees. For example, Decree 45 (Art 23(7)) limits an association's ability to comment, advocate, and provide feedback to circumstances where there is a request from relevant government agencies. The restrictive nature of these government decrees regulating Vietnam's associational sector has been widely criticized.

Concerning foreign non-governmental aid, the legal rules also reflect the Party-State's general strategy of limiting domestic civil society, particularly the ability of independent groups to organize. All over the world, authoritarian regimes have increased restrictions on foreign support for civil society, particularly targeting NGOs that monitor the government, promote human rights, and strengthen the democratic process.<sup>18</sup> Foreign funding in these politically sensitive areas was always likely to cause tensions between the State and CSOs due to the blurred lines between political activism and the social justice work of NGOs. Given this sensitivity, foreign funding for CSOs in Vietnam is an important concern for the Party-State. As such, to maintain and enhance State control over foreign non-governmental aid, the government issued Decree 93/ND-CP on promulgating the regulations on the management and use of foreign non-governmental aid in October 2009, followed by Circular 07/2010/TT-BKH issued by the MPI which provided implementation guidelines in March 2010. The restrictions and burdensome appraisal processes necessary for foreign funded projects to gain approval, together with heavy and difficult reporting requirements are evident in Decree 93 and Circular 07. As a result, it usually involves greater costs for compliance and longer times for appraisal approval:<sup>19</sup>

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17 For an official typology of these organizations according to their purposes, see Art 9 of the 2013 Constitution.

18 See Christensen and Weinstein, 'Defunding dissent: restrictions on aid to NGOs' *Journal of Democracy*, 2013, Vol 24(2), p 79.

19 Decree 93 stipulates a deadline of 20 days for the appraisal of foreign non-governmental aid items following the receipt of full and valid dossiers, but there is no specific deadline for approval after conclusion of the appraisal.

*Organizations that are more independent from the State, like local NGOs established under VUSTA, sometimes face double approval: once by VUSTA at the central level and once by the People's Committee at the provincial level. With regards to appraisal and approval time, the questionnaire surveys reveal that the process usually takes longer than permitted by Decree 93.20*

In short, a lot of attention has been given to the regulatory framework and the material conditions necessary to exercise the right to associate in Vietnam even though the Constitution has long provided for it. As such, the never-ending debate about how to both mitigate CPV concerns about the security of the political regime and accommodate demands to actually practice this fundamental human right looks set to continue.

### **B. Workers' Rights**

More than half of Vietnam's population (54 million, of which 51.6% are men and 48.4% are women) is in the labour force. Over the past decades, Vietnam's transition to a market economy has resulted in many workers' rights issues leading to "an unprecedented level of industrial action" across the country, notably, wildcat strikes, high labour turnover, and absenteeism in foreign invested firms.<sup>21</sup> Labour conditions in Vietnam also figure prominently in its participation in the TPP trade negotiations and application to join the Generalized System of Preferences (GSP) program. Labour unrest is an increasingly prominent issue although the number of wildcat strikes has decreased since 2011 (when they reached a peak of about 1000 strikes). Wildcat strikes take place mainly in foreign-invested companies where the scope for protest seems likely to increase. Under current State practice, strikes are officially illegal while formal bargaining processes remain weak. The May 2014 riots against foreign-owned firms in industrial areas near Ho Chi Minh City were partly motivated by workers' frustrations with factory conditions. Indeed, labour activism in foreign-owned firms often take place on an informal basis and are less easily suppressed than in other sectors including State-owned enterprises, domestic private enterprises, and government agencies. Other factors explaining wildcat strikes in foreign firms may include cultural differences and poor labour management.<sup>22</sup> In particular, Vietnamese workers may have taken to strikes because of a perceived lack of representation by official unions.

20 Nam, PQ, and Anh, NN, 'Implementation of Decree 93/2009/ND-CP: issues and recommendations' Care International in Vietnam, 2014.

21 Chi, DQ, and van den Broek, D, 'Wildcat strikes: a catalyst for union reform in Vietnam?' Journal of Industrial Relations, 2013, Vol 55(5), p 783.

22 Chi, DQ, and van den Broek, D, 'Wildcat strikes: a catalyst for union reform in Vietnam?' Journal of Industrial Relations, 2013, Vol 55(5), p 783 at 785-789.

Worker and union complaints do not necessarily concentrate on employers' actions but also against government policies including social insurance and pension policies. In March 2015, for example, 90,000 textile workers at a Chinese-owned factory in Binh Duong province protested against changes to social insurance. This was the first time such a large strike had been organized around a legal or political demand, rather than against employers, wages, or working conditions.

The efforts by the CPV-led government to adapt to rapid social and economic change as well as the demands of integrating into the world economy have introduced a new dynamic into the labour rights regime. Although Vietnam has made significant improvements in its labour laws, local government enforcement and business compliance remain ongoing problems.

Formal labour rights, unions, and labour organisations are of great interest to the Party-State and remain under close control. For example, there are tight restrictions on workers' rights to form trade unions outside the Vietnam General Confederation of Labour (VGCL). In fact, workers have no legal grounds to form unions independent of the VGCL (a mass organization under the Vietnam Fatherland Front) at all. As the only organization responsible for upholding workers' rights in Vietnam, the VGCL is supposed to organize a union within six months of the establishment of any new business, regardless of its ownership – State, foreign, or private. Workers automatically become members of the union of their workplace and all labour unions must be a member of the VGCL. As a result, strong links between the CPV-led government and unions at all levels monitor worker industrial action. This relationship is even more consolidated at State-owned enterprises (SOEs) where workers find it almost impossible to call for official strikes.

The TPP and GSP negotiations are likely to result in an increasing acceptance of space for unions. Positive signs can be seen in the VGCL's support of the government's ratification of the remaining fundamental international labour conventions including those relating to freedom of association (ILO Convention 87), and collective bargaining (Convention 98). Some observers are optimistic that these moves may lead to some changes in unionization, demonstrating that union independence and freedom of association may no longer be untouchable issues.<sup>23</sup>

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23 Van, D. (2015) 'Chủ tịch Tổng LĐLĐVN Đặng Ngọc Tùng làm việc với LĐLĐ tỉnh Gia Lai: Đặt quyền lợi người lao động lên hàng đầu' ('VGCL President Đặng Ngọc Tùng works with Gia Lai provincial Confederation of Labour: put worker's rights as the top priority'), Lao Dong, 18 May 2015, available at <http://laodong.com.vn/cong-doan/chu-tich-tong-ldldvn-dang-ngoc-tung-lam-viec-voi-ldld-tinh-gia-lai-dat-quyen-loi-nguoi-lao-dong-len-hang-dau-326877.bld>, accessed on 16 August 2015.

Despite restrictions on independent rights to organize, gradual progress has been made in worker rights. An ongoing series of reforms under consideration has sought to balance workers' interests in the foreign investment sector with foreign investors' concerns. In 2015, discussions about proposals that would make it easier for employers to dismiss under-performing employees were ongoing. In a number of provinces, 'strike action teams' have also been set up to address disputes rapidly.<sup>24</sup> In January 2015, the government passed Decree 05/2015/ND-CP to speed up the process by which strikes may be declared illegal.

Workers' concerns are also recognized in the new Labour Code passed by the National Assembly in June 2012. This new law is likely to herald a number of changes to working conditions that will be generally favourable to workers and their rights, e.g. increasing maternity leave from four to six months. Moreover, in April 2014, the VGCL established a Committee of Labour Relations. Given the continued large number of wage-related strikes and pressure from the public, the government has tightened its inspection of working conditions and supervision of wage policies, especially for foreign-funded factories to deal with violations more effectively.

According to the CRS report, hundreds of unaffiliated and, therefore, unofficial 'labour associations' appear to have sprouted without significant repression from the government, and in many recent cases, the VGCL has evolved into a more aggressive advocate for workers.<sup>25</sup> For example, the government of Vietnam took "no action" against the more than 150 strikes that occurred in the first half of 2013, despite the fact that all were technically illegal. In practice, most strikes are still officially illegal given that the process of legally registering a strike under the Labour Law and associated legislation is cumbersome and impractical. Most strikes are settled informally with workers often gaining some concessions.

In short, as Vietnam transitions to a market economy and pressure under TPP negotiations grows, greater independence for unions may be required to bolster formal labour relations. The increasing space for union organization outside the official VGCL parameter could offer a more measured channel to address workers' grievances, facilitate better industrial negotiation and arbitration, and thus, reduce the scale and scope of wildcat strikes.

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24 Tu, NP, 'Vietnam Labour Code strikes out at labour disputes' East Asia Forum, 24 April 2015, available at <http://www.eastasiaforum.org/2015/04/10/vietnam-strikes-out-at-labour-disputes/>.

25 Manyin, ME, 'US-Vietnam relations in 2014: current issues and implications for US policy' CRS Report, 2014, Washington: Congressional Research Service, p 16 at 20.

### Part 3: Conclusion

Vietnam's introduction of a market economy, the development of a socialist law-based State doctrine and the exposure of Vietnam's long-held socialist norms of human rights to liberal universalism, have paved the way for an evolving human rights regime. As can be seen from the 2011-13 constitutional amendment debate, the discourse around human rights is dynamic and ever changing. On the one hand, legal limits on freedom of association and workers' rights, freedom of the press and peaceful assembly, including the right to demonstrate, and access to information, are apparent and are used by the Party-State to control civil society and to prevent any group or individual from potentially engaging in political advocacy. On the other hand, despite setbacks and restrictions in the regulatory framework on a number of human rights issues, it must be stressed that efforts to institutionalize a more effective and consistent legal-rational model of human rights has made some progress. The 'new thinking' on the rule of law and human rights has been gradually transplanted and developed while still drawing resistance within some conservative elements of the CPV. A number of reforms have been proposed and considered seriously that could open up truly substantive and constructive deliberations. Thus, a more effective and consistent legal-rational model is beginning to take root in Vietnam.

The foregoing analysis has aimed to shed clearer light on the ongoing issues on the right to association and workers' rights in Vietnam. While the Vietnamese Party-State has accepted the universality of human rights at a high level of abstraction, it still disagrees with western countries and international institutions over the content, justification, interpretation, and implementation of these rights in practice at a more detailed level. The interim solution to this impasse is necessarily a syncretism that enables "new and contradictory substantive ideas to enter and enlarge the range of values applied to new situations."<sup>26</sup> While the socialist legality doctrine is in decline and a law-based state is still embryonic, a dynamic and tolerant political model of human rights is likely to embrace such syncretism and adjust itself in the long-run.

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<sup>26</sup> Gillespie, J, 'Concepts of law in Vietnam: transforming statist socialism' in R Peerenboom (ed), *Asian Discourses of the Rule of Law*, 2004, London: Routledge, at p 172.



# Appendix

A decorative graphic consisting of several parallel diagonal stripes in shades of gray, located on the right side of the dark horizontal band.

# Appendix

## ASEAN HUMAN RIGHTS DECLARATION

**WE**, the Heads of State/Government of the Member States of the Association of Southeast Asian Nations (hereinafter referred to as “ASEAN”), namely Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, on the occasion of the 21<sup>st</sup> ASEAN Summit in Phnom Penh, Cambodia.

**REAFFIRMING** our adherence to the purposes and principles of ASEAN as enshrined in the ASEAN Charter, in particular the respect for and promotion and protection of human rights and fundamental freedoms, as well as the principles of democracy, the rule of law and good governance;

**REAFFIRMING FURTHER** our commitment to the Universal Declaration of Human Rights, the Charter of the United Nations, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties;

**REAFFIRMING ALSO** the importance of ASEAN’s efforts in promoting human rights, including the Declaration of the Advancement of Women in the ASEAN Region and the Declaration on the Elimination of Violence against Women in the ASEAN Region;

**CONVINCED** that this Declaration will help establish a framework for human rights cooperation in the region and contribute to the ASEAN community building process;

## HEREBY DECLARE AS FOLLOWS:

### GENERAL PRINCIPLES

1. All persons 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 humanity.
2. Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.
3. Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law.
4. The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.
5. Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.
6. The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other 9 November 2012 3 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.
7. All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.

8. The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.
9. In the realisation of the human rights and freedoms contained in this Declaration, the principles of impartiality, objectivity, non-selectivity, non-discrimination, nonconfrontation and avoidance of double standards and politicisation, should always be upheld. The process of such realisation shall take into account peoples' participation, inclusivity and the need for accountability.
10. ASEAN Member States affirm all the civil and political rights in the Universal Declaration of Human Rights. Specifically, ASEAN Member States affirm the following rights and fundamental freedoms:
  11. Every person has an inherent right to life which shall be protected by law. No person shall be deprived of life save in accordance with law.
  12. Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.
  13. No person shall be held in servitude or slavery in any of its forms, or be subject to human smuggling or trafficking in persons, including for the purpose of trafficking in human organs.
  14. No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.
  15. Every person has the right to freedom of movement and residence within the borders of each State. Every person has the right to leave any country including his or her own, and to return to his or her country.
  16. Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.

17. Every person has the right to own, use, dispose of and give that person's lawfully acquired possessions alone or in association with others. No person shall be arbitrarily deprived of such property.
18. Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.
19. The family as the natural and fundamental unit of society is entitled to protection by society and each ASEAN Member State. Men and women of full age have the right to marry on the basis of their free and full consent, to found a family and to dissolve a marriage, as prescribed by law.
20. (1) Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.  
(2) No person shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.  
(3) No person shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each ASEAN Member State.
21. Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation. Every person has the right to the protection of the law against such interference or attacks.
22. Every person has the right to freedom of thought, conscience and religion. All forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated.
23. Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.

24. Every person has the right to freedom of peaceful assembly.
25. (1) Every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law.
- (2) Every citizen has the right to vote in periodic and genuine elections, which should be by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law.

#### ECONOMIC, SOCIAL AND CULTURAL RIGHTS

26. ASEAN Member States affirm all the economic, social and cultural rights in the Universal Declaration of Human Rights. Specifically, ASEAN Member States affirm the following:
- (1) Every person has the right to work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed.
- (2) Every person has the right to form trade unions and join the trade union of his or her choice for the protection of his or her interests, in accordance with national laws and regulations.
- (3) No child or any young person shall be subjected to economic and social exploitation. Those who employ children and young people in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development, including their education should be punished by law. ASEAN Member States should also set age limits below which the paid employment of child labour should be prohibited and punished by law.
28. Every person has the right to an adequate standard of living for himself or herself and his or her family including:
- a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food;
  - b. The right to clothing;
  - c. The right to adequate and affordable housing;
  - d. The right to medical care and necessary social services;
  - e. The right to safe drinking water and sanitation;
  - f. The right to a safe, clean and sustainable environment.

29. (1) Every person has the right to the enjoyment of the highest attainable standard of physical, mental and reproductive health, to basic and affordable health-care services, and to have access to medical facilities.
- (2) The ASEAN Member States shall create a positive environment in overcoming stigma, silence, denial and discrimination in the prevention, treatment, care and support of people suffering from communicable diseases, including HIV/AIDS.
30. (1) Every person shall have the right to social security, including social insurance where available, which assists him or her to secure the means for a dignified and decent existence.
- (2) Special protection should be accorded to mothers during a reasonable period as determined by national laws and regulations before and after childbirth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits.
- (3) Motherhood and childhood are entitled to special care and assistance. Every child, whether born in or out of wedlock, shall enjoy the same social protection.
31. (1) Every person has the right to education.
- (2) Primary education shall be compulsory and made available free to all. Secondary education in its different forms shall be available and accessible to all through every appropriate means. Technical and vocational education shall be made generally available. Higher education shall be equally accessible to all on the basis of merit.
- (3) Education shall be directed to the full development of the human personality and the sense of his or her dignity. Education shall strengthen the respect for human rights and fundamental freedoms in ASEAN Member States. Furthermore, education shall enable all persons to participate effectively in their respective societies, promote understanding, tolerance and friendship among all nations, racial and religious groups, and enhance the activities of ASEAN for the maintenance of peace.
32. Every person has the right, individually or in association with others, to freely take part in cultural life, to enjoy the arts and the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or appropriate artistic production of which one is the author.

33. ASEAN Member States should take steps, individually and through regional and international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of economic, social and cultural rights recognised in this Declaration.
34. ASEAN Member States may determine the extent to which they would guarantee the economic and social rights found in this Declaration to non-nationals, with due regard to human rights and the organisation and resources of their respective national economies.

#### RIGHT TO DEVELOPMENT

35. The right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. While development facilitates and is necessary for the enjoyment of all human rights, the lack of development may not be invoked to justify the violations of internationally recognised human rights.
36. ASEAN Member States should adopt meaningful people-oriented and gender responsive development programmes aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis, and the progressive narrowing of the development gap within ASEAN.
37. ASEAN Member States recognise that the implementation of the right to development requires effective development policies at the national level as well as equitable economic relations, international cooperation and a favourable international economic environment. ASEAN Member States should mainstream the multidimensional aspects of the right to development into the relevant areas of ASEAN community building and beyond, and shall work with the international community to promote equitable and sustainable development, fair trade practices and effective international cooperation.

## RIGHT TO PEACE

38. Every person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this Declaration can be fully realised. To this end, ASEAN Member States should continue to enhance friendship and cooperation in the furtherance of peace, harmony and stability in the region.

## COOPERATION IN THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

39. ASEAN Member States share a common interest in and commitment to the promotion and protection of human rights and fundamental freedoms which shall be achieved through, inter alia, cooperation with one another as well as with relevant national, regional and international institutions/organisations, in accordance with the ASEAN Charter.
40. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN, or at the destruction of any of the rights and fundamental freedoms set forth in this Declaration and international human rights instruments to which ASEAN Member States are parties.

Adopted by the Heads of State/Government of ASEAN Member States at Phnom Penh, Cambodia, this Eighteenth Day of November in the Year Two Thousand and Twelve, in one single original copy in the English Language.

# About SHAPE-SEA

Strengthening Human Rights and Peace Research and Education in ASEAN/Southeast Asia (SHAPE-SEA) was launched on February 2015 in Bangkok, Thailand. It is a collaboration between the ASEAN University Network-Human Rights Education (AUN-HRE) which has thirty member-universities and the Southeast Asian Human Rights Studies Network (SEAHRN) which has twenty-two members.

The overall aim of SHAPE-SEA is to contribute to the improvement of the human rights and peace situation in ASEAN/ Southeast Asia through applied research and education. The core themes of the Programme are (1) ASEAN and Human Rights, (2) Business Accountability, (3) Peace and Security, (4) Governance and Justice, and (5) Academic Freedom. Its main areas of work are Research, Education, Capacity- Building and Outreach and Publications and Public Relations.

The Programme focuses on supporting research on innovative and critical projects on human rights and peace, and in exploring ways in which this knowledge is made accessible to university students throughout Southeast Asia/ASEAN. It is directly involved and engaged with universities in the Region to play a more significant role in the sustainability of human rights protection by contributing research, and increasing the knowledge on human rights and peace by incorporating these issues into university education. The Programme also creates spaces for knowledge-building and dissemination through production and publication of research amongst the academic community and other human rights and peace stakeholders

SHAPE-SEA Secretariat is hosted by the Institute of Human Rights and Peace Studies (IHRP) at Mahidol University. The programme is supported by the Swedish International Development Cooperation Agency (SIDA), and the Norwegian Centre for Human Rights (NCHR)





This Outlook is the first in a series where we shall be examining the state of human rights in Southeast Asia. The chapters are a combination of hard data as well as the impressions of the writers, all of whom are human rights academics or activists their respective countries. Each book shall be a worthy source of information, but taken as a whole it is hoped that the series will provide an invaluable charting of the human rights journey in this region.



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