



AN INTRODUCTION TO

Human Rights in Southeast Asia

VOLUME
2

An Introduction to Human Rights in Southeast Asia

Volume 2

By
Strengthening Human Rights and
Peace Research and Education in
ASEAN/Southeast Asia (SHAPE-SEA)



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An Introduction to Human Rights in Southeast Asia : Volume 2

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Acknowledgments

The textbook is a project of the Southeast Asian Human Rights Studies Network (SEAHRN), and the Strengthening Human Rights and Peace Research and Education in ASEAN/Southeast Asia (SHAPE-SEA). The ultimate goal of the textbook is to contribute to the promotion of human rights and peace education in Southeast Asia through which human rights and peace in the region will be better promoted and protected.

The writing and production of the textbook has been funded by the Swedish International Development Cooperation Agency (SIDA), and the Norwegian Centre for Human Rights (NCHR). The first volume was produced in collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. We are very thankful for all their support. We would also like to emphasize that this textbook would not have been possible without a lot of contributions from many people, too many to name all of them here. Their contributions are highly appreciated.

As an ongoing project we hope they will continue with their work.



Preface

When the Southeast Asian Human Rights Studies Network (SEAHRN) was formed in 2009 one of its first objectives was the development of a textbook for Southeast Asia University students. This was in response to concerns voiced by many lecturers that there are no textbooks appropriate for teaching human rights in the Southeast Asia. Further, with an estimate from SEAHRN of only one in a thousand students in the region graduating university having completed a single human rights course, there are few opportunities for students to study this topic. Given the importance of human rights today, alongside the legal obligation of governments to ensure students are taught their rights, much needs to be done to make human rights education available in universities in ASEAN/Southeast Asia.

Written by a team of human rights academics working at universities in the region, this textbook is aimed at being a contemporary and engaging reading for students of human rights. This textbook is for undergraduate students who are studying a general education level course on human rights, or students who study human rights as a part of their program in sociology, law, politics, ASEAN studies, development studies and so on. The textbook does not require specialist knowledge of any discipline.

A large team of writers, researchers and reviewers have pooled their energy for this project. Even when the full edition of the textbook arrives, it will be a huge challenge to get it taught in universities throughout the region. Not only are governments reluctant to place human rights in a core curriculum, students are unaware of its relevance, and lecturers do not have the facilities to learn enough about the subject to teach it. The discussion of some human rights topics, such as historical events or current political conflicts, can be sensitive within a country. Yet, even given this climate, an increasing number of students and lecturers want to gain knowledge on human rights.

Volume one of the textbook was completed in March 2015, and the second volume was released in October 2016. A third and final volume is planned for release in early 2018.

Principles of the Textbook

At the outset a number of principles for a human rights textbook for undergraduate students in Southeast Asia were established. These are:

- The textbook must be open source and freely available to all students. There would be no limitations to the distribution through copyright or control by an international publisher.
- The chapters and the text would be available through the web in PDF format.
- The textbook will have an accessible format which is easy to print and photocopy.
- The target audience is undergraduate students who study human rights as a general studies or elective course. The student does not need extensive background knowledge in law, politics, development, or sociology, but the textbook should supplement students studying these majors.
- The text examines the status of human rights in Southeast Asia using examples and case studies from the region.
- The textbook will be translated into major Southeast Asian languages.
- The textbook only refers to relevant writing that is accessible to the students. Given the limited library resources and the cost of international journals, the textbook favors referring to work which is freely available on the internet.

Features of the textbook

The textbook has the following features to engage and assist students in understanding human rights:

- Definitions: helps students to understand human rights terminology
- Concepts: Outlines of concepts important to understanding human rights
- Focus on: Provides an in-depth look at relevant issues through providing real-life case studies to assist students to understand human rights in action
- Discussion and Debate boxes: designed to encourage debate and discussion on human rights issues. These can be used to increase discussion and debate between students about human rights challenges.
- Southeast Asian examples: Where relevant, human rights are contextualized in the eleven Southeast Asian countries.
- Typical exam or essay questions: end of chapter section to help lecturers structure exam and essay questions.
- Further Reading: highlighting authors, on line resources, and relevant texts for further study. Please note that the further reading mainly lists texts which are available free on the internet. Because many universities in the region are limited in their access to on-line journals and texts, the authors have decided to note research and authors who have material which is free and available to all.

A note on the use of Southeast Asia: The textbook uses Southeast Asia rather than ASEAN because it includes the eleven countries of Southeast Asia, that is the ASEAN countries and Timor Leste, as it is likely Timor Leste will join ASEAN in the near future.

Notes for Lecturers

The textbook is designed for undergraduate students but may be used as basic background reading for graduate students. The textbook places human rights in a Southeast Asian context, using Southeast Asian examples, and examining regional laws, policies, and practices around human rights.

Each chapter can work as a stand-alone text with individual pdfs of chapters available from the SEAHNR and SHAPE-SEA website. The lecturer can select from the list chapters to create their own textbook.

Use of the textbook

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Translations

As of December 2017, the textbook has been translated into a few ASEAN languages namely Cambodian, Myanmar, and Thai. SHAPE-SEA encourages the translation of the Textbook into local Southeast Asian languages with permission of SHAPE SEA.

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A large number of lectures, human rights professional and students have been involved in the making of the textbook. The textbook is not traditional in its production as each chapter may have many contributors. This list only covers those most directly involved, and we would also like to thank the many others in the human rights community for their participation and interest in this project.

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Contents

01 Chapter Eight: Human Rights in Southeast Asian History

02 8.1 Introduction

DISCUSSION AND DEBATE: What is the History of Human Rights?

04 8.2 Pre-Colonial History of Human Rights

Discussion and Debate: How was Pre-colonial History Taught at Your School?

05 8.3 From Colonialism to Self Determination

8.3.1 Colonialism

8.3.2 Nationalist Movements in the 1900s

CONCEPT: Nationalist Movements

8.3.3 Struggles for Self Determination

Concept: Self-Determination

09 8.4 From Independence to Authoritarianism

Concept: Non-Aligned Movement (NAM) in the Three Worlds

8.4.1 Authoritarianism and Military Rule

Table 8-1: Where do Coups Occur in Southeast Asia?

FOCUS ON: Some Military Governments in Southeast Asia

8.4.2 The Impact of the Cold War

FOCUS ON: Operation Menu

8.4.3 Atrocities in Southeast Asia

FOCUS ON: Khmer Rouge

FOCUS ON: Santa Cruz Massacre

15 8.5 The Democratization of Southeast Asia

8.5.1 Theories of Democratization in Southeast Asia

Concept: Huntington's Waves

Concept: Asian Values

DISCUSSION AND DEBATE: What Makes a Country Turn Democratic?

18	8.6 The Emergence of Universal Human Rights
	8.6.1 The Rise of Civil Society: Women and Students
	DISCUSSION AND DEBATE: Is History Made by People or Organizations?
	8.6.2 The Rise of Civil Society: From NGOs to New Social Movements
	CASE STUDY: Philippines–People Power Movement
	8.6.3 Southeast Asia and the UN Human Rights System
	DISCUSSION AND DEBATE: How Active is Your Country in the UN System
	DISCUSSION AND DEBATE: Why was the Bangkok Declaration Disliked by Human Rights Defenders?
25	8.7 Is There a History of Human Rights in Southeast Asia?

31 Chapter Nine: Women’s Human Rights

32	9.1 Introduction
	9.1.1 Brief History of Women’s Rights
33	9.2 Defining Discrimination
	9.2.1 Sex and Gender
	Table 9-1: Words for Sex and Gender in Southeast Asia
	9.2.2 Linking Discrimination to ‘Sex’
	CONCEPT: Socially Constructed Roles
36	9.3 CEDAW
	Table 9-2: CEDAW status
	9.3.1 Non Discrimination in CEDAW
	9.3.2 Concept of Equality in CEDAW
	9.3.3 State Obligations in CEDAW
	9.3.4 CEDAW Challenges
42	9.4 Protection Mechanisms for Women’s Rights
	9.4.1 Treaty Body Protection Mechanisms: The Optional Protocol

	Table 9-3: CEDAW Optional Protocol Status
	CASE STUDY: CEDAW Individual Compliant
	9.4.2 Women's Organizations at the UN
	FOCUS ON: United Nations Women's Organizations
	9.4.3 ASEAN Mechanisms
45	9.5 Women's Human Rights Contemporary Concerns
	9.5.1 Violence Against Women
	CONCEPTS: Violence Against Women, Domestic Violence, and Gender-Based Violence
	Table 9-4 Domestic Violence Laws in Southeast Asia
	9.5.2 Women's Political Representation
	Table 9-5. Ranking of Percentage of Women Parliamentarians in Southeast Asia
	FOCUS ON: Gender and Politics in Viet Nam
	DISCUSSION AND DEBATE: Should Women have Reserved Positions in Government?
	9.5.3 Women at Work
	CASE STUDY: Discrimination Against Women at the Workplace in Southeast Asia
	Table 9-6. Maternity Leave Standards in Southeast Asia
	CASE STUDY: Gender and Land Rights in Cambodia
	DISCUSSION AND DEBATE: Women in the Boardroom
53	9.6 Conclusion

57 Chapter Ten: Children's Human Rights

58	10.1 The Rights of Children
	Table 10-1: Ratification of Child Rights Treaties by Southeast Asian States
	10.1.1 Background to Children's Rights
60	10.2 Convention on the Rights of the Child (CRC)
	FACT AND FIGURES: Summary of CRC Rights

10.2.1 General Principles of the CRC

FOCUS ON: General Principles of the CRC General Comment No. 12 (2009)

10.2.2 Survival and Development of the Child

10.2.3 Best Interests of the Child

DISCUSSION AND DEBATE: Best Interest of the Child

10.2.4 Non-Discrimination

10.2.5 Right to Participate

67 **10.3 Protection of Children against Violence**

10.3.1 Children and Domestic Violence

DISCUSSION AND DEBATE: When is it acceptable for a parent to hit a naughty child?

10.3.2 Children and Violence at School

CASE STUDY: Types of Corporal Punishment and Abuse in Southeast Asia

Table 10-2: Is Corporal Punishment (CP) Outlawed in Southeast Asia?

DISCUSSION AND DEBATE: How to Stop Corporal Punishment?

10.3.3 Children and Sexual Abuse

FOCUS ON: The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

75 **10.4 The Right to Education**

10.4.1 Elements of the Right to Education

FOCUS ON: Right to Education, the 4As

10.4.2 Availability and Accessibility of Education in Southeast Asia

Table 10-3: Percentage of Children in Primary Schools in Southeast Asia

10.4.3 Acceptable and Adaptable Education in Southeast Asia

DISCUSSION AND DEBATE: Should Nationalism be an Objective of Education?

DISCUSSION AND DEBATE: Language of Instruction for Ethnic Minority Children

10.4.4 Protecting Minority and Indigenous Children in Southeast Asia

82 **10.5 Juvenile Justice**

10.5.1 Laws of Juvenile Justice

Concept: Child in Conflict with the Law

Table 10-4: Laws on Juvenile Justice

10.5.2 Juvenile Courts and Detention Centres

85 **10.6 Children and Labour**

10.6.1 International Law on the Protection of Working Children

Table 10-5: Ratification of Main ILO Conventions by Southeast Asian States

Table 10-6: ILO Minimum Age

10.6.2 Violations of Child Labour Laws in Southeast Asia

CASE STUDY: Some of the Worst Form of Child Labour in the Region

89 **10.7 Children in Armed Conflict**

10.7.1 Protection of Children from Armed Conflict Under International Law

Table 10-7: Relevant International Law on Child Soldiers

FOCUS ON: Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

10.7.2 Child Soldiers in Southeast Asia

91 **10.8 Right of Adolescents to Reproductive Health**

Table 10-8: Age of Consent in Southeast Asia

DISCUSSION AND DEBATE: How much did you learn about reproductive health at school?

94 **10.9 Conclusion**

99 **Chapter Eleven: Sex and Gender Diversity**

100 **11.1 Overview**

11.1.1 Post-War Change

11.1.2 Changes in Southeast Asia

11.1.3 Change at the UN

FOCUS ON: The Yogyakarta Principles

11.1.4 ASEAN

103	11.2 Terms and Categories
	DISCUSSION AND DEBATE: Separate Colours or a Rainbow Spectrum?
105	11.3 Criminal Laws
	11.3.1 The Origins of Colonial Era Criminal Laws
	CASE STUDY: Criminal Laws in Southeast Asia
	11.3.2 The Movement for Decriminalization
	11.3.3 Criminal Laws in Southeast Asia
	CASE STUDY: The Two Prosecutions of Anwar Ibrahim in Malaysia
	CASE STUDY: Police Actions in Mandalay
	11.3.4 Sharia laws
	CASE STUDY: Sharia Criminal Laws on Sexuality in Southeast Asia (and Islamic State Areas)
111	11.4 Violence
112	11.5 LGBTI Visibility and Activism
	11.5.1 Legal Status for Civil Society Organizations
	11.5.2 Public Actions, Public Advocacy
	CASE STUDY: Pink Dot in Singapore
	CASE STUDY: Seksualiti Merdeka in Malaysia
114	11.6 Public Media and Government Censorship
115	11.7 Discrimination
	CASE STUDY: The Thai Gender Equality Act
116	11.8 Recognition of Same-Sex Relationships
118	11.9 Transgender
	11.9.1 Transsexuals
	11.9.2 Discrimination Based on Transsexuality
	CASE STUDY: Transgender in Malaysia
	11.9.3 Distinct Transgender Identities
121	11.10 Intersexuals
122	11.11 Conclusion

127 Chapter Twelve: Human Rights and Development

128 12.1 Introduction

Concept: Development

Concept: Unequal Development

130 12.2 The Politics of Development

Concept: Poverty

12.2.1 The Politics of Cold War Development

DISCUSSION AND DEBATE: How difficult is it to plan a development?

12.2.2 The Right to Development

Concept: Categorizing Countries

135 12.3 Globalization and Development

Concept: Globalization

Concept: Trading Off Rights

FOCUS ON: The Washington Consensus and the Bretton Woods Institutes

Concept: The Anti-Globalization Movement

12.3.1 The VDPA and New Ways of Understanding Development

12.3.2 Human Development and Human Security

Table12-1: Relationship between the Seven Dimensions of Human Security and Human Rights

142 12.4 Development as Freedom and Capabilities Approach

FOCUS ON: Nussbaum's Central Capabilities

143 12.5 Pursuing Development Goals: the MDGs and SDGs

FOCUS ON: Had Southeast Asia Met the Eight Goals of the MDGs by 2015?

Table 12-2: The Connection Between the 17 Sustainable Development Goals and Specific Human Rights

146 12.6 Introduction to a Human Rights-Based Approach (RBA) to Development

12.6.1 Features of RBA

FOCUS ON: Some Definitions of RBA

12.6.2 Core Concept 1: No Human Rights Violations

DISCUSSION AND DEBATE: Is development possible without violating rights?

12.6.3 Core Concept 2: The Objective of Development is to Improve People's Rights

12.6.4 Core Concept 3: The Rights-Based Approach Differs from Charity and Needs-Based Approaches

12.6.5 Core Concept 4: Ensuring All People Participate in the Development Process

DISCUSSION AND DEBATE: Should development only focus on the poorest people?

12.6.6 Core Concept 5: Development Causes Changes in Power Relationships

151 **12.7 Conclusion**

155 Chapter Thirteen: Business and Human Rights

156 **13.1 Introduction to Business and Human Rights**

Concept: Business

DISCUSSION AND DEBATE: Business as Duty Bearers

158 **13.2 Labour Rights as Human Rights**

FOCUS ON: An Overview of Labour Rights

13.2.1 Challenges to Labour Rights in Southeast Asia

FOCUS ON: Wildcat Strikes in Vietnam

161 **13.3 Business Accountability**

Concept: Business Accountability

13.3.1 Corporate Social Responsibility

FOCUS ON: Business CSR Initiatives

163 **13.4 Accountability at the UN**

FOCUS ON: Business Accountability at the UN

13.4.1 Global Compact (1999)

FOCUS ON: Ten Principles of the UN Global Compact

13.4.2 UN Norms (2003)

13.4.3 UN Guiding Principles (2011)

DISCUSSION AND DEBATE: Is it better to compromise or pressure business?

13.4.4 Guiding Principle 1: Protect

FOCUS ON: Guiding Principles on Human Rights and Business – General State Regulatory and Policy Functions

13.4.5 Guiding Principle 2: Respect

13.4.6 Guiding Principle 3: Remedy

FOCUS ON: Where do the guiding principles fit?

171 **13.5 Responding to Business Violations in Southeast Asia**

13.5.1 Legal Actions Against TNCs

CASE STUDY: Xayaburi Dam Court Case

13.5.2 Extraterritorial Obligations

FOCUS ON: Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights

CASE STUDY: Koh Kong Sugar Plantations and Extraterritorial Obligations

13.5.3 Consumer Activism

CASE STUDY: Boycotts of Thai Fisheries

175 **13.6 The Global Economy and Human Rights**

13.6.1 International Trade and Human Rights

FOCUS ON: The Trans Pacific Partnership (TPP)

DISCUSSION AND DEBATE: Should governments ignore TRIPs when it comes to life-saving medicines?

13.6.2 Global Finance and Human Rights

DISCUSSION AND DEBATE: Privatization, Nationalization, and Human Rights

179 **13.7 Worker Resiliency and Self-Protection**

183 Chapter Fourteen: The Environment and Human Rights

184 **14.1 Introduction to Human Rights and the Environment**

FOCUS ON: Major Environmental Disasters of the 1960s

FOCUS ON: Major Environmental Disasters of the 1980s

DISCUSSION AND DEBATE: What are the environmental concerns of your country?

FOCUS ON: Extrajudicial Killing of Environmental Activists in Southeast Asia

188 **14.2 Environmental Standards**

FOCUS ON: Elements of a Right to a Clean Environment

14.2.1 Substantive Right to a Clean Environment

CASE STUDY: *Minors Oposa v Factoran* (1993), Supreme Court of the Philippines

192 **14.3 Procedural Right to a Clean Environment**

FOCUS ON: The Aarhus Convention (1998)

14.3.1 Right to Environmental Information

14.3.2 Right to Participate in Environmental Decision-Making

DISCUSSION AND DEBATE: Meaningful Participation

14.3.3 Access to the Court System

CASE STUDIES: Environmental Protests in Southeast Asia

197 **14.4 Right to a Safe, Clean, Healthy, and Sustainable Environment**

FOCUS ON: State Obligations Relating to Environmental Harm

CASE STUDY: The Southeast Asian Haze

14.4.1 Indigenous Groups and the Environment

FOCUS ON: Son La Dam, Viet Nam

14.4.2 United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP)

201 **14.5 Climate Change and Human Rights**

DISCUSSION AND DEBATE: Human Rights Impact of Climate Change

203 **14.6 Conclusion**

210 **15.1 Introduction**

211 **15.2 Political Human Rights**

Table 15-1: Political Rights in the UDHR and ICCPR

15.2.1 Right to Peaceful Association and Assembly (Articles 21, 22 of ICCPR)

Concept: Laws of Association

DISCUSSION AND DEBATE: Limiting Rights to Assemble

15.2.2 Right to Take Part in Public Affairs

DISCUSSION AND DEBATE: Is there a right to be a politician?

15.2.3 Right to Access Public Services

15.2.4 Right to Vote

215 **15.3 Understanding Democracy**

CASE STUDIES: Southeast Asian Versions of Democracy

DISCUSSION AND DEBATE: Models of democracy in Southeast Asia—minimalist or participatory democracy?

15.3.1 Democratization

15.3.2 Current Status of Democratization in Southeast Asia

219 **15.4 Human Right to Democracy**

DISCUSSION AND DEBATE: Human Right to Democracy?

15.4.1 Key Elements of the Right to Vote

15.4.2 Free and Fair Elections

Table 15.2: Elected Positions in Southeast Asia (from 2016)

Concept: Standards of Free and Fair Elections

FOCUS ON: ANFREL (Asian Network for Free Elections)

15.5 Freedom of Expression

15.5.1 Elements of Freedom of Expression

Concept: Standards of Free and Fair Elections

15.5.2 Right to Seek, Receive, and Impart Information

DISCUSSION AND DEBATE: Is the Internet a human right?

DISCUSSION AND DEBATE: How much information should the government tell you about smoking?

15.5.3 Limiting the Freedom of Expression

15.5.4 Freedom of Expression in Southeast Asia

DISCUSSION AND DEBATE: Pornography and Freedom of Expression

CASE STUDIES: Laws Criminalizing Anti-Government Expression

Concept: Defamation, Libel, and Slander

15.6 Human Rights and the Media

15.6.1 Traditional Media in Southeast Asia

Table 15-3: Ranking of Media Freedom

15.6.2 Censoring Traditional Media in Southeast Asia

CASE STUDY: The Maguindanao Massacre

15.6.3 Freedom of Information

CASE STUDY: Thailand's Official Information Act (1997)

15.6.4 New Media Issues

Concept Amateurization of the News

DISCUSSION AND DEBATE: Jurisdiction on the Internet

DISCUSSION AND DEBATE: How private should your Internet use be?

CASE STUDY: Internet Laws in Southeast Asia

15.7 Conclusion

Contents of Volume 1

- Chapter 1 The Fundamentals of Human Rights
- Chapter 2 International Human Rights Standards
- Chapter 3 International Human Rights Treaties
- Chapter 4 Protecting Human Rights in Southeast Asia
- Chapter 5 Human Rights Protection: The United Nation and the International System
- Chapter 6 The Rights of Non-Citizens: Refugees and the Stateless
- Chapter 7 The Rights of Non-Citizens: Migrant Workers and Trafficked Persons

8

Human Rights in Southeast Asian History*

Human rights in Southeast Asia cannot be traced to a single point in history when their existence was recognised by any States, or when they were introduced into the region from outside.

* The Chapter was prepared by Muhadi Sugiono, Department of International Relations, Universitas Gadjah Mada; Matthew Mullen and Michael (Mike) Hayes, Institute of Human Rights and Peace Studies (IHRP), Mahidol University with editorial inputs from Claus Meyer, Institute of Human Rights and Peace Studies (IHRP), Mahidol University; James Gomez, Bangkok University and Matt Copeland, Mahidol University International College

8.1 Introduction

Religious morals and community beliefs, including rules prohibiting violence or protecting private property, have always existed in some form or another, but these alone are not human rights. Rights to education or healthcare developed when governments emerged in the region, but again though they may overlap with human rights, they do not carry the same meaning as human rights. With the rise of globalization and the transmission of values from one region to another more rights were adopted such as women's rights, or the protection of people with a disability. At some point between the moral rights of religion and traditional customs to today's structure of universal rights, the human rights system came into being. It is not possible to point to one simple and undisputed history of human rights in Southeast Asia.

There are two debates on the history of human rights. The first debate concerns historiography or how to write history and it focuses on debates about whether history is a straightforward narrative or a range of views. Should human rights have a start point and a single narrative? Is history a simple story of a set of rights and freedoms gradually becoming accepted in the region until we have today's understanding of rights? Or is there no single story and history, but different views of what human rights mean and how they emerged? The second debate asks what history should include. This debate is more detail-orientated, concerning the events, people, and organizations that played a role in the rise of human rights. This chapter does focus more on the second debate on what should be in a history of human rights and details various events and periods, but it will refer to the first debate on how history should be written.

A major issue in the historiography of human rights concerns the question: how does the history understand the meaning of 'human rights'? There are three ways to approach this debate.

- Human rights means a set of ideas advocating the dignified treatment of people, a concept that already existed in religions and other social or moral values. This viewpoint associates the spread of human rights with the rise of religions and the development of organized communities. Those supporting this idea see human rights emerge with the spread of Buddhism, Hinduism, and then later Islam and Christianity, and linked to the establishment of rules and religious principles. Under this approach, human rights can be said to have always existed in the region.
- Human rights means how people are protected from the power of the State, and as a way to restrict that power. This viewpoint associates human rights with the rise of States and the various declarations and constitutions on the rights of men emerging mainly during the European Enlightenment in the 1700s. As such, human rights cannot be said to have existed before States themselves because their purpose is to limit State power. Under this approach, human rights in the region began with protests against abuses of colonial power, before moving into self-determination movements which used the idea of rights to argue for independence, and then finally into constitutions and other mechanisms which define State duties and obligations.
- Human rights means a universal standard of protection above and beyond the State. This viewpoint associates universal rights with the adoption of the Universal Declaration of Human Rights (UDHR) at the United Nations (UN) in 1948. The meaning of rights here is a set of rights for all humans, regardless of States, religions, or pre-existing moral values. This concept cannot emerge until there is

a belief that humans themselves, regardless of any status, have rights. Under this approach, rights are enforced through the international system (especially the UN) and its laws.

Further debate exists about the content of human rights history. Should the history be on popular movements against the State: how they defied dictatorships, formed democracies, and used protests to ensure the protection of people's rights? Or should it focus on how international laws on human rights influenced States and changed their behaviour? Or perhaps the emphasis should be on how human rights operated alongside political, economic, and social development in the region? Who or what had the most influence on Southeast Asian human rights? Is it civil society movements, government activities, or economic development? The history can be written in a number of different ways. There is no one correct answer to these questions. As such, this chapter will not propose a single history of rights, but instead, will examine a range of histories.

This chapter will discuss how States, laws, civil society, and violations together are the history of human rights in Southeast Asia. By selecting particular ideas each history assumes a better or more correct way of understanding human rights. But some questions will inevitably arise: for instance, if religions are the source of rights, why do they also create conflict and tension? Or how can governments be deemed vital when they have been so slow to implement human rights? Finally, while civil society movements are important, at the same time they alone can do little without the support of larger institutions like governments, religions, and cultures.

DISCUSSION AND DEBATE

What is the History of Human Rights?

For some historians, human rights can be traced to the European enlightenment where the concepts of equality and dignity gained importance. But others noted that these rights were not universal: slavery still existed and most women were excluded as rights were described as 'men's rights.' Still, others pinpointed the origin of rights to the establishment of the United Nations and the idea of universal rights from the UDHR, which assumed everyone possessed human rights regardless of where they lived, and States do not get to choose who gets their rights. More recently, Samuel Moyne (see Further Reading) argued that the rights movement didn't begin till the 1970s because until then the idea had been discussed, but not taken seriously. Only in the 1970s did civil society use them in advocacy and States begin to accept that human rights were deserving of universal protection.

How do you understand the history of human rights? Which dates are important? When did people begin to get protection from the powers of the State? When the world started to take human rights seriously? Or when people realized they should treat each other with respect, an idea found in major religions?



This chapter will examine the increasing influence of human rights in Southeast Asia through its recent history. An examination of this history will show that when given the opportunity, people in the region asserted their rights against colonizers, dictators, and other oppressive forces. The history will also show that States also took note of human rights and began to promote and protect them, though sometimes with reluctance and sometimes because they were demanded by civil society and international bodies.

8.2 Pre-Colonial History of Human Rights

Rights have existed in Southeast Asia in all periods of history, most coming from the religious values of reciprocity and respect for human life. These rights were limited in who had them: often belief in a religion or living within the political unit were required. But still, they were rights. Religion aside, various kingdoms or political units also granted some rights, but these tended to be limited to loyal subjects. In pre-colonial times, few people claimed or exercised their rights. There was a great diversity of political units at this time. Currently, the world almost entirely consists of the same type of political unit, the Nation State, but in pre-colonial Southeast Asia many different types of political units existed such as monarchies, tribes, sultanates, merchant city-States, ethnic groups, and so on. And such a variety of units will often mean different relationships between rulers and ruled and different legal systems. It is this diversity that makes it difficult to define a single, or even dominant, equivalent to human rights. The eras of sultanates, kingdoms, tribes, and colonies by modern standards were brutal: slavery was common; any form of equality, such as between genders or classes, was practically unheard of; kingdoms could assert ownership over people and land, freely enslave individuals, and extract steep taxes from the rural poor. In addition, those in power often claimed a divine right to rule.

Whatever the type of political system, most recognized people had religious and family rights, as well as rights to complain, and this sometimes even applied to slaves in the region. Although by current standards, these systems would not be considered fair and just, one could argue that they were in the context of the moral and legal systems of the time. While many political units were deeply patriarchal and more interested in protecting the elite, it is perhaps unfair to examine these periods from the perspective of our values and standards of human rights. It is inaccurate to claim the region mostly consisted of slave-based kingdoms with no respect for rights. Rather, the political units operated their own legal systems, structures, and values of human life which obviously are very different from today's views. Most of these political units were acting like the rest of the world, and according to the laws of the time. It is not accurate to say that these eras were golden periods where people lived in peace and harmony, as is sometimes taught in school. In these eras mortality was high, life was short, social mobility was non-existent, and women and children were treated poorly.

A challenge in writing a history of human rights is the relative nature of morality. Should historians equate all moral values to current standards and come to the inevitable conclusion that earlier societies were unjust and discriminatory? Or should morals be relative to the society they are in? Is it accurate to harshly judge mistreatment, such as slave ownership, or should these actions be considered acceptable under the morals of the time?



Discussion and Debate

How was Pre-colonial History Taught at Your School?

History is usually told from the viewpoint of the powerful and often does not mention the conditions of people who worked in the fields or who were not rich. In your primary and high school were ordinary people ever mentioned in textbooks at all? Was pre-colonial history taught as a period of peace and happiness? Did textbooks imply people had rights in this period?

How should topics like slavery be taught in history? Slavery is now seen as a serious crime, and something evil. But in the 18th Century slavery was clearly legal and just another form of ownership, like owning a car. Should the history describe slave owners as law abiding citizens complying to the legal and social standards of the time, or should history see them as people who do not realize the value of human life and that people should be treated with dignity?

8.3 From Colonialism to Self Determination

8.3.1 Colonialism

Colonialism occurs when one State asserts control over foreign land and dependencies. In other words, colonialism is a policy of dominance, where powerful States lay claim to foreign territories and force people on that territory to become dependents or subjects.

European **colonialism** fundamentally changed the social and political structure in Southeast Asia, but again, it is too simple to claim that colonialism as an evil period that enslaved millions. Under colonial rule, individuals were granted rights, but these were dictated by colonial companies or governments in faraway empires. Colonial laws automatically assumed colonizers had more rights and protection than the local population which fundamentally conflicts with the idea that rights make all people equal (the laws automatically assumed that the colonizers had more rights and gave them more protection). The main function of colonies was to provide goods and profit to colonial empires, using local resources and labour. Colonialism often led to economic difficulties in many Southeast Asian societies as the Colonial companies - often by force - took over markets and trade. Some groups, and this includes hill tribes or communities distant from colonial centres, managed to avoid these problems.

In much of Southeast Asia, colonialism was a move from local to foreign domination, rather than from freedom to servitude. While the negative impacts were severe and had long-term repercussions, some developments did occur. Rule of law was introduced, though not to current day standards. Some women's rights were established, although the struggle for equal rights for women still had many barriers. Developments in technology, such as telegraphs and medicine, led to improved communication and better healthcare. Southeast Asia was more connected to the world. The establishment of governments and bureaucracies led to more humane treatment. For example, introducing jails across the region meant less frequent use of the death penalty and corporal punishment. These advances cannot be regarded as early versions of human rights because they were not based on a desire to treat people with dignity, nor did they attempt to create equality. Rather they could be seen as bringing in European moral values, or ways to better manage colonial people.

8.3.2 Nationalist Movements in the 1900s

Nationalist movements first began to emerge in the late 19th century across Southeast Asia. They were led by predominantly western-educated elites with liberal views who aimed to liberate humans from the oppressive power of States by

recognizing freedoms, such as the freedom to express oneself, to vote, and to own property. These early nationalist movements did not immediately and exclusively focus on independence from colonial power, but on developing greater freedoms for the local peoples. The first nationalist movement in the late 1800s in the Philippines led by Jose Rizal resulted in Spain pulling out of the country. The movement aimed at turning the Philippines into an equal and genuine Spanish province. Similarly, students and Monk's movements in Myanmar argued for the equality of Myanmar citizens in the early 1900s, and similar movements operated in Vietnam, Malaysia, and Indonesia. Even in uncolonized nations like Thailand, at about the same time, Thailand banned slavery and torture, introduced a modern government system, and reformed education which all gave people more rights under the modernizing reign of King Chulalongkorn. While these movements may have made claims about rights, they were not to human rights as understood today. The focus was on citizen's rights, political rights, and freedom from abuse by the colonial governments.



CONCEPT

Nationalist Movements

Nationalist movements are made up of national groups who wish to gain independence typically from a colonial government, though in some cases independence can be based on ethnicity or religion. Most common in Southeast Asia were anti-colonial movements, which can also be called national liberation or independence movements. Movements also existed at the sub-national level such as in Aceh, Mindanao, or Southern Thailand.

Independence movements in Southeast Asia developed alongside challenges to colonialism across the globe. Particularly from 1900 onwards, administrative and political reforms began to lead to greater levels of local representation and participation. For example, in Indonesia, the Dutch introduced an 'Ethical Policy' in 1901 under which the Netherlands pledged welfare and modernization to fulfil a debt to Indonesians for the wealth it had generated for the Dutch empire. The policy may have had good intentions and was probably the most liberal in the region, as most other empires considered colonial populations inferior, but it was not successful as it was given little financial or political support. In Burma, administrative reforms were initiated in the 1920s and came after similar reforms in India. In British Malaya, reforms included decentralization which aimed to redistribute power back to local rulers, and came in reaction to British concerns about colonial rule upsetting the Islamic rulers. It has been suggested that the concessions made by colonial governments were an acknowledgement that Southeast Asian nationals should be treated better. Consequently, though the changes were not up to the standards set by post-World War II universal human rights treaties.

A major turning point towards independence came with the Japanese occupation of Southeast Asia and the retreat of former colonizing countries during World War II. War brought with it significant violations of rights. The Japanese used forced labour throughout Asia, resulting in the deaths of hundreds of thousands of labourers who were forced to work building roads, railways, and other constructions. Over 16,000 prisoners of war, including nationals of western countries, were captured during

fighting in the region. In addition, Japan used 'comfort women:' young women from various ethnic and national backgrounds who were forced into sexual servitude for Japanese soldiers. The Japanese occupation of Southeast Asia may at first have appeared to liberate these countries from colonialism, but soon people realised that liberation was yet to be achieved. For instance, in Burma, the independence fighters, including Aung San and Ne Win (both who would become leaders in post-war Burma), were originally trained and supported by the Japanese but soon switched sides to the British after realizing that Japanese promises of independence were not genuine.

With the defeat of the Japanese, many Southeast Asian nationalist movements assumed they would gain independence, but this did not happen. Instead many colonial nations returned to reclaim their colonies such as the Dutch to Indonesia, the French to Indochina (Vietnam, Cambodia, and Laos), and the British to Malaysia and Burma. And so the next phase of the struggle for these national movements became self-determination.

8.3.3 Struggles for Self Determination

The struggle for self-determination may be the first human rights movement in Southeast Asia. Across the region, nationalist movements believed they should no longer be considered colonies, claiming it was their right, and this would later become a human right, to decide their own political systems and the management of their resources.

Anti-colonial movements across the globe influenced self-determination movements in Southeast Asia. In British India, the national movement led by Gandhi, Nehru, and others became a source of inspiration for anti-colonialism. Gandhi's idea of peaceful protest, which was practiced by the Indian nationalists, eventually led to Indian independence and is still influential today among peace practitioners. Other nationalists in Southeast Asia looked towards China for ideological inspiration. As such, Marxist and Maoist ideologies became influential tools for both the guerrilla uprisings against colonial powers and then economic structures of liberated countries. Both the Burma Communist Party and the Communist Party of Indochina, which later split into Vietnamese, Laotian and Cambodian factions, were established in the early 1930s and had connections to the Chinese Communist Party. The largest communist party at the time was in Indonesia. The method of self-determination itself was often in conflict as many countries had both communist and non-communist independence movements, which led to civil wars throughout the region.

Another influence was the United Nations. With the adoption of the UN Charter and the UDHR, colonial powers were forced to acknowledge the right to self-determination as a part of international law. Nationalist movements across Southeast Asia could draw upon the language and promises of the UN Charter in their claim for self-determination and racial equality. Self-determination is mentioned in Articles 1.2 (on the UN's purpose) and 55 (on economic and social cooperation) of the UN Charter. Self-determination also appears as a human right, and one which should be available to colonial subjects as they were a common standard "both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction," as stated in the Preamble of the UDHR. Further legal standards on self-determination include the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, and the first Article of the ICCPR and ICESCR treaties. Disagreement still existed regarding the meaning of self-determinism as the term was only vaguely defined and did not imply legally binding obligations on State parties. Nor did it clearly detail who had this right. While technically considered a human

right, self-determination can be considered a group right and intended for 'peoples' and not a right for an individual (see box on Self Determination for a discussion of this term), and so it is not seen as an individual right in some UN bodies.



Concept Self-Determination

Generally, self-determination refers to colonized political groups seeking to regain their political freedom in order to govern themselves. Self-determination refers to the rights of peoples (or groups of people who are politically linked) to freely determine their sovereign and international political status. The right to self-determination uses a confusing English word: 'peoples.' Peoples is the plural of people, or many groups of different people, but there is no legal definition of the word, and no indication how it differs from 'people.' The term was invented because States were reluctant to recognize minority or ethnic groups for fear they would want independence, so only recognized colonized states were acknowledged. In Southeast Asia the definition of colonized 'peoples' has led to debates on who can claim self-determination. For example, many ethnic groups in Myanmar such as the Shan, Kachin, Karen, make this claim, though its legal basis is open to dispute

What is surprising is that human rights were left out of most self-determination discussions during this period. Why self-determination movements did not to use the language of human rights is unclear, but several arguments have been put forward. First, self-determination was primarily a political issue, and not regarded as an individual rights issue. As such, most anti-colonial movements focused on the rights of a particular group, and not individual rights. Second, States only occasionally and strategically mentioned rights to support their position. For example, the British discussed minority rights for the Karen and Kachin groups in Myanmar who had supported them during World War II but the topic was quickly forgotten following Burmese independence. Further, although decolonizing countries prominently declared their support for human rights (see the Non Aligned Movement's use of human rights below), they rarely indicated how they themselves would comply with such rights. Third, the dominant political concern in Southeast Asia at this time was the **Cold War**. The promotion and protection of human rights was drowned under Cold War rhetoric to fight for or against international communism. Lastly and importantly, human rights were still a very fringe topic at this point. There were no international treaties in force and it was not taught in schools. Only the educated even knew what the term meant, so mentioning human rights was never going to gain these movements widespread support. Instead, ideals such as the promotion of nationalism and development were prioritized by the newly emerging countries.

Cold War

The term 'Cold War' refers to a confrontation between the two superpowers of the USA and the Soviet Union that went from the end of World War II to around 1990. The conflicts are mainly called 'proxy wars,' where rather than the two superpowers confronting each other directly they supported conflicts in other countries such as Vietnam, Afghanistan, and Angola.

8.4 From Independence to Authoritarianism

The countries of Southeast Asia eventually gained their independence in a variety of ways, although not always peacefully or in a timely manner. Whether through bloody revolution or otherwise, by 1957, there were seven independent states in Southeast Asia. To these would be added Singapore (1965, after it split from Malaya), Brunei (1984, after it split from former British Malaya) and Timor Leste (liberated from Portugal in 1975, annexed by Indonesia in 1976, before referendum in 1999 led to independence in 2002).

Upon independence, countries were pressured to align themselves politically in the global order. Some were communist, others capitalist, though most in Southeast Asia joined the Non-Aligned Movement (NAM). As such, the region was to play a central role in the development of the NAM, a group of States who did not closely align themselves to either side in the Cold War, and who became known as the Third World. Decolonizing countries shared many interests. They were concerned about the economic and military power of the First and Second Worlds, and they were united in a mutual dislike of discrimination and racism still common as a result of colonial legacies (such as the apartheid regulations of South Africa). They also recognized that to counter the economic power of European and North American countries, they needed to align closely.



Concept

Non-Aligned Movement (NAM) in the Three Worlds

During the Cold War the world divided into three camps: the First World (or western capitalist countries); the Second World (or communist countries); and the Third World (or poor, developing, and decolonizing countries). Third world countries formed the basis of the Non-Aligned Movement, a group of around 100 States not aligned to the major power blocs of the First or Second Worlds. Active countries in this alliance were India, Indonesia, Malaysia, Egypt, and Cuba.

The first large meeting of decolonizing countries (mainly African and Asian) occurred in Bandung, Indonesia in April 1955. The NAM, which was announced in 1961 in a follow-up conference, can be said to have originated from the Bandung Conference. It is interesting to note that human rights were on the agenda. They were also the first of the ten principles found in the outcome document called the Final Communiqué of the Asian-African Conference, declared at Bandung. In practice it is debatable whether NAM countries were supportive of all human rights, as NAM countries tended to focus on a selection of rights concerning decolonization and non-discrimination, and at the same time, they had strict controls over civil rights such as the freedom of expression, and political freedoms.

Independence would bring with it new human rights tests and challenges. Colonialism and World War II had taken its toll on Southeast Asia. Throughout the region, even after borders were drawn and independence gained, disagreement remained as to how nations should be governed, and by whom. The new governments across the region faced internal conflicts from ethnic minorities, religious groups, and political ideologies. In newly independent states, political and economic models could be

Authoritarian
 Authoritarianism is defined as a strong centralized rule with few political freedom allowed for the population. There are many types of authoritarianism, but the main feature is that one person, or a small group, makes all the political decisions. Authoritarianism may be brutal, such as in a military dictatorship, or soft, where political systems seem democratic but all decision-making is done by a select person or group.

exploited. For example, the leading role of the military in Burmese independence movements allowed it to dominate politics. In other countries, governing ideologies and experiments were tested, often at the expense of the people. Most of these governments were **authoritarian**, a political system where power is concentrated, and people have little say in what government does. In much of the region, State power could not be questioned and human rights were ignored. In addition, forty years of the Cold War added to the violence, all of which resulted in a period of widespread and systematic human rights violations. But, as will be illustrated, it was the violations and suffering of people that inspired them to challenge military rule through changes such as the rise of civil society and democratic movements. Features of this period were the pervasiveness of authoritarian rule by military strongmen; the conflict and atrocities created by the Cold War; and growing desire for democratization by people in the region. The next section examines these three features.

8.4.1 Authoritarianism and Military Rule

While not all countries in Southeast Asia have had military governments, it is by far the most common type of non-democratic government. During the 1970s, the military ruled in all but two countries (Singapore and Malaysia). The reasons for the rise in military governments across the region are mostly similar. Countries faced internal conflict, some as a result of ethnic insurgencies (Burma), political uprisings (for instance, the communist movements in Indonesia, Cambodia, Vietnam, Laos, and Thailand), or unstable democracies (Thailand). In such cases, the military considered they had to intervene in the political system to create stability and order. Military governments primarily come to power through **Coups d'états**, and some countries in the region have been prone to many with Thailand being infamous for its number of coups.

Coups d'état

Literally, to hit or cut the State. Coup refers to an illegal seizure of power (most commonly by the military). Coups are often conducted by force, with the military seizing government buildings, media, and severely restricting people's rights while establishing power.

Table 8-1: Where do Coups Occur in Southeast Asia?

Country	Occurrence of Coups
Thailand	22: Around twenty-two since 1932, the most recent in 2014
Lao PDR	8: Laos had eight coups in the 1960s, three of them successful
Vietnam	5: South Vietnam experienced around five coups in the 1960s
Philippines	5: Around five coups since the Marcos regime, all but one unsuccessful
Myanmar	2: Ne Win comes to power through a coup in 1962, as does the SLORC in 1988
Cambodia	2: Lon Nol comes to power in a 1970 Coup. Hun Sen consolidates his power in a coup in 1997
Indonesia	1: Suharto coming to power in 1965
Timor-Leste	1: Following independence from Portugal in 1975, and before Indonesia annexed Timor Leste
Brunei	None
Malaysia	None
Singapore	None

The human rights record of Southeast Asian military governments, as opposed to democratic governments, has often been very poor, with widespread violations of political rights, freedom of expression, and more violently, disappearances, torture, and arbitrary detentions. Because military governments rule through force, their

greater use of violence and intimidation is hardly surprising. Further, because many military governments may not see themselves as bound by international standards there may be a greater tendency to ignore human rights, regardless that these may already be law in the State. While not inconceivable that military government can lead to an increase in human rights standards, it is rare.

A brief examination of military governments in Southeast Asia shows why they have a poor human rights record. During the Marcos regime in the Philippines, martial law was established which allowed for the arrest of political opponents, the criminalization of political activities, and the closing down of the media. During his regime, businesses were taken over and given to the Marcos family who amassed great wealth. Indeed, the legal system is still searching for the billions of dollars Marcos is considered to have stolen to compensate those who faced violations during his period in office. Similarly, the Suharto family in Indonesia is also known for the wealth it gained while in power. Suharto was estimated to be worth \$15 billion when he stepped down from government. During this period, the military became known for its extra judicial killings, suppression of free speech, the arrest of political opponents, and military interference into government activities.

FOCUS ON

Some Military Governments in Southeast Asia

Burma (Myanmar): Ne Win (1962–1988); SLORC and later the SPDC (1988–2011)

Cambodia: Lon Nol (1970–1975); Khmer Rouge (1975–1979)

Indonesia: Sukharno (1959–1966); Suharto (1966–1998)

Laos: Phoumi Nosavan (1959–1960)

Philippines: Marcos (1972–1981)

Thailand: Phibunsongkhram (1938–1944 and 1948–1957); Sarit Thanarat (1959–1963); Thanom Kittikachorn (1963–1973); Surayud Chulanont (2006–2008); Prayut Chan-ocha (2014–)

South Vietnam: Duong Van Minh (1963); Nguyen Khanh (1964) Nguyen Cao Ky and Nguyen Van Theiu (1965–1975)

Despite the above violations, military governments may be supported by large sections of society and can bring stability and peace to many. Often the wealthy elite welcome these governments because they allow the economy to grow and business to develop, although this could be through corruption rather than the establishment of the rule of law. Both Marcos and Suharto were popularly welcomed by the middle classes, and their many rights violations were also tolerated by this group.



The support was also international. During the Cold War, the West, and particularly the US, supported military governments if they were anti-communist, as most were in Southeast Asia. For example, the Philippines, Thailand, Cambodia, South Vietnam, and Indonesia all received economic and military support from the US for their anti-communist activities. The fact that these regimes violated rights was ignored. The United States rarely criticized these regimes, claiming as they did about the Marcos regime that human rights violations were an internal problem outside the USA's jurisdiction. In the years since this view changed dramatically. Now all States, including the USA, recognize that widespread human rights violations are not internal matters and that the international community has obligations to respond to widespread human rights violations.

To summarise, the Cold War, through international support from the West, enabled dictators to stay in power. And within their countries, a fear led some people to support undemocratic military rule to save them from the threat, whether real or imaginary, of communism. Numerous complaints were made to the UN, and as Chapter 5 on the UN shows. The Philippines and Indonesia even faced an investigation by the Human Rights Commission. While some countries did experience occasional breaks from dictatorship (for example, a brief period in the 1970s for Thailand), most countries lived under authoritarian rulers until the 1990s when civil society groups advocating for democracy finally challenged the status quo.

8.4.2 The Impact of the Cold War

The Cold War not only affected security around the world but also had economic and political repercussions too. As regards economic factors, the USA and its allies promoted capitalist economic systems, while the Soviet Union sought to establish communist governments. As regards politics, both sides were willing to support dictatorships and ignore human rights violations if the State supported their ideology. The USA, which sees itself as a great supporter of democracy, not only tolerated authoritarian regimes but supported them. For example, the USA was a close supporter of General Suharto, General Marcos, the Lon Nol military government in Cambodia, and the South Vietnamese military governments. And China was one of the few countries to support the Khmer Rouge despite the atrocities they committed, and then later the USA and other Western States were to throw their support behind the Khmer Rouge to maintain their seat at the UN, regardless of the millions of people who died because of their regime. They chose to prop up a regime that had committed genocide over the possibility of a communist-Vietnam backed regime gaining the Cambodian seat. In other words, during the Cold War, alliances took precedence over human rights. As regards security, both sides gave military support to insurgency forces which started or prolonged conflict in the region. As such, the Cold War instigated a period of instability and conflict where human rights often went unprotected.

Tensions grew significantly during this period. The western non-communist world was especially concerned that the spread of communism could lead to a 'domino effect,' where if one country fell to communism, all other Southeast Asian countries would fall too, like a line of dominos. The victory of communists in Vietnam, Cambodia, and Laos, the strong communist movements in Thailand, Myanmar, Malaysia, and the Philippines, all reinforced this fear. As such, all the major Southeast Asian countries which constituted the founding countries of the Association of Southeast Asian Nations (ASEAN)—that is, Indonesia, Malaysia, the Philippines, Singapore, and Thailand—clearly shared this authoritarian anti-communist view. Southeast Asia, in effect, became a battleground between the United States, China, and the Soviet Union.

The American War in Vietnam shows the human cost of the Cold War. Following the first Indochina War between the French and the Viet Minh from 1945 to the mid 1950s, Vietnam was divided in two. Officially between North Vietnam (supported by communist allies) and South Vietnam (supported by the US and other anti-communist forces), the war spilled across the border to Laos and Cambodia, leading to over a million dead.

The American War in Vietnam played a significant role in the evolution of human rights, both regionally and internationally. During the conflict, international standards were disregarded, prisoners of war abused, and civilians targeted. The guerrilla style of conflict brought the war to small communities, killing many innocent civilians. Because North Vietnam used Laos and Cambodia as supply routes for fighters in the south, the USA illegally bombed them in violation of international law. It was these war crimes that revealed a need to strengthen international humanitarian law. For example, US bombing operations, particularly those in Cambodia and Laos, failed to make distinctions between civilians and combatants, resulting in the widespread death and suffering of civilian populations, and which some argue led to the rise of the Khmer Rouge. The American War in Vietnam was not classified as a type of conflict governed by the laws of armed conflict (more details of this are in Chapter 10). It has been argued that the legal shortcomings during the American War made it possible for the USA to disregard the impact on civilian populations. As a result more humanitarian protection was designed in the form of the two Additional Protocols to the Geneva Conventions in 1977, a topic which will be discussed further in Chapter 10.



FOCUS ON Operation Menu

‘Operation Menu’ was the name given to one of many US covert carpet-bombing operations during the American War in Cambodia and Laos and lasted from 18 March 1969 to 26 May 1970. This operation was particularly controversial because it went ahead without the approval of the US Congress, arguably making it a war crime. According to the National Security Advisor, Henry Kissinger, the massive bombing campaign in Cambodia was targeted at “anything that flies, anything that moves.” As a result, Laos became one of the most bombed countries in the world despite not even being a party to the conflict. To this day, people continue to be injured or die from unexploded ordinances found in the ground.

8.4.3 Atrocities in Southeast Asia

During this period of authoritarianism and conflict, significant gross and systematic violations of human rights occurred. The most significant of these was the Cambodian ‘genocide’ where 1.7 million Cambodians died as a result of the Khmer Rouge. Whether the deaths during the Khmer Rouge can be called ‘genocide’ is only a technical argument about the legal definition of Genocide, (to be addressed in a future chapter). Following a mix of Marxism, Maoism, and Leninism, the Khmer Rouge rose to power in the early 1970s, preaching peace and justice to rural communities who had experienced US carpet-bombings and the Vietnamese occupation of eastern Cambodia. As such, they advocated abolishing religion, private property and money, and the pursuit of a peasant utopia. After taking over Phnom Penh on 19 April 1975, the

Khmer Rouge expelled people from the city to start large agrarian projects. Anyone deemed an intellectual, professional, capitalist, politician or trader was targeted, and most frequently, killed. From 1975-1979, more than 1.7 million people died, many of these starving because the ill-conceived agrarian projects failed to deliver food, while others were executed or tortured. This genocide occurred only thirty years after a post-holocaust world vowed 'never again.'

FOCUS ON Khmer Rouge

The Khmer Rouge, sometimes known as Democratic Kampuchea, Angkhar, or the Pol Pot regime, was the self-proclaimed communist regime that controlled Cambodia from 1975 to 1979. They came to power after a turbulent period in Cambodia's history involving civil war, coups, and the American War in neighbouring Vietnam spilling across the border. Cambodia avoided taking sides during the American war for much of the 1960s, but the Military government which came to power through a coup in 1970 took a strong anti-North Vietnamese position, dragging Cambodia into the conflict. Khmer Rouge forces captured Phnom Penh and introduced their harsh rules. Under the leadership of Pol Pot, the communists systematically destroyed various pillars of society including the money markets, organized religion, and family life. Inhabitants of cities and towns were forced to live and work in rural areas, and everywhere people suffered from overwork and malnutrition. Fear of losing power caused the regime into a reign of terror in which people were tortured and killed because they were accused of being an 'enemy of the revolution,' Over one million people died as a direct result of the regime's policies, including about 100,000 people who were killed in prisons like the infamous, 'Tuol Sleng' in Phnom Penh. The Khmer Rouge's rule finally came to an end in early 1979 when the Vietnamese army overthrew them and installed a new government.

Alongside Cambodian atrocities was Indonesia's brutal suppression of a supposed communist coup in 1965-6 in which somewhere between one-half and one million suspected communist party members were killed, and hundreds of thousand imprisoned. The killings were mostly carried out by paramilitary groups and are still not openly discussed in Indonesia, though recent films and books have finally led to discussions in the media. After suppressing the communists, the Indonesian military used similar tactics to occupy East Timor (1975-1999). During this occupation, an estimated 200,000 East Timorese, or about a third of its population, were killed. A notorious incident in the suppression of the East Timorese is the **Santa Cruz Massacre**.





FOCUS ON

Santa Cruz Massacre

The Santa Cruz massacre refers to the killing of 250 people at Santa Cruz cemetery in Dili, Timor Leste on 12 November 1991. Around 2,000 people marched to Santa Cruz cemetery in honour of a young man shot dead by Pro-Indonesian forces. The group which consisted of people waving pro-independence flags and protesting the Indonesian occupation were attacked by Indonesian soldiers inside the cemetery. Most victims were shot, but some were reportedly stabbed and beaten to death. What distinguished this massacre was that it was not only recorded, but the video was smuggled out of East Timor (past Australian authorities looking to seize it) and broadcast around the world, leading to widespread protests against the Indonesian military. It also led to increased international support for East Timor independence.

Other events in Southeast Asian post war history can also be described as massacres. These include the numerous massacres of Vietnamese villagers during the American War, the killing of university students at Thammasat University in Thailand in 1976, and the killings of villagers and political opponents throughout Myanmar during its military dictatorships, such as the Depayin massacre of around 70 LDP supporters in 2003. Though the response to these massacres has empowered the human rights movement, few, if any, of the perpetrators have ever been brought to justice.

8.5 The Democratization of Southeast Asia

At the end of World War II, no country in Southeast Asia could be described as a democracy. While many did experiment with democracy in the post war period, by 1990, few could be described even as partial democracies. However, by the end of the 1990s, most countries underwent a process of **democratization**. Why the sudden change during this period? This section examines the rise of democracy in the 1990s and how it is linked to human rights.

Democratization

Democratization describes the process of becoming a democracy. Theories as to why democratization occurs include economic development, the rise of civil society during globalization, and strong leadership.

Democratization simply refers to the process of becoming a democracy. Democratization can take many forms, from sudden regime changes through uprising, such as the Philippines People's Power movement of 1986, to slow and gradual transitions as when the Myanmar's military government gradually increased the number of elected representatives from 2008 onwards. Regardless of how democratization occurs, the result allows people to play a greater role in the political system, which means that their human rights, and particularly their political rights, will be better protected.

8.5.1 Theories of Democratization in Southeast Asia

There are many arguments on what causes a country to turn democratic. Looking at the examples across Southeast Asia, no clear pattern emerges. While some countries did not become more democratic, others made huge transitions from authoritarianism to democracy. One theory proposed by Samuel Huntington in his book *The Third Wave: Democratization in the Late Twentieth Century*, is that democratic change does not occur individually to each state, but is more like a wave which sweeps across regions or even the globe. In this theory known as Huntington's Waves, the third wave of democratization occurred from 1970 to the late 1980s. In Southeast Asia, only events in

the Philippines—which overthrew the dictator, President Marcos, during the People’s Power movement in 1986—fit the pattern. The wave of democratization in Southeast Asia came later, with democratization occurring in three other countries in the following decade (Cambodia in 1991, Thailand in 1992, and Indonesia in 1999).



CONCEPT

Huntington’s Waves

Influential in the study of democracy, Huntington’s book *The Third Wave* introduced the phrase, ‘the third wave of democratization,’ an important social science concept of the 1990s. Defined as “a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly outnumber transition in the opposite direction during that period of time,” this process began in Portugal in the mid-1970s and spread across the globe from South America to Asia and Eastern Europe by the end of the 1980s. It was preceded by two other waves that took place from 1828-1926 and after World War II from 1943-1964.

A combination of factors may explain the slow influence of democratization in Southeast Asia. In particular, the threat of communism was a great concern in the 1970s. Because neither of the major Cold War parties supported democracy (as mentioned previously, the West supported military dictatorships that fought communism, and communist parties rejected liberal democratic models), those advocating it had little support from the international community. In fact, they would not be heard until the end of the Cold War.

Fear of communism aside, two other factors prevented Southeast Asian countries from democratizing earlier: economy and culture. Most countries affected by the third wave of democratization in East and Central Europe and Latin America faced serious economic and, consequently, social problems. It was these problems that led people to feel dissatisfied with their governments and encouraged them to rise up in protest. On the other hand, most Southeast Asian countries enjoyed unprecedented economic growth in the 1970s, leading to a reduction in poverty and improvements in people’s quality of life. Such prosperity gave Southeast Asians less incentive to demand political change. As a result, sustained economic growth during the third wave of democratization meant no significant opposition to dictatorship emerged in this region.

Culture, especially the influence of Confucianism, is another important factor which prevented Southeast Asian countries from democratizing. Characterized by its emphasis on collectivism, hierarchy, discipline and conformism, Confucian beliefs can be in conflict with the values of democracy, such as individual freedoms, equality, and the right to hold opposing political opinion. While Confucianism is mainly associated with Chinese culture, it has influenced other non-Chinese countries in Southeast Asia. In the context of their economic success, many Southeast Asian leaders supported Confucian values as collective values, later rebranding them as Asian Values. They opposed democracy as mostly reflecting the western values of individualism, and argued for the superiority of Asian Values as being culturally more relevant while also allowing for quicker economic growth.



CONCEPT

Asian Values

'Asian Values' argues that Asian countries do not share the same social, cultural and political values as Western countries, including differing views of human rights, democracy, and political practice. Asian Values assume that proper Asian citizens should respect their elders, not criticize their government, and know the importance of duty to one's community. Asian Values were used to criticize the belief in universal human rights during the 1980s and 1990s. The main elements of the Asian Values debate on human rights are:

- Human rights are culturally specific rather than universal;
- International systems should work on the principle of non-interference which means countries should not criticize one another on their human rights record; and
- A country's sovereign rights are threatened by human rights.

Despite opposition, Southeast Asian countries could not escape the demand for democracy. In the late 1980s and early 1990s democratization took place in the four Southeast Asian countries of Cambodia, Indonesia, the Philippines, and Thailand. Democratization in Indonesia and Thailand occurred as a process of negotiation between the ruling elites, the military, and the opposition democratic groups, while in the Philippines it took place following the overthrow of a president by a popular uprising. Cambodia took a different path of a peace treaty. These four processes will be briefly examined to show the variety of paths democratization can take.

In the Philippines, the ruling government under President Marcos was ousted through a 'People Power Revolution,' after more than two decades in power. Democratization began with an election in February 1986 with President Marcos running for a fourth term. He was opposed by Mrs. Corazon Aquino, whose husband was among those killed by his regime. As predicted, the fraudulent election gave victory to President Marcos but in so doing, sparked the anger of the people. Around 500,000 people, including prominent figures, took to the street on the day Marcos was sworn in, which resulted in his removal from power. President Marcos and his family were forced to leave the country and Corazon Aquino became the new president.

In Thailand, following weeks of violence in May 1992, democratic transition began with an agreement between the military junta led by General Suchinda and the opposition forces to amend the constitution with the ultimate aim of reducing the role of the military in politics. This amendment led to the adoption of the 1997 constitution, a foundation of Thai democracy. Similar to Thailand, democratization took place in Indonesia following huge protests against the government caused by frustration at the collapsing economy as a result of the economic crisis of 1997. With riots in the streets and military and political groups divided in their support, President Suharto handed power to Vice President Habibie in May 1998. A constitutional amendment was negotiated between Habibie, his ruling Golkar Party, the military, and opposition forces. Based on this democratic constitution, parliamentary and presidential elections were held in 1999, the first election after more than 30 years of military-backed authoritarian government under Suharto.

Cambodia underwent a unique democratic transition. In September 1991 peace talks were held between the warring parties of the Khmer Rouge, the royalist Funcinpec Party, and the Cambodian People's Party (CPP). The result of the negotiation was a peace treaty known as the Paris Peace Accords. The international community played a significant role in this peace agreement, with the UN Secretary General present at the meetings. The negotiation resulted in the establishment of a UN mission to Cambodia (called UNTAC or the UN Transitional Authority in Cambodia) to manage the transition to democracy and the founding of a democratic government, which divided power between supporters of the monarchy and the CPP. Although Cambodia did eventually hold a democratic election in May 1993, the results were overturned by a military coup in 1997 when the CPP forced the Funcinpec leader into exile.

DISCUSSION AND DEBATE

What makes a country turn democratic?

- Is it rising levels of wealth? Do wealthier people desire more input into decisions in the economy?
- Is it the increasing globalization of the media? Do people see democracy in other countries and want similar developments in their own?
- Is it because people have become more educated about politics, rights, and wealth?
- Is it because a small number of powerful people have decided democracy is a better system?

Find out what happened when your country democratized, talk to people who lived through democratic change and ask them why they think it happened, and why people supported the change.

8.6 The Emergence of Universal Human Rights

Human rights, as currently understood, that is, the rights as found in international treaties, and managed by the United Nations, became more accepted in the region from the 1970s. Human rights had been acknowledged before this period - as previously mentioned in this chapter, human rights were noted by the NAM movement, and parties to the Cold War conflict sometimes mentioned rights as related to their cause—but the idea of a universal set of rights relevant to all humans was not widely accepted by States, individuals, and organizations until more recently. This section details the rise of a contemporary understanding of human rights by explaining how it was accepted by civil society groups and enforced by UN activities.

8.6.1 The Rise of Civil Society: Women and Students

Throughout Southeast Asian history, people have organized into civil society groups to oppose ruling powers. Some took the form of nationalist movements, others became revolutionary armies, and more recently, social movements were formed. In this section, the term 'civil society' does not refer to revolutionary armies or opposition governments, but groups of people organizing outside the military and



State. These civil society groups mainly formed from the late 1960s and went on to become either social movements (such as People's Power in the Philippines) or NGOs. Two important precursors to civil society human rights movements will now be briefly examined: women's rights and student movements.

Today, many people would never question whether women are equal to men in value and rights. But not long ago, in Southeast Asia and throughout the world, equal rights for women were an outrageous notion. By the 1970s though, the women's rights movement gained momentum, firstly in the west and soon after in developing countries. Women's rights were being discussed in the media, at university, and in politics for the first time. In Indonesia, Gerwani, a women's organization working in the 1950s and 1960s with millions of members, advocated for equality but its close association with communism led to its abandonment by the late 1960s. Many other Southeast Asian countries had similar women's rights groups, which are discussed in Chapter 9.

The women's rights movement could establish the broader acceptance of human rights in the region whereas other human rights activists had great difficulty. There are a couple of reasons. First, many supporters of women's rights were already working in government, and in some cases, were the wives and daughters of officials. The women's rights movement was not overtly political in the sense of challenging State power, and as such, they were not considered an anti-government force. A second reason is that there was a developed civil society network around these rights in pre-existing women's organizations working on issues like education, health, and employment. Finally, many Southeast Asian governments already had women's commissions, women's development plans, government-run shelters, established departments, ministries, and social welfare programs for women, all of which allowed for greater engagement between women and the government. For all these reasons, human rights activism first developed through the women's rights movement in many Southeast Asian countries.

Students also constituted another significant movement. Most countries in the region have seen student movements challenging governments, and many of these have been harshly put down. There are a variety of reasons students are politically active: they're enthusiastic and passionate about events; they are affected by poorly run economies and bad governance which can deteriorate university standards and prevent students finding jobs after graduation; students are already organized into institutions through universities; and finally, they are often exposed to ideas such as rights, democracy, and freedom through lecturers and fellow students. Many were also influenced by communist movements in the post-war years.

The more famous student movements were anti-government. In Thailand, student protests in 1973 led to the fall of the military government; a few years later students were attacked by pro-government forces, killing around 100 students. Similarly, in Myanmar, students have been active since the 1920s, with movements in the 1960s and more famously, in the 8-8-88 (8 August 1988) uprising. They also faced repression from the military. Like Thailand, after military crackdowns, students left the city to take up arms in the jungle, forming groups such as the ABSDF (All Burmese Students Democratic Front). But not all student groups were anti-government. Pro-government student groups were also active on ethnic or religious issues. In particular, Malaysia had strong student groups who sought greater recognition of Islam in universities, and some Indonesian student groups sided with Suharto and played an important role in his rise to power, although other student groups were aligned with communists in an attempt to overthrow him.

Although student movements did not actively advocate specifically for human rights, they did work around rights issues such as democracy, livelihood, and equality. Student movements peaked in the 1970s when they helped to depose governments. Following this period, most students in Southeast Asia faced restrictions from their governments, making protests difficult. For example, the Myanmar government closed its universities for about 5 years after the 8-8-88 movement. In fact, in 2015, student protests are still banned in Thailand, Singapore, Malaysia, and Vietnam. Even under these restrictions, many student groups continue to advocate for rights, democracy, and peace.



DISCUSSION AND DEBATE

Is history made by people or organizations?

In all this talk of kingdoms, slaves, military governments, and democratic movements, it may appear that individuals matter little; that it is larger and more powerful institutions which determine history. While it is true that a single individual cannot overthrow a political system, many individuals working together can.

How important were individuals to the history of human rights? Can one person change a society, or rather is it their activities in coordination with many others that leads to change? For example, within the region, many hardworking women and students helped to force change in human rights. But who can take the most credit for the ensuing democratization and women's rights? The people or the movements they led?

8.6.2 The Rise of Civil Society: From NGOs to New Social Movements

The women's and students' movements were important precursors to the national-level human rights NGOs which started in the 1970s in many Southeast Asian countries. Among the first was the Indonesia Legal Aid Foundation (YLBHI) established in 1970. This organization gave legal aid mainly to political prisoners. Appearing soon after, the Task Force Detainees of the Philippines (TFDP) was established in 1974, which like YLBHI, supported political prisoners jailed under Marcos's martial law. In Thailand, the Union for Civil Liberty (UCL) was formed in 1973 by university lecturers (although they were not officially registered till 1983), mainly to support the student movement and to ensure the civil liberties of members of the democracy movement.

Why human rights organizations appeared in these three countries at about the same time could be because they all experienced similar political upheavals at about the same time – martial law in the Philippines, the 1973 coup in Thailand, and Suharto's 'New Order' of the late 1960s. This was a period of great upheaval in many Southeast Asian societies. Students were politically active. Farmers, workers, and peasants were organizing into protest groups. Communist and anti-communist groups were actively recruiting people in villages, universities, and workplaces. Most of these groups were seeking some solution to their problems, whether it was democracy, peace, or better treatment, and in the next decades some groups would turn to human rights.

Some external factors contributed to the development of human rights at this time too. In the Philippines the actions of the Roman Catholic Church did much to support human rights. Likewise, in Latin America, Catholic churches engaged in poverty alleviation and opposed military dictatorships believing that the promotion of human rights, alongside peace and charity, were important church activities. These actions were known as liberation theology. Another influential organization was Amnesty International which after it was established in early 1960s highlighted the injustice of many prisoners of conscience (prisoners jailed for their political beliefs), and picked up the causes of Indonesian and Philippine prisoners alongside the NGOs working in these countries.

It should be remembered that in the early 1970s no human rights treaties were in effect in any country, the UN did not protect human rights, and for most countries, human rights was considered solely a domestic issue not open to criticism by other countries. One challenge for those seeking to document the history of rights is that when these organizations began, they did not label their activities 'human rights.' Rather they defined their work under such terms as civil liberties, civil rights, constitutional rights, peasant mobilization, rights of prisoners of conscience, and so on. It was not until sometime later, in the 1980s, that the term 'human rights' would be adopted to describe all these diverse activities.

Human rights organizations would appear later in other Southeast Asian countries. In particular, this occurred when national organizations began developing regional networks. In Malaysia, SUARAM was established in 1989 in response to government detention of political opponents, and in 1992, LICADHO was launched as one of Cambodia's first human rights NGOs. By the early 1990s, many human rights organizations had been established throughout the region and an umbrella organization, Forum-Asia (Asian Forum for Human Rights and Development), was founded to bring together 46 member organizations from across Asia. Forum Asia was established in Manila in 1991 and has been headquartered in Bangkok since 1994.

Alongside NGOs, in the late 1980s, new social movements emerged. A new social movement is a large movement of people that involves many sectors of society including the middle class, students, and civil society organizations. Mostly, they took part in public assemblies and protests often organized around rights-based values such as democracy, equality, the rule of law, and livelihood issues. New social movements are much broader and more powerful in scope and as such, can challenge the State. Social movements played a role in toppling governments in Thailand, Indonesia, and the Philippines. The challenge to the Marcos regime by the People's Power Movement in 1986 is an early example of a new social movement. This mass civil society uprising used street protests and government walkouts to force Marcos from power and out of the country. Likewise, in 1988, student-led uprisings in Burma set in motion an anti-military movement which continues to this day. And in May 1992, revolution by people massing in the streets of Bangkok replaced a military-appointed prime minister with an elected head of state for the first time in 18 years. These changes were evidence of increasing space for civil society and human rights in Southeast Asia.



CASE STUDY

Philippines–People Power Movement

The ‘People Power Movement,’ sometimes known as the EDSA Revolution, after the street where many protests occurred, of 1986 was a mass uprising which led to the non-violent removal of Ferdinand Marcos in the Philippines. It included a wide range of organizations from the Catholic Church to trade unions, human rights groups, and students, and used techniques such as civil disobedience and mass rallies to put pressure on the regime.

After declaring martial law on 22 September 1972, Marcos abolished democracy and silenced the media. By the beginning of the 1980s, the Philippines was suffering from a weak economy, corruption, and widespread human rights violations. When the opposition leader, Benigno Aquino Jr, was assassinated at the airport after returning from exile in 1983 a broad civil resistance movement grew. These non-violent protests eventually put so much pressure on the Marcos regime that it was forced to call a snap election in early 1986. Marcos believed he could win the election through fraud, violence, interference with the ballots, and improper counting of the votes, but was defeated when a group of 35 election commission workers walked out of the vote counting centre and protests grew in the streets leading to factions of the military to call for his resignation. Only then did Marcos realize he could not win so fled the country with his family to the safety of the USA. The Marcos dictatorship ended on 25 February 1986, a day which is now celebrated by a national holiday.

The rise of new social movements is commonly attributed to globalization because it is argued that global media and technology allows people to be better informed about their rights which empowers them to organize protests (as discussed in Chapter 12). Globalization was at the same time the reason many NGOs and social movements gained in strength and importance, while also being the target of protests because it can lead to instability in the economy, environment, and the workplace.

Despite the progress of the 1990s, many human rights challenges remained while others emerged. The military remains a powerful political force across the region. Likewise, the media, which should hold State power in check, is controlled or monitored by the State in most Southeast Asian countries. Some governments have remained resilient to political change. Other governments have made progress, but refuse to make genuine reforms towards greater transparency and accountability, and political opponents continue to be threatened. Human rights have also been threatened or undermined in the name of national security. For example, the so-called ‘War on Terror’ has led many States to dismiss human rights in the name of counterterrorism. In other words, the task of regional civil society to ensure that human rights are protected has faced many challenges in recent years.

8.6.3 Southeast Asia and the UN Human Rights System

Southeast Asian countries have played an active role in the United Nations and in the development of international human rights. Among the member states which voted in favour of the UDHR on 10 December, 1948 were Burma, the Philippines, and Siam (as Thailand was then called). The other eight of the eleven countries in Southeast Asia were not yet in existence and at the time, the General Assembly only comprised 58 member States. Southeast Asia’s contribution to the UDHR was not limited to voting,

as the Philippine diplomat, Carlos P Romulo, also helped in the drafting process. He would later become president of the 1949 UNGA. As an outspoken anti-colonialist, Romulo ensured that the UDHR did not ignore the rights of colonized people. Previously, he also led a successful campaign to ensure the UN Charter explicitly state that human rights applied to all “without distinction as to race, sex, language, or religion.” Romulo’s influence shows that the Philippines has been actively involved with the UN since its very inception, even holding a seat at the first convening of the Commission on Human Rights in 1947.

During the period of decolonization, Southeast Asia was active in the UN process. In the 1960s, the Secretary General of the United Nations was Burmese diplomat, U Thant. During his tenure, large numbers of decolonizing countries joined the UN. By 1965, when the number of member States had risen from 51 to about 130, developing or Third World nations outnumbered developed and communist countries which enabled them to determine the agenda of the General Assembly. As a result, concerns of Third World countries, such as development, decolonization, and racism, came to the fore.

At this time, human rights were driven by issues of racial discrimination and self-determination. However, it could be argued that Southeast Asian States have had an inconsistent relationship with the UN human rights system, especially during the Cold War. While many actively participated in the system, it was not always in a positive manner. Many governments were accused of using the system to protect themselves and their allies, or to challenge the very principles of human rights. The delayed ratifications of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is one such inconsistency. While the elimination of racial discrimination was a cause promoted by Southeast Asian States and by the NAM, few Southeast Asian States ratified the convention. By 1990, only four Southeast Asian States had ratified. The Philippines was the first to do so in 1967, followed by Laos in 1974, then Cambodia and Vietnam.



DISCUSSION AND DEBATE

How Active is Your Country in the UN System

Is your country a member of any UN special bodies, such as the councils or commissions? Do some research to find out if your country has ever been a member of any council or commission (for example the UNSC, the Human Rights Council, the ECOSOC, or the Commission on the Status of Women).

Southeast Asian States challenged the international human rights system in a variety of ways, but one collective challenge is particularly notable: the Bangkok Declaration. In the lead up to the 1993 World Conference on Human Rights (as discussed in Chapter One), ministers and representatives of Asian States met beforehand in Bangkok to bring a regional understanding of human rights to the global conference. This regional understanding, as led mainly by Singapore and Malaysia, argued that human rights vary from country to country, dismissing the idea of a universal standard. Human rights, they contended, could be modified by States to suit their specific cultural and historical contexts. In addition, they argued that human rights should be considered

a sovereign issue and as such, should not be open to interference from foreign countries. In other words, they should not even be considered a part of international affairs. This is known as the 'Asian Values' debate, referred to above.

These regional ideas challenged many fundamental concepts of universal human rights: that they are universal, that they limit State power, and that they are an international issue. Regional civil societies responded immediately by drafting and submitting the Bangkok NGO Declaration on Human Rights to the UN General Assembly on 19 April 1993. More than 240 delegates from over a 100 NGOs across Asia reaffirmed their commitment to the universality and indivisibility of human rights, and to reiterate that human rights should reinforce Asia's cultures and traditions.

DISCUSSION AND DEBATE

How Active is Your Country in the UN System

NGOs were quick to criticize the Bangkok Declaration and a brief examination of some of the articles reveals why. For example, Article 5 attempts to domesticate human rights:

5. *Emphasize the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure.*

In other words, this article attempts to prevent outsiders from criticising the human rights record of a country. Why is this not a good idea?

Similarly, Article 8 expresses the dominant theory of Asian Values:

8. *Recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.*

Why is this article inconsistent with the principles of human rights? What is the danger of allowing national particularities, or giving importance to religious or cultural backgrounds?

At the World Conference on Human Rights, which produced the Vienna Declaration and Program of Action (VDPA), the arguments raised in the Bangkok Declaration were addressed with concessions made to both sides, but the universality of human rights was never questioned. Article 5 of the VDPA states:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.



As this article makes clear, recognition was made of the concerns of regional particularities, but were considered subservient to universal standards. Most people saw this as a victory for the NGO declaration, and a negation of the Asian Values view of human rights.

Currently, Southeast Asian States play an active role in the UN as members of various commissions (including the Human Rights Council). They are also active in peacekeeping and work with coalitions of States for the development of rights.

8.7 Is There a History of Human Rights in Southeast Asia?

The history of human rights in Southeast Asia is not just the history of UN activity. As has been detailed, many organizations in the region undertook human rights work before the UN became active. While it has been vital in setting standards through the adoption and promotion of international treaties, much human rights work on the ground was done by local NGOs and activists. As such, one cannot say that human rights were introduced into the region by the UN, by foreign States, or international NGOs, but neither were they invented entirely within the region.

The idea of human rights has no single source as it came from both within and outside the region. While ideas of dignity are inherent in religions and cultures throughout the region, they were not adequately protected until States wrote laws recognizing them as such. Unfortunately, States will often only do this reluctantly, following pressure from civil society, NGOs, and the international community.

This chapter has given an overview of the history of human rights in Southeast Asia by examining how human rights were understood at various points in time, and also by looking at the main historical actors who either supported or violated human rights: governments, the military, civil society, and social movements. Throughout history, no clear moment can be pinpointed when human rights were accepted as a mainstream concept. There is a view that human rights were used during fights for self-determination and independence, but nationalist movements barely made reference to them. Human rights could have been used by NAM to protest the abuse of power by the main actors in the Cold War, but again, they were not mentioned. In democracy movements, people claimed rights to democracy, but not always as human rights. It is true that the first NGOs would now be considered human rights organizations but at the time, even they did not use the term.

As the opening paragraphs of this chapter detailed, the term 'human rights' itself can mean different things to different groups in different periods, making any history open to interpretation. Without a doubt, standards of rights have significantly improved over the past hundred years: slaves were freed, colonial subjects gained equal rights, and people became citizens in independent countries. They gained access to services, and understood they had rights and freedoms. These improvements can be attributed to other factors besides human rights, such as the rule of law, economic development, or the dispersal of values based on non-discrimination and human dignity. In conclusion, there is still much to understand about the history of human rights with much of it, such as the beginning of social movements or the end of slavery, still being closely studied.

A. Chapter Summary and Key Points

Introduction

There is no single, simple, and undisputed history of human rights in Southeast Asia, nor is there a single starting point. This leads to two debates: (1) how to write the history of human rights, and (2) what history should be included? How human rights are interpreted will influence this debate. They can be a set of ideas advocating the dignified treatment of people which exists in religions and a society's moral values. This viewpoint associates the spread of human rights with the rise of religions and the development of organized communities. Supporters of this idea see human rights emerging with the spread of religions and link them to the establishment of rules and religious principles. Another approach argues that human rights are linked to how people are protected from the power of the State, and this view considers human rights originate with the formation of States. A final viewpoint is that human rights are a universal standard of protection above and beyond the State, enabled by international laws and organizations, which is how they are mostly seen today.

Pre-Colonial History of Human Rights

Rights have existed in all periods of Southeast Asian history, but were limited to someone's religion or place of residence. The diversity of political units (such as sultanates, kingdoms, tribes, and colonies) throughout history meant the relationships between rulers and ruled were different in each, for they had their own legal systems, structures, morals and values of human life, and therefore their own concept and use of rights.

Colonialism

In some cases, colonial rule granted rights but often unequally (for example, colonizers and the colonized were treated differently). Although colonialism had many negative impacts, it did introduce the rule of law, recognise some women's rights, and improved health and education for some. Nationalist and later independence movements from the late 19th century demanded more freedoms and equalities for local citizens, with the focus on citizen's rights, political rights, and freedom from abuse by colonial governments. A major turning point towards independence came with the Japanese occupation of Southeast Asia which at first appeared to liberate people from colonialism, but this was not the case. With the defeat of the Japanese, many Southeast Asian nationalist movements assumed they would gain independence, but colonial nations returned to reclaim their colonies setting off a series of wars of independence in the region.

Struggles for Self-Determination

Self-determination movements in Southeast Asia were influenced by Marxism, Maoism, and liberalist ideologies. Also, many justified self-determination through the UN Charter, the UDHR and later declarations and resolutions. These movements occurred in the context of the Cold War, when countries were forced to side with either western or communist rule following independence. In response, many decolonizing countries formed a Non Alignment Movement which was supportive of human rights, especially as regards self-determination and racial equality.

Authoritarianism and the Cold War

Most Southeast Asian countries had authoritarian or military governments during the Cold War because of internal conflict, political instability, or powerful militaries. Widespread and systematic human rights violations occurred at this time. Military

governments generally have poor human rights records, as can be seen in the regimes of Pol Pot in Cambodia, Marcos in the Philippines, and Suharto in Indonesia. During the Cold War, alliances took precedence over human rights. Conflicts were common, such as the American War in Vietnam and communist insurgencies in most other Southeast Asian countries. The conduct of these wars commonly disregarded international standards. The greatest atrocities of this time were the Cambodian 'genocide' and Indonesia's brutal suppression of a supposed communist coup in the mid 1960s.

Democratization of Southeast Asia

From World War II to the 1990s, nearly all Southeast Asian countries improved their levels of democracy. Democratization was slow because of anti-communist activities, the economic growth, and the support of Asian Values through Confucianism. Strong democratic movements include the Philippine's 'People Power Revolution,' and the May 1992 event in Thailand.

The Emergence of Universal Human Rights

Human rights became more accepted in the region from the 1970s and can be linked to the increase in civil society groups and the women's rights movement, both of which spread the influence of human rights. Students were also a significant force in some countries. National-level human rights NGOs started in the 1970s, often in response to dictatorships. They worked with farmers, workers, and peasant groups. The 1990s saw the rise of new social movements in response to the negative impact of globalization.

Southeast Asia in the UN Human Rights System

Since its inception in 1945 and through the period of decolonization, Southeast Asian countries have played an active role in the United Nations, but they have had an inconsistent relationship as some governments used the system to protect themselves from human rights criticisms or delayed their ratifications of human rights treaties. The Bangkok Declaration by Asian States in 1993, which argued for a non-universal understanding of rights, was widely challenged, especially by regional civil society organizations. Currently, Southeast Asian States are still active in the UN.

B. Typical exam or essay questions

- What violations occurred in the early history of your country? How did society or the State justify violations such as slavery or the caste system?
- What are the positive and negative aspects of colonial legacy in any selected country? Consider the laws introduced and how they either supported or violated people's rights.
- Was the self-determination movement in your country linked to human rights? How did national or local groups fight for independence, and did they use or violate human rights?
- What was the impact of the Cold War on democracy and rights in your country?
- Was the introduction of human rights the result of foreign influence, or was it developed inside your country? What factors influenced the first human rights advocates and organizations in your country?

- Is it true that military governments abuse human rights more than democratic governments?
- How does the current respect for human rights in your country compare to the situation in 1990 or 1970?
- What is the history of either the student movement or the women's rights movement in your country? Who were the first figures in these movements, and what did they advocate for?

C. Further Reading

Many histories of Southeast Asia are used in university classrooms but it should be noted that few writers discuss human rights.

General History of Southeast Asia

- Clive Christie
- Milton Osbourne
- Craig Lockhard
- Clark Neher
- David Chandler
- D. R. SarDesai
- Martin Stuart-Fox
- Benedict Anderson

Writers Addressing Particular Rights in History

- James Scott and Christopher Duncan (minority group rights)
- Dan Slater (authoritarianism)
- Phillip Hirsch (land rights)
- Barbara Andaya and Jane Atkinson (women's rights)
- Clive Christy and Merle Ricklefs (self-determination and modern Southeast Asian history)

Writers on the Cold War and Military Governments

- Benedict Anderson (Indonesia and Thailand)
- Than Myint U, Mary Callahan, Martin Smith, David Steinberg (Myanmar)
- Much has been written on the Vietnam War, including documentaries available on YouTube, original documents from the Virtual Vietnam archive, and documents from both the Vietnamese and US governments
- Much has been written on the Khmer Rouge period by authors such as David Chandler, Ben Kiernan, Elizabeth Becker, and Chanrithy Him. Especially useful is the work of the Documentation Centre of Cambodia (DC Cam), and the Cambodian Genocide Program at Yale University

Debates on the History of Human Rights

- Samuel Moyné and Jan Eckyl: started much of the debate about the origins of human rights
- Mark Mazower, Barbara Keys, and Akira Iriye

Historians of Human Rights

- Lynée Hunt
- Gary Bass
- Kenneth Cmiel
- Michele Ishay
- Paul Gordon Lauren
- Costas Douzinas

Online History Resources

- Asian Studies WWW virtual library
- *Journal of Southeast Asian Studies*

9

Women's Human Rights*

Societies across the world and throughout history have rarely, if ever, given women the same opportunities as men.

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9.1 Introduction

Women face discrimination in a number of ways: women are paid less than men for the same amount of work; women frequently face violence; women and girls are discouraged from going to school; women and girls not given the same importance as men in history, traditions, and cultural activities. This chapter examines how societies discriminate against women, and presents the consequences of this discrimination. In order to understand discrimination this chapter first discusses the values given to gender. It then addresses how human rights are working to stop discrimination against women, mainly by looking at the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). Lastly, important concerns for women are examined in the areas of violence against women, rights in politics, and non-discrimination in the workplace including economic rights.

9.1.1 Brief History of Women's Rights

While the history of the women's rights movement tends to focus on two events, women's suffrage (or the right to vote) in Europe in the early 1900s, and the rise of feminism in the 1960s, there have been debates and movements for giving women more rights throughout history. In the ancient Chinese, Greek, Egyptian and Roman societies, women could play significant roles as leaders, Gods, heads of households, though they did not have equal rights to men. During the European enlightenment when an early version of human rights emerged, women's rights were discussed by prominent thinkers such as John Locke and Thomas Paine. One of the more famous women writers at this time was Mary Wollstonecraft, who as well as writing *Frankenstein*, authored the famous text, *A Vindication of the Rights of Women* (1792). By the end of the 19th century, the first women's rights organizations were in place in the major Western countries. Through the nineteenth and early twentieth century, women held national and international conferences and lobbied around issues of war, equality, the right to vote, and the prohibition of alcohol. The **Suffragettes**, who were advocating for women's right to vote, are probably the most well-known of the early movements. There were other lobbying successes in the areas of work and protection of women. In 1919 women's rights organizations succeeded in getting provisions in the *Covenant of the League of Nations* and the constitution of the International Labor Organization ensuring that women could hold positions in the new organizations. Moreover, the ILO endorsed the principle of equal pay for work of equal value in the preamble of the ILO's constitution. A provision on women holding positions is repeated in the Charter of the United Nations (1945). The prohibition of discrimination on the basis of sex is stated four times in the Charter. These successes show that women have been advocating for their rights at the international level for over a century.

The Suffragettes

Activists working on women's right to vote. Most commonly women in the early 19th century

There had also been a history of activism for women's rights in Southeast Asia. Highly restrictive traditions in relation to women can be found in recent history in Southeast Asia, for example the case of Raden Adjeng Kartini, a feminist pioneer in Indonesia. She was born in 1879 in the polygamous household of the regent of Jepara. Unusually, her father allowed her to go to a European primary school until the age of 12, at which time according to Javanese customs, she was to be kept secluded at home until marriage. She was forced to consent to a polygamous marriage with the Regent of Rembang, who had six children and three wives. However, even in her seclusion she wrote about her situation and the importance of education for girls, and these

letters became an inspiration to feminists and nationalists. Another Indonesian, Dewi Sartika advocated for the education for women in Indonesia, and founded one of the first schools for women in 1904. The Indonesian government acknowledged her as a National Hero in 1966.

There are many notable Filipino women advocating for rights such as education, voting, and welfare. Concepción Roque started one of the first women's organizations in the Philippines in 1905. She was also an active humanitarian, working on the well-being of mothers and their children, and advocating for prison and labor reform for women and children. After WWII in Singapore Che Zahara binte Noor Mohamed a Malay activist, worked towards women's and children's rights from the 1950s. She was one of the first Malay women in Singapore to advocate for modern women's rights, and was the founder of the first Muslim women's welfare organization in Singapore, the Malay Women's Welfare Association (MWWA). In 1961, she helped establish the Women's Charter of Singapore. Another Singaporean Linda Chen Mong Hock, founded the Singapore Women's Federation (SWF) in 1956. She was arrested and jailed in 1956 as a suspected communist in part because of her social work. By 1960s, there were numerous women's organizations calling for women's rights throughout the region.

The women's movement gained global momentum in the 1960s and 1970s. There was the broad social movement in the West which at the time was commonly called the '**women's liberation**' movement. Though not solely a human rights movement, it called for women to be liberated from the unfair structures of society such as marriage and unfair labour laws. Influential feminists at this time include Simone de Beauvoir, Gloria Steinman and Betty Friedan. These movements for women's equality were influential in the UN proclaiming 1975 as *International Women's Year*, and following that with an *International Decade for Women*. In this period, the UN adopted the text of CEDAW which came into force in 1979. As noted above, women's organizations were emerging in many Southeast Asian countries. Some were influenced by Women's Liberation from the west, others had their roots in religion, welfare or education. They have been influential in changing laws, attitudes, and opportunities to increase women's equality.

Women's Liberation

Social movement in the 1960s and 1970s advocating for women's equality and liberation from restrictive social values

9.2 Defining Discrimination

In order to understand discrimination, the concepts of 'sex' and 'gender' must be distinguished. In social practice there is a tendency to conflate, or mistake sex for gender, or vice versa. The result is the belief that inequality between men and women is a natural, biological fact, and not a social construct. By distinguishing these concepts, it can be seen that belief in the superiority of men is primarily a cultural belief, and not a biological fact.

9.2.1 Sex and Gender

Sex
Refers to the biological features which distinguish men from women.

Simply put, '**sex**' refers to the physical and biological features of men and women while '**gender**' refers to the social roles men or women play in society. Sex is biologically determined according to the physical characteristics and biological features of someone's body. However, as recent scientific studies have shown, a body is not always either male or female. While the majority of people have a clearly assigned sex, for many others their biological sex is unclear. There are cases of intersexuals (discussed in Chapter 10), people whose body may exhibit physical features of both sexes, or other biological conditions where chromosomes or hormones are closer to

Gender

The roles and values give to a male or female in society.

their opposite sex. Societies tend to accept that every human is either male or female, and thus forces people into one of these roles, even though biologically this is not true.

Gender is the expected role a male or female plays in society, and the values associated with that role. From birth and throughout their lifetime, males and females are assigned specific attributes, traits, roles and tasks in the society. These may be traditional values like men are expected to be strong, and women expected to be mothers. Gender is a deeply cultural view, and varies across cultures in the roles and values given to men and women. However, what is similar across cultures is that these roles are given according to the biological sex of the person, even though the roles and values have little to do with biology. Distinguishing sex from gender, and understanding the social construction of gender, shows that, firstly, if gender is socially constructed so to must be inequality. Secondly, if inequality is a social construct, it can be changed or eliminated through cultural changes. Finally, to understand the unequal treatment of women demands an understanding of how society and its institutions construct gender, for example how the gender role of women is enforced through traditions, religion, courts, schools, businesses, and so on.

Many languages combine the terms for sex and gender into one word, and English-speakers commonly treat the two words as meaning the same thing. The distinction between the two terms is fairly recent, and is the result of recent feminist theories. As can be seen in the languages of Southeast Asia in Figure 9.1, this distinction is now appearing in language. The purpose of distinguishing these concepts is to show that all the inequalities faced by women are the result of social constructs. There is no biological reason to stop women being treated equally to men.

Table 9-1: Words for Sex and Gender in Southeast Asia

Language	Words for Gender and Sex
Bahasa (Malay language)	Kelamin (sex), jantina (gender)
Thai	Phed (for both sex and gender)
Burmese	Lein (sex), Kyar/Ma (gender)
Khmer	Phet (sex), Gender (gender)
Vietnamese	Giới tính (sex), Giới (gender)
Philippines	Kasarian (sex)

9.2.2 Linking Discrimination to ‘Sex’

A common assumption is that if you are born with one sex, then automatically you will also fit the gender roles and rules associated with that sex. This assumption is reinforced, or **normalized**, through social and cultural practices and institutional arrangements. People born of one sex are forced to play the gender roles associated with that sex. Many of the values, and beliefs of those gender roles are discriminatory to start with. The belief is that men are attributed with protective instincts, physical strength and rational thinking. They are expected to be the breadwinners in the family, the protector, the leader, and the decision-maker. Their primary domain is the public, in the world of work outside the home and in politics. On the other hand the belief is that women are attributed with motherly instincts and their roles centered on emotions, relationships, and care. For example, women are expected to be mothers who assume primarily the duties of child rearing and care for sick and elderly in the

Normalized

The process where a society re-enforces a norm, like a belief or behavior, in someone. Gender roles are normalized by education, the media, and social values. They can be forcibly normalized by physically punishing someone for not fitting in.

family because of they are regarded as more empathic, more sensitive and able to relate with the needs of others. These views are disempowering for women as they restrict women to the domestic sphere, and give men freedom and privilege.

The assumption for these gender roles is based on the physical differences between the bodies of men and women. That men are bigger and women bear children is used to explain the division of labor between men and women and the value assigned to the work they engage in. The claim is that different treatment between men and women is due to the reality of sex, that is, it is a biological difference and not a social one. Excuses are given such as for thousands of years of human life as hunter-gatherers men went out from the family household to hunt, while women gave birth and worked close to home, gathering food, preparing meals, and taking care of children. However, physical differences have very limited significance in modern societies. Physically, women can be very strong, for example female weight lifters at the Olympics can lift weights far in excess of most men. Men can nurture babies, shown by a recent trend of 'stay at home dads' in some countries. Women can be aggressive, decisive and ambitious. We now see women excelling in higher education while men are more likely to drop out along the way. In other words, people are led to believe that treating women differently is justified by nature, when really it comes from social values.

Societies invent a gender role for males and females to perform, as a contemporary feminist theorist Judith Butler explains. An example of **socially constructed** roles is clothing and appearance. Now days men wear pants, women wear dresses. Though these conventions are socially constructed. In Southeast Asia, for example, in Myanmar and Java men can wear longyis or sarongs. In most Southeast Asia countries gender differences in appearance were almost non-existent, unlike in Western societies where social construction of women's roles, appearance, and behaviors were strictly differentiated. In Western societies, women have always worn dresses, and women began to wear trousers, sometimes as a form of protest, around the 1920s. Before that, they were legally prohibited in many countries. However, in 19th century Siam (Thailand), women's clothing was identical to that of men. Foreigners visiting Siam at this time had trouble telling men and women apart. Both had short hair, both wore the same clothing, and both shared identical names. To the untrained eye, men and women looked and acted identically. This does not mean that men and women were treated equally, for women were identified when they spoke (in Thai language men and women use different pronouns). The point here is that how gender is assigned, whether it is through clothes, language, or other status, it is a cultural process, not a biological one.

CONCEPT

Socially Constructed Roles



If a role is socially constructed, it means that society has invented it, and it does not come from nature or biology. The role of the mother is often considered to be biological, because women give birth to babies. Yet, women who are not biological mothers can still play the role of mothers to their adopted babies. Different societies see motherhood differently, for example a good mother could be very strict to the children in some places, and very caring and kind in others. This shows that the role of motherhood is socially constructed.

The process of socially constructing gender should be confronted to eliminate discrimination. Institutions such as the family, schools, workplaces, religious institutions, government and the media play an important role in assigning what males and females should be good or bad at, how they should look, and so on. Through a system of rewards and punishments, institutions socialize and normalize a person into the roles of male and female. So for example, schools may teach different subjects to boys and girls. Parents may buy children different toys according to their sex. The media highlights what beauty and handsomeness looks like. It is important to note that institutions do pressure both men and women to follow gender conventions.

The objective of gender conventions is so men's and women's social behavior fits society's expectations. This process will produce someone is **gender normative**. There are negative impacts of gender normalization. In the worst cases women may be normalized to feel weaker, inferior, or more at risk than men, and men normalized not to show emotions and to act aggressively. Men and women who fail to conform to society's prescribed gender norms and practices may be subjected to various forms of discrimination, social pressure, shame, and abuse. For example, women who experience sexual violence may be blamed because of the clothes they wear or refusing to engage in sexual intercourse with their husbands or boyfriends. Boys are called weak if they cry. Within this process human rights violations can occur. The pressure or violence people face to perform their gender violates their safety and security. The objective of eliminating all forms of discrimination is to eliminate these violations.

Gender Normative

Society's view of what is 'normal' for a man or woman. Roles or views not fitting this norm may be criticized or punished.

9.3 CEDAW

The CEDAW convention is an important development in protecting women's human rights. Its key message is that women and men should have equal rights in all aspects of their lives. It defines what discrimination is and how States could combat such discrimination. It presents the different areas where governments should focus on their efforts to achieve equal rights for women. Countries who ratify CEDAW are committed to amend their national laws to guarantee women's equal rights, provide opportunities and remedies where gaps exist, as well as to submit a report every four years on its progress in implementing their treaty obligations. The treaty establishes the *Committee on the Elimination of Discrimination against Women* to monitor State compliance with the Convention. CEDAW is a historical achievement for women around the world because it became the main international standards to measure the treatment of women.

CEDAW, which came into force in 1979, is the fourth human rights convention. The Commission on the Status of Women (CSW), which had previously drafted a declaration in 1967, as well as conventions on political rights, nationality, and marriage, supported the treaty drafting process. It took 10 years of debates and negotiations among States at the UN before the convention was ready for adoption. Most opposition centered on rights which clashed with culture and religion, especially around the family, marriage, and citizenship. Nearly all countries did not give women equal rights in divorce or inheritance, and many did not give women rights to pass their citizenship on to children. Considering this, the language, context and assumptions of CEDAW at the time of its drafting and ratification reflect the power dynamics of State parties represented by men, and to a limited extent, of the women proponents of equality within the diplomatic, government and international organizations. The adoption of CEDAW was made possible through the collective efforts of women themselves who

pushed for women's issues in the agenda of the League of Nations, then later on the United Nations. Some women, particularly those who assumed leadership positions, had important roles in advancing women's rights. As previously noted, the 1960s was a time of increased activity around women's rights. There was a greater awareness of all the discrimination confronting women in many parts of the world and the notable rise of organizations committed to fighting the effects of discrimination.

In ratifying CEDAW, states have duties to:

1. Change laws or introduce new laws: Incorporate the principle of equality and non-discrimination of men and women, abolish all discriminatory laws and practices, and adopt appropriate measures to prevent discrimination against women (Art 2 & 15)
2. Ensure access to justice: To ensure the effective protection against discrimination through courts and similar institutions (Art 2)
3. Develop programs to accelerate equality: Implementing temporary special measures such as **affirmative action** to help achieve equality (Art 4)
4. Modify Culture: To change cultural and traditional practices and attitudes including stereotypical roles of women and men (Art 5)

**Affirmative
Action**

Special
allowances
which
increase
access or
benefits for
a group of
people, for
example
reserving
seats in
government
for women

CEDAW creates obligations on States to work towards the equality of women. Through its strong wording it tells governments to have programs and initiatives to stop or prevent discrimination from occurring. The convention requires government to apply its principles in the private sector as well as the public sector. Discrimination by any "enterprise" is to be prohibited and specifically prohibited in relation to bank loans and other forms of financial credit. The convention identifies at least twelve areas of discrimination directly: Culture, law, trafficking, politics, international politics, nationality, education, Health, Economics, Rural women, marriage, and family. Further, the convention supports giving women information on family planning and supports equal pay for work. CEDAW was progressive at the time, but it was also a product of the time. The convention was drafted in the 1960s and 70s, and there has been much development in ideas around equality since this time. CEDAW is not a static document and there have been developments, enabled both by civil society and the CEDAW committee to expand upon these rights. An example, returned to later in the chapter, is domestic violence.

CEDAW, like CRC, has near universal ratification. Currently, only six countries have not ratified the convention (Iran, Palau, Somalia, Sudan, Tonga, and the United States). All Southeast Asia countries are State Parties to the convention.

Table 9-2: CEDAW status

States Parties	Date of Ratification	Reservations
Brunei	24 May 2006	Art 9 (2) Art 29 (1)
Cambodia	15 October 1992	None
Indonesia	13 September 1984	Art 29 (1)
Lao PDR	14 August 1981	None
Malaysia	5 July 1995	Art 5 (a) Art 7 (b) Art 9 Art 16 1(a), 1 (c), 1(f) and 1 (g) Withdrawn reservations on Art 2(f), 9 (1), 16 (b), 16 (d), 16 (e) and 16 (h)
Myanmar	22 July 1997	Art 29 (1)
Philippines	5 August 1981	None
Singapore	5 October 1995	Art 2 Art 11 (1) Art 16, Art 29 (1)
Thailand	9 August 1985	Art 29 (1) Withdrawn reservations on: Art 7, 9 (2), 10, 11 (1), 15 (3), 16
Timor-Leste	16 April 2003	None
Viet Nam	17 February 1982	Art 29 (1)

As noted in Table 9.1 though CEDAW is one of the most widely ratified treaties. But States have attached more reservations to CEDAW than to any other convention. Reservations enable States to specify the parts of the convention that they will not be bound by. States were saying “yes - but” to women’s equality. As the table shows there are many reservations to Art 29.1 (about using the ICJ to resolve disputes about the treaty between two countries) and Art 16 (about equality in marriage). Thailand, Malaysia, Brunei, and Singapore, have all made reservations on giving equal rights in marriage and nationality. For Malaysia, Brunei, and Singapore, this was because they saw the rights as incompatible with cultural and religious beliefs (or Sharia Law for Malaysia). For Thailand, the reservation against equality in marriage was due to an unwillingness to change existing inequalities in the domestic law. Thai women did not have equality in divorce: for a woman to divorce she needed to prove infidelity of the husband, or for the husband to have been missing for two years. Males do not have the same requirements. Since ratifying the treaty some of these reservations have been withdrawn, including Thailand’s reservation on equality in marriage, but not Malaysia and Singapore’s reservations of articles protecting equality at work and in marriage. There are also reservations on the equal right to citizenship, with some countries only allowing citizen to descend from the father and not the mother. For example, a child born outside of Malaysia can only get citizenship through the father and not the mother. There are five States (all European: Austria, Norway, Netherlands and Germany) who have all made objections to Malaysia’s reservation, but they all note that “the objection shall not preclude the entry into force of the Convention.” It should also be noted that many countries have dropped reservations. Thailand originally made seven reservations, and now has only one.

9.3.1 Non Discrimination in CEDAW

The CEDAW defines discrimination as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (Art 1)

Discrimination here is the basis of sex, though this can be extended to gender as well, in that most places mix sex and gender. The UDHR, ICCPR, and ICESCR, all written before 1966, also prohibit discrimination on the basis of sex. More recently the *ASEAN Declaration on Human Rights* (2010) prohibits discrimination on the basis of gender. Logically, given the pattern of usage, 'gender' can mean 'sex' and vice versa. So while the *ASEAN Declaration* may appear very contemporary in its usage, because society tends to understand sex and gender the same way, discrimination based on sex or gender is basically the same thing. Feminists, however, note that discrimination against women is caused by almost completely attitudes and values towards gender roles, not to sex, given that sex itself can only be confirmed by a physical examination of a person.

The definition of discrimination in CEDAW has three elements:

- ***A distinction, exclusion, or restriction.*** Examples may be laws terminating employment of women on the basis of marriage or pregnancy, unequal retirement age, unequal inheritance rights, or not letting girls go to school.
- ***A distinction is based on sex (or gender).*** The distinction must be made against women. If the distinction is made for everyone (say a uniform dress code for males and females), then such distinction is not based on sex.
- ***A result of a woman not having equal human rights to a man,*** or does not get human rights at all. Discrimination must result in women not getting access to, or equal human rights to men. For example, women do not have an equal right to a divorce because it is easier for men to divorce, or children cannot get their mother's citizenship, only their father's.

Discrimination can occur in two ways: as a product of laws (*de jure* discrimination) or discrimination in fact or reality (*de facto* discrimination). Laws that do not give women equal marriage rights to men, or restrict women from certain jobs are examples of *de jure* discrimination. *De facto* discrimination occurs where even though there are no laws discriminating against women, the reality is that women do not have equality. For example, even though there are no laws restricting girls from going to school or women from entering formal politics in Southeast Asia, in these countries there are fewer girls in school and fewer female politicians.

9.3.2 Concept of equality in CEDAW

To address discrimination effectively, the objective of eliminating discrimination should result in the equality between men and women. However, there are different views of what equality means. The **formal model of equality** is based on the argument that men and women are the same and therefore, they should be given the same treatment. For women to be equal to men, they must be allowed to do what men do. For example, if men are permitted to study, to work, to vote or run for public office, then women must also be allowed to do so as well. This view, however, fails to

Formal Model of Equality

This model of equality which assumes men and women should be treated exactly the same way.

take into account the biological and gender differences between men and women. For example, women may be allowed to study or work but remain burdened with household chores at home, or they do not get any special allowances for child care. The formal model of equality considers that if differences exist between women and men, then they should be treated differently, in cases such as maternity leave.

Protectionist Approach to Equality

A model of equality which assumes women need special protection because they are weaker

The **protectionist approach to equality** means that women are restricted from doing certain types of work or activities for their own interests. For example, women may be restricted from working in construction sites because of the belief that they may be too weak to do hard physical labor, or they cannot do male-oriented jobs such as being a soldier or sailor because they may be assaulted or harassed at the workplace where most workers are males. This approach recognizes difference between men and women but view such difference as a weakness or inferiority.

The **substantive model of equality** stresses the importance of equality in terms of opportunity and results. The focus is not only on the provision of resources, entitlements and benefits to women, and whether or not they are able to access these opportunities, but also on the positive results and changes to status of women. Equality of opportunity is achieved by creating the necessary laws, policies, and social practices. Equality of results is when the changes result in women gaining equality. For example, a policy that supports women getting into university may give an opportunity, but the real measurement of success is the substantive result of how many women graduate from university. The substantive model of equality recognizes that men and women may be treated differently in order to benefit them equally in accessing opportunities, results and benefits. CEDAW promotes the substantive model of equality in putting an end to all forms of discrimination against women.

Substantive Model of Equality

A model which assumes equality is only reached when the result of a law, policy, or action is that women have equality.

CEDAW uses a substantive equality approach based on both a de jure and de facto equality between women and men. It is not enough to ensure laws promote equality, but that the result of the laws, and the practice in society, ensures equality and non-discrimination. The Convention recognizes that despite legal rights granted to women in most States, women's rights continue to be challenged by social and customary practices based on the **stereotypical roles** of women and their perceived inferiority to men. CEDAW also recognizes that violations of women's human rights occur both at the public and private spheres and that States have an accountability to address both violations.

Stereotypical Roles

An assumption on what a group of people are like or do. Stereotypes are commonly negative, and they may simplify or exaggerate some feature of a group of people.

In ensuring substantive equality between women and men, CEDAW adopts corrective and transformative approaches. **Corrective approaches** are based on the premise that women are in unequal position because of experiences of discrimination, past or present, or that they face social, cultural and political restrictions that limit the exercise of their human rights. An example of the corrective approach is found in Art 5 which requires that socially constructed differences, such as traditional practices that perpetuate women's subordination and perceived inferiority to men, should be modified. This is one of the more debated articles, as it appears to say that human rights should change culture. The article does not say that culture should be eliminated, but rather that actions which treat women as inferior, say the belief that girls should not go to school, should be modified to allow girls to go to school. CEDAW also adopts a **transformative approach** on equality which argues that equality of results can be achieved by ensuring access to resources and benefits. This can be done through laws or policies which create the conditions enabling women to enjoy of their rights and by affirmative action or special temporary measures such as quota systems, where women's special needs are met.

Corrective Approach

To correct or modify existing behavior or beliefs to ensure women are treated equally

Transformative Approach

Policies and actions which eliminate inequality by ensuring access to resources or through affirmative action.

9.3.3 State Obligations in CEDAW

State parties to CEDAW are obligated to ensure their laws and activities relating to women result in the elimination of discrimination. Like all other human rights treaties, State parties have the duty to respect, protect and fulfill women's human rights. The obligation to *respect* refers to the obligation of the State party to ensure that it does not violate women's rights. The obligation to *protect* refers to the obligation to prevent violations by non-state actors (such as companies, schools, or husbands) and the duty to investigate, punish and redress violations when they do occur. The obligation to fulfill refers to the State obligation to create enabling conditions for all women to enjoy their human rights.

States can apply the wrong approach to a situation of inequality. As an example, in a review by the CEDAW Committee on China's compliance to the Convention, the Committee was concerned that China tried to increase equality by protecting women, especially by managing their reproductive rights through policies like the One Child Policy. The protective approach to equality does not empower women. The CEDAW Committee noted that the government bodies in China (such as, the National Working Committee on Women and Children), were perpetuating views which stop women being seen as equal in status with men by, for example, seeing women as the same as children. Likewise, in other sectors such as labor laws, there was little to empower women in the workplace as the laws emphasized the protection of women from abuse, as if women are weak and need protection by men.

9.3.4 CEDAW Challenges

No one denies that women have legitimate human rights and they should be treated equally, but in reality women are unequal in terms of employment, income, holding elected office, and laws. This contradiction underpins the ratification of the CEDAW convention. Though the convention is strong and innovative, and it is ratified by all Southeast Asian States, this has not resulted in equality for women. Through ratifying CEDAW governments are saying they support women's rights, though whether they do in practice is another matter. Partially this is historical. When CEDAW was ratified in the 1980s the Asian Values arguments had not yet emerged to challenge equal rights. Religious lobbies were not strong at the UN as the Roman Catholic Church was not directly active, and cooperation between the Catholic Church, Muslim States and Evangelical or Christians had yet come into being. Controversial issues like female genital mutilation and rape as a war crime were yet being discussed. Women's rights in these early days was a relatively safe topic.

Even though CEDAW is strong there are still gaps in the convention. One significant gap is that of violence against women (VAW). CEDAW eventually was able to address this through the CEDAW Committee General Recommendation No. 12 of 1989, the *Declaration on the Elimination of Violence against Women* in 1993 and the appointment of a Special Rapporteur on Violence against Women in 1994. Another gap is to 'diversity' issues, or women who suffer discrimination on the basis of sex and some additional factors such as race, sexual orientation, or disability. This is called **intersectionality**, where the two or more forms of discrimination in effect double the impact of the exclusions faced by a woman or girl. An example of this is a woman from an ethnic minority with a disability faces discrimination because of her gender, ethnicity, and disability.

Intersectionality

Where two or more categories of identity, such as gender, ethnicity, or caste, multiply the impact of discrimination

The empowerment of women is standard language at the UN, and prominent in advocating for women's rights, though the term itself is not found in CEDAW. The original language of CEDAW is concerned with the equality with men, as found in Art

3, though in practice CEDAW is not used primarily for this. By basing discrimination on the objective of having equality with men necessitates a comparison to men, defining equality in general as ‘being like a man.’ Limitations are revealed in cases where there is no significant male referent to speak of, for instance, there are few, if any, male migrant domestic workers to compare with the significant number of women migrant domestic workers. As a result, many women’s rights advocates do not use comparison or equivalence in rights as this simple equality fails to take into account some the differentiated conditions of women.

9.4 Protection Mechanisms for Women’s Rights

The protection of women’s rights at the international level is found in the treaty bodies, with and Optional Protocol allowing for complaints and investigations. Further, the UN has established a number of bodies to protect women’s rights. There are also mechanisms at the regional level in ASEAN.

9.4.1 Treaty Body Protection Mechanisms: The Optional Protocol

An Optional Protocol to CEDAW (OP-CEDAW) was adopted in October 1999 and came into force just over a year later in December 2000. The Optional Protocol does not create new rights but is a procedure for people to claim their rights. It is the first gender specific complaints procedures adopted, and it improves the existing protection mechanisms for women’s human rights. Currently, it has 107 State Parties. In Southeast Asia, only four have ratified the OP-CEDAW, as seen in Table 9.2.

Table 9-3: CEDAW Optional Protocol Status

States Parties	Ratification Date
Brunei	-
Cambodia	13 Oct 2010
Indonesia	28 Feb 2000 (Signed only)
Lao PDR	-
Malaysia	-
Myanmar	-
Philippines	12 November 2003
Singapore	-
Thailand	14 June 2000
Timor-Leste	16 April 2003
Viet Nam	-

The OP-CEDAW establishes two procedures:

- A ***communications procedure*** through which the CEDAW Committee can review complaints filed by an individual or a group of individuals seeking redress for specific violations resulting from an act or omission by the State Party.
- An ***inquiry procedure through*** which the CEDAW Committee can issue comments and recommendations on grave or systematic violations of rights. A grave violation refers to violent or abusive violations. The term ‘systematic’ refers to the scale or prevalence of a violation, or to the existence of a scheme or policy causing the violations.

For the individual communications, as of mid-2016 there have been 67 cases received by the CEDAW committee, of which 15 have found the State in violation, though there are still 26 cases under review. This is a small number compared to ICCPR and CAT complaints procedures which both have over 1000 cases, though these mechanisms have been in force for much longer. The most common case is on violence against women, but also issues like asylum, gender stereotyping, and marriage have been discussed in multiple cases.



CASE STUDY

CEDAW Individual Compliant

In the case submitted to the CEDAW Committee under the individual communications procedure, Karen Vertido claimed that the Republic of the Philippines violated her rights when the courts found her rapist innocent of rape because she did not escape from him. In this case Karen Vertido filed rape charges in 1996 against Jose Bautista Custodio, but after several years in court, he was acquitted in 2005. The Court said that Karen Vertido “had the courage to resist the advances of the accused [and] does not appear to be a timid woman. This Court cannot understand why she did not escape when she appeared to have had so many opportunities to do so.” The court’s decision, which blamed the victim for not escaping rather than punishing the rapist for raping, is based on a stereotype found in many criminal courts where rape is the fault of victim. Karen Vertido’s rights to equal protection of the law and to an effective remedy were violated according to the Committee.

There have been two cases in the inquiry procedure. The first one examines the rape and killing of women in the Juarez area in Mexico (on the border with United States), where around 340 women were killed in recent decades, and the killing still continues today. The CEDAW committee found that the government did not protect women from this violence, which is suspected to occur because of high levels of organized crime, and an environment of impunity because police investigations were often badly done and police failed to protect women. The second case is violence against indigenous women in Canada, where there are high levels of VAW and many unsolved murders of indigenous women. Around half of the murders of indigenous women remain unsolved, though around 80% of murders of non-indigenous women get solved. The procedure is now considering other situations for investigation including the situation of reproductive health rights for women in the Philippines, and the access to abortion for women in Northern Ireland.

9.4.2 Women’s Organizations at the UN

Over time a number of programs, offices and agencies have been established within the UN system dealing with women’s issues. The best known was UNIFEM, the UN Development Fund for Women, which alongside at least 6 other offices or agencies specifically concerned with women’s issues. Though this kind of duplication or overlapping of functions was not unusual for the UN, there was criticism that there were too many offices with too little impact. Women lobbied for the creation of a single, overarching, umbrella organization, headed by a new Assistant Secretary-General, in order to give women’s issues more prominence, better organization, and higher levels of funding within the UN system. The lobbying resulted in the establishment of UN

Women in 2010. The first Executive Director of UN Women was Michelle Bachelet, who had served as the elected head of government in Chile from 2006-2010. Currently, the South African Phumzile Mlambo-Ngcuka serves as UN Women's Executive Director. Other activities at the UN level includes the sponsored world conferences of women in Mexico City (1975), Copenhagen (1980), Nairobi (1985), and Beijing (1995).

FOCUS ON United Nations Women's Organizations

UN Women: founded in 2010 by UNGA and exclusively focuses in Gender Equality and the Women's Empowerment. UN Women connects four distinct parts of UN System: the Division for the Advancement of Women (DAW), the UN International Research and Training Institute for the Advancement of Women (INSTRAW), the Office of the Special Adviser to the Secretary-General on Gender Issues and Advancement of Women (OSAGI) and UNIFEM (which no longer exists).

Commission on the Status of Women (CSW): Founded in 1946 by ECOSOC, this body is the main intergovernmental body in promoting women's rights. As a commission, and comprised of States, it differs from UN Women which is a program of the UN.

CEDAW committee: This body manages States obligations to the CEDAW treaty. Founded in 1982 and composed of 23 experts on women's issues from around the world, it monitors the implementation of CEDAW.

UN Inter-Agency Network on Women and Gender Equality (IANWGE): A network of Gender Focal Points in UN offices consists of 60 members representing 25 entities of the UN system, playing a central role in promoting gender equality throughout the UN system.

UN Women currently gives priority to three issues: violence against women, women's political participation, and economic integration. Apart from these, women's issues have been incorporated into a number of programs and activities such as the *Millennium Development Goals* where two goals have direct implications for women (3. Gender Equality and 5. Maternal Health). The current Sustainable Development Goals has maintained gender equity as a goal. Other UN organs working on women include the UN Security Council which has produced a number of resolutions on women in conflict, starting with resolution 1325. There has been mainstreaming of gender issues into development programming, with most organizations, and development theory, incorporating views of gender and development and requiring gender equality in all stages of development.

As can be seen, over time women's organizations have been effectively lobbying at the UN and other inter-governmental organizations. While some of the basic goals of these women's organizations are broadly accepted in theory, progress has been slow towards reaching some goals of women's empowerment and gender equality such as giving priority to reproductive rights, which is still controversial at the UN as many States do not recognize women's control over their own fertility. Further, women are still commonly threatened by violence at home, at work, and in conflict situations.



Women are still under represented politically. Even the UN, which is now less of a male-dominated organization, is yet to have a female Secretary General, though there are female candidates for this position.

9.4.3 ASEAN Mechanisms

ASEAN held a Women Leaders' Conference in 1975 (the UN's Year of the Woman), and established what is now the ASEAN Committee on Women the following year. In 1988 the ASEAN Foreign Ministers approved the *Declaration on the Advancement of Women in ASEAN* and in 2002 approved the *Declaration on the Elimination of Violence against Women*. An ASEAN High Level Meeting on Gender Mainstreaming in 2006 adopted a *Joint Statement and Commitment to Implement Gender Mainstreaming*. An ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) was formally established on the 7 April 2010, some time after the first call for its establishment in the 2004 Vientiane Action Program. It is an intergovernmental commission made up of 20 representatives nominated from the ten member states in ASEAN (2 representatives from each state, one in women's rights and another on children's rights). Each representative is voluntary and part-time, working for a three-year term. ACWC's primary purpose is promoting the human rights of women and children in ASEAN. It does not have the ability to receive or investigate human rights violations, it is predominantly a promotion, and not a protection, body.

9.5 Women's Human Rights Contemporary Concerns

As the chapter so far has highlighted, there are many areas of concern for women's rights. The remainder of this chapter will discuss four concerns: violence against women, women in politics, and women in work.

9.5.1 Violence Against Women

Women face violence at home, at work, in public, at a much higher rate than men. It has only been in recent years that much of this violence has been considered a crime. Previously a husband beating a wife was considered a private matter and was socially acceptable in many cultures and communities. Similarly, there was no law against a husband raping a wife (or marital rape) in Southeast Asia. The response to these violations in law and social behavior has significantly changed. Though there were people and organizations in the late 1800s and early 1900s who provided shelters for 'battered women,' there was little action to increase the protection of women. With the coming into force of CEDAW there was greater recognition of the violations caused by **violence against women** (VAW), though this term was not used in the convention itself. Around this time the term **domestic violence** (DV) began to be used, which replace terms like battered women or wife abuse. More recently, **gender based violence** (GBV) is more commonly used. These three concepts will now be examined.



CONCEPTS

Violence Against Women, Domestic Violence, and Gender-Based Violence

Violence Against Women (VAW) covers any form of violence which is directed at women because they are women.

Domestic Violence is violence that happens at the home and can include GBV, VAW, and violence against children. Domestic violence is a term most commonly used in national laws.

Gender Based Violence (GBV) is defined as violence someone faces because of their gender, more commonly because they are not complying with gender normative roles. This violence is often based on an abuse of power between genders. While the major group of concern is women, anyone can be the victim of GBV, including men or boys who are not considered masculine enough.

VAW appears in the General Comments 12 and 19, and in the *UN Declaration on the Elimination of Violence Against Women* (1993) which defines VAW as:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life (Art 1).

The basic element is that VAW is violence done to a woman, almost always by a man (but it may be by other women). As the preamble states, VAW is a result of

a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into subordinate position compared to men.

In this sense, VAW is not an act of violence alone, but also a mechanism of disempowering women. When communities and cultures tolerate VAW they are ensuring that women cannot gain equality in society. A complicity can also be found in governments, police, schools, and families who do nothing to stop the violence.

The definition of GBV from the CEDAW Committee refers to women only: “violence that is directed against a woman because she is a woman or that affects women disproportionately.” GBV is more commonly used now because it recognizes that the violence is socially constructed – it is based on gender and not sex. It is also used because it includes violence against men and boys, and not just women. Because some person is not complying with their gender role in society they may face GBV. The violence can be done to men who are not seen as masculine, or are homosexual. The violence can be done by women to other women as punishment for not conforming to gender values, such as mother in laws harming their daughter in laws because they do not look after their sons well enough.

Domestic violence may take many forms. While physical and sexual violence against wives and daughters is a significant form, it can also include economic and emotional abuse. Economic abuse is when a partner controls the financial resources resulting in one partner losing freedoms or being coerced into activities. The worst forms of domestic violence in Asia are honour killings (where a woman is killed for bringing dishonour to the family by acts such as having a boyfriend), dowry deaths (mainly in India where a wife is killed to get her dowry), and acid attacks (where acid is thrown over a victim's face to disfigure them, often because they have embarrassed or rejected a male's advances). All Southeast Asian countries except Brunei and Myanmar have specific domestic violence laws. Malaysia was first with its Domestic Violence Act of 1994 which protects both females and males, and covers either spouse, a former spouse, children and incapacitated adults, or any member of the family who is subject to violence in a domestic situation. The law provides the remedy of protection orders which can be issued by the courts to restrain violence and other actions such as entering the protected person's place of residence, school or other institution, and communicating with the protected person. Muslim wives who are in abusive marriages can also apply for divorce.

The Philippines' Anti-Violence Against Women and Their Children Act (R.A. 9262), which was passed in 2004, covers domestic violence and updates the criminal code for crimes where there is an intimate relationship. The legislation covers physical, sexual, psychological and economic abuse. The victims of violence include a wife, former wife, or a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or her child whether legitimate or illegitimate. Under the law, violence against women and their children is considered a public offense, which means that a complaint may be filed by any citizen who has personal knowledge of the circumstances involved in the commission of the crime. Indonesia enacted a *Domestic Violence Law* in 2004. The most recent laws are Thailand (2007) and Vietnam (2007).

Table 9-4 Domestic Violence Laws in Southeast Asia

	Relevant law on domestic violence
Brunei	Married Women Act, 1999 (not specific all about domestic violence, but sections 19-25 give some protections)
Cambodia	The Law on Prevention of Domestic Violence and The Protection of Victims, 2005
Indonesia	Elimination of Violence in Household, 2004
Lao PDR	There is a punishment under its penal code, but there is no separate law.
Malaysia	Domestic Violence Act, 1994.
Myanmar	There is a punishment under the penal code, but no separate law. Some laws are based on ethnicity.
Philippines	Republic Act No. 9262 Anti-Violence Against Women and Their Children Act of 2014
Singapore	Women's Charter 1996 (part VII: Protection of the Family)
Thailand	Domestic Violence Victim Protection Act, 2007.
Timor-Leste	Law on Domestic Violence, 2010
Viet Nam	Law on Domestic Violence Prevention and Control, 2007.

The weaknesses of domestic violence acts are that they often do not give full protection from the different forms of violence. Some only cover marriages, so girlfriends, ex-wives, or a gay person is not protected. The laws also vary in what kind of protection

they offer. While some Acts include providing shelters and counseling to victims, other laws do not address this need of the victim. The other major concern is the laws may be strong, but they are not strictly enforced. Many cultures and communities still see domestic violence as a private issue, best left to the family to resolve. A woman may go to the police for help, but they send her back to her husband to sort out the problem herself. The police may think it is not their business to solve domestic disputes, or they may consider protecting the wife will embarrass the husband and his family, or they do not consider the violence severe enough. Unfortunately all these responses are ill considered in both fact and practice. Most women who are murdered are not killed strangers but their husbands. While the rate does vary across the region, the fact is that homes can be more dangerous for women than public spaces.

9.5.2 Women's Political Representation

One of the top priorities at UN Women has been on women's political representation. In 2011 the UN General Assembly passed a resolution on women's political participation which calls on all countries to increase the number of women at all levels of political decision-making, including monitoring progress, conducting trainings, and increasing media on the issue. The facts on women's participation show their significant under representation: in 2012, women constituted about 19.5% of elected parliamentarians in countries around the world. Only 21 women are heads of state or government out of around 200 governments. Only 1 in 5 parliamentarians are women. Less than 10 % of peace negotiators are women.

Table 9-5. Ranking of Percentage of Women Parliamentarians in Southeast Asia*

	State	Number of women parliamentarians	Female heads of state
1	Timor-Leste	25 women of 65 = 38.5% (2012)	
2	Lao PDR	41 women 149 = 27.5% (2016)	
3	Philippines	79 women of 290 = 27.2% (2013)	Corazon Aquino 1986-1992 Gloria Macapagal Arroyo, 2001-2010
4	Viet Nam	121 women of 498 = 24.3% (2011)	
5	Singapore	24 women of 100 = 24% (2015)	
6	Cambodia	25 women of 123 = 20.3% (2013)	
7	Indonesia	95 women of 555 = 17.1% (2014)	Megawati Sukarnoputri, 2001-2004
8	Myanmar	55 women of 433 = 12.7% (2016)	
9	Malaysia	23 women of 222 = 10.4% (2013)	
10	Brunei	2 women of 31 = 6.5% (2016)	
11	Thailand	12 women of 197 = 6.1% (2014)	Yingluck Shinawatra, 2011-2014

*Based on World Bank data

Even though Southeast Asia has a low rate of women's political representation, women are beginning to take on more roles in politics. In countries like Thailand it has been noted by social commentators that there is a change with more female District Chiefs or Provincial Governors. Regardless, there are additional challenges to women running to be elected across Southeast Asian countries. Electoral systems are often biased against women because men can raise more money, travel more freely, and are better connected to police, army, and industry than women. Access to funds is a significant challenge because male politicians are more likely than women to have connections to senior (male) identities in business and finance. Further, male

politicians can raise a political profile through new strategies such as ownership of sports teams. Again, this is not available for women. Further, in countries where the military plays a significant role such as Thailand and Myanmar, this automatically excludes women. Myanmar's military reserved seats are almost a *de facto* reservation for male politicians. Voter reluctance to elect women is on the decline, but still significant to impede the election of women.



FOCUS ON

Gender and Politics in Viet Nam

Article 11 on the Law on Gender Equality provides that one of the measures to promote gender equality in the field of politics is to ensure the appropriate proportion of National Assembly female members and People's Committee female members in accordance with national gender equality targets. Nevertheless, during the 2007 elections for the 12th National Assembly, women deputies made up 25% of the total of National Assembly deputies, which was a decline from the figures from 27% the previous year.

Still, even this fairly good number of over a quarter representation of women has its weaknesses. Critics observed that women were well represented in Committees that focus on 'soft' issues such as social affairs, culture, education, youth and ethnic minorities, and poorly represented in committees working on the budget, economics, defense and security. There are very few women in leadership positions.

In Southeast Asia, Indonesia and East Timor are the only countries with electoral quotas for women in the lower house. However, Thailand and Philippines have political parties which voluntarily implement quotas. In South Asia quotas are more common. A *Women's Reservation Bill* is proposed in India that would reserve 33% of the seats in the Lok Sabha (lower house) to women. There are reserved seats at other levels in India, and also Bangladesh, Afghanistan, and Pakistan all have reserved seats for women.



DISCUSSION AND DEBATE

Should women have reserved positions in government?

As Michelle Bachelet, the head of UN Women, has pointed out, UN Women is a strong proponent of temporary special measures, such as quotas, to achieve at least 30% of women in parliament, in line with international agreements. Is reserving positions for women good for equality?

Opponents say that political reservations for women are based neither on equality nor democracy. Also, reserved positions tend to be filled up with wives, sisters, and daughters of other politicians. Just because there are more women does not mean they will be better politicians, especially if they have an easier path to government.

Supporters point out that reservations are a necessary temporary measure to get women into government, and to fix prior imbalances and discrimination. Elections and politics are so inherently biased against women that only a quota or reservations can address the inequality. Finally, because women make up 50% of the population in all countries, they deserve to have more representation in government.

What do you think?

- is a reservation necessary to get more women into government in your country?
- will reservations change the culture in government to allow more female politicians?
- is it fair that it is easier for to be politicians if they have reserved seats?
- how vulnerable to corruption is the use of reserved seats?

9.5.3 Women at Work

Equality in economic rights for women is still a long way off. A list of some facts on Women's Economic Participation from UN Women include:

- Women in most countries earn on average only 60 to 75% of men's wages
- Women devote 1 to 3 hours more a day to housework than men
- Around 50% of the world's working women were in vulnerable employment
- In one study almost 90% of countries have at least one legal difference restricting women's economic opportunities
- Most countries restriction women's access to land, credit, or property for women
- 40% of women leave the workforce early, the majority of them for family reasons.
- Women are always under represented at senior levels in business. For example only 5% of CEOs and 6% of company board members are women in Indonesia.

These differences are mostly in fact and not in law. All Southeast Asian countries have laws against discrimination in the workplace, and equal pay for equal work is protected in law, yet there is still a significant economic disparity between men and women. The reasons given for women's inequality are similar in many countries. Pregnancy is grounds for terminating employment in many countries. They are "last to be hired, first to be fired". Women's livelihood and earning continue to be seen as merely supplementing their husband's income when in fact they suffer more from economic and financial crises.

Though women's labor participation has increased in the last decades, their responsibilities at home have not decreased. A majority of women continue to assume multiple burdens in doing household work, care work for the children, the sick and the elderly while at the same time earning a living for the family. In most instances they are also involved in community work, which are extensions of their household responsibilities. Another reason is that women often work in lower paying and insecure jobs, such as cleaners, hospitality, and service industries. For example, while many women may be serving in a convenience store, few women will be owners or managers of these stores. Compounding these problems are the other inequalities such as access to education, sexual harassment in the workplace, and men conducting business in male only venues (such as sports arenas and golf courses).



CASE STUDY

Discrimination Against Women at the Workplace in Southeast Asia

Southeast Asia has recently seen some landmark rulings regarding women's rights.

1. In the Philippines 600 flight attendants filed a suit challenging the legality of a policy mandating that women flight attendants have to retire at the age of 55, whereas the male flight attendants retirement age was 60. In July 2010, the Philippine's trial court issued an injunction against the policy since it was discriminatory towards women.
2. In Malaysia, a teacher was prevented from applying for a teaching post because she was pregnant. She filed a suit that was heard High Court of Malaysia in July 2012. The High Court used CEDAW to judge for gender based discrimination. The court treated CEDAW as a binding law, and found that the restriction imposed on pregnant women was discriminatory and unjust.

Many countries offer maternity leave, but this is as low as 8 weeks in Malaysia, and only as high as 4 months in Vietnam. Further, with little help in childcare, women are often forced to leave work to look after their children.

Table 9-6. Maternity Leave standards in Southeast Asia

	Data on Maternity leave
Brunei	Length of maternity leaves is 105 days of paid leaves, maternity costs paid by government fully.
Cambodia	Female employees are entitled to at 90 days paid maternity leave on the birth of a child (labour code 1997, article 182-185)
Indonesia	Women are entitled to receive full wages during maternity leave, including 1.5 months before the birth and 1.5 months after the birth (MANPOWER ACT NO. 13 OF 2003, ARTS. 82-84)
Lao PDR	90 days with normal pay (article 39-40 of labor law 2006)
Malaysia	Every female employee shall be entitled to maternity leave for a period of not less than sixty consecutive days with pay (part IX 'maternity protection of Malaysia Employment Act 1955)
Myanmar	Maternity leave is provided to women workers covered by the Social Security Act 1954 for six weeks before and after the expected date of childbirth on the condition of 26 weeks of contribution before the benefit.
Philippines	100 days with paid salary, and extend for 30 days with no pay
Singapore	8 weeks with pay (session IX 'maternity protection and benefits' of Singapore Employment Act 1981)
Thailand	A pregnant woman is entitled to 90 days maternity leave, including holidays. The employer must pay wages during the leave period, but not exceeding 45 days (Labor Protection Act 1998, maternity leave section)
Timor-Leste	The employee shall be entitled to a maternity leave with pay for a period of at least 12 weeks, 10 weeks of which must necessarily be taken after childbirth without loss of seniority rights and remuneration (article 59 of labor law 2012).
Viet Nam	Between 120 to 180 days with paid salary (article 114-115 of labor code 1994)

Women's economic inequality is not just in the workplace alone, as women can be locked out of other income generating resources such as land. The most common tradition with inheritance throughout Southeast Asia is that the eldest son gets the property or family business. Women have also been dissuaded to inherit property for fear that it will be lost to her husband's family. This can be seen in the Thai law (which has been struck) that a Thai woman marrying a foreign man cannot own land, though a Thai man with a foreign wife does not lose his right to property. While there may be cases where the daughter inherits the family business, this is not the norm.

CASE STUDY

Gender and Land Rights in Cambodia

Since the adoption of the Land Law in 2001, approximately 80,000 new land titles have been issued. Some 78% of these are in the names of both wife and husband. When land rights are vested solely in the name of the male head of household, the woman may lose her land rights if the couple separate or divorce, or if the husband dies. An assessment shows that land rights of women, especially for women-headed households, are often ignored, partly owing to women's lack of knowledge of land rights and of titling procedures. Land grabbing by powerful persons also results in a large number of serious human rights violation cases, in which women are evicted from their land and have no place to make a living. For example, in 2004, 307 families living on Koh Pich Island were evicted from their land because of a municipal development project. The majority of these victims were women. Frequent migration to the cities or to more developed towns from rural areas also results in difficulties in obtaining land titles.

(NGO Committee on CEDAW & Cambodian Committee of Women 2006)

Feminization of Labour

Structural changes in economy and production leading towards an increase in women in the labour force, mainly in factories.

Globalization has caused many changes to women's position in the labour force. The phenomenon of the **feminization of labour** is double edged: there are many more women in the labour force, but often in the lower paying jobs. The increase of migrant labour has meant there are more women travelling from work, especially from Philippines and Indonesia. These changes can mean women may have better access to economic resources, but if access to credit and control over assets is not equal women will still face economic challenges.

DISCUSSION AND DEBATE

Women in the Boardroom

Norway introduced a law in 2003 requiring private companies to have at least 40% of board members being women within five years. Norway now leads the world with women accounting for 35% of corporate directors and 18% of senior management. Sweden has set a goal of 50% board representatives. Presently 25% are women. France has set a goal of 40%. Korea is considering a law to set a quota of 30% in five years.

Questions:

- What are the advantages of having women in boardrooms?
- Will laws which force companies to put more women in boardrooms create more gender equality in a company? How?
- Is it fair to force these requirements on a private company?

9.6 Conclusion

This chapter examines the cultural and institutional reasons for discrimination against women. The CEDAW treaty is the main human rights treaty working against discrimination, and its ratification throughout Southeast Asia should infer that States are addressing the discrimination faced by women. However, discrimination is deeply entrenched in cultural and traditional values, and there is still much work that needs to be done before women are treated equally in Southeast Asia. While sectors of work, politics, and violence were discussed, there are many more areas of concern in women's rights including reproductive health, education, and religion.

A. Chapter Summary and Key Points

Introduction

Women are rarely, if ever, given the same opportunities as men. Women face discrimination in many areas including work, education, culture, and health. The history of the women's rights movement focuses on women's suffrage and the rise of feminism in the 1960s, but the struggle for women's equality has a longer history. Women were active from ancient society, through the European enlightenment, to contemporary times. In Southeast Asia, early activists worked on education, voting, and welfare. The modern women's liberation movement was influential in the UN's International Women's Year and with the adoption of CEDAW (1979).

Defining Discrimination

Discrimination conflates the concepts of sex (or a person's biology) and gender (or a person's social role and expectations as a male or female). Sex is biologically determined, though recently scientific studies have shown a body is not always either male or female. Gender is the attributes and traits, many linked to traditional values, that men and women are expected to adhere to. One assumption is that people of a sex will automatically play the gender role. This can be disempowering for women as they are expected to be mothers or housewives, and not active in politics or business. These roles are socially constructed, and supported by institutions such as the family, schools, workplaces, and religion. Men and women who fail to conform to these gender norms may be subjected to various forms of discrimination, social pressure, shame, and abuse.

CEDAW

The CEDAW defines discrimination and identifies where governments should focus on their efforts to achieve equal rights for women. Most opposition to CEDAW is about rights which clash with culture and religion, especially around the family and marriage. CEDAW asks States to modify laws to incorporate the principle of non-discrimination, ensure women access to justice, accelerate equality, and modify culture. Though CEDAW is widely ratified treaty, it has more reservations than any other convention. Reservations are on equal rights in marriage, equality in divorce and equality at work. Discrimination in CEDAW has three elements: some kind of distinction, exclusion, or restriction, which is based on sex, with the result that a woman does not get equal human rights to a man. Discrimination can occur in two ways: as a product of laws (*De Jure* discrimination) or discrimination in fact or reality (*De Facto* discrimination). State parties have to ensure that actions and laws result in the elimination of discrimination.

Concept of Equality in CEDAW

The formal model of equality is based on the argument that men and women are the same and therefore, they should be given the same treatment. The protectionist approach to equality means that women are restricted from doing certain types of work or activities for their own protection. The substantive model of equality, which is used by CEDAW, sees equality in terms of opportunity and results. CEDAW also has corrective approaches where States must correct practices that perpetuate women's subordination and inferiority. CEDAW could be stronger in violence against women, diversity issues, and promoting the empowerment of women

Protection Mechanisms on Women's Rights

The protection of women's rights at the international level is found in the Optional Protocol to CEDAW which has a communications procedure for individual complaints (with around 67 cases) and an inquiry procedure which has looked at cases in Mexico and Canada. A number of programs, offices and agencies have been established within the UN such as UN Women in 2010, the Commission on the Status of Women founded in 1946, and the UN Inter-Agency Network on Women and Gender Equality.

While some goals of these women's organizations are accepted, progress has been slow towards goals of women's empowerment, reproductive rights and violence. The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children is a regional body promoting women's and children's rights.

Violence Against Women

Women faced violence at home, at work, in public, at a much higher rate than men. VAW covers all forms of violence, though more recently the term domestic violence is used to talk about violence by a partner, and now gender based violence includes any violence done because people are not complying with their gender roles. VAW is both an act of violence and a mechanism for disempowering women. When communities and cultures tolerate VAW they are ensuring that women cannot gain equality in society. Violence is socially constructed and can be done as punishment for not conforming to gender values. Domestic violence may take forms of physical, sexual, economic and emotional abuse. Nearly all Southeast Asian countries have Domestic Violence Laws but they can be weak when they do not give full protection from the different forms of violence, and they are not strictly enforced.

Women's Political Representation

Women's political representation is a UN Women priority. Women are significantly underrepresented in Southeast Asian governments. The challenges to women getting elected are that men can raise more money, travel more freely, and are better connected to police, army, and industry than women. Some countries have electoral quotas for women, but there is still some debate on this.

Women at Work

Women do not have equality in economic rights. Women are paid less, work more, and do not get equal access to credit, income generating resources and inheritance. Women work more in lower paying and insecure jobs while also being unprotected from sexual harassment in the workplace. When women get pregnant, they may get sacked or have insufficient maternity leave. Labour has changed with globalization, with more women working and increased migration for work, which has both positive and negative consequences.

B. Typical exam or essay questions

- Do you think the physical differences between men and women justify some different treatment? Explain why you think this.
- Has your country made any reservations to CEDAW? What are they? Do you agree with them? Why or why not?
- Do laws on domestic violence in your country give women greater protection?
- Do women hold government or high-ranking positions in your country? What are the challenges for women to get elected to government?
- Do female university students face any forms of discrimination at your university? Do they get the same opportunities as male students?
- What are some difference in women's rights today compared to people of your grandmother's generation? When your grandmother was young, did she get the same opportunities as women today in terms of education, work, and social freedoms?
- What are examples of traditional cultural beliefs and practices which discriminate against women? How difficult is it to modify these practices and beliefs?
- Find an example of a court case based on discrimination against women. Outline the case, the discrimination, and discuss if the finding is justified.

C. Further Reading

There are many authors writing on feminism. Those writing more specifically on women's human rights include

- Charlotte Bunch
- Martha Nussbaum
- Niamh Reilly
- Julie Peters
- Rebecca Cook
- Vera Mackie
- Maila Stivens

International organizations with programs and research on women's human rights include:

- UN Women
- UN Women Watch
- Equality Now

Asian based organizations working on women's right include:

- Asia Pacific Forum on Women, Law and Development (APWLD)
- Asia Foundation: Empower Women
- Asian-Pacific Resource and Research Centre for Women
- Committee for Asian Women
- International Women's Rights Action Watch Asia Pacific (IWRAP, Asia Pacific)

Sites with specific focus:

- **Violence:** Stop Violence Against Women (STOPVAW), a project of The Advocates for Human Rights,
- **Economics:** EmpowerWomen.org, a global community advancing women's economic empowerment.
- **Politics:** International Knowledge Network of Women in Politics

10

Children's Human Rights*

Childhood is understood differently today than how it was understood in the past. The rights a child should have, and what they should be protected from, was very different in Southeast Asia as little as one or two generations ago.

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10.1 The Rights of Children

While parents may always love their children, opinions on how they should be protected, what rights they should have, and what type of work they can do, change according to how society views children and childhood. Centuries ago, some children could be forced into hard labour, face criminal charges as adults, and were often married as adults. Throughout Southeast Asia, it was common for children to labour in the fields from as young as five, while European children of the same age worked in mines and factories. There was no minimum age for marriage, and many girls forced to marry adult men commonly gave birth at the age of fourteen or fifteen. A child committing a crime could be found guilty, jailed, or even executed. Why were children treated this way? Not because society disliked them, but because they were seen as adults, and treated as adults. It was not until the seventeenth century that, in a sense, the idea of childhood was invented and children were seen as different to adults, and they should be treated differently.

It is only in the last few decades that improvements have been made in the treatment of and protection given to Southeast Asian children. A range of special services, from education to health, are now given specifically to children. For example, harsh labour has been forbidden (though children are permitted to, and often do, work), and much effort has been put into protecting children from abuse and neglect. Worldwide, these changes occurred over a long period of time, starting in eighteenth century Europe, but they were only implemented in Southeast Asia in the years following independence. These changes result from the values society gives to the idea of childhood. While this concept varies between different cultures, some similar features are that childhood should be a period of safety and security, meant for play, learning, and development during which children should be protected from violence and abuse. It was the acceptance of these ideas that led to the introduction of children's human rights.

No other set of rights has been as universally ratified, nor as widely accepted, as the *Convention on the Rights of the Child (CRC)*. Having said this, gaps in protection still exist, especially in Southeast Asia where child labour, sexual exploitation, and denial of access to healthcare and education are still problems. This chapter will detail the key elements of children's rights by examining their history before reviewing how these are dealt with in the CRC. The remainder of the chapter will explore important areas of protection such as violence against children, rights to education, juvenile justice, child labour, child soldiers, and child reproductive health.

Table 10-1: Ratification of Child Rights Treaties by Southeast Asian States

	CRC	OP-AC	OP-SC	OP-Complaints
Brunei DS	27 Dec 1995	2016	21 Nov 2006	-
Cambodia	15 Oct 1992	16 July 2004	30 May 2002	-
Indonesia	5 Sep 1990	24 Sep 2012	24 Sep 2012	-
Lao PDR	8 May 1991	20 Sep 2006	20 Sep 2006	-
Malaysia	17 Feb 1995	12 Apr 2012	12 Apr 2012	-
Myanmar	15 Jul 1991	-	16 Jan 2012	-
Philippines	21 Aug 1990	26 Aug 2003	28 May 2002	-
Singapore	5 Oct 1995	11 Dec 2008	-	-
Thailand	27 Mar 1992	27 Feb 2006	11 Jan 2006	23 Sep 2012
Timor Leste	16 Apr 2003	2 Aug 2004	16 Apr 2003	-
Vietnam	28 Feb 1990	20 Dec 2001	20 Dec 2001	-

10.1.1 Background to Children's Rights

In the 1800s, a few industrial European countries began to recognize some children's rights, for example, by passing labour laws to protect children (1833 in England, and 1841 in France). At the same time, laws on compulsory education were introduced first in Prussia in 1764, and much later in England in 1870, with other European countries sometime in-between. The international instruments on children's rights evolved from mere statements of recognition of the rights of the child as can be seen in the League of Nations' Geneva Declaration of the Rights of Children (1924), to legally binding documents in the form of the CRC. The English woman, Eglantyne Jebb, who was involved in drafting the Declaration on the Rights of the Child, also established Save the Children in 1919 as the first humanitarian organization dedicated exclusively to children, and now one of the largest humanitarian organizations in the world. Alongside these developments came changes to laws relating to children in court and the introduction of juvenile justice systems (around the early 1900s) when many European nations outlawed corporal punishment for children. These changes were only to reach Southeast Asia in the twentieth century (mostly after 1945) during early periods of independence. At the same time, labour laws began changing in the 1950s, although the process would not be complete until the 1990s. Compulsory education followed in the 1960s, but some countries did not develop juvenile justice systems until after 2000.

All these changes reflect changing social attitudes to children. Once seen as small adults, children were treated exactly the same in work and law until the 1700s when childhood was seen as a different and special period of life, one in which children were more vulnerable and would need support to learn and develop into responsible adults. Many reasons are given for these changing attitudes including lower childhood mortality rates due to improvements in healthcare and the invention of the vaccinations which resulted in smaller families. Another is mechanization in the industrial revolution which meant child labour was no longer as necessary in farms and factories. Alongside these changes, strong advocates worked tirelessly for the better treatment of children so that by the 1920s most children in wealthy countries had been removed from factories and battlefields and were relatively free of severe

health concerns. In addition, welfare systems developed, particularly for orphans and single mothers – although the treatment they received would be deemed harsh today, such systems did recognize that children needed extra protection and care.

As demonstrated by the size of the Geneva Declaration which lists only five rights and takes up less than half a page, children's rights in this period were limited. The result is that by the time universal human rights are recognized in the UDHR, only a small number of children's rights exist. The UDHR itself only gives one right: Art. 25 (on livelihood). Applying directly to children (and motherhood), this stated that both were "entitled to special care and assistance." As will be discussed in the next section, these early rights focused almost exclusively on children as subjects of welfare who needed to be fed or protected from exploitation. Under the CRC, children's rights were expanded to recognize children as holders of rights, and not just recipients of assistance.

10.2 Convention on the Rights of the Child (CRC)

The CRC entered into force in 1990 and is now the most widely ratified human rights treaty in history. International laws in existence before the CRC included the 1924 Geneva Declaration and the ILO labour laws from 1919. In addition, a Declaration on the Rights of the Child was adopted by the UN in 1959, and 1979 was declared the Year of the Child. With numerous governments supporting the idea of children's rights, and coordinated efforts from UNICEF and WHO, the CRC was rapidly drafted and adopted, coming into force in 1990. The rapidity with which it became international law shows the universal acceptance of children's rights at this time. For most treaties, the period from drafting to enforcement can last as long as 30 years (like the ICCPR, ICESCR, and ICMW) but for CRC, the entire process took less than ten.

The CRC is the most ratified treaty in history, with every country but the USA ratifying it. A variety of reasons are given for this non-ratification. There are political reasons because the government is reluctant to agree to any international treaties. Further challenges to ratification included the difficulties of a Federal government changing State laws, as some States allowed children to be given the death penalty which CRC would not permit, although this has been disallowed in the USA since 2005. Finally, there is a strong family values movement who fear child rights would undermine existing parental rights. Throughout Southeast Asia, all States ratified the convention soon after its adoption, with Singapore, Malaysia and Brunei being the last to ratify a mere five years after the others.

Coming at a revolutionary time, the CRC is an important treaty because it marked a change in human rights. With the breaking up of the Soviet Union and the end of the Cold War, the world was rapidly changing. This led to a fundamental restructuring of human rights as seen in the new understanding and approach brought about by the Vienna Declaration and Program of Action in 1993 (as discussed in Chapter One). What sets the CRC apart is that it treats human rights as indivisible so that civil and political rights are alongside economic and social rights. Significantly, the convention incorporated participation as a right. Another major difference to previous treaties is that it moves away from a legalistic approach of defining rights and violations to a more rights-based approach. The CRC sees human rights as a method to address and ultimately solve problems using the 'best interests of the child' as a guiding principle.

FACT AND FIGURES: Summary of CRC Rights

Article 1	Definition of the child as anyone under the age of 18
Article 2	Right to non-discrimination, and protection from discrimination
Article 3	Best interests of the child
Article 4	Governments should implement children's rights
Article 5	Parental rights and responsibilities
Article 6	Child's right to life, and the importance of the survival and development of the child.
Article 7	Child must get birth registration, and given a name and nationality
Article 8	A child's identity must be protected and can't be taken away
Article 9	Children must not be separated from their parents unless it is in the best interests of the child
Article 10	When families are in separate countries, Governments should support family reunification
Article 11	Protection from illegal transfer of children
Article 12	Children's right to participate
Article 13	Child's freedom of expression.
Article 14	Right for Children have freedom of religion, and parents input to the child when choosing a religion.
Article 15	Freedom of association and assembly
Article 16	Child's right to privacy
Article 17	Child's right to access information, and duty to provide media for children.
Article 18	Parents have the main responsibility to bring up the children, which should be done in the child's best interests, and governments must assist parents to do this.
Article 19	Children's freedom from abuse and violence, and government's duty to protect children from this.
Article 20	Right to special care when removed from families
Article 21	Rights during adoption
Article 22	Rights for refugee children

Article 23	Rights for children with disabilities
Article 24	Rights to health
Article 25	Right to review of treatment while in care
Article 26	Right to social security
Article 27	Right to an adequate standard of living
Article 28	Right to education
Article 29	The aim of education is to develop every child's personality, talents and abilities to the full, and to teach them about human rights and respect for others
Article 30	Right to learn about or practise minority cultures
Article 31	Right to play
Article 32	Right to protection from child labour
Article 33	Right to protection from drug abuse
Article 34	Right to protection from sexual exploitation
Article 35	Right to protection from abduction
Article 36	Right to protection from all forms of exploitation
Article 37	Right to be free from torture, avoiding detaining children, and keeping detained children separate from adults.
Article 38	Right to protection in conflict situations; right to avoid being recruited as a child soldier
Article 39	Right to rehabilitation if a child has been abused in any way.
Article 40	Right to a fair juvenile justice system
Article 41	If national standards are better than CRC standard, then use the national standards
Article 42	Children must know their rights

The CRC brought together rights found in existing treaties like the UDHR, ICESCR, and ICCPR but it also introduced some new ones, such as protection from various abuses, rights to protection in conflict, and rights during adoption. The CRC is slightly different from other treaties in that it placed rights among three parties:

1. States, who have duties and obligations to meet children's rights;
2. Children who are the right holders; and
3. Parents who have various duties towards their children, for example, to provide protection and access to education and healthcare, but who are also *rights holders*, for example, the right to influence a child's religion and education, rights to services like childcare, and to protection from having their children removed.

The treaty describes the family as a natural and fundamental unit of society which is entitled to protection and assistance, as was also noted by the UDHR, ICCPR and ICESCR. As mentioned in Chapter Nine on women's rights, there is much debate on the meaning of a 'natural unit.' Does 'natural' imply something biological? If this is the case, what of adopted children or step parents? Would they not be considered as real or true as biological parents or children?

There are three optional protocols to the CRC. Two were introduced on the same day (25 May 2000) to address child soldiers (the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, OP-CRC-AC) and the sexual exploitation of children (the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, OP-CRC-SC). A third optional protocol which allows the CRC treaty body to accept individual complaints (see Chapter 5 for further details about how treaty bodies take complaints) entered into force in April 2014 – but in the region only Thailand ratified this. The treaty and optional protocols aside, other mechanisms on children at the United Nations include a Special Rapporteur on the sale of children, child prostitution and child pornography (active since 1990)—of which a Thai representative was the first rapporteur—and a position for a Special Representative of the Secretary General on violence against children. The latter was set up in response to a UN study on violence against children in 2002, and will be discussed in section 10.3 below.

At the regional level, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) was established in April 2010 (discussed in Chapter 9). Like AICHR, it is an intergovernmental commission consisting of two representatives from each ASEAN State. The ACWC does not have a protection mandate, so it does not take, or address complaints from individuals. Rather, its work is focused on the promotion and protection of the rights of women and children, aiming to develop cooperation, policies, and activities in pursuit of these goals.

10.2.1 General Principles of the CRC

The CRC is guided by four overarching principles set out in General Comment No. 12 (2009). The principles in themselves are not new, as they did exist before the CRC. However, they are intended to strengthen both the understanding of children's rights, and to influence how children's rights are protected by State and families. The four principles in the Focus on box. These principles will now be investigated.



FOCUS ON

General Principles of the CRC General Comment No. 12 (2009)

1. Non-Discrimination (Art 2): children should not be denied their rights because of discrimination.
2. Best Interests of the Child (Art 3): when making decisions about children, the best interests of the child should be the most important criteria.
3. Survival and Development of the Child (Art 6): the life and survival of the child should be of the utmost importance to States in their activities, and they are obligated to ensure children develop into healthy adults.
4. Respect of the views of the child, or rights to participate (Art 12): children should be able to participate in decisions that concern them according to their age and maturity.

10.2.2 Survival and Development of the Child

In societies around the world, ensuring the survival of children is always given high priority. If there is a famine, organizations will work to feed children first; if a boat is sinking, women and children will be called to board the lifeboats first. While these principles are widely held, in practice this does not always occur. As late as 100 years ago, a sizeable proportion of the population still died as children (child mortality rates were as high as 30%), and even if children survived their first five years of life, they would likely still face hunger, conscription to the military, or harsh labour.

As a result, the first principle directed States to ensure a child's survival by reducing child mortality, protecting children from violence, and investing in healthcare. Because the State is responsible for a child's right to life, the CRC insists that these concerns should take priority over other government affairs. Governments reducing spending on maternal health, only to increase spending on the military, would clearly be in violation of this principle. This principle is particularly important in cultures where a preference for boys often results in the termination of female foetuses, or where girls are not given the same rights as boys. The same principle also ensured that children cannot face the death penalty, while giving them special protection in areas of armed conflict (additional protection is also offered under international humanitarian law, as discussed in section 10.7 below).

Included in this principle is the right to development, because obligations go beyond merely keeping a child alive; they also require children are able to develop into healthy, educated adults. The right to development covers rights to health which enables children to grow into healthy adults, the right to education which teaches children how to be responsible adults, and freedom of expression which develops a child's knowledge. Development is challenging for Southeast Asian governments as it requires them to devote precious government resources to the health and education of children. As later sections of this chapter will show, as regards the education of children, there is still much room for improvement in this region.

10.2.3 Best Interests of the Child

The principle of the best interests of the child is novel. While not actually defined, it means that decisions concerning a child should give the child's interests priority over other interests like the parents, the government, the culture, the economy, and so on. What is a 'best interest' of the child is not defined, though obviously things like their rights, their survival and development would be important. The flexibility around 'best interests' can be beneficial as it allows this principle to operate in a variety of settings, whether they are court rooms, schools, hospitals, or in the family. This principle was in use before the CRC, as it appeared in many State laws, particularly in family law, adoption and custody judgments. In international human rights law, the principle is mentioned in the 1959 *Declaration on the Rights of the Child*, and in CEDAW (Arts 5 and 16). In the CRC, best interests are mentioned in relation to separating children from parents, parental responsibility, adoption, and court hearings.

This principle requires that decisions about children should prioritize the child's interests above all others. For example, when deciding if a child should be separated from its parents, the fact the parents are violent and abusive must take priority over the parent's rights to look after their child, and the government's economic interest in avoiding paying for the child's relocation.

DISCUSSION AND DEBATE

Best Interest of the Child

The following case details the best interests of the child, and what actions should be taken. Best interests are subjective though, and it must be noted that discussions are open to disagreement and different interpretations.

Case Study

A brother and sister, aged five (female) and seventeen (male), appear in a Thai refugee camp after walking in from Myanmar. Escaping from a conflict zone, they were separated from their parents when the military attacked their village. Their parents cannot be found, but the children have an aunt in the camp. The boy wants to return to the conflict zone to find his parents, and he wants his sister to come with him. The sister wants to be with her brother. What should camp officials do? They know the conflict area is unsafe, but the children desire to be reunited with their parents. While the boy has shown he can safely cross the zone with his sister, the camp can offer food, healthcare, and education for the girl (but not the boy), a place to live with the aunt, and other children to play and socialize with.

Discussion

This situation was not uncommon in Thai-Burmese refugee camps during the 1990s and 2000s. In each case, camp officials had to make decisions based on the child's best interests. In this case, the best interests for the five year old girl would be to stay inside a safe camp where she could also access healthcare and education. In addition, the camp would offer better food, shelter, and water than the conflict zone. Although staying with her brother is important, it should not be at the risk of her safety.

The best interests of the brother differ from the sister. Because he is older and more mature, he should be able to participate in decisions that concern him. Considered too old for education, he can travel through the conflict zone relatively safely but



should not be able to do so with his sister. Ideally, he should wait with her in the camp until their parents are found, or until he turns eighteen when he can make the decision as an adult. Whether the children stay or go should not depend on space or resources (these are economic issues, and nothing to do with their best interests); it should also not depend on a parent's desire to see his/her children (which are the parent's interests); and finally, it should not depend on the law managing the camps (which are legal interests, and not the child's interests).

Questions

- Is keeping both children in the camp the best solution?
- Considering the boy is so adamant to go, should you let him?
- How would you rank the best interests of the girl from most to least important (including interests like survival, health, education, food, leisure and play, reuniting with parents, and staying with her brother)?

10.2.4 Non-Discrimination

All human rights treaties give prominence to non-discrimination and the CRC is no different. This principle does not cover discrimination against children as a group (for example, treating children differently from adults), but discrimination against specific groups of children. Some groups of children face constant discrimination. For instance, girls in many countries have less rights than boys. They are forced to leave school earlier, or do not receive the same education as their brothers. This situation is seen more in East and South Asia, where there is a saying, "sending your daughter to school is like watering your neighbour's garden," or in other words, doing something to benefit others and not yourself. Disabled children also face discrimination. Across the region, they rarely get the same access to education while governments offer little support to their parents, and they are made fun of in the community. Other groups facing discrimination may also include ethnic minority children, the children of migrant workers, and child migrants (discussed later in this chapter).

10.2.5 Right to Participate

Participation is a widely recognized human right and commonly associated with rights to development. Although not directly mentioned in treaties before the CRC, rights to participate in politics and freedom of expression are rights to participation. Strictly speaking, there is only one use of the word 'participation' in the CRC in relation to children with a disability being able to participate in the community, so it is not about all children. The general principle is about the views of the child being taken seriously, as found in Art. 12, which essentially means the right to participation. By being included as a general principle, it may be argued that the right to participation put children's rights on a higher level. So according to this new standard, children should firstly be seen as active subjects in the process, meaning that they should have a say in how their rights are met. The aim is to get away from the so-called 'charity' approach where, as passive recipients of charity, responding to the needs of children is entirely decided by the charity givers. Viewing children as rights holders who are able to contribute to decisions about them, fits into the 'rights-based' approach (as discussed in Chapter 12). A second objective of participation is to ensure children have a say in how their rights are delivered. This is particularly important as regards rights to religion, education, and media.

A child's right to participate in decisions concerning them has been noted in many areas including adoption, education, judicial decisions, custody, development, and policies relating to children. For example, courts should hear the views of children alongside their parents in a custody case. The participation of the child is weighted according to the age and maturity of the child. An example of this is allowing children to participate in decision about education. All high school systems in the region let students elect subjects to study in addition to various compulsory courses. Five year olds, on the other hand, would not be given a choice because they lack maturity and knowledge to decide their education. As the term 'best interests' is not defined, neither are 'maturity' and 'age.' Instead, it is usually left up to governments and parents to make the final decision, taking into account the child's views.

The principle of participation clashes with more traditional and patriarchal social views which assume that parents, or in some cases, only the father, should have final say on their children's lives. The right for children to choose their own religion and to have access to their own media is not widely accepted in some communities. It is mainly for this reason that rights to participation are poorly institutionalized in Southeast Asia. Most legal systems recognize the right of children to participate in decisions concerning them, but this may not actually occur in courts. Likewise, children are given few opportunities to provide input in their education.

These four general principles are important throughout the convention, as they influence the way children's rights are met while also providing solutions to some problems facing children. The rest of this chapter will examine five areas where children need special services, or are vulnerable to exploitation and threats: protection from violence, education, work, armed conflict, and reproductive health.

10.3 Protection of Children against Violence

Protecting children from violence is one of the most important duties of both State and family, and constitutes a major problem in Southeast Asia. In fact, it has been argued that the institutions which should protect them (the family and the State) are frequently complicit in this violence. As stated in Art. 19 of the CRC, every child has a right to protection from abuse, neglect, violence, and exploitation:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has care of the child. Art. 19.1

Importantly, this article defines violence as physical or mental, injury, abuse, neglect and so on. The definition was further expanded in the CRC's General Comment No 13 (2011) on Art. 19. The full definition includes other forms of violence such as corporal punishment, forced marriages, and initiation rites. Art. 19 noted that to prevent violence, governments should ensure appropriate educational programmes, laws, and government agencies are in place. It also recognizes that although caregivers should protect children from violence, they can also be the perpetrators of it. As such, the General Comment emphasized the importance of these duties and obligations because the "extent and intensity of violence exerted on children is alarming" and that "no violence against children is justifiable; all violence against children is preventable." Further, it demanded States provide proper forms of prevention, investigation, and follow-up of instances of child maltreatment or exploitation.

A UN study which starts in 2002 and is published as the Secretary General's Study on Violence Against Children (2006) is important because it recognized violence against children as a mostly hidden global phenomenon, but whose impacts are serious. In most Southeast Asian societies children face violence everywhere: from parents and teachers disciplining naughty children to violence in detention, orphanages, and the workplace. Communities often ignore such violence, accepting it as a parent's right or acceptable cultural practice. Many societies even see the hitting of children as good parenting. For example, the saying "spare the rod and spoil the child," although originally adapted from a biblical proverb, has equivalent phrases in the region. As such, no laws exist against parents hitting their children although they do in many other countries. For instance, Sweden was one of the first countries to ban domestic corporal punishment. Similarly, teachers are still permitted to hit children in most Southeast Asian countries, as are employers, although striking an adult in the workplace is a criminal offence. Children or teenagers being hit or slapped at work, while not being seen as a good thing, would rarely be seen as a criminal offence whereas to hit an adult in the workplace is a crime. These examples show there is still much tolerance in society for violence against children. This section will address three main areas of violence faced by children: domestic violence or violence at home, corporal punishment at school, and sexual violence.

10.3.1 Children and Domestic Violence

The family should be a place where a child's physical and emotional safety is guaranteed. Yet, children do experience violence at home, often committed by family members. Frequently, children experience cruel or humiliating punishment, or neglect. In addition, they may be harshly disciplined. Insults, name-calling, isolation, rejection, threats, emotional indifference and belittling are all forms of violence which children may face and which they should be protected from.

There are many challenges to preventing domestic violence against children. First, such behaviour is deeply embedded in Southeast Asian culture – it is widely believed that good parents discipline their children. Second, how parents treat their children is largely regarded as a private matter. For anyone to get involved, including neighbours or the police, would be seen as an invasion of privacy. Third, domestic corporal punishment is not considered a serious issue. Not only is hitting a child not a crime, it is not even considered particularly bad for that child – in fact, many children would prefer a quick smack over sitting alone in a room or giving up something they like. Finally, parents are often unaware of other ways to discipline children, or they simply don't have the energy to design an appropriate program of discipline.

UN bodies such as UNICEF and the Committee on the Rights of the Child have argued for a ban on **corporal punishment** at home, urging countries to change their laws. However, only about a quarter of countries in the world have done so, the majority in Europe. In fact, South Korea is the only Asian country to ban domestic corporal punishment, and these laws were not introduced until 2015 and are limited to Seoul. While corporal punishment is mostly legal, all countries have laws limiting the punishment a child can face – normally in the form of laws prohibiting sexual violence and child abuse. Considered more serious than corporal punishment, child abuse normally entails harsh physical punishment, sexual violence, or severe neglect, all of which can have long term effects on the child.

Corporal Punishment

Corporal punishment is punishment against the body (the corpus) which is intended to cause pain. Corporal punishment includes a parent smacking a child, a teacher using a cane, or whipping as a court sentences. establishing power.



DISCUSSION AND DEBATE

When is it acceptable for a parent to hit a naughty child?

When can a parent hit a naughty child? Will hitting the child serve a purpose? In most societies in the region, hitting children is tolerated because it is considered a valid way to teach them. The arguments for corporal punishment are:

- It is educational as the child learns not to be naughty again
- It is quick and effective, as it links the naughty action with an immediate negative response
- It is a parent's right to choose how to discipline their child
- Hitting does not harm the child
- Children won't behave properly unless they are hit

Questions

Are these arguments logical? When parents hit children, are they doing this because they have rationalised it as the best method to educate the child, or were they just angry at the child?

- If it is an effective method of education, why isn't it acceptable to hit adults as well? If a husband or a worker has behaved badly, why can't we hit them?
- Why don't husbands have similar rights to hit their wives? Why are such acts criminalized? If husbands are unable to choose how they treat their wives because such acts are criminal laws, why shouldn't there be laws to protect children from parental violence?

10.3.2 Children and Violence at School

Violence in schools and educational settings is widespread in the region. Recent surveys of high school students in Thailand found that over 60% had experienced it (see 'Further Reading' for more information). Teachers are allowed to hit students in three of the ten Southeast Asian countries. In other countries, although unlawful, it is not specifically prohibited. In addition, children under institutional care in shelters, orphanages, the workplace, or in custody can also face physical violence. Staff may discipline children with beatings, restraints, or by imprisoning them. In some institutions, children with disabilities face violence under the guise of treatment, for example, by being subjected to electric shocks to control their behaviour, or by being forced to take drugs to encourage obedience. A similar problem can be seen in playground bullying which often takes the form of violence. Bullying especially affects children from minority and vulnerable groups and can include the children of migrant workers, ethnic minorities, and gay, lesbian, and transgender children. This section will focus on the use of corporal punishment in schools.



CASE STUDY

Types of Corporal Punishment and Abuse in Southeast Asia

Across the region, children are disciplined in many ways. Officially approved corporal punishment includes striking with a cane or slapping, but unofficial or non-approved punishments are also common, many of which may be illegal. These may not be defined as corporal punishment but different forms of abuse. The punishments detailed below are taken from national and regional reports from the website, Global Initiative to End All Corporal Punishment of Children.

Acceptable methods of corporal punishment include:

- Hitting with wooden rods, canes, rulers
- Slapping of legs and buttocks
- Physical restraint (holding down)

Unacceptable but used forms of punishment include:

- Kicking, punching, face slapping, hair, eyebrow or ear pulling
- Standing for long periods in the sun
- Whipping with electrical cords
- Rubbing chilli pepper in the eyes
- Stomach pinching
- Burning with cigarettes
- Shaving of heads
- Twisting arms and legs, pulling or twisting of joints,
- Shocking with electric batons (or electroshock weapons)
- Painful physical exercises
- Throwing dirty water
- Withdrawal of food

While the CRC does not explicitly state that corporal punishment should be banned, many articles imply it. Art. 28 declares that States should “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.” Likewise, Art. 19 called for an end to all violence and freedom from torture, while General Comment No 8 asserted the right of a child to protection from corporal punishment. Although 102 countries have banned corporal punishment in schools, often this ban is not adequately enforced. From the table below, it can be seen that the protection of children from corporal punishment in school has some way to go before it is universally enforced. Some protection is gender-based (for example, only girls in Brunei DS are protected), some is based on policy and not law (for example, Thailand), or is badly defined (for example, what does “such force as is reasonable” mean in Singaporean law?). Regardless of the existence of such laws, it is likely that corporal punishment is still frequently used.

Corporal punishment is still used in schools for a variety of reasons because many parents and teachers still believe the most effective way to teach naughty children is by hitting them. Corporal punishment, many believe, instils discipline, prevents laziness or disrespectful behaviour, and helps children stay interested – which is why sparing the rod is widely believed in Southeast Asia to spoil the child.

Table 10-2: Is Corporal Punishment (CP) Outlawed in Southeast Asia?

Country	Violence Laws
Brunei DS	CP is lawful at home, at schools (boys only), in penal institutions, and as sentencing for crimes provided it does not cause “substantial and observable” injury. Caning is used as punishment for boys in schools, juvenile correctional institutions, and as a sentence for juvenile offenders for certain crimes, but is prohibited for girls in the same settings. CP is prohibited in childcare centres. No explicit prohibition in alternative care settings.
Cambodia	CP is lawful at home, in alternative care settings, and day care. CP is unlawful in public and private schools, penal institutions, and crime sentencing.
Indonesia	CP is lawful at home and in schools, although there are laws to protect children from abuse in these settings. CP is unlawful in penal institutions and for crime sentencing. No explicit prohibition for alternative care settings and day care. CP is legal in all settings. There are laws to protect children from violence at home, in school and in penal institutions, but these laws do not specifically prohibit CP. Although CP is unlawful as a criminal sentence, it is unclear if this also applies to Sharia law.
Lao PDR	The Law on the Protection of the Rights and Interests of Children seeks to end violence against women and children in all settings. CP is unlawful in early childhood education but no such prohibition applies to older children. CP is unlawful as a criminal sentence but not explicitly prohibited in penal institutions.
Malaysia	The Child Act of 2001 integrates all laws on children. However, CP is legal in the home, alternative care settings, and day care centres for children under 12 years of age. It is also legal in schools (for boys) and penal institutions in the form of caning. Caning can be used as a criminal punishment for men and boys under secular law; whipping men and women over the age of puberty is acceptable under Islamic law. Under both secular and Islamic law, caning or whipping must be performed according to guidelines.
Myanmar	CP is legal for children under the age of 12 in the home, although new legislation is now being drafted which may change this. No explicit prohibition of CP in schools. Lawful as a disciplinary measure in penal institutions. CP is prohibited as a criminal sentence for children below the age of 16.
Philippines	The relevant legislation, <i>Laws on Worst Forms of Child Labor, and Special Protection of Children Against Abuse, Exploitation and Discrimination Act</i> (1992), makes CP lawful at home, but unlawful in alternative care settings, day care, in public and private schools, in penal institutions, and for crime sentencing.
Singapore	CP is lawful at home with caning authorized in children’s homes. CP is prohibited in some but not all day care centres. CP is lawful in schools but only for male pupils and only in the form of caning. CP is lawful in juvenile penal institutions and can be used as a sentence for crime. However, only juveniles tried by the High Court may be sentenced to CP. CP in the form of caning is also allowed as punishment for boys during compulsory military service.

Country	Violence Laws
Timor Leste	CP is lawful at home. CP is unlawful in penal institutions and for crime sentencing. No explicit prohibition in alternative care settings, day care, or schools.
Thailand	The Child Protection Act of 2003 and the National Policy Strategy on domestic violence and trafficking prohibits CP in schools, penal institutions and for crime sentencing. CP is lawful at home, in early childhood and day care.
Vietnam	Under the Revised Law on Protection, Care, and Education for Children (2004), CP is unlawful in schools, in penal institutions, and for crime sentencing. CP is lawful at home, and there is no explicit prohibition for alternative care settings or day care.

Corporal punishment is still used in schools for a variety of reasons because many parents and teachers still believe the most effective way to teach naughty children is by hitting them. Corporal punishment, many believe, instils discipline, prevents laziness or disrespectful behaviour, and helps children stay interested – which is why sparing the rod is widely believed in Southeast Asia to spoil the child.

This culture is also reflected in the fact that teachers are often not taught alternative ways to discipline students, and in any case may view it as a successful method of dealing with naughty children. Such attitudes mean that for many teachers the only way they know how to deal with a naughty child, and the only way they see as successful, is corporal punishment. While corporal punishment may be banned, some teachers will quietly use it or ignore when other teachers use it. The use of corporal punishment is not the teacher's fault alone. In some cases, parents may ask teachers to discipline their children because even though they believe corporal punishment is needed, they prefer someone else to do it. Finally, students themselves may be complicit in the use of corporal punishment. Faced with a choice of a week's detention or six lashes, some students would prefer getting it over and done with quickly. Because of these reasons, corporal punishment continues to be regularly used in all Southeast Asian countries despite being banned in some.

The ambition to end corporal punishment is challenging, but a number of measures have been introduced to reduce its prevalence. Measures include retraining teachers to use alternative ways to discipline children, educating parents and teachers about its negative effects, and increasing the participation of parents and children in decisions on educational standards.



DISCUSSION AND DEBATE

How to Stop Corporal Punishment?

How can cultural and institutional support of corporal punishment be stopped? How effective will the following measures be?

1. Legal reform: Criminalise corporal punishment with harsh penalties.
2. Re-educate teachers to use alternative methods of discipline (for example, detention instead of caning).
3. Increase public awareness of the negative effects of corporal punishment including the psychological impact on children which could lead to anti-social behaviour, lower grades, increased aggression, increased aversion to education, and higher dropout rates.
4. Increase school inspections and anonymous reporting systems for students.
5. Educate parents against using violence at home.

Questions

- Which of these solutions is the best and why?
- Name some challenges to implementing these solutions

10.3.3 Children and Sexual Abuse

Sexual abuse is a particularly disturbing form of violence against children. The World Health Organization in 2002 reported that there were around 150 million female and 73 million male child victims of sexual violence worldwide (see Further Reading at the end of the chapter). More recent studies in 2011 found nearly 33% of girls in Africa and 23% of girls in Asia had faced sexual abuse. While the rate for boys is lower, it was still estimated (in 2011) that nearly 10% of boys had faced sexual abuse. Most incidents were at the hands of someone they knew, often a member of their own family. They also estimated that between 100 and 140 million girls and women had undergone some form of female genital mutilation/cutting (FGM), including 3 million a year in Sub-Saharan Africa alone, especially Egypt, Sudan, Somalia and Sierra Leone.

The problem of child sexual abuse has led to the introduction of laws on the age of consent (see Table 10.8 in section 10.8), child sex, and rape laws to name but a few. The last two crimes, in particular, face harsh penalties but despite this, the sexual abuse of children is still prevalent in all Southeast Asian countries. Laws on these crimes only came into force in the 1960s, with many countries in the region either having no legislation against child sex, or ignoring the ones they did have. Child marriages and underage sex workers were especially common in Southeast Asia in the early 1900s and before.

Unfortunately, some forms of child sexual abuse (like child marriage) have escaped legal intervention. Child marriages are prevalent in South Asia with girls as young as twelve being married off by their parents in Pakistan, Afghanistan, and Bangladesh. Many women in rural India are married before they reach adulthood. Within Southeast Asia child marriage is not so prevalent but does occur in some regions. For example, Indonesia has a high number of teenage brides, with UNICEF estimating that 17% of

girls are married before eighteen. Attempts to raise the legal age to marry in Indonesia from sixteen (with parental consent) to the global norm of eighteen have consistently failed with the Indonesian Constitutional Court as late as 2015 refused to increase the age arguing that it has little impact on social problems or divorce rates. Indeed, they considered that such an increase could create a rise in extramarital sex. Likewise, in Malaysia and the Philippines, child marriages may be prevalent in some rural areas.

Child abuse is closely linked with the abuse of authority, as most cases involve someone known to the child. This can be a family member or relative, or a teacher, or boss at work. Sexual abuse is a particularly serious problem because of its long term negative effects, both physical and mental, which can result in a range of psychological disorders including depression, drug addiction, and anxiety. Recent research has also found that those who commit gender-based violence are often themselves a victims of child abuse. For example, Partners for Prevention (see Further Reading) in a study across six Asian countries, found that around a third of those who had committed sexual abuse had themselves been abused as children.

Another troubling issue addressed by the Optional Protocol on the sale of children concerns the commercial exploitation of children, which often takes the form of child prostitution or pornography. Some Southeast Asian countries have reported particular problems with child prostitution – for example, in 2007, ECPAT (see Further Reading) estimated there were around 60,000 child prostitutes in Philippines. Thailand, Indonesia, and Malaysia also have similar problems although not on the same scale as the Philippines.

In many cases, child prostitution can be linked to tourism, where sex tourists travel specifically to certain countries to exploit children. Source countries of sex tourists include Canada, Australia, and USA, all of which have now enacted extra territorial laws against it (laws that can be enforced outside the territory of the country), meaning sex tourists may be arrested and charged for their crimes in their home countries, even though the crime was not committed there. Other areas of sexual exploitation include child pornography.

FOCUS ON

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (CRC OPSC)

This optional protocol (OP) was adopted in 2000, and came into force two years later in 2002. It now has over 170 ratifications, including all of Southeast Asia except Singapore.

The main purpose of the OP was to: (1) define the crimes of selling children, child prostitution, and child pornography; (2) to criminalize these activities; and (3) to better protect children from these crimes by empowering States to prosecute the perpetrators.

The OP has many uses in Southeast Asia. One major use is to prevent online child pornography as many developing countries in Southeast Asia at the time the OP was adopted had no such laws because they only recently gained access to the internet. The OP defines and criminalizes the hosting of child pornography sites, making it



easier for States to prosecute perpetrators. Another use is with child prostitution laws. It makes child sex an extraditable offence and the law has extraterritorial scope, which allows people to be charged even if the crime was committed outside their own country. In this case they are under the jurisdiction of the State based on their citizenship and not because use they are in the territory of the State. Finally the OP is one of a number of laws introduced in the early 2000s to stop trafficking including the Palermo Protocol on trafficking which came out in the same year (and discussed in Chapter 7 on trafficking).

10.4 The Right to Education

The right to education is a critical human right relevant to all children, and is found in Art. 28 of the CRC, as well as in other treaties such as the ICESCR, MWC, and CEDAW. All these say that primary level education must be available to all children, regardless of their nationality, gender, or any other category. But just getting children into school is not enough as quality and safety standards must also be met. This section will only address a child's right to primary and high school education as university education almost always only applies to adults.

10.4.1 Elements of the Right to Education

The right to education depends on the stage and type of education and can be divided into three stages: the right to primary education (for children aged between around 5-12), the right to secondary or high school education (for children aged around 12-18), and the right to tertiary, university, or vocational education (for those over 18). Primary education must be free and compulsory. That is, every child aged between 5-12 (although the age varies slightly throughout the region), must have access to free primary education. Children cannot be denied primary education because they do not speak the language, or they are children of migrant workers, or they are refugees. Every child must have a free primary education.

In addition, high school education must be available and accessible to every child but it does not have to be compulsory or free. Having said this, the majority of Southeast Asian countries have both compulsory and free high schools although the amount of compulsory education in the region does vary between States. The levels of compulsory education can be as little as only six or primary education being compulsory, such as in Myanmar. It can be up to nine years, or primary school plus the first three years of high school until the student reaches about fifteen. Many countries aim for twelve years which includes high school as well. In Southeast Asia, most countries provide nine years of compulsory education although Myanmar and Cambodia have limited this to six, making eleven or twelve the average school leaving age. Schooling is particularly important because it reduces child labour. If children can leave school at eleven, the chances are they will look for work. An additional problem is that an eleven year old but may not be able to legally work until they are fourteen or fifteen, so the child will face three years of unprotected labour. Obviously, the answer should be, not to lower the minimum working age, but to increase the years of compulsory education.

Rights to education encompass many different issues and activities, from simply getting an education, to the quality of education itself. Laws and policies on compulsory education will not necessarily ensure children get access to schools, nor

if they get access they receive a decent education. State duties have been summarized in the 4A framework, which was devised by the Special Rapporteur on education, Katarine Tomascvski, and may also be found in ICESCR General Comment 13. The rest of this section will examine the right to education in the region by examining the 4A standards.



FOCUS ON

Right to Education, the 4As

Availability: education is available to everyone, requiring sufficient schools, rooms, and seats.

Accessibility: education should be accessible to all, and no one should be denied it due to distance, expense or discrimination.

Acceptability: education should be relevant, up-to-date, appropriate, and of necessary quality, with properly trained teachers and adequate facilities.

Adaptability: education should be able to keep up with new innovations such as computers, adaptable to suit specific groups such as children with disabilities or from minority groups, and be able to address challenges such as gender or racial discrimination.

10.4.2 Availability and Accessibility of Education in Southeast Asia

While primary schooling may be widely available in the region, this does not mean all children will go to school. The availability of education - which basically translates to enough school places for all children in the country - requires governments to allocate resources to build enough schools and to train enough teachers. Accessibility seems to be the main reason children miss out on school, in that places in the class may be available but something like the cost, distance, the need to work, or language issues prevents a child from attending. As Table 10.3 shows, schools are available in all Southeast Asian countries, and most have high enrolment rates, but the number of children not finishing primary school (the dropout rate) is very high among less developed countries, with the exception of Vietnam. For developing countries, this dropout rate can mainly be attributed to poverty (children forced to leave school to work), or cost (the school is too expensive to attend), or quality (teaching standards

are so low, children don't want to go). The exception is Vietnam, which has not only made primary school available and accessible but also succeeded in keeping these children in school. Compare their success to the Philippines where one in four primary school children do not graduate despite near full enrolment rates. These numbers clearly show that the problem is not so much availability but inaccessibility for whatever reason.

Table 10-3: Percentage of Children in Primary Schools in Southeast Asia

	Enrolment rate in primary schools [#]	Primary school dropout rate	Enrolment rate in high schools [#]	Spending on education [*]
Brunei DS	94%	3.6	106%	3.8
Cambodia	125%	36%	45%	2.6
Indonesia	109%	11%	83%	3.6
Lao PDR	121%	27%	50%	2.8
Malaysia	101%	0.9%	71%	5.9
Myanmar	114%	25.2%	50%	0.8
Philippines	106%	24.2%	85%	3.4
Singapore^{**}	-	1.3%	-	2.9
Thailand^{***}	93%	-	87%	7.6
Timor Leste	125%	16%	57%	9.4
Vietnam^{****}	105%	5.5%	-	6.3

The figures are all taken from the *Human Development Report 2015*

[#] % population of children of primary/secondary school age

^{*} Spending as % of GDP

^{**} Singapore provides no figures on education participation

^{***} Though Thailand does not measure dropout rates, given that 87% of students go on to high school, it can be assumed the rate is low (less than 5%)

^{****} Vietnam does not measure high school participation rates, but as the dropout rate is low and university participation is 25%, it may be assumed they are high

The reasons children do not finish school vary. A major factor is economic – some parents are so poor, they cannot afford to send children to school even if they're free as additional costs, such as uniforms, books, lunch, travel, and pencils, may add up. As such, governments should ensure education is accessible by also providing free uniforms, food, and transport. There are also cases where the family is so poor, the child must work to help support the family.

Discrimination constitutes a further reason why schools may not be accessible to some children. Globally, the most common form of discrimination in education targets girls. Many societies believe a girl's main role in life will be to look after her husband and children, making an education pointless. Fortunately, this view is not widely held in Southeast Asia, and while girls may have less schooling than boys on average, the gap has been reduced in most countries to less than a year. In some countries like Thailand, according to recent studies girls may now expect to get more education than boys.

Other groups facing discrimination in the region are the children of ethnic minorities and migrant workers. In countries such as Malaysia and Thailand which have large numbers of migrant workers, many children cannot access primary education at all. In Malaysia, undocumented children are not allowed to attend school. And although Thailand made it legal for them to do so in 2005, many migrant worker children do not because they fear discrimination in the classroom and playground, they fear being detained by police on the way to and from school, and because they don't speak the language. As a response, some organizations established schools specifically for this group, but while these may offer an acceptable education, many challenges arise. First, their curriculums may not be recognized by the government so disqualifying the child from attending high school. Second, some children may choose to stay at home and help their parents so attendance may be a problem. This is especially common in situations where parents do 'piece work,' and are paid by the number of pieces they produce (for example, shirts sewed, prawns peeled, or products boxed). In these cases, children can help to produce more pieces increasing the family income.

For the reasons stated above, accessibility is a significant problem in the region, with poor Southeast Asian countries only managing to send around 25% of their population to high school. In order to fix this, governments should increase accessibility by making education cheaper or free, and by making schools more accessible to minority and vulnerable populations. But just getting children to attend school is not enough – they must also be able to learn there. The quality of education, or acceptable and adaptable education, will be examined next.

10.4.3 Acceptable and Adaptable Education in Southeast Asia

The UDHR defines the quality of education as the “full development of the human personality and the strengthening of respect for human rights and fundamental freedoms.” This view is also found in the ICESCR (Art. 13), and was further expanded in Art. 29 of the CRC to include respect for a child's parent's culture and values, responsible social views, and respect for the environment. Quality of education covers elements such as the curriculum, the standard of schoolrooms and other facilities, and the quality of teachers.

As regards the curriculum, children should be educated to enable them to contribute to society. Although the exact content of curricula will vary between countries, basic literacy and numeracy are considered vital, as are science and social science. More widely contested are subjects such as history, nationalism, sex education, and religion. As can be seen in the Discussion and Debate box below, States may assign nationalistic or religious objectives to education. As discussed in Chapter Eight, most national curricula do not teach accurate histories of their countries. Common omissions include gross violations of human rights, the negative role of the military, and animosity with neighbouring countries. For example, Thailand still teaches its wars with Burmese empires, even though the last conflict happened around 250 years ago.



DISCUSSION AND DEBATE

Should nationalism be an objective of education?

The objectives of education in many Southeast Asian countries include patriotism and religious beliefs. For example, Indonesia's Education For All (2003) policy states that education should ensure students are "faithful and pious to the one and only God," while Laos' constitution claims education should "raise the ... patriotic spirit, the spirit of cherishing the People's Democratic Regime." Finally, Vietnam's Education Law states the objective of education is to ensure students are "loyal to the ideology of national independence and socialism; to shape and foster the personality, quality and capacity of citizens."

While nationalism can lead to discrimination, conflict, and war, it may also hold a country together and encourage people to work towards a common good or shared goal. For example, people often cheer their national sports teams or feel pride when a fellow citizen wins a famous award. On the negative side, nationalism can also instill a sense of superiority while teaching students of the threat posed by other nations.

Questions

- How should nationalism be taught?
- When is teaching nationalism a good idea, and when is it a bad one?

Curriculum aside, other factors which define the quality of education include:

- School facilities: adequately sized classrooms with tables, chairs, blackboards, and other facilities such as playgrounds, toilets, and shelter from the weather
- Qualified teachers: teachers have the necessary training
- Access to information: a library, books to assist education, and other sources of information
- A safe and non-discriminatory learning environment: children should feel safe from bullying, be able to reach school safely, and girls should not feel threatened by boys or male teachers
- Inclusive teaching methods: children should be encouraged to ask questions and be curious. They should be allowed to participate in all activities and their education should include activities which encourages their learning and socializing.

There are many more elements to a quality education than the ones given above, but these are some core elements in the quality of education.

A common problem throughout Southeast Asia concerns the language of instruction, particularly when teaching children from ethnic and linguistic minorities. As already mentioned, education should be acceptable in terms of quality and adaptability to be inclusive of to children from different backgrounds. Given that most lessons are taught in the national language, the cultural and linguistic diversity in Southeast Asia is problematic, many children do not speak their national language at home. For example, Indonesia, the most linguistically diverse country with about 700 languages

and much less than half the population speak Bahasa as their mother tongue, still uses Bahasa exclusively in its government schools. The debate is that children may not speak their national language, how will they be able to understand their teachers or read textbooks? For this reason, it is argued that all children should be taught their national language so they will be able to attend high school and university, and as a result, get good jobs.

DISCUSSION AND DEBATE

Language of Instruction for Ethnic Minority Children

Throughout the region, many ethnic minority children do not speak the national language. Southeast Asia has hundreds, if not thousands of ethnic minorities, all of whom speak their own language (such as the Chin, Katchin, and Naga of Myanmar, the Akka and Hmong hill tribes of Thailand and Laos, and the Dyak and Papuan people of Indonesia). What should the language of instruction for these children be: the national language or the language they speak at home? Advantages and disadvantages for both options are:

Learning in the National Language

- If a child plans to attend high school and university, they will need to learn the national language as this is the language of instruction
- Most workplaces use the national language
- Government services (such as a driver's licence test) normally use national languages
- Most teachers only speak the national language, and it may be difficult to find and train teachers who can speak ethnic languages
- Children able to speak the national language are also able to socialize with a much broader group of people, watch soap operas, listen to music, sing karaoke, and text each other

Learning in One's Ethnic Language

- If children don't understand their teachers they cannot learn in the classroom.
- Children need to be able to communicate with their families at home
- Ethnic cultures should be respected, and if children no longer speak their mother tongue, they will lose touch with their cultural roots

Questions

- What language should be used in schools?
- Is it preferable that all children speak the national language so they can go on to attend high school and university?
- But shouldn't governments respect local cultures? If children stop speaking their ethnic language, culture and traditions may be lost



Another area where discrimination stops a child's access to school involves disabled children. While it is estimated that about 3-5% of children have a disability, the number of disabled children in school in Southeast Asia is much smaller. Not only are schools generally not equipped to teach them, teachers may also not, for example, understand sign language or have Braille texts readily available. Further, parents may be too embarrassed to take their disabled children to school, or they may worry about bullying. As a result, very few disabled children get access to education.

The examples of education for ethnic minority and disabled children are examples of groups of children who will either not get access to education or will receive substandard teaching due to government failures to provide accessible, acceptable, and adaptable education. This section has addressed the right to education through the 4A model to show how to measure if the right to education is being met for children. The next section will briefly examine the rights of children of ethnic and indigenous minorities.

10.4.4 Protecting Minority and Indigenous Children in Southeast Asia

It is relevant at this point to note how States treat children from ethnic and indigenous minorities by examining how they are schooled or otherwise protected by laws and policies. The CRC states:

a child belonging to such a minority who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language (Art. 30).

Article 30 should be read alongside other rights mentioned in the CRC, including the principle of non-discrimination, the rights of the child to education, and access to healthcare found in other treaties.

Although most States do not have any specific laws on the rights of ethnic and indigenous children, all recognize the principle of non-discrimination, but not specifically around ethnicity or indigeneity. States which have passed laws include Indonesia and Malaysia. Indonesia's Constitution protects national cultures and gives children the right "to protection from violence or discrimination." Similarly, in Malaysia, the Constitution recognizes that "there shall be no discrimination against citizens on the ground only of religion, race, and descent, place of birth or gender in any law."

The governments of Laos and Vietnam go even further. In a 1992 policy entitled, Resolution of the Party Central Organization Concerning Ethnic Minority Affairs in the New Era, Laos recognizes it is a "multi-ethnic country" so seeks to (i) improve the living conditions of ethnic minorities, (ii) expand the cultural heritage and ethnic identity of each group through formal primary education and a revival of 'ethnic youth schools' in mountainous areas, (iii) research the writing systems of the Hmong and the Khmou, and (iv) to allow study of these systems together with the Lao language and alphabet. Likewise, Vietnam has formally recognized ethnic equality and offers full citizenship to ethnic minority peoples through both the old 1992 Constitution, and the more recent 2013 Constitution. Rights are found in Art. 5 which states that "all ethnicities are equal," allowing every ethnic group to use its own language, and Art. 58 which gives minorities priority in healthcare and education. Further, Vietnam has created ethnic minority boarding schools (like Laos) while offering lower entry requirements and quotas for minority children to enter schools.

This brief overview of the rights of children from ethnic minorities and indigenous groups shows that while their rights have been recognised to a certain extent, in reality, much discrimination still exists. This is found in the fact that ethnic and indigenous children get less education, face greater health risks, and are more likely to be stateless. Clearly, these children not getting full access to their rights. The next section turns to the problem of juvenile justice and children in detention.

10.5 Juvenile Justice

States face many challenges when dealing with children who are in conflict with the law. According to Art. 40 of the CRC, children in the justice system should have their rights protected in line with the CRC General Principles, by promoting certain practices to ensure children's rights while in the justice system. These are:

- Diversion: keeping children out of the juvenile justice system and avoiding juvenile detention should be a priority
- Restorative justice: making the objective of justice the restoration of peace and human rights to the victim, perpetrator, and community
- Community-based rehabilitation: reintegrating the child back into the family and community to avoid further conflicts with the law

Other relevant international standards include the UN Guidelines for the Prevention of Juvenile Delinquency (the 'Riyadh Guidelines'), the UN Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules') and the UN Rules for the Protection of Juveniles Deprived of their Liberty. Though juvenile justice is a relatively small concern in absolute numbers, broader implications about the safety and security of children in the community make it a significant one. Though in some cases children should face justice, they are too often incarcerated for minor offences or otherwise institutionalised, often leading them to commit more crimes. According to the General Principles on the development of the child, the justice system should be concerned about the impact of punishment has on a child's development. The next section will provide an overview of the topic by examining the laws and court processes governing juvenile justice, before looking at the detention of children.

10.5.1 Laws of Juvenile Justice

Juvenile justice systems in Southeast Asia are still undergoing development. Countries such as Singapore and Malaysia have had juvenile justice systems for decades. The systems in Myanmar, Vietnam, and Cambodia are either very recent, or still under development. The system itself consists of the laws recognizing crimes and punishments for minors, the police and courts which apprehend juveniles and put them on trial, and the detention centres which incarcerate them. Across Southeast Asia, the number of juvenile offenders is relatively small. Reports estimate that around 70,000 children are charged with a crime a year leading to about 20,000 incarcerations. As a comparison, USA (which has about half the population of Southeast Asia) detains 5 times as many juveniles. Not only do juveniles in Southeast Asia commit less crimes, the crimes tend to be minor such as such as robbery and vagrancy.



Concept

Child in Conflict with the Law

The term ‘in conflict with the law’ tends to be used rather than ‘breaking the law’ or ‘committing a crime’ because often children do not deliberately attempt to break the law. They may be compelled to steal food because they are hungry. They may be homeless so they are considered a vagrant. They may not have enough understanding of the law to know that what they did was a crime. In these cases it is not only the child’s fault that the law has been broken, as the State has some responsibility because they are not providing food, housing, or education to the children to prevent them from breaking the law.

A central element of juvenile justice laws concerns the age of criminal responsibility, that is, the age at which a person can face criminal punishment. Though CRC General Comment 10 considers above twelve children may be responsible, though international standards tend to use fourteen as the minimum standard. In many Southeast Asian countries the age lower than this. In Brunei DS, Singapore, and Myanmar, the age is seven; eight in Indonesia, and ten in Malaysia and Thailand. In Vietnam, a twelve year old can face administrative punishment but will not be considered a criminal until fourteen. It must be noted that although the age of criminal responsibility is set at seven in Brunei, no one below twelve has ever actually faced criminal charges. In all States there is flexibility in applying criminal law, with police in most cases not treating young children as criminals even if they are above the minimum age.

Table 10-4: Laws on Juvenile Justice*

	Juvenile justice laws	Age of criminal responsibility	Number of children in detention	Most common juvenile offence
Brunei DS	Children and Young Persons Act, Chapter 29	7	1	Theft
Cambodia		14	342	Unknown
Indonesia		12	5,549	Theft
Lao PDR		15	Unknown	Theft
Malaysia	Child Act 6111	10	7,043	Property Crimes
Myanmar	State Law and Order Restoration Council Law No. 9/93	7	960	Theft
Philippines		15	484 in jail 1,484 in community programs 583 in special institutions	Theft
Singapore		7	322 in juvenile homes	Unknown

Thailand	Act of Juvenile and Family Court Procedure B.E. 2553 (2010)	10	7,024	Drug-related crimes
Timor Leste		16	10	Theft
Vietnam		14	1,073	Theft

*Data extracted from Raoul Wallenburg's report on the *Current Status of Juvenile Justice in ASEAN* (see Further Reading for more details)

The age range and criteria for criminal responsibility varies throughout Southeast Asia. Those countries that set the age of responsibility under fifteen must first consider the child to have "sufficient maturity of understanding to judge ... the nature and consequences of his conduct on that occasion" before prosecution. Other States like Vietnam have gone even further by claiming administrative responsibility (where the child can be put into a home) before criminal responsibility. Age should be considered as it is argued that a ten year old would have a different understanding of the consequences of a crime than a seventeen year old. Regardless, many countries in Southeast Asia have 10-14 year olds in detention.

10.5.2 Juvenile Courts and Detention Centres

Children in conflict with the law enter a process of justice which starts with the arrest, interrogation, and court appearance of the child, followed by the sanction if found guilty. A number of problems can occur during the process. Firstly, many children are arrested for relatively minor crimes throughout the region. As Table 10.4 shows, the most common crime is theft, which many have argued, is a survival crime – in that, a child who is poor and hungry must steal in order to eat. The same can be said for other survival crimes such as vagrancy where homeless children are arrested for living on the streets. Following arrest, children may be vulnerable to violence and mistreatment while in police detention, sometimes by the police themselves, particularly those suspected of being gang members or repeat offenders. There are situations where authority figures such as teachers and police administer corporal punishment to children. Child Protection Units, or police specially trained to deal with children, are unfortunately not used much in Southeast Asia. While some States such as the Philippines have introduced protection units, the levels of protection offered in other States are basic or almost non-existent. For example, Myanmar has only 2-3 specialist officers in the main cities, while Malaysia has none at all.

A feature of a juvenile justice system is the juvenile court. Ideally, juvenile courts should be separate from the adult system with residing judges ideally expected to have experience in dealing with minors during both trial and sentencing. In most countries, these courts are closed to the public and juvenile records are often sealed once the child reaches adulthood. But this is not the case in all Southeast Asian countries. Cambodia has no separate court system for children (though children are tried under a different law to adults), and less developed countries may simply not have invested in the necessary resources to establish separate court systems and specially trained judges and lawyers. Other problems may include:

- *Access to legal aid:* ensuring children will be adequately defended by competent lawyers
- *The separation of children and adults during the process:* ensuring children are not incarcerated with adults who may threaten them

- *Avoiding the use of corporal punishment on children:* Malaysia and Singapore permit the use of caning as a punishment for children
- *Adequate training for legal professionals:* ensuring those working with children receive training in areas like counselling and child psychology
- *Disallowing the death penalty or life imprisonment:* no State in Southeast Asia permits children to face the death penalty

Once arrested, charged and convicted, the final concern of the juvenile system will be the sanction the child faces. International best practice recommends diversion as the most suitable response. Diverting a child from detention will not only ensure compliance with the child's rights but also ensures their safety with the aim of reintegrating them into society and reducing their recidivism (or the child committing another crime). Examples of diversion practices include releasing children to the supervision of their family, releasing them on parole, or the use of alternative sanctions like community service or counselling. It should be noted that diversion is not only used in sentencing, but can be used throughout the whole justice process. Diversion can occur at the time of arrest, so police avoid arresting the child. Court appearances can be diverted from, so a child can face a panel which finds justice without the need to sentence the child.

Some States prefer to avoid jailing children on the basis of cost and also because it achieves better results. In Thailand, the most common sentence given is probation which is used in over half of all juvenile court cases. However, diversion from detention still remains an underused option. Instead, the use of training or residential centres, similar to boarding schools, is common in many countries despite being the equivalent of jail. It is argued that the objective of punishment should be the rehabilitation and reintegration of the child offender into society. Such aims are challenging as they will necessarily involve child welfare organizations, counselling and education facilities, and the willing involvement of the child itself.

As yet, no State in Southeast Asia has managed to develop a functioning juvenile justice system based on CRC principles, although developments have been made. The best interests of the child are often not the priority, with contrary views—such as punishment as a deterrent—taking precedence. Further, for whatever reason, a government may simply be unwilling to develop a separate justice system for children. As a result, the principles of diversion and restorative justice are adhered to unevenly throughout the region so while significant developments have occurred in recent decades, there is still much work to be done.

10.6 Children and Labour

Child labour can be seen as a violation which must be stopped, or a useful, educational and productive activity for older children. The difference depends on the age of the child, the type of labour, and the effect the labour has on other parts of the child's life. Child labour can be due to the level of development in a child's community, as children of poorer families will labour more than the children of rich parents. It can also be where they live as in urban centres children may help with housework, keep their rooms clean, or do chores around the home while rural children may have to feed animals or do agricultural work. Culture plays a role, too as labour can be defined by the gender of the child, which girls having to do housework, or boys helping with agricultural labour.

A duty of States is to protect children from unacceptable working conditions. Article 32 of the CRC defines this as being “free from economic and social exploitation.” As such, States should prevent children from performing any work that is bad for their health, development, and education. A child who cannot go to school because they work all day in a factory is being exploited. Not only must they miss school, their work may be unsafe, preventing them from growing and developing as other children. A child who goes unpaid or who is forced to work is exploited. It is these conditions that need to be eliminated.

These goals can be achieved by introducing a minimum age of employment, regulating work conditions, and banning certain types of labour to name but a few options. It should be noted though that not all child labour is bad – many teenagers like working part time to earn extra money for a new phone or go to the movies, and experience work which may help them to learn and develop new skills. The next section will examine definitions of child labour in international and national laws, then detail how child workers are protected by regulations on minimum wage and work conditions. Finally, some cases of child labour in the region will be outlined.

10.6.1 International Law on the Protection of Working Children

Most international laws on minimum wage and working conditions were introduced by the International Labour Organization (ILO). From 1919, the earliest ILO conventions included sections on child labour as can be seen in ILO Conventions 5 (1919), 7 (1920), and 10 (1921) on minimum working ages in industry, seafaring, and agriculture respectively. Each convention gives 14 as the minimum age. There were about twelve conventions on minimum wage which were replaced by the Convention Concerning Minimum Age for Admission to Employment, or Convention 138 (1973), which is one of the eight core conventions of the ILO (as discussed in Chapter Seven). In Southeast Asia all but two States have ratified it, although mostly it took around twenty-five years before agreeing to it.

Table 10-5: Ratification of Main ILO Conventions by Southeast Asian States

	Convention 138 (minimum age): date of ratification	Minimum age stated by Govt.	Convention 182 (worst forms of child labour): date of ratification
Brunei DS	17 Jun 2011	16	09 Jun 2008
Cambodia	23 Aug 1999	14	14 Mar 2006
Indonesia	07 Jun 1999	15	28 Mar 2000
Lao PDR	13 Jun 2005	14	13 Jun 2005
Malaysia	09 Sep 1997	15	28 Nov 2000
Myanmar	Not Ratified	13/15*	18 Dec 2013
Philippines	04 Jun 1998	15	28 Nov 2000
Singapore	07 Nov 2005	15	14 Jun 2001
Thailand	11 May 2004	15	16 Feb 2001
Timor Leste	Not Ratified	15	16 Jun 2009
Vietnam	24 Jun 2003	15	19 Dec 2000

*children aged 13-15 cannot work more than 4 hours a day. Children of 13 or 14 years of age can only be employed in certain industries

ILO Convention 138 requires States to progressively increase the minimum age of employment. They must also declare the minimum age upon ratification. The Convention established fifteen as the minimum age, but also allowed for different ages to apply under certain circumstances. For example, the age is raised to eighteen where work is hazardous, and this includes work done in mines or on fishing boats. Developing countries can also reduce the minimum age to fourteen if justifiable, and it may even be set at twelve for 'light work,' or work that does not interfere with education, health, or social development. Examples of light labour may be washing dishes at the family restaurant, domestic work, or feeding animals on a farm.

Table 10-6: ILO Minimum Age

	Convention 138 (minimum age): date of ratification	Minimum age stated by Govt.
Light work	13-15	12-14
Basic minimum wage	15	14
Hazardous work	18	18

The 1999 Worst Forms of Child Labour Convention (No 182) is another of the eight Core Conventions. It is ratified by all Southeast Asian countries, and its purpose is to keep children out of the worst forms of child labour. The convention lists the labour, which includes slavery, trafficking, debt bondage, commercial sex work, and criminal activities, while also permitting States to define their own worst forms of labour. ILO Recommendation 190 on The Worst Forms of Child Labour (1999), which is not legally binding like a convention, assists States to understand their duties and obligations, and gives details on some worst forms. It says that work can be considered the worst forms if it is:

- Work in dangerous places, such as underground or at a height;
- Work with dangerous machinery;
- Work in an unhealthy environment; and
- Work for long hours or during the night.

The recommendation also asked States to give special attention to work done by girls, particularly hidden work situations, such as domestic work.

According to the international standards outlined above, child labour is prohibited when done by children under a certain age (which, although varying between countries, should generally not be lower than fourteen), and if the work is deemed dangerous (categorized as the worst forms of labour). This labour is considered damaging because children may miss out on education, be physically and psychologically damaged, be injured, all of which may inhibit their overall development because they will also lack the education or social skills of other children. Child labour has long term negative impacts and may be detrimental not only to the child, but also to the society that will miss out on the contribution the child could make to their community. Resources will also have to be spent to rehabilitate that child into society.

10.6.2 Violations of Child Labour Laws in Southeast Asia

The ILO estimates that around 15% of children in Southeast Asia are currently working. Of these, 9% work enough to be classified as child labourers, with a further 4% in hazardous jobs. Some industries in Southeast Asia are known to use more child labour because of the need to keep costs low. Examples of such industries include the fishing and fish processing industries, and agriculture where children work in palm, rubber, and sugar plantations in Malaysia, Indonesia, Thailand, and the Philippines. Child beggars are also widespread. Begging is considered a form of labour because children are often recruited into the job and only get to keep a small amount of the money they raise from begging. In addition, many young girls work as domestic labourers, while others are recruited by restaurants or other entertainment venues to either service customers or wash. Still others may be involved in scavenging and garbage picking which is not only low-paid but dangerous. The worst forms of child labour often occur as a result of child trafficking and are found in many countries in the region. Though the numbers involved may be small, such exploitation comprises one of the worst forms of child labour.

CASE STUDY

Some of the Worst Form of Child Labour in the Region

Child beggars

Child beggars are found in large urban centres throughout the region. Most child beggars are not allowed to keep the money they raise. Once brought to the site, they are watched over and given tips on how to collect more money which is then returned to their minders. Child beggars are generally brought in from other regions (for example, beggars in Bangkok tend to come from Cambodia or Myanmar, while in Jakarta, they may be transported in from rural Java). In some cases, the child's minder may even be a parent who knows that a young child will collect more money than an adult. Begging can be lucrative. It is estimated that a child begging in a busy city centre could raise about \$US 50 a day, and up to \$US100 on a busy day.

Garbage scavengers

Garbage scavenging still occurs in some Southeast Asian countries. The Philippines, in particular, has a long history of scavenging with the famous 'Smokey Mountain' dump which operated for 40 years until its closure in the 1980s, leading many residents to move to a new dump called Payatas. Thousands of people, many of them children, live and work as scavengers in this dump collecting and selling recyclable material like plastic and glass to earn a few dollars a day. Working in garbage recycling is a health hazard because of fumes, pollution, and infection from contaminated water. Landslides have killed people. The government has responded by banning children under 14 from work, developing the recycling industry, and providing education and housing.

Tea shop workers of Myanmar

As one of Southeast Asia's poorest countries, Myanmar has many child labourers mainly due to the large number of agricultural families sending their children, some aged as young as ten, to work in the city. Many children work in the tea shops for as little as a \$1 a day. This may occur because the children have no school to attend in at their home village, and their families may be too poor to feed them. Some estimates have put the number of child labourers in Myanmar at close to one million.



10.7 Children in Armed Conflict

10.7.1 Protection of Children from Armed Conflict Under International Law

The main laws governing the conduct of armed conduct, including the protection of children in armed conflicts may be found in International Humanitarian Law (IHL) which is discussed in Chapter 16. Although limited protection is offered by the Geneva Conventions (1949) and its protocols (1977), they only offer limited protection for children. The CRC and its Optional Protocol have since gone further. The reasons for this are partially historic as the Geneva Conventions predate the CRC by 40 years, and children's rights changed tremendously in that time. The new rules were also designed to change the practice in many countries which recruited soldiers from the age of sixteen.

The four Geneva Conventions (1949) asked for specific protection of children in times of armed conflict, whether the child is classified as a civilian, a victim, or a combatant. As a combatant, Art. 16 of the Third Geneva Convention states that if the child is a prisoner of war, this should be taken into account by the Detaining State to ensure that the child's good physical and mental state. As a non-combatant during the conflict, or even in times of peace, children are entitled to their rights. The Fourth Geneva Convention also required States to protect children from the effects of war by actions such as taking children from conflict areas and transferred to safety where they should receive assistance such as medicine, food or clothing.

Table 10-7: Relevant International Law on Child Soldiers

International Convention	Notes
Four Geneva Conventions (1949) and Additional Protocols – 1977	Specifies 15 as minimum age for a soldier Asks for special protection of children during conflict
CRC: Optional Protocol on the Rights of the Child on the involvement of children in armed conflict (OPAC) – 2002	Specifies 18 as minimum age for a soldier Prohibits recruitment by both State and non-State armed groups
Rome Statute (establishing the ICC) – 2002	Makes conscripting or enlisting of child soldiers (under 18 years) a war crime
ILO Worst Forms of Child Labour Convention 182 – 1999	Makes the forced or compulsory recruitment of child soldiers (under 18 years) a worst form of child labour
The Paris Commitments and Principles (Paris Principles) – 2007	Requires States to protect children (under 18 years) from unlawful recruitment by armed forces or armed groups

States should also protect children who are orphaned or separated from their families because of the conflict, which may entail taking them to a safe neutral country. Further, if a military occupies an area, the Occupying Power must ensure the education of children. The 1977 protocols to the Geneva Convention added provisions such as education and evacuation from conflict areas. Additional Protocol I is the first treaty to limit the use of child soldiers, stating:

Children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into the armed forces.

As can be seen by Table 10.7, one important limitation to the protections was that they were limited to children under the age of fifteen, but this was rectified by the CRC Optional Protocol (see 'Focus On' box below) which set the minimum age to eighteen. The strongest protection offered to children can be found in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC), which was adopted by the UNGA on 25 May 2000, and entered into force on 12 February 2002. OPAC is nicknamed the 'Straight 18' protocol because it requires States to set eighteen as the universal age for recruitment to take part in hostilities.



FOCUS ON

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC)

The main objective of OPAC is to prevent the conscription of children into the military, and to ensure they take no other part in armed conflicts. OPAC is necessary because the existing standards under IHL dating from the 1940s has fifteen as the minimum age for child soldiers. OPAC ensures that IHL complies with current child rights' standards. While OPAC does allow children to volunteer for the military, it also states they should be not allowed to take a "direct part in hostilities." The precise meaning of "direct" is not defined. Some armies may assume that as long as a child is not given a weapon, the law is not broken, while others may consider supplying troops or scouting as taking a direct part. In compliance with OPAC, volunteers under 18 may work as mechanics, cooks, or drivers, but not during conflict situations. OPAC applies to both national armies, and non-State armed groups. All Southeast Asian States but Myanmar have ratified OPAC.

10.7.2 Child Soldiers in Southeast Asia

All states in Southeast Asia have had to change their behaviours to comply with the new rules and regulations on child soldiers. For some States (such as Singapore), the problem concerns conscription and school cadets which could contravene the provision that no one under 18 should join the military. Other countries such as Myanmar and the Philippines have had to deal with the fact that their militaries or armed groups regularly used children as soldiers or porters. While it was estimated that there may have been over 100,000 child soldiers in armed forces in the 1990s, the estimated number now is much smaller, probably nearer 1,000.

Three Southeast Asian countries have a history of using child soldiers: Myanmar, the Philippines, and Cambodia. It was once estimated that Myanmar had up to 100,000 child soldiers serving in both the Tatmadaw (national army), and the many ethnic armed groups. Throughout the 1980s and 1990s many documented cases of children being forcibly recruited into the Tatmadaw became known. In some, children were abducted from the streets and forced to work as porters or labourers for the army, often for years at a time. Myanmar still has active disarmament, demobilization, and reintegration (DDR) programs for its former child soldiers.

Cambodia's problem with child soldiers is more historic. During the Khmer Rouge period (1975-1979), many child-soldiers were recruited, a fact that was noted in 1975

when Phnom Penh was first entered by the young soldiers of the Khmer Rouge. But following its defeat, this number dropped drastically and the end of the conflict, there are assumed to be few, if any, child soldiers in Cambodia. Lastly, in the Philippines, a number of non-state armed groups have admitted to recruiting and training children, including the Moro Islamic Liberation Front (MILF), the communist New People's Army (NPA), and the Abu Sayyaf Group in Sulu and Basilan. Though many different groups were involved, it seems the number of actual cases was small, with less than 200 being found in the past 4 years.

As these cases show, historically, the problem of child soldiers was significant in the region, but much has since been done to reduce or eliminate the problem. Many factors combined to ensure the elimination of child soldiers including changing cultural attitudes to children and stricter enforcement mechanisms. The first, and perhaps most significant, reason concerns the reduction of armed conflict in the region. During the 1960s and 1970s, nearly all Southeast Asian countries were involved in some form of ongoing conflict, resulting in many active armed groups. In recent years, these numbers have dropped drastically. A second reason concerns changing attitudes towards child soldiers. Previously, while not exactly supporting the idea of child soldiers, many armed groups did not make any attempts to stop children who wished to voluntarily join them. However, now that child soldiers is an international crime most armed groups do want to be seen as committing war crimes which are criminalized with the establishment of the International Criminal Court (ICC). While few Southeast Asian countries were actually signatories to the ICC, many armed groups believed such accusations would severely impact their support, especially if they claimed to be fighting for human rights and freedoms.

From 1990, the widespread ratification of the CRC led to changing attitudes towards children's rights. Given the universality of such rights, it became impossible for States to claim child soldiers were an unimportant issue. Concerted advocacy around child soldiers also played a vital role in bringing the problem to light. Efforts to rehabilitate child soldiers into the community named Disarmament, Demobilization, Reintegration (DDR) led to an increased monitoring of armed groups. While it is unlikely the problem of child soldiers will entirely disappear—as some teenagers will always want to join the military while other groups will continue to use children as cooks or entertainers—the problem is now much smaller than it was decades ago when Southeast Asia was seen as one of the worst places for child soldiers.

10.8 Right of Adolescents to Reproductive Health

One of the more challenging issues around child rights concerns children and sex. Though States may have strict laws protecting children from sexual violence, they have found it more difficult to address the issue of teenagers engaging in consensual sex. States can no longer ignore the fact that teenagers engage in sexual activity because the average age of a child's first sexual experience is getting younger in the region. As such, it becomes all the more imperative to educate teens about responsibility and safe sex. Though the data on this is inconclusive, because it is difficult to collect data on such a private issue, it is estimated that across the region about one third of children (more boys than girls) have sex before the age of eighteen. States would much rather pretend this does not exist, and they offer poor information and services for children regarding safe sex. The main laws that address teenage sex concern the age of consent – that is, the age a person can legally consent to having sex. If someone has sex with a person under this age, it is considered statutory rape.

Table 10-8: Age of Consent in Southeast Asia

Age of Consent	Country
12	Philippines (although having sex with a commercial sex worker under 18 is a crime)
14	Timor Leste (an adult having sex with a 14-15 year old is a crime) Myanmar
15	Indonesia Cambodia Lao PDR Thailand (although it is an offence for an adult to have sex with someone below 18)
16	Brunei Malaysia (but only for heterosexual sex) Singapore (but only for heterosexual sex) Vietnam

Increased teenage sexual activity can lead to many problems including the spread of sexually transmitted diseases, non-consensual sex, and poor reproductive health choices. Although the rate of HIV in Southeast Asian teenagers is very low, it is worrying that many sexually active teenagers have no access to contraception and are taking risks. In addition, other treatable sexually transmitted diseases may go untreated because of poor knowledge or embarrassment. As a result of this lack of information, there are concerns about rising levels of teenage sexual abuse, especially relating to the definition of consensual sex: is sex consensual if a girl is facing peer pressure or coercion? Another problem that must be addressed is the discrimination faced by lesbian, gay and transgender children.

States have shown the most concern on the issue of teenage pregnancy which is seen as a problem in some Southeast Asian countries (although compared to South Asia, the numbers are relatively small). Countries with high rates of teenage pregnancies include Thailand, Cambodia, Indonesia and Laos, where about 5% of female teenagers get pregnant. In contrast, Malaysia, Myanmar, and Singapore claim much lower rates. Singapore, in particular, puts their figure at closer to 0.5%. Teenage pregnancies occur for a variety of reasons. Girls may be married off young, as in the case of Indonesia. But lack of information and understanding about reproductive health must also take some of the blame as most Southeast Asian parents tell their children very little about sex and sexuality. As a result, many teenagers will not get access to contraception because it is either too embarrassing to ask for, illegal to buy, or simply unavailable. Other issues may arise from young males pressuring girls to engage in sex at an early age, or from teenage girls dating older males. Some reports have also claimed that the situation has been enhanced by the media because of internet pornography and the increased sexuality of pop culture, although these factors are difficult to prove.

The consequences of pregnancies on teenage mothers can be huge ranging from medical complications which are more likely when the mother is young, to social stigma which can be especially destructive if a girl is forced to leave school, to difficulties in finding employment later on in life. For these reasons, States now wish to reduce their teenage pregnancy rates. Of course, the most effective way to inform children of the risks would be through sex education but laws and policy and reproductive health in the region are either basic or non-existent.

In Indonesia, access to sexual and reproductive health services may only legally be given to married couples. As such, family planning is aimed solely at husbands and wives (or future husbands and wives). Laos has no specific laws on adolescent reproductive health rights at all, but the National Population and Development Policy does “provide adolescents with reproductive health and sexuality education.” In spite of that, Laos has the highest teen pregnancy rate in the region so it appears this policy has been largely ineffective. Likewise, Malaysia has a National Adolescents Health Policy (2001) which oddly does not even mention the reproductive health of adolescents. In contrast, Thailand’s Public Health Ministry has been more active, believing that Thai citizens of all ages must have good reproductive health throughout their entire lives. Further, it has actually stated that one of its goals should be to address the issue of teen pregnancies. Finally, Vietnam does have reproductive health measures aimed at adolescents through education and counselling.

DISCUSSION AND DEBATE

How much did you learn about reproductive health at school?

Most children receive little information about sex and sexuality in school. Sex education should include sections not only on the biology of sex and how babies are formed, but also information on such topics as consensual sex, sexual health concerns, and non-heterosexual behaviours such as homosexuality. Though, the last three topics are rarely discussed especially as homosexuality may still be illegal in some countries.

Questions

- How much sex education was taught at your school?
- What were you taught about sex?
- At what age do you think children should be taught about sex?
- Where do young people now get information about sex? From friends? Books? The internet? How reliable do you think this information is?

Government policy and laws on child reproductive health often do not tell the whole story. In actual fact, most children in the region only get basic access to such information and few children understand how pregnancy occurs, or how to protect themselves from sexually transmitted diseases. Most information about sexuality tends to be received from friends or the internet, both of which are unreliable sources. As a result, both girls and boys may feel increasing pressure to be sexually active at an earlier age. In addition, boys may pressure girls to have sex, resulting in a disturbing number of rapes committed by children. A UN study (2010-2013) as part of the Partners for Prevention project (see ‘Further Reading’) found a very high prevalence of men admitting to rape, some even committed when they were children. About 10% of the men surveyed admitted to committing rape as a child, and while the reasons for this varied, one common claim was that as men they felt entitled to have sex with women. Consequently, the study recommended changing ideas around masculinity, making families safer, and educating boys earlier on sexual values.



The reality is that many children do have sex at an early age so States should plan accordingly by ensuring they know about safe sex and educating them on the meaning of consensual sex which will hopefully instil both boys and girls with enough confidence to wait until they feel ready before having sex.

10.9 Conclusion

This chapter has detailed the key elements of children's rights, and addressed specific areas such as education, work, armed conflict, and reproductive health. While nearly universal, there are still many areas where the understanding of children's rights, and the protection of children from violence and discrimination, could be improved. Some improvements to better protect children from violence and abuse will be legal. Other improvements like getting children to attend school and not labour are economic. Finally cultural changes forged at community level will allow children to participate more fully in their own futures, in particular, by contributing their own ideas and views.

A. Chapter Summary and Key Points

The Rights of Children

Children are given much more protection now than they have ever had in history. Previously, children were treated like adults but this changed over time. The passing of labour laws and compulsory education in the 1800s, and humanitarian protection in the early 1900s gave extra protection to children. More improvements have been made in the last few decades especially in the fields of education, health, and labour rights. Today, no other set of rights has been as widely accepted as children's rights, but protection gaps still exist.

Convention on the Rights of the Child (CRC)

Some children's rights exist in the UDHR and other declarations before 1990 when the CRC was introduced. The CRC is now the most widely ratified human rights treaty. It has a post-Cold War understanding of rights as indivisible, participatory, and rights-based. The CRC also differs in recognizing three parties: the State, children, and their parents. It is based on four general principles, set out in General Comment No. 12: (1) the survival and development of the child; (2) the best interests of the child (meaning that decisions concerning a child should give the child's interests priority); (3) non-discrimination against specific groups of children like girls or indigenous children; and (4) the child's right to participate.

Protection of Children Against Violence

Every child has a right to protection from abuse, neglect, violence, and exploitation, but violence against children is a hidden global phenomenon with serious impacts. Children experience violence at home (often committed by family members) or at schools or institutions (at the hands of teachers or other authority figures). Violence in schools and educational settings is widespread in the region because no specific prohibitions prevent it, and also parents and teachers often believe it is the most effective way to teach naughty children. Measures to reduce it include: alternative ways to discipline children; educating parents and teachers about its negative effects;

and involving parents and children in decisions about school. A disturbing form of violence against children is sexual abuse. Most incidents involve someone the child knows. Some forms of child sexual abuse like child marriage have escaped legal intervention. In Southeast Asia, the commercial sexual exploitation of children may occur in the form of child prostitution or pornography; the relevant international standard prohibiting this is the Optional Protocol on the Sale of Children.

The Right to Education

Primary education must be free and compulsory; high school education must be available and accessible. The standard used to determine the right to education is known as the 4As: available, accessible, acceptable and adaptable. Availability means ensuring there are enough places at school for all children. Accessibility means children should be able to reach school. Schools can be inaccessible because of cost (some parents cannot afford to send children to school) and discrimination (usually affecting such groups as girls, non-citizens, or children of ethnic minorities). Acceptable refers to the quality of education meaning it should be relevant, up-to-date, and help children develop into productive adults. Adaptable education ensures the inclusion of different groups and subjects in the learning process. Common problems in Southeast Asia involve the language of instruction as many children do not speak their national language at home, and also the education of children with a disability.

Juvenile Justice

The safety and security of children in conflict with the law is a concern. Juvenile justice systems in Southeast Asia are still undergoing development. Juvenile justice consists of: (1) the laws recognizing crimes and punishments for minors; (2) the police and courts which apprehend juveniles and put them on trial; and (3) the detention centres which incarcerate them. The justice system should be concerned about the impact of punishment on a child's development. The age of criminal responsibility in many countries is too low, and too often children are put into juvenile courts and detention centres without alternatives first being sought. Children are often arrested for relatively minor crimes and made vulnerable to violence and mistreatment in detention. Ideally, juvenile courts should be separate from the adult system. The child should also have access to legal aid, be protected against corporal punishment, and have access to counselling. The policy of diversion (to divert children from the justice system) is widely supported and involves alternatives to justice and detention.

Children and Labour

Although in some cases, it is reasonable for older children to work, labour which exploits children or stops them attending school violates their rights. Measures to protect children include: minimum age laws, regulations on work conditions, and laws banning certain types of labour. The first laws protecting children were introduced by the ILO in 1919; more recently, the convention on the Worst Forms of Child Labour has outlawed such situations as slavery, trafficking, and debt bondage. Violations of child labour in the region include hazardous jobs like fishing, begging, and garbage scavenging.

Children in Armed Conflict

The protection of children in armed conflicts can be found in International Humanitarian Law and the Optional Protocol on Children in Armed Conflict which sets the minimum age of a soldier at eighteen. Children should be protected in times of armed conflict, whether the child is a civilian, a victim, or a combatant. Protection can include being removed from conflict areas and providing humanitarian support.

In Southeast Asia, use of children as soldiers or porters in the 1980s and 1990s was once a significant problem with many in armed forces and in non-State armed groups. The number now is much smaller. Factors explaining this reduction include: changing attitudes to children, stricter enforcement mechanisms, and the reduction of armed conflict in the region. Child soldiers require special rehabilitation to integrate them back into the community.

Right of Adolescents to Reproductive Health

One of the more challenging issues around child rights concerns children and consensual sex. Although States may have strict laws protecting children from sexual violence, they have found it more difficult to address the issue of teenagers engaging in consensual sex. Although important, education on responsibility and safe sex tends to be poor. Problems of sexually transmitted diseases, non-consensual sex, and poor reproductive health choices can be especially damaging to young adults. Lack of access to contraception and social pressures (particularly on girls) may lead to teenage pregnancy, an issue which is a concern of many Southeast Asian States.

B. Typical exam or essay questions

- What laws for children has your government introduced on work, education, and violence?
- What is an example where the best interests of the child is in use by the government or an institution? Has it been used in court and government decisions concerning children?
- Does corporal punishment occur in schools? Why does it occur, and what has been done to stop it?
- Why do children drop out of school in your country? How can this be stopped?
- Select an indigenous or minority group of children in your country, and discuss the challenges in educating them.
- Does the juvenile justice system in your country use diversion to keep children from detention?
- What are the features of a good juvenile justice system?
- Are there any cases of child labour in your country? Where do children work, and why are they working?
- Which areas currently still use child soldiers, and why are children fighting in these conflicts?
- What information should children receive about reproductive health?

C. Further Reading

General Information

Websites with extensive information include:

- Child Rights Information Network (CRIN): many useful guides and introductions to child rights
- United Nations International Children's Emergency Fund (UNICEF): a wide variety of studies on issues such as education, work, and health
- Save the Children International: research on child rights, development, and education
- Child Rights Connect: introductory materials
- Child Rights Coalition Asia (CRC Asia): a regional network of children's rights and human rights organizations with the objective of mainstreaming children's rights perspectives and agenda into regional and international advocacy processes

The Convention on the Rights of the Child (CRC)

- Information specific to the CRC can be found on the OHCHR website and the Committee on the Rights of the Child (the treaty body of the CRC). Links to the rapporteurs and studies on child violence, child soldiers, and the sale of children may also be found here
- For more specific information on child rights in ASEAN, the Institute for Human Rights and Peace Studies (Mahidol University) partnered with Save the Children International to produce 'Regional Synthesis: Child Rights Situation Analysis within the ASEAN Region' (2016)

Violence Against Children

The websites of the following NGOs have reports and studies on this:

- End Child Prostitution in Asian Tourism (ECPAT): studies of countries throughout Southeast Asia. This NGO also works in the areas of sex trafficking and child prostitution
- Global Initiative to End All Corporal Punishment of Children: database of the status of laws on corporal punishment and its use in many countries
- Global Partnership to End Violence Against Children
- Partners for Prevention: studies of sexual violence in many Asian countries although not specifically about children

Education

- United Nations Development Programme (UNDP): statistics on children in schools can be found in the UNDP's Human Development Reports
- The World Bank also has extensive data on children in the areas of education and work.
- United Nations Educational, Scientific and Cultural Organization (UNESCO): material on the right to education, including its Education for All Global Monitoring Reports. First Language First is also a study on language and ethnic and indigenous children

- Katarina Tomasevski: searching for work by the first Special Rapporteur on education will uncover much material including a world education report, and various reports on the 4A system

Juvenile Justice

- Raoul Wallenberg Institute (RWI): A Measure of Last Resort: Juvenile Justice in ASEAN Member States reviews all the laws and practices of juvenile justice
- International Juvenile Justice Observatory (IJJO): includes relevant research
- Other bodies working on juvenile justice: the International NGO Council on Violence Against Children, the United Nations Interregional Crime and Justice Research Institute (UNICRI), and the United Nations Office on Drugs and Crime (UNODC)

Child Labour

- International Labour Organization (ILO): databases on child labour laws, and also research on child labour
- US Department of Labor, Bureau of International Labor Affairs: country studies on the worst forms of child labour including many Southeast Asian countries

Reproductive Health

- World Health Organization (WHO): has an adolescent reproductive health program which includes studies on this topic
- United Nations Population Fund (UNFPA): resources on this topic

11

Sex and Gender Diversity*

Hostility and discrimination against homosexuals, bisexuals, and transgender individuals are commonly explained as religious in origin.

* The Chapter was prepared by Douglas Sanders, Institute of Human Rights and Peace Studies (IHRP), Mahidol University.

11.1 Overview

There is an old anti-homosexual tradition linking Christianity and Islam back to Judaism. Buddhists in Southeast Asia know of an old belief that being transgender or homosexual reflects misdeeds in a past life. The contemporary strength of these religious beliefs is often unclear. Christianity dropped many Jewish rules, including circumcision and food laws. In our time, mainstream Protestant denominations have come to support equality and non-discrimination. Pope Francis surprised many by refusing to judge a homosexual “who has good will and looks for God,” while also saying that the Church should apologize “to a gay person whom it offended.” Outside of the Islamic heartland in the Middle East, there are some lesbian, gay, bisexual, transgender, and intersexual (LGBTI) friendly Muslim congregations, and certain prominent gay Imams. There is acknowledgement that some gay men have been ordained as Buddhist monks in Thailand. All major religious traditions now have internal divisions or debates on the extension of human rights principles to LGBTI.

Even apart from religion, social attitudes are often difficult. In response, individuals hid their same-sex attractions, even from close family members, and strove to hide gender variance. Staying hidden—or ‘in the closet’—was a stressful, but rational, defensive strategy. It is probably still the most common strategy almost everywhere for gays and lesbians. In broad terms, LGBTI found society to be hostile to their existence, but usually blind to their presence. This combination of responses is odd (or distinctive) when we compare the experience of sexual minorities with that of women and racial minorities (two other equality seeking groups).

The history of anti-homosexual, anti-transgender social views is uneven, with periods of quite open acceptance of certain patterns (best documented for Greece, China, Japan, and Korea). Newer Western thinking, treating homosexuality as an illness or pathology (a secular analysis), spread around the world in the late 19th century. In the most recent half-century, hostile laws have been dropped in the West and Latin America, and sometimes in other places. Generally, social patterns of discomfort or hostility have continued into our time. It has fallen to current human rights thinking to challenge older discriminatory thinking. In this task, there has been support from modern medicine (which holds that no illness or pathology is involved) and biology (which tells us how common these variations are among humans and in the animal world). This rethinking is aided in modern societies by: (a) the mobility of individuals and their independence from their birth families; and (b) the individual rights orientation of modern human rights principles.

This chapter begins by looking at changing responses to sexuality issues and then considers terms and categories, a surprisingly complicated task. It will look at the history of criminal laws and their present reality in Southeast Asia, before turning to the extent of public activism and visibility that is possible in Southeast Asia these days. Finally, issues relating to combating discrimination, the recognition of relationships, transgendered individuals, and intersexuals are considered.

11.1.1 Post-War Change

There have been dramatic changes on sexuality issues around the world in the years since the Universal Declaration of Human Rights. In 1948, half the world had criminal laws against male-male sexual acts, reflecting the impact of British colonialism. Governments and private businesses would not knowingly hire homosexuals. Psychiatrists, psychologists, and lay people regarded homosexuality as some kind of

illness. In 1948, no state extended any legal recognition to same-sex couples. Lesbians could lose custody or access to their biological children if their sexual orientation became known. The major religious traditions were seen as hostile or silent on LGBTI issues. Exceptionally, spirit mediums in various traditions were often transgender or homosexual (with many examples in Southeast Asia).

Today there is a striking international divide on issues of sexual orientation and gender identity. In the West and Latin America (a) Criminal laws are gone, almost completely, (b) anti-discrimination laws now usually cover 'sexual orientation' and sometimes 'gender identity,' 'gender expression' or 'intersex status,' and (c) some or all of the rights and obligations of marriage now apply to same-sex couples. Marriage was opened to any two individuals in the Netherlands in 2001, a lead that has now been followed in over twenty countries, including all of the European colonial powers that once held colonies in Southeast Asia: France, the Netherlands, Portugal, Spain, the United Kingdom, and the United States.

In contrast, there has been clear regression in much of Sub-Saharan Africa, Russia and its immediate neighbours. Colonial-era criminal prohibitions have been strengthened in some African states, and national leaders often vocally condemn homosexuality. Vigilante actions against suspected homosexuals or homosexual gatherings have occurred in a number of African states. LGBTI human rights defenders have been assaulted. Some have been killed. Russia and its neighbours have introduced new laws against 'propaganda' in favour of homosexuality to broadly try to push gays and lesbians back into the closet, end visibility, ban public activism, and block the work of civil society organizations. The goal of such laws, it is said, is to protect children from exposure to propaganda in favour of homosexuality. Opposition to LGBTI rights continues in the MENA region (Middle East and North Africa) and in member states of the Organization of Islamic Cooperation (which includes Indonesia, Malaysia, and Brunei).

11.1.2 Changes in Southeast Asia

What of Asia and Southeast Asia? Criminal prohibitions survive from colonial times in former British colonies (with the single exception of Hong Kong, which decriminalized male-male sexual acts before reversion to China). No country in South or Southeast Asia actively enforces such laws. Police harassment and arrests on vagrancy or public nuisance charges occur at some times in some places. Vigilante actions against gay or transgender events occur occasionally in Java, where police fail to curb actions of the Islamic Defenders Front and similar vigilante groups. In February 2016, two gay rights activists were murdered in Bangladesh, the first such incident in Asia (but part of a series of religiously based extra-judicial killings in the country aimed at atheists and non-Sunni Muslims). Laws protecting LGBTI from discrimination in employment are just beginning to appear in the region. Transsexuals can get recognition of post-operative sex through changes in personal documents in only three Southeast Asian states (Indonesia, Singapore, and Vietnam). Lack of acceptance by families is widely reported as a major problem for LGBTI, with States and religion giving little or no support. Bullying in schools is a regional problem.

Policy statements by heads of government and other national political figures vary. Prime Minister Lee, in Singapore in 2007, referred to homosexuals as part of society, and part of many Singaporean families. His government does not discriminate against LGBT in employment. Yet he supported the retention of a colonial-era criminal prohibition of male-male sexual acts (while promising no 'proactive enforcement'). Two prime ministers in Malaysia, including the present incumbent, Najib Razak, have

frequently spoken out condemning homosexuality. The Sultan of Brunei has proposed new religious laws against homosexual acts, on top of a colonial-era prohibition. In Myanmar, which also inherited a prohibition, no leading politicians seem to have addressed the issue of enforcement, retention, or repeal. In Indonesia, starting in January 2016, a number of cabinet ministers, leading politicians, educators, and clerics condemned homosexuality, some calling for a criminal prohibition or compulsory treatment. This broke general patterns of silence by political and other leaders on issues of sexual and gender diversity in the country, and ended the sense that Indonesia was fairly tolerant of such diversity. A criminal prohibition is being considered in constitutional litigation and in the ongoing project of enacting a new national penal code. Exceptionally, in Cambodia, the President and government have called for acceptance and criticized stereotypical depictions in media reports.

11.1.3 Change at the UN

In the UN system, issues of sexual orientation and gender identity were taken up by treaty bodies and special rapporteurs (the ‘expert’ parts of the UN system), starting with the 1993 decision of the Human Rights Committee in *Toonen v Australia* (described in the ‘Criminal Laws’ section).

FOCUS ON

The Yogyakarta Principles

In 2006, in a period in which progress in the ‘political’ bodies of the UN seemed to be blocked, a group of human rights experts met on the campus of Gadjah Mada University in Yogyakarta, a historic sultanate in central Java. They formulated the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. A major goal was to make it clear that SOGI rights were not ‘new’ rights, as opponents argued, but were simply the application of existing human rights principles to LGBTI individuals. Many of the experts had worked in the UN system as members of treaty bodies or as special rapporteurs. Others were academics, or judges, or from leading human rights NGOs. One co-chair was Professor Vitit Muntarbhorn from Chulalongkorn University in Bangkok, long active as an expert in the UN human rights system. Former UN High Commissioner for Human Rights, Mary Robinson, participated. Twenty five countries were represented in the gathering. The 29 principles are well drafted, and have been referred to often at the UN and in various legal contexts. The document is one of many similar documents, prepared by groupings of international law experts on various issues, the best known of which would probably be the *Paris Principles on National Institutions for the Promotion and Protection of Human Rights*.

The UN Human Rights Council (the key ‘political’ body in the UN human rights system), for the first time, supported LGBTI human rights with resolutions in 2011 and 2014. The Office of the UN High Commissioner for Human Rights completed two studies and launched an active campaign, ‘Born Free and Equal’ with publications and videos. UN Secretary General, Ban Ki-moon, and the UN High Commissioner for Human Rights, frequently spoke in its support. In 2016, the Human Rights Council took the further step of establishing an on-going mechanism, an independent expert to address “violence and discrimination based on sexual orientation and gender identity.” This



key resolution was put forward by seven Latin American states, including Argentina, Brazil, Colombia, and Mexico. Asian states supporting the resolution were South Korea and Vietnam. Asian opposition came from Bangladesh, China, Indonesia, Kyrgyzstan, Maldives, and Qatar. India and the Philippines abstained. There was bitter opposition and prolonged debates on each of the three Human Rights Council resolutions. The preamble to the 2016 resolution was amended to refer to some of the arguments used against LGBTI equality rights (respect for individual state sovereignty, religious values, local cultural particularities), without limiting the substantive sections of the resolution.

In Asia, the UN Development Programme has been particularly active, with an ongoing 'Being LGBTI in Asia' program, funded by the United States and Sweden. The UNDP has published Country Reports on LGBTI issues in Cambodia, China, Indonesia, Mongolia, Nepal, Philippines, Thailand, and Vietnam.

In 2015, the UN Security Council, the most powerful body in the UN system (charged with issues of international peace and security), held an information session on the killing of homosexuals by Islamic State (ISIS or ISIL) in the parts of Syria and Iraq that it controlled. On 13 June 2016, the UN Security Council condemned the terrorist killing of 49 individuals at a gay night club in Orlando, Florida, one day after it occurred. The statement specifically denounced violence targeting people on the basis of their "sexual orientation," the first time the Security Council had used the phrase in a statement. The Orlando massacre was condemned by a dozen or more world leaders, including Vladimir Putin of Russia, Xi Jinping of China, heads of government in France, Germany, the United Kingdom and the United States, King Bhumibol Adulyadej of Thailand, and Pope Francis.

11.1.4 ASEAN

In ASEAN, there were campaigns to include sexual orientation and gender identity rights in the ASEAN Declaration on Human Rights. No express inclusion was possible. On the formal signing of the Declaration at the 21st ASEAN summit in Kuala Lumpur in 2012, Malaysian Prime Minister, Najib Razak, specifically said that Malaysia rejected lesbian, gay, bisexual, and transgender rights, adding that other ASEAN leaders knew the position of Malaysia and had accepted Malaysia's stance. To date, the work of the ASEAN Intergovernmental Commission on Human Rights has not addressed LGBTI issues.

11.2 Terms and Categories

SEX and GENDER

'Sex' is often used to mean 'gender' – and 'gender' is often used to mean 'sex.' Part of the reason for these usages is the fact that the word 'sex' in English has two meanings. It can mean one's physical sex or it can refer to sexual acts.

SEX

Properly used, 'sex' refers to one's physical or biological sex. There are three broad categories: female, male, and intersexual.

GENDER

Properly used, 'gender' refers to 'socially constructed' patterns of roles, behaviour, and self-presentation that are 'feminine,' 'masculine,' or 'androgynous.'

GENDER EXPRESSION

Refers to how individuals express themselves (in terms of patterns of masculinity or femininity).

GENDER IDENTITY

Refers to an individual's sense of being a man, a woman, or an androgynous, or non-binary individual (neither masculine nor feminine). Gender identity may or may not conform to the individual's physical sex.

SEXUAL ORIENTATION

Sexual orientation refers to the sexual attraction felt by an individual to other individuals on the basis of the other individual's physical sex. Individuals can be sexually attracted to men, women, or both. There is no necessary relationship between gender expression/gender identity, and sexual orientation. Not all effeminate men are homosexual, and not all homosexual men are effeminate. There is some apparent overlapping of categories.

TRANSGENDER

Transgender is an umbrella term that refers to individuals who depart, in whole or in part, from the gendered patterns of dress and behaviour associated with their physical sex. It includes masculinity in women, effeminacy in men, androgyny, transvestism (cross-dressing), and transsexualism.

TRANSSEXUALS

'Transsexuals' (note the double 'ss') are individuals whose 'gender identity' is with the 'other' sex. Individuals will usually 'cross-dress.' Individuals may seek some extent of bodily modification to better conform to their personal sense of 'gender identity.' They may (or may not) seek sex reassignment surgery (sometimes now called gender confirmation surgery). A male-to-female transsexual is now often referred to as a 'transwoman,' while a female-to-male transsexual is a 'transman.'

TRANSGENDER IDENTITIES

Various transgender 'identities' exist in parts of South and Southeast Asia. For example, male bodied individuals living as women, may be identified as Hijra, Metis, Open, Kathoey, Mak Nyah, Waria, or Bakla (in India, Nepal, Myanmar, Thailand, Malaysia, Indonesia, and the Philippines, respectively). As well, there are female bodied individuals who are identified as Toms or Butches. These categories are different from 'transwomen' and 'transmen,' who typically seek recognition as women or men, and who do not adopt the particular transgender identities referred to here.

INTERSEXUAL

Intersexuality refers to various conditions in which the body at birth is neither completely male nor completely female.

LGBTI/SOGI/QUEER

What were initially 'gay rights' organizations gradually expanded to cover a range of sexuality identities that shared the problem of hostility (or at least discomfort) on the part of the larger society to the existence of sex and gender diversity. This led to the acronym, LGBTI, bringing together as allies lesbians, gay men, bisexuals, transgenders, and intersexuals. Sometimes Q (queer or questioning) is added. Some activists prefer to avoid the 'identity categories' listed in LGBTI, in favour of conceptual categories. This resulted in SOGI, standing for sexual orientation and gender identity, sometimes

adding an 'E' for gender expression, and sometimes a second 'I' for intersexuality. Queer is now an umbrella term used by many activists and academics, but it is not used legally or in UN work.



DISCUSSION AND DEBATE

Separate colours or a rainbow spectrum?

Discussions of sex and gender diversity use a number of distinct terms or categories. The rainbow flag is now an international symbol of sex/gender diversity. It has separate bands of colours. But in nature, a rainbow is a spectrum or a continuum. We now have some celebrities identifying as sexually 'fluid.'

Questions

- Do most people (or all people) have elements of masculinity and femininity in their physical bodies, and in their actions and orientations?
- If sex and gender are on a continuum (or scale) why do most people live exclusively as one type?

11.3 Criminal Laws

11.3.1 The origins of colonial era criminal Laws

Passages in the book of Leviticus (18:22 and 20:13) impose the death penalty for a man who "lies with a male as with a woman ...". This Jewish prohibition, one of hundreds of rules in early Judaism, continued in Christianity and Islam (supplemented by a particular interpretation of the story of Lot/Lut and the destruction of Sodom). Through Christianity, the prohibition became part of Roman law, then part of Roman Catholic religious law, and was enforced throughout Europe. With the Protestant Reformation, church courts were abolished in half of Europe, and the offence moved from religious law to regular secular criminal law. In Britain, it took the form of the 'buggery' act of 1534, prohibiting anal intercourse. The wording of the law clearly marked its religious origins (the act was called "abominable," as in Leviticus). These criminal laws were faithful to Leviticus: (a) in only dealing with males, and (b) by imposing the death penalty (which continued in British law to 1860).

The *Napoleonic Penal Code of 1810* was a major reform of criminal law in France, setting out all criminal offences in one comprehensive, well-organized code. Without explanation or any public debate, the prohibition of homosexual acts was dropped. This 'decriminalization' spread to half of Europe as a result of French conquests, and also by governments voluntarily adopting or copying the French code. Major colonial powers—the Netherlands, France, Spain, and Portugal—had no prohibition. As a result, there was no prohibition in the criminal laws of their colonies: Cambodia, Indonesia, Laos, the Philippines, or Vietnam. Thailand, never directly colonized, copied a prohibition, but later repealed it after a history of non-enforcement.

In 1860, Britain enacted a penal code for India. It included a reformulation of the British 'buggery' law, but now without the religious language and the death penalty.

The famous Art 377 reads:

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

It is important to note that Art 377 shifted the basis for the prohibition away from morality or religion ('vice' and 'abominable' are gone). In place of moral/religious language, the acts involved are described as "against the order of nature," a secular, biological assertion. It became common to describe homosexuality as some kind of illness, disorder, or pathology. Often people would express a fear that this pathology would spread (and so argued that it must be kept under control, to avoid contagion).

Post-World War II studies established that:

- (a) Homosexual acts were much more common than had been popularly assumed;
- (b) Psychological testing could not establish any patterns of maladjustment among homosexuals; and
- (c) Homosexual activity was recorded among hundreds of animal species, countering rather dramatically, the argument that homosexual acts are 'unnatural.'

As a result of these studies, homosexuality was removed from the listing of pathological conditions by medical associations in the United States and the United Kingdom in 1973, and by the World Health Organization in 1983. Most countries have followed this change, including China in 2001. The American Psychiatric Association now condemns as unscientific and harmful any treatments designed to change or 'cure' homosexuals. A court in China in 2014 ruled against a 'conversion' therapy clinic as practicing consumer fraud.

The wording of Art 377 continues in the legal systems of former British colonies or protectorates in most of Asia. In Southeast Asia today, it is part of the law in Brunei, Malaysia, and Myanmar. It continues to be in force in Bangladesh, India, Pakistan, and Sri Lanka (and former British colonies in Oceania, the Caribbean, and Africa). Decriminalization occurred in Hong Kong before reversion to China. In Singapore, Art 377 was dropped in 2007, but the country retained a separate colonial-era criminal provision condemning acts of 'gross indecency' between males. Prohibitions in Central Asia date back to the period of the Soviet Union, when a Western European influenced criminal prohibition was retained for the Central Asian region. The criminal prohibitions have been extended to apply to two women in both Malaysia and Sri Lanka.



CASE STUDY

Criminal Laws in Southeast Asia

Prohibition of “carnal intercourse against the order of nature”: Brunei, Malaysia, Myanmar.

Prohibition of “acts of gross indecency between males”: Singapore.

Prohibition of “acts of gross indecency” between any two people: Malaysia.

Prohibition of male-male sexual acts, with a punishment of 100 public lashes: Province of Aceh, Indonesia, the only local government empowered to enact Sharia criminal law.

Minor laws penalizing vagrancy, public nuisance and disorderly conduct, exist throughout the region and may be used against homosexuals or transgender individuals. The Philippines has a “grave scandal law” for actions “offending decency and good customs.”

Sharia laws, usually applicable only to Muslims, regulate many aspects of family law including inheritance. They apply in the individual states in Malaysia. They cover cross-dressing. Many local laws in Indonesia are said to be Sharia based, and regulate alcohol, women’s clothing, and sometimes have provisions on prostitution or homosexuality. While those are matters that should be dealt with only in national criminal law, Indonesia’s Home Affairs Minister Tjahjo Kumolo said in June, 2016 that the national government would not interfere with such regulations.

11.3.2 The Movement for Decriminalization

History’s first homosexual rights organization, led by elite gay males (doctors and lawyers), began in late 19th century in Europe in the context of a campaign for decriminalization. The movement was centred at an institute in Berlin and was led by Dr Magnus Hirschfeld, who travelled on speaking tours in Europe, America, and Asia. Branches and affiliates sprang up in various parts of Europe. The institute in Berlin was destroyed by the Nazis in 1939, and the books and documents in its research library were publicly burned. With minor exceptions, no gay rights organizations survived that setback. New ones began in Europe and North America after World War II. They faced the fact that half the world had criminal laws prohibiting male-male sexual acts, in each case linked back to the religiously-based laws of Europe. The primary goal was decriminalization.

Post-World War II reforms began slowly with decriminalization in Illinois in 1960, Britain and Wales in 1967, and Canada in 1969. The criminal prohibition in Northern Ireland was held to violate the European Convention of Human Rights in the famous case of *Dudgeon v United Kingdom* (1981), relying on arguments of personal privacy. Similar decisions were made for criminal laws in Cyprus and Ireland. Criminal prohibition in Tasmania was held to be in breach of the International Covenant on Civil and Political Rights in *Toonen v Australia* (1994) on grounds of privacy and equality. The *Toonen* decision was a key breakthrough in the UN human rights system. The United States Supreme Court found such laws unconstitutional in 2003. The laws are now gone in the West, but survive as colonial era prohibitions in most former British colonies.

In 2009, the Delhi High Court ruled against Art 377 on grounds of equality and privacy, adding that the prohibition of discrimination on the basis of 'sex' in the Indian constitution, included a prohibition of discrimination on the basis of 'sexual orientation.' The Indian Supreme Court reversed that decision in 2013, but in January 2016, ordered a rehearing of the issue by a panel of five judges. Over the ongoing life of the Indian litigation: (a) the Congress Party came out in favour of decriminalization; (b) one or more cultural celebrities were publicly identified as gay; (c) decriminalization gained support in liberal public opinion; and (d) annual colourful pride parades flourished in perhaps a half dozen cities. The flip-flops and delays in the judicial challenge have proven very useful in the process of gaining visibility for LGBTI issues.

In 2015, the Court of Appeal in Singapore upheld its prohibition of "acts of gross indecency between males," saying that the government was free to define any particular offence on grounds of morality or social order, and prohibit the activity in question (*Lim Meng Suang v Attorney-General* [2015] 1 S.L.R. 26). The decision failed to cite any of the examples of decriminalization in other jurisdictions. The decision was paradoxical, for in 2007, the government said it would retain the prohibition, but that there would be no 'proactive enforcement,' a kind of de facto repeal. The government retains the section: (a) to appease an active evangelical Christian minority, and (b) to block any divisive debates over allowing same sex marriage. No court challenges have been mounted in Malaysia or Brunei.

11.3.3 Criminal laws in Southeast Asia

In Southeast Asia, the four former British colonies, Brunei, Malaysia, Myanmar, and Singapore, each retain colonial-era prohibitions. Such laws do not reflect local decisions or arise out of domestic, religious, or social considerations. Catholic majority Philippines has no prohibition, though the Church condemns homosexual acts. Buddhist majority Myanmar has a prohibition. Buddhist majority Thailand has no prohibition. Muslim majority Malaysia has a prohibition. The national criminal law in Muslim majority Indonesia has no prohibition. Singapore has a prohibition. China does not. No country in Asia with such a law tries actively to enforce it. The few cases reported in Brunei media of prosecutions all involve acts with underage males. Other prosecutions do not seem to occur.

In March, 2015, the leading body of Islamic leaders in Indonesia, the Council of Indonesian Ulama (MUI) issued a Fatwa, or religious ruling, calling for the criminalization of homosexual acts. In 2016 the Indonesian Constitutional Court gave serious attention to a case urging criminalization. As well, the on-going project of drafting a new comprehensive criminal code could result in criminalization. No state in Asia since the ending of the colonial period has criminalized homosexual acts (though Sri Lanka extended its prohibition to include acts between women). Only in Africa have two countries that had no prohibition, former French colonies, enacted criminal prohibitions in the years since independence.



CASE STUDY

The Two Prosecutions of Anwar Ibrahim in Malaysia

From 1993 to 1998, Anwar Ibrahim was the deputy and obvious successor to long-serving Prime Minister, Mahathir Mohammad of Malaysia. The two politicians had a falling out over policies responding to the Asian financial crisis of 1998. Mahathir fired Anwar, who was charged with corruption and sodomy (under Art 377 of the Penal Code). It was alleged that Anwar had had sexual relations with his wife's driver. While the suggestion was that Anwar was exploiting his position in relation to a junior employee, there was no violence or physical coercion. The sexual activity, if it occurred, was consensual. Anwar said the charges were a fabrication and that the prosecution was politically motivated. He was convicted of corruption (for using his position in an attempt to deflect prosecution) and sodomy, and served six years in jail. A final appeal to the Federal Court resulted in a reversal of the sodomy conviction on technical grounds.

Anwar was released (at a point in time when Mahathir had retired and Abdullah Badawi, somewhat of a reformer, was Prime Minister). Anwar then founded a new political party and was successful in building an alliance with two other opposition parties. In the 2008 general election, this opposition alliance made significant gains against the national coalition which had ruled Malaysia since independence. Four months later, Anwar was again charged with sodomy. Again, it was said to involve an aide, again without violence or physical coercion. Anwar again said the charges were fabricated for political reasons. He was acquitted at trial. Current Prime Minister, Najib Razak, authorized an appeal. The ruling was reversed and a five-year sentence imposed. The decision was upheld by the Federal Court in February 2015. There was extensive national and international coverage of the two prosecutions, with Amnesty International and others condemning the outcome. There is almost no history of prosecutions under Art 377 in Malaysia, except for the two charges against Anwar Ibrahim. In October 2015, the United Nations Working Group on Arbitrary Detention held that Anwar was being arbitrarily detained and demanded his release and the reinstatement of his political rights. This was on the basis that the law used to convict him discriminated on grounds of sexual orientation, in violation of international human rights standards.

Police may lay charges for public nuisance, soliciting, vagrancy, or other similar minor offences. It is easy to get convictions for such charges, or even just to use the threat of prosecution to intimidate or harass individuals, move them away from visible public areas, or extort bribes.



CASE STUDY

Police Actions in Mandalay

On the evening of 6 July 2013, a group of 12 male-bodied individuals, dressed as women, were gathered along the south eastern area of the moat surrounding the old royal palace grounds in Mandalay. Police arrested them under a colonial-era vagrancy law that applied to individuals, in disguise, in a public place at night, without a proper reason. They were detained for several hours at the Mandalay Division police station. They were stripped of their clothing and “verbally, physically, and sexually abused and assaulted by up to 10 police officers,” according to a report. They were eventually released without charge.

For the first time, there was an organized campaign around such police actions. The LGBT Rights Network held a press conference and released statements. Several national and international news sources reported on the story. Three individuals filed complaints with the Myanmar National Human Rights Commission, the Ministry of Home Affairs, the Head of the Police, and two committees of the national legislature. Videos of interviews with victims and activists were posted on YouTube. The UN Special Rapporteur on Human Rights in Myanmar met with the victims and included information on the incident in a report to the UN General Assembly. A law suit against the police was dismissed by the courts. The Human Rights Commission asked the Home Ministry to respond to the allegations. The request was ignored. At the time, the Commission had no authority to compel the Ministry to respond. The incident became a significant national and international story. The publicity and controversy may deter police from further abuse.

11.3.4 Sharia laws



CASE STUDY

Sharia Criminal Laws on Sexuality in Southeast Asia (and Islamic State Areas)

Indonesia

In 2009, the legislature in Aceh, an autonomous province at the northern tip of the island of Sumatra in Indonesia, enacted a local criminal law which decreed death by stoning for adultery, and 100 lashes for homosexual acts. These offences were part of what are referred to as Islamic Sharia (Shariah, Syariah) laws, that Aceh (uniquely in Indonesia) was authorized to impose. The Governor did not sign the new Sharia law and it never came into force. In 2014, the legislature in Aceh enacted a new law against homosexual acts both between men and between women. The penalty was caning, up to 100 lashes, or a payment in gold, or imprisonment. The law applied to both Muslims and non-Muslims, the only Sharia law in Southeast Asia to apply to non-Muslims. Showing affection in public between the sexes was also forbidden. The law came into effect in September 2015. There are no accounts of prosecutions.

Malaysia

The State of Kelantan in north-eastern Malaysia, governed by the Parti Islam se Malaysia (PAS), enacted Sharia laws in 1993 and 2015 with punishments of stoning to death for adultery, crucifixion for armed robbery when accompanied by a killing, amputation of the right hand for theft, and death for apostasy (converting away from Islam). The State of Terengganu, when it had a one-term PAS government, enacted an equivalent law in 2002. The imposition of these penalties by State governments is blocked by national legislation. In 2015, Kelantan, not for the first time, sought a reform in national legislation to allow it to impose “enhanced punishment” for Sharia offences. In May 2016, the national government submitted a bill in parliament on behalf of the PAS Party, which sits in the opposition ranks. The bill added caning to the punishments that Kelantan could impose for particular moral offences committed by Muslims. Debate on the bill was deferred. Media accounts have not been clear whether homosexual acts are covered in these initiatives.

Brunei

In 2013, the Sultan of Brunei introduced what was to be the first of three stages to implement a comprehensive code of Sharia law, with stoning to death for homosexual acts to be introduced in phase three. There were internal and international protests. As of September, 2016, phase two continued to be delayed, though the Sultan has confirmed his intention to proceed with the additional stages.

Islamic State (ISIS, ISIL)

The so-called ‘Islamic State,’ which in 2015 and 2016 controlled significant parts of Syria and Iraq, has executed probably over 25 males, alleged to be homosexual, by throwing them from the roofs of buildings. Large crowds witnessed these events, often stoning the body after its fall. The campaigns of Islamic State against minority Christians and homosexuals have been discussed in separate special sessions of the UN Security Council in 2015. Individuals from Southeast Asia have travelled to the Middle East to join Islamic State, and some will return to their home countries.

11.4 Violence

A major study of violence against lesbians, bisexual women and trans people, published in 2014 by OutRight International, described situations in five Asian countries, including Malaysia and the Philippines. The report concluded that the family “was the primary perpetrator of violence”, carrying out emotional, verbal, physical and sexual violence against LBT people. LBT Issues were avoided in reports and programs on violence against women, and LGBT reports regularly focused on state perpetrators of violence, not family members, intimate partners and employers. When there was attention to LGBTI, it was typically on gay men and transwomen, and did not deal with violence in the private realm. OutRight International also documented the deaths of over a dozen Thai lesbians in a detailed letter to top government officials in March, 2012. Most seem to have been ‘tomboys’, and the killings were not by police or security officials.

11.5 LGBTI Visibility and Activism

11.5.1 Legal Status for Civil Society Organizations

Many of the first publicly active LGBTI civil society organizations in Southeast Asia were focused on health and concerned themselves with education and HIV/AIDS prevention programs. They were run or staffed by gay males. The health focus made it possible to legally organize and be publicly active. Even this was not possible in Myanmar before 2011, and overseas funders opened HIV/AIDS clinics and programs in their own names – notably Population Services International with US money, and the Burnet Institute from Australia. Pioneering HIV/AIDS organizations in Southeast Asia were PT Foundation in Malaysia, and FACT in Thailand. Typically, these organizations received some overseas funding and developed good relations with government health programs. The only visible organization in Brunei is the Brunei AIDS Council, which gets some project funding from the government. Like Action for AIDS in Singapore, it receives no outside funding.

People Like Us (PLU) was established in Singapore as an LGBTI rights organization. It applied for registration. Registration is legally required for organizations or associations in Singapore. It is an offence to be active in an unregistered organization. PLU was refused registration three times (once when it tried to incorporate as a business, twice as a non-profit society). It continued to be active, cautiously. It was included in particular meetings and consultations with government officials, leading Russell Heng to describe himself and fellow PLU activists as “criminals at the table.” It seems that even today no LGBTI rights advocacy groups are registered as such in Singapore.

Some health and advocacy organizations exist now in major Southeast Asian countries. Gaya Nusantara can claim to be the oldest gay rights organization in Asia, founded in 1983. The lesbian organization, Anjaree, was the first organization in Thailand, founded in 1989. Most are unregistered. Those that are registered tend to use muted names, often using the rainbow symbolism that is now quite universal, for example, Rainbow Sky Association of Thailand, Rainbow Stream (Arus Pelangi) in Indonesia, and Colors Rainbow in Myanmar. Two main organizations in Vietnam are registered and active, but their names give no indication of any LGBTI focus. Vietnam seems to have the only Southeast Asian branch of PFLAG (Parents and Friends of Lesbians and Gays).

11.5.2 Public Actions, Public Advocacy

What of rights to assemble, associate, and conduct peaceful demonstrations? Demonstrations, parades, and other public actions and advocacy are strictly controlled in parts of Southeast Asia. The first public ‘pride parade’ was held in the Philippines in 1994. Annual pride parades, with people and floats moving on public roads, now occur annually in Cambodia, the Philippines, and Thailand (and Hong Kong, Japan, Taiwan, South Korea, and India). Pride events, held indoors, often in the cultural facilities of foreign embassies, have occurred in Indonesia, Laos, and Vietnam. An annual bicycle rally (with flags, balloons, and special t-shirts) is now held annually in Hanoi (no permit required). A public ‘rainbow walk’ has been held in conjunction with indoor activities in Ho Chi Minh City, again with flags, balloons, and matching t-shirts (no permit required to walk on sidewalks). Occasionally, activists in Thailand have held public walks, carrying matching rainbow umbrellas (no permit required). Celebrations of the International Day against Homophobia and Transphobia in Myanmar have, so far, been indoor events. The most famous example of the public ‘non-parades’ is Pink Dot in Singapore.



CASE STUDY

Pink Dot in Singapore

The government of Singapore, which tightly limits public political events, decided to authorize a ‘speakers’ corner’ in a public park, away from the central business district. It was to be the one place in Singapore where people could exercise a public right of free speech (though the sensitive topics of race and religion were forbidden). Activists began holding an annual picnic in the park, with speakers and everyone else dressed in pink. The government eased the rules and began to allow entertainment. Pink Dot, as the annual event is now called, sees thousands of Singaporeans gather each year for a few hours with speakers and popular entertainment. At dusk, the people bring out candles, light up cell phone screens, and brandish flashlights (pink if possible), forming a huge illuminated pink dot. The cover of the book, *Mobilizing Gay Singapore*, by National University of Singapore law professor, Lynette Chua, has an iconic photograph, taken from the top of a nearby hotel, of the huge illuminated pink dot, with the lights of the central business district and Singapore’s giant Ferris wheel in the distance. The name Pink Dot is a playful reference to the description of Singapore as simply a little red dot on maps.

In 2015, 28,000 Singaporeans participated. In 2016, it even had 18 corporate sponsors, including Google, Barclays, JP Morgan, Goldman Sachs, Bloomberg, BP, Facebook, Apple, General Electric, and Visa. The government issued a statement:

The Government’s general position has always been that foreign entities should not interfere in our domestic issues, especially political issues or controversial social issues with political overtones. These are political, social or moral choices for Singaporeans to decide for ourselves. LGBT issues are one such example. This is why under the rules governing the use of the Speakers’ Corner, for events like Pink Dot, foreigners are not allowed to organize or speak at the events, or participate in demonstrations.

The same rationale lay behind Singapore banning the author of this chapter from a public talk in 2007 on the history of colonial-era anti-homosexual criminal laws.



CASE STUDY

Seksualiti Merdeka in Malaysia

On Merdeka Day, 31 August 2008 (a day celebrating the independence of Malaysia from colonial rule), a loose coalition of artists, activists, academics, and NGOs organized a program of concerts, theatre, workshops, films, and talks under the title, Seksualiti Merdeka (sexual freedom, or sexual independence). It became an annual event, celebrating sex and gender diversity. The venue was a commercial art gallery located in the well-known arts and crafts centre, Central Market, located in a vintage area of Kuala Lumpur. The annual festival began when Abdullah Badawi was prime minister. Badawi, unlike his predecessor, Mahathir Mohammad, and successor, Najib Razak, never seems to have publicly denounced homosexuality. He was seen as a reformer, willing to take on the police and fight corruption. Seksualiti Merdeka gained support from the Malaysian Bar Council, Suaram (a well-established human rights NGO), Amnesty International, the UN Theme Group on HIV, and various musicians

and artists. It carefully avoided staging any public protests or actions, and received favourable coverage in the press. Controversy erupted in the autumn of 2010 when a YouTube video, part of the international, 'It Gets Better Project', showed a young Malaysian Muslim man saying he hoped one day that gay Malaysians could say "Saya gay, gaya okey" ("I'm gay, I'm okay"). There was harsh condemnation in the Malay language press. In the face of death threats aimed at the young man, Seksualiti Merdeka withdrew the video. Controversy continued in 2011. In November, when after the beginning of the annual program, the police banned the organization on grounds that Seksualiti Merdeka events were likely to "excite a disturbance of the peace." The reformist, Badawi, was no longer the Prime Minister. The ruling political coalition had done badly in the 2008 election, although it held onto power. The organizers of Seksualiti Merdeka went to court seeking judicial review of the police banning order. The courts refused to question the ban. No judicial review was allowed. Seksualiti Merdeka was over.

To facilitate the political participation of marginalized groups, the Philippines introduced a system of special party-list parties, which would represent dispersed economic or social groupings that were unrepresented in the legislative branch as a result of the constituency system. An LGBTI political party applied to be so recognized, but was denied on moral grounds. In 2010, the Supreme Court upheld the registration of Ang Ladlad as a party-list party, based on the rights of LGBT people to political participation, freedom of expression, and equal treatment. Ang Ladlad ran in two national elections, but failed to win seats.

11.6 Public Media and Government Censorship

What of freedom of expression (which for LGBTI is usually the struggle to gain legitimate visibility within society)? The government of Singapore explicitly bans positive images of homosexuals. The gay Christian singers, Jason and DiMarco, were banned. In 2008, a cable television channel was fined when a home decorating program featured a nursery in the home of a lesbian couple who had adopted a baby. The Media Development Authority said the program "normalizes and promotes a gay lifestyle." In February 2009, Singapore censored the annual Academy Awards broadcast from Los Angeles, cutting parts of speeches about the film on the gay politician, Harvey Milk. A quick same-sex kiss was cut from the stage production of *Les Misérables* in June 2016. A similar blockage of 'positive images' occurs in Malaysia, Brunei, and Laos. Foreign gay magazines are not available in these countries, and wire service stories on LGBTI topics worldwide do not get reprinted.

Thailand has a reputation as the most relaxed jurisdiction in Asia on sexuality issues, and has a very visible gay scene. Two magazines appear regularly on newsstands. One is the first overseas edition of the British gay magazine, *Attitude*, with local Thai content and translations of articles from the British edition. The second, *@ Tom Actz*, a Thai lesbian magazine has been in print for five or six years. These two print magazines may be unique in Southeast Asia. In Singapore and the Philippines, there are online magazines, which, of course, have less public visibility.

Thailand has released a surprising number of gay movies, though most are low-budget comedies with mocking depictions of gay men and transgender women. But there are a few stand-out productions: *Iron Ladies*, *Beautiful Boxer*, *Love of Siam*,

Bangkok Love Story, *Yes or No*, *Yes or No 2*, and the charming 2015 film, *Winning at Checkers (Every Time)*. The last was submitted as the country's foreign language entry to the Oscars. These Thai films show in regular cineplexes throughout the country. Similarly, there have been numerous gay and lesbian films in the Philippines. Other parts of Southeast Asia can claim one or two titles: *Lost in Paradise* in Vietnam, *Arisan*, *Arisan 2* and *Beautiful Man* in Indonesia, *In a Bottle* in Malaysia, and some comedies in Myanmar. There are LGBTI film festivals in Indonesia, Thailand and Myanmar, and showings in other places.

11.7 Discrimination

Most national constitutions in Southeast Asia promise equal rights and prohibit discrimination. Typically, they have a list of prohibited grounds of discrimination. For example, the constitution of Cambodia states in Art 31 that citizens are equal before the law, regardless of "race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status." No constitution in Southeast Asia expressly includes in such lists 'sexual orientation,' 'gender expression' or 'intersex status.' These grounds may come within 'other status,' but no court in Southeast Asia has yet so ruled. Constitutional provisions usually apply to government actions and laws – and not to employment, accommodation, or services provided by private businesses. Specific non-discrimination laws are required to counter such discrimination.

Express discrimination exists in some countries in the context of military service. The Philippines bars gay males from service in the armed forces. Same-sex sexual acts are not against the law in South Korea, except if the individual is a member of the armed forces. Conscripts in Singapore who are known to be gay are given some kind of alternative service. Thailand has never been concerned with sexual orientation. It exempts transgender individuals from military service on the basis of the medical classification of 'gender identity disorder.'

Activists in the Philippines have lobbied for a decade for a national anti-discrimination law covering employment. Quezon City, home to the main campus of the University of the Philippines, enacted the first such law. As of the beginning of 2016, local ordinances protecting LGBT from discrimination were in place in the Philippines in two provinces, nine cities, one municipality, and three barangays (neighbourhoods within Quezon City). Taiwan enacted a national law against sexual orientation discrimination in employment in 2002, and in education in 2004.

CASE STUDY The Thai Gender Equality Act

The 1997 Thai Constitution prohibited discrimination on grounds of 'phet,' a Thai word usually translated as 'sex' or 'gender.' Like some other languages, Thai has not drawn a distinction between the two English language terms. In 2007, a constitutional drafting convention debated whether to add words to include what Thai's often call 'sexual diversity.' No wording was added, but a formal statement of the drafter's decision was issued, saying that 'phet' already included "sexual identity or gender or sexual diversity, which may be different from the phet in which the person was



born.” This interpretation was accepted by the Thai Administrative Court in two cases in which the Province of Chiang Mai had excluded transgender kathoey from equal participation in government sponsored public festivals. In 2015, the slow process of drafting legislation to implement the constitutional non-discrimination provision finally resulted in the *Gender Equality Act*, passed by a military appointed legislature. The *Gender Equality Act* clearly covers discrimination against women, and also against transgender kathoeyes and toms, whose self-presentation is different from the sex assigned at birth. It is understood that the legislation would also prohibit discrimination on the basis of sexual orientation, separately from gender identity or gender expression. A committee has been established to facilitate the implementation of the new provisions.

To what extent should individuals be able to claim an exemption from anti-discrimination laws on the basis of personally held religious views or personal conscience? For example, laws opening legal marriage to same-sex couples have an exemption. They do not require religious authorities to perform same-sex marriages (allowing them to discriminate against same-sex couples). Equally, they are allowed to discriminate on the basis of sex (for they often have male-only clergy). Disputes arose in France, the United States, and Canada as to whether civil servants involved in issuing marriage licenses or actually performing marriages could refuse same-sex couples on the basis of their personal beliefs. Such exemptions for government employees were usually rejected, though controversy continues. In *Ladele, McFarlane v UK* (2013), the European Court of Human Rights upheld the firing of a government clerk who refused, on grounds of personal belief, to register a same-sex partnership. Additional disputes developed as to whether private businesses could refuse services, such as wedding planning or the provision of wedding cakes or flowers for same-sex events. Some individual states in the US have enacted ‘religious liberty’ laws allowing such personal exemptions. Their constitutional validity has not yet been tested. In *Boy Scouts v Dale* (2000), the US Supreme Court allowed the Boy Scouts organization to exclude homosexuals from its programs, holding that the organization had a right of free association. After years of controversy, the organization finally dropped the ban. The same sequence of events occurred with the banning of gay and lesbian organizations from St Patrick’s Day parades (big public non-religious events associated with Irish heritage). The US Supreme Court upheld the discrimination in the name of freedom of expression, but after long controversy, the discrimination was ended by the parade organizers themselves.

11.8 Recognition of Same-Sex Relationships

Legal recognition of relationships is needed to give couples security in relation to children, property, and finances so when a husband or wife dies, the partner can take over ownership of their house, access bank accounts, and maintain guardianship of children. These securities are not regularly available to gay and lesbian couples. A surviving partner may be evicted from their house or lose access to their finances, which will then be transferred to the dead partner’s family.

The only examples we have in Asia of the legal recognition of same-sex relationships are in relation to: (a) immigration residency rights, and (b) domestic violence legislation.

Immigration authorities in Hong Kong, Singapore, Thailand (and probably other jurisdictions as well) will grant residency rights for the same-sex partners of individuals who are taking up positions in their jurisdictions, perhaps as embassy staff, academics, or employees of multinational corporations. For example, the same-sex husbands of the current US ambassador to Vietnam and the current UK ambassador to Thailand have residency rights. The relevant immigration laws make no specific reference to same-sex partners, but in practice they do not block such accommodation. In *Taddeucci and McCall v Italy* (2016), the European Court of Human Rights ruled that residency rights must be granted to a partner in a same-sex relationship if such rights are extended to heterosexual partners. In 2016, a judicial challenge in Hong Kong sought the right of the same-sex partner to work, which would have been given to a heterosexual married partner.

It is now common to have special laws on domestic violence. Such laws typically apply not simply to legally married couples, but also partners who are cohabiting. In Hong Kong and the Philippines, these laws apply to same-sex partners. A 2016 law in China is also worded in a gender neutral fashion, and should apply to same-sex partners.

In 2013, the government of Vietnam proposed the legal recognition of unmarried couples, heterosexual or homosexual, for purposes of resolving disputes over child custody or the division of property. There was significant national debate on the set of reforms, but it was the legislature, in the end, that rejected the recognition of same-sex couples. An unusual law which prohibited holding an event and calling it a same-sex wedding was dropped (which led to many news stories saying, incorrectly, that Vietnam now recognized same-sex marriage).

A committee of the Thai parliament held five seminars or hearings in different parts of the country (the last in April 2013) to consider establishing a registration system for same-sex couples that would provide various legal rights and obligations. Separately, a number of activists worked with the Law Reform Commission of Thailand to produce an alternative registration law that would be available to all couples and which would be more comprehensive in dealing with issues of property, social programs, and children. One prominent activist held out for the opening of marriage, rejecting the idea of a separate registration system. No political parties or prominent politicians publicly endorsed any of these alternatives. Drafting was not complete at the time of the military coup in May 2014, and none of the three proposals has been pursued since that time.

What of international law? In *Joslin v. New Zealand* (2002), the UN Human Rights Committee rejected a claim by same-sex couples for equal access to legal marriage, but on the basis of the specifically gendered language in Art 23(2) of the *International Covenant on Civil and Political Rights*. The Committee in *Young v. Australia* (2003) found that the denial of a spousal pension to a surviving same-sex partner violated equality rights. That ruling was confirmed in 2007 in *X v. Colombia*.

The European Court of Human Rights in *Schalk and Kopf v. Austria* (2010) held that a new registration law remedied many of the inequalities in Austrian law between heterosexual couples and same-sex couples (rejecting a claim for full marriage). In *Oliari v. Italy* (2015), the court ruled that Italy was required to have some system of recognition of same-sex couples, either by way of registration or marriage. The court noted that the movement towards legal recognition of same-sex couples had continued to develop rapidly in Europe and other parts of the world (citing the decision of the US Supreme Court earlier in the year opening marriage). Italy subsequently enacted

a registration law (which had been blocked by opposition in the Senate). Italy was the last jurisdiction in Western Europe to introduce either marriage or a registration system.

In 2001, the Netherlands opened marriage to same-sex couples, followed by Argentina, Belgium, Brazil, Canada, Finland, France, Iceland, Ireland, Luxembourg, Mexico, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom, the United States, and Uruguay. The new president in Taiwan, elected in early 2016, supports the opening of marriage.

In a new Asian development in 2015, a small number of local governments, first in Japan, then in Taiwan, allowed same-sex couples to register their relationships. The benefits of registration were largely linked to: (a) medical situations, where a partner sought hospital visitation rights or the ability to authorize medical procedures in emergency cases; and (b) in relation to the joint rental of apartments. Suddenly, there was a procedure that involved some official recognition, though with very limited consequences.

11.9 Transgender

‘Transgender’ is an umbrella term that came into use in the 1990s to describe individuals who reject the gendered patterns of dress and behaviour associated with their physical sex. The stereotypical association of transgender with homosexuality is still a problem. The two categories are different. Most cross-dressers are heterosexual. Most transsexuals, after body change, seek heterosexual relationships.

11.9.1 Transsexuals

An individual with a female body may have a male ‘gender identity.’ An individual with a male body may have a female ‘gender identity.’ This is a reality that goes beyond most forms of female masculinity and male femininity, and can lead the individual to: (a) full time presentation of his or her self in the non-biological sex; (b) hormonal medication; (c) surgery reducing or enlarging breasts; and perhaps (d) genital surgery.

Genital surgery became widely available only in the 1960s, first in the West. A set of medical rules developed:

- (1) A diagnosis by psychologists or psychiatrists that the individual has ‘gender dysphoria,’ ‘transsexualism’ or an older phrase ‘gender identity disorder;’
- (2) A transitional period, usually two years, in which the individual receives counselling, hormonal therapy, perhaps minor surgery, and lives on a day-to-day basis in the desired sex; and
- (3) A decision by the individual and the doctor on appropriate treatment, which may or may not include genital surgery.

Since human bodies first develop in the womb as potentially either male or female, the bodies of men and women are sufficiently similar that it is possible to reconstruct the genital organs by surgery. Such surgery is easier for the transition from male to female. It remains difficult to construct a successful penis for a female to male transsexual. In either case, XX or XY chromosomes will not change.

For transsexuals, the right to health found in Art 12 of the *International Covenant on Economic, Social and Cultural Rights*, would include a proper diagnosis and appropriate treatment. The European Court of Human Rights in *L v Lithuania* (2007) held that the state medical system could not refuse surgery in a case where the individual had been diagnosed as a transsexual and a course of treatment had begun. The *Diagnostic and Statistic Manual of Mental Disorders, DSM-IV* of the American Psychiatric Association and the *ICD-10* of the World Health Organization represent an international consensus on diagnosis and treatment.

Individuals in Indonesia, Singapore, and Vietnam, on completing genital surgery can get their personal documents, such as national identity cards, driver's licenses and passports, altered to reflect their post-operative 'gender identity.' Document change is also possible in China, Japan, South Korea, Hong Kong, and Taiwan. With document change, the individual can marry in the newly recognized sex. A male to female transsexual will be able to legally marry a male. In 2007, the Supreme Court in the Philippines rejected document change beginning its judgment with a quotation from the book of Genesis in the Bible. Thailand, as well, does not alter personal documents, though it is the regional centre for sex reassignment surgery.

Requirements for document change have been rapidly changing in the West. Change started with the United Kingdom's *Gender Recognition Act* of 2004, which provided that genital surgery was not a requirement for a transsexual seeking document change. Reforms have taken place in a number of countries, including Argentina, Denmark, Ireland, Italy, Malta, Netherlands, Norway, and Sweden. Even the British reform of 2004 is now recognized by the UK government as seriously out of date. The new rules mean that a person committed to living as the 'other sex' can gain document change without the requirement of: (a) a medical diagnosis, (b) genital surgery, (c) sterility, (d) hormonal treatment, or (e) a divorce ending any existing marriage. These new reforms are described as respecting the 'self-determination' of the individual. The European Court of Human Rights in *YY v Turkey* (2015) ruled that it was a violation of rights of privacy and family life to require, for document change, that the individual have undergone genital surgery which would have made them sterile. The first jurisdiction in Asia to respond to this newer thinking has been Taiwan. In December 2013, the Ministry of Health and Welfare authorized document change without any psychiatric evaluation or surgery.

A 2015 report to the Council of Europe said the state should ensure "that the change of name and gender on official documents can be obtained through quick, transparent and accessible procedures that effectively guarantee full legal recognition in all areas of life." Denmark, Malta, Ireland, and Norway have led in making the procedure for changing documents a simple administrative matter.

The old requirements—diagnosis, waiting periods, divorce, genital surgery, sterility—now seem simply to reflect neurotic fears of any loosening of the sex/gender system (even for a small minority of individuals). International media first reported on a 'pregnant men' a decade ago – the sensational story of an individual in Oregon who had given birth to a child after document change identified him as male. Media do not bother to report new examples. The story is no longer news.

In a 2016 report, the UN Special Rapporteur on Torture noted that the refusal of transgender people's legal recognition in their appropriate gender "leads to grave consequences for the enjoyment of their human rights, including obstacles to accessing education, employment, health care and other essential services." The report noted

that “in states that permit the modification of gender markers on identity documents abusive requirements can be imposed, such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures.” It is now frequently asserted that the requirement of genital surgery and sterility for legal recognition of gender identity is a form of torture.

In recent years, the strong transsexual identification of some pre-puberty children has come to be recognized and respected. Medical treatment may involve the blocking of puberty, delaying that bodily change until it is clear what decision the individual wants to make.

11.9.2 Discrimination Based on Transsexuality

In *P v S and Cornwall County Council* (1996), the European Court of Justice held that discrimination on the basis of sex reassignment was discrimination on the basis of ‘sex’ and, for that reason, contrary to European Union law. Recent decisions in the US also recognize that discrimination against transsexuals is discrimination on the basis of ‘sex.’ Antidiscrimination laws that cover gender identity are mandatory in the EU, and increasingly common in other parts of the West. The 2009 constitution of Bolivia was the first constitution to ban discrimination on grounds of gender identity, as well as sex and sexual orientation.

A recurring issue relates to sexually segregated toilets. In October 2006, the New York Metropolitan Transportation Authority resolved a long-standing dispute by ruling that individuals throughout their extensive subway and railroad system could access whichever restroom was “consistent with their gender expression.” In 2016, some individual states in the US enacted laws requiring individuals to use toilets in accordance with the ‘sex’ indicated on their birth certificates, a challenge to the federal government which makes grants to schools dependent upon toilet access based on gender expression or gender identity. A coalition of state governments has sued the national government over the issue. The issue could be heard by the Supreme Court in 2017.

CASE STUDY

Transgender in Malaysia

One of the few available studies on discrimination against transgender women was published by Human Rights Watch in 2014, under the title, *I’m Scared to be a Woman: Human Rights Abuses against Transgender People in Malaysia*.

Three transgender women in Negeri Sembilan, who had been arrested and prosecuted for wearing women’s clothing under a state-level Sharia law, challenged the law as in conflict with human rights provisions in the Malaysian Constitution. State level governments have authority to legislate on matters related to Islam, and all 13 states prohibit Muslim men from dressing as women. Three states also criminalize women “posing as men.” Cases are heard in Sharia courts. In a carefully prepared challenge, backed by the NGO, Justice for Sisters, a trial court heard evidence about the classification of Gender Identity Disorder in the *DSM-IV* of the American Psychiatric Association. The three individuals had been diagnosed as having GID and evidence established that the condition was neither a matter of personal choice nor amenable to treatment. A sociologist gave evidence describing the Mak Nyah community in



the country (a long recognized transgender grouping). A religious authority testified that cross-dressing was forbidden in Islam. After losing at trial, the petitioners were successful on appeal. In 2014, the Court of Appeal ruled that the state-level Sharia law was in conflict with the constitutional rights to life and personal liberty, equality, freedom from gender discrimination, freedom of movement, and freedom of speech, assembly, and association. The judgment cited a decision of the Supreme Court in India which held that the prohibition of discrimination on grounds of 'sex' covered 'gender identity' as well. It quoted from a Malaysian government report to the UN General Assembly Special Session on HIV/AIDS in 2010 which said that the social shunning of transsexuals in the country resulted in the majority of Mak Nyah being "unable to obtain employment and thus end up doing sex work." The judgment criticized the trial court judgment, which equated transgender with homosexuals, saying the case had "absolutely nothing to do with homosexuality." The implications for a challenge to Art 377, however, were very clear. In October, 2015, the Federal Court, the highest court in the Malaysian system, on purely procedural grounds, ruled that the decision could not stand. It said that a constitutional challenge could only proceed with an authorization from the Federal Court. The authorization of a high court judge, which had been obtained, was insufficient. As in the *Seksualiti Merdeka* case, judicial review was rejected on grounds that avoided any discussion of human rights. The ruling suggests that the Federal Court could block any attempt to revive the challenge.

11.9.3 Distinct Transgender Identities

In the Southeast Asian region, there are 'third sex' transgender groupings, made up of individuals who share some extent of a collective identity. The best known are the Bakla in the Philippines, the Mak Nyah in Malaysia, the Waria in Indonesia, and the Kathoey in Thailand. Internationally, the best known (and largest) of the 'third sex' groupings are the Hijra and related groups in India, Pakistan, and Bangladesh. These groupings have no equivalents in the contemporary West or in Confucian influenced societies in East Asia. Some find a place in entertainment, as in the transvestite cabaret shows in Thailand, or as entertainers at political rallies in Indonesia. Some run small businesses, such as beauty parlours, or work selling cosmetics in department stores. In the Philippines, they are often called 'parloristas.' In South Asia and Southeast Asia, they frequently engage in sex work, being barred from most other jobs.

Two reforms have been taking place. Some government agencies have recognized these groups as socially and economically marginalized. At times, training programs have been extended to them by government social welfare departments in Malaysia and Indonesia. Some governmental recognition of a 'third sex' category has occurred in South Asia, but not in Southeast Asia.

11.10 Intersexuals

Intersexuality refers to various conditions in which the body at birth is neither completely male nor female. Some forms of intersexuality do not become apparent until the onset of puberty. When an intersex child is born, some confusion and embarrassment usually overwhelms the parents. Doctors, at least in the past, routinely recommended 'normalizing' surgery, to bring the child's physical appearance into

line with a male or female standard. The fact of an intersex history was regularly kept from the child, who may come to realize on maturity that critical information has been suppressed.

Intersex activists argue that almost all ‘normalizing’ surgeries are cosmetic in nature. They are not medically necessary. They involve guesswork, for doctors cannot know how the individual will identify on maturity in terms of sex or gender identity. Many intersexuals have rejected the sex assigned at birth, and must face the fact that irreversible genital surgery has taken place. Medical treatment, activists argued, should be deferred until the child (sometime after puberty) is able to give fully informed consent to a course of treatment (or to reject intervention). In other words, it should be up to the individual to determine whether to be male, female, or intersexual.

In response to controversies around intersex issues, a fifty-person panel of experts in paediatric endocrinology from both Europe and North America, together with patient-centred activists, studied the issues involved. The result was the 2006 *Consensus Statement on Management of Intersex Disorders*. The statement supports patient’s rights and the need for informed consent. The 2006 Yogyakarta Principles requires the state to ensure “that no child’s body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free, and informed consent of the child.” The 2013 report of the UN Special Rapporteur on Torture condemned any non-consensual surgical intervention on intersex infants, calling such actions a form of torture. Criticism of ‘normalizing’ surgeries have come, as well, from the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child. In the Universal Periodic Review, governments are now criticized for allowing such surgery to continue. In 2015, Malta prohibited such surgeries in its leading legislation on transgender and intersex issues.

Little information exists in Southeast Asia as to whether the new international standards are being followed by doctors and medical institutions. Intersex individuals have been able to get their personal documents corrected, even in countries that will not change documents for post-operative transsexuals. There was considerable publicity about the case of Alter(ina) Hofan in Indonesia, who was classified as female at birth but whose designation was changed to male after surgery. He married a woman, only to be accused by the woman’s mother of not being a man. After sensational coverage in the Indonesian media, Alter was imprisoned for a period of weeks before the charges were finally dropped. In 2008, the Philippine Supreme Court in the Cagandahan case granted an intersex applicant’s petition to be recognized as male. The petitioner was classified as female at birth, but male characteristics developed as the body matured. The judgment reflected on the rigidity of having only two sexual categories, male and female, when the petitioner’s body did not conform to either model. Since the petitioner identified as male, and sought that classification, the court so ordered.

11.11 Conclusion

We are in a period of significant change on LGBTI rights, but only in certain parts of the world. There has been a shift away from near universal condemnation sixty years ago. There are now fairly slim majorities in the UN Human Rights Council supporting change. For young people growing up in Southeast Asia there is some chance of support and recognition for sex and gender diversity.

A. Chapter Summary and Key Points

Introduction

The hostility and discrimination against lesbian, gay, bisexual, transgender, and intersexual (LGBTI) people is commonly explained as religious in origin. Some religions have an anti-homosexual tradition, but their contemporary views may be less clear. All major religious traditions now have internal divisions or debates on the human rights of LGBTI. The history of anti-homosexual, anti-transgender bias is uneven with periods of quite open acceptance, but hostility is the more recent trend. Now, LGBTI people find society hostile to their existence, but blind to their presence.

Post-War Change

There have been dramatic changes on rights about sexuality since the UDHR was adopted in 1948. At that time, half the world had criminal laws against homosexuality and many regarded it as an illness. Today, most criminal laws have been abolished and same-sex marriage is allowed in many countries, but there has been regression in much of Sub-Saharan Africa, Russia, the Middle East, North Africa, and in member states of the Organization of Islamic Cooperation. In Southeast Asia, criminal prohibitions survive from colonial times but no country actively enforces these laws. Police harassment continues while vigilante actions against gay or transgender events still occur in the region. Lack of acceptance by families is widely reported with States and religious organizations giving little or no support. Bullying in schools is a regional problem. Views of heads of government vary.

Change at the UN

In the UN system, issues of sexual orientation and gender identity were taken up by various bodies starting in 1993 with *Toonen v Australia*. The UN Human Rights Council has passed supportive resolutions on LGBTI human rights despite bitter opposition. Other bodies like the UNDP, the UNSC and the UN General Secretary, have also been supportive.

Criminal Laws

The Bible prohibited homosexuality, a provision which became part of Roman and Roman Catholic religious law. The *Napoleonic Penal Code* reformed criminal law in 1810, dropping the prohibition against homosexual acts, and this change spread to half of Europe. Most colonial powers and their colonies had no prohibition against homosexuality. The major exception is Britain, where criminalization was maintained in its colonies. For example, the penal code for India contained the famous Art 377 which still exists in many ex-British colonies, prohibiting acts “against the order of nature,” commonly defined as homosexuality. The movement for homosexual rights and decriminalization began in late 19th century Europe and was centred in Berlin. In most western countries, reforms began after World War II. Cases in the Indian and Singaporean Supreme Courts of Appeal have challenged, but not overturned these laws.

LGBTI Visibility and Activism

The first active LGBTI civil society organizations in Southeast Asia were focused on health and concerned themselves with education and the prevention of HIV/AIDS. Today, the rights to assemble and associate are tested with ‘pride parades’ held in various city centres; governments have tried to prevent these in Malaysia and Singapore. Some governments explicitly ban positive images of homosexuals, while other countries are more relaxed.

Discrimination

Most national constitutions in Southeast Asia promise equal rights and prohibit discrimination although discrimination exists in the context of military service. The Philippines has lobbied for a national anti-discrimination law covering employment. Whether private businesses can refuse services, such as wedding planning, for same-sex events has been disputed.

Recognition of Same-Sex Relationships

Giving relationships legal recognition offers couples security as regards children, property, and finances, especially when one partner dies. These securities are not regularly available to gay and lesbian couples. Immigration authorities may grant residency rights to the same-sex partners of individuals in some countries. Domestic violence laws typically apply to cohabiting partners. In 2015, a small number of local governments in Japan and Taiwan allowed same-sex couples to register their relationships. The benefits of registration were largely linked to medical situations, for example, where a partner seeks hospital visitation rights, or in relation to the joint rental of apartments.

Transgender

‘Transgender’ is an umbrella term to describe individuals who reject the gendered patterns of dress and behaviour associated with their physical sex. In Southeast Asia, there are a number of ‘third sex’ transgender groupings such as the Bakla in the Philippines, the Mak Nyah in Malaysia, the Waria in Indonesia, the Kathoey in Thailand, and the Hijra in India, Pakistan, and Bangladesh. The stereotypical association of transgender with homosexuality is still a problem. Most cross-dressers are heterosexual. Most transsexuals, after body change, seek heterosexual relationships. Genital surgery only became available in the 1960s. Individuals in Indonesia, Singapore, and Vietnam, on completing genital surgery, can have their personal documents altered to reflect their post-operative ‘gender identity.’

Discrimination Based on Transsexuality

Anti-discrimination laws that cover gender identity are increasingly common in the world. Reforms are taking place in South Asia (but not Southeast Asia) in the following areas: services for socially and economically marginalized LGBTI, training programs for social welfare departments, and recognition of a ‘third sex’ category (but only in some governments). A recurring issue is sexually segregated toilets.

Intersexuals

Intersexuality refers to various conditions in which the body at birth is neither completely male nor female. Some forms of intersexuality do not become apparent until the onset of puberty. In recent years, the transsexual identification of some pre-pubescent children has been recognized and respected. Previously, when an intersex child was born, doctors would routinely recommend surgery to bring the child’s physical appearance into line with a male or female standard. Intersex activists argue that almost all these surgeries are cosmetic and not medically necessary. They also involve guesswork, for doctors cannot know how the individual will identify on maturity in terms of sex or gender identity. The preferred practice now is to recognize the patient’s rights and acquire informed consent before surgery.

B. Typical exam or essay questions

- What are the laws, government policies, and general social attitudes in your country on the issues raised in this chapter? What positions has your country taken on sexuality issues at the United Nations?
- Do LGBTI rights advocacy groups function openly and visibly in your country?
- What countries or jurisdictions regularly enforce: (a) criminal laws against same-sex sexual acts between consenting adults; (b) laws against cross-dressing; (c) laws against individuals hanging out at night in places that gays or cross-dressers frequent; (d) laws or policies that prohibit gay or lesbian or transgender bars; or (e) restrictions on media that feature images of LGBTI?
- Why do countries retain anti-homosexual criminal laws when these are not actively enforced?
- Should anti-homosexual criminal laws be held to discriminate on the basis of sex (as was held in *Toonen v Australia* and at trial in *Naz v India*)?
- Is the bullying of students who are perceived to be LGBTI a problem in your country?
- What violations do transgender people face in your country? What has been the response of the government and civil society?
- If someone changes their sex through an operation, should their birth certificate also be changed to reflect the current sex of that person? Why, or why not?

C. Further Reading

Sexuality and Rights

- Lynette Chua
- Peter Jackson
- Julian Lee
- Michele Ford
- Douglas Sanders
- Mergawati Zulfakar

Research Organizations

The UNDP has many useful publications on sexuality in the Asia Pacific. They produce country reports under the “Being LGBT in Asia” program including for Cambodia, Indonesia, Philippines, Thailand, and Vietnam.

The UNDP and the Asia Pacific Forum have produced recent big report: *Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity and Sex Characteristics* (2016).

Other UNDP reports include:

Leave No One Behind: Advancing Social, Cultural and Political Inclusion of LGBTI People in Asia and the Pacific (2015)

Discussion Paper: *Transgender Health and Human Rights* (2013)

Council of Europe, *Protecting Human Rights of Transgender Persons: A Short Guide to Legal Gender Recognition* (2015).

Human Rights Watch and Amnesty International have programs on LGBT rights with advocacy notes and research reports. Some relevant HRW reports include:

I'm Scared to be a Woman: Human Rights Abuses against Transgender People in Malaysia (2014).

'These Political Games Ruin Our Lives': Indonesia's LGBT Community Under Threat, (2016).

The OHCHR has some publications including a *Fact Sheet on Intersex, and Born Free and Equal: SOGI in International Human Rights Law*.

OutRight International is an NGO with research and reports including: "Letter to Thai Officials: Killings of Lesbian Women and Transgender People in Thailand" (March 22, 2012) and *Violence: Through the Lens of Lesbians, Bisexual Women and Trans People in Asia* (2014).

The ICJ has a *SOGI Case Book* of court cases and the *SOGI UN Database* of reports, resolutions, and findings from treaty bodies.

The International Council on Human Rights Policy has a study on *Sexuality and Rights*

Other organizations include ILGA, Sexual Rights Initiative (SRI), and WHO's programs on Sexuality, and Gender and human rights.

12

Human Rights and Development*

For most people in Southeast Asia in the 1960s, there was no electricity, no high school, and limited medical facilities. Few people owned a car or a motorbike or had ever been in an air conditioned room.

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12.1 Introduction

Most people lived on farms, did not go to school, and rarely left their country. Rapid development over the next few decades transformed Southeast Asian society. Many of the goods and services people have today, from electricity to hospitals and shopping centres, only arrived in recent decades. The transformations benefitted some but by no means all people. The challenge within developing societies is to undertake development, so people can access all the benefits that come with it, but to avoid the costs. This is especially the case for human rights given that development can be both a means to access greater human rights, but also a process where people's human rights are violated. This Chapter discusses the challenge of delivering development while protecting human rights.

For benefits, development gives people access to safer and better paying jobs, better education, government services like roads and hospitals, and access to electricity, which lead to additional luxuries such as fans, refrigerators, television, and lights. Everyone now reading this textbook has had the benefits of education, electricity, roads, and hospitals. However, developments rarely benefit everyone equally. So while some will get rich, others may stay poor, or worse, become even poorer. Reasons for these disparities include: the expansion of industry and an ensuing need for resources – a combination that can lead to the displacement of whole communities; increasing pollution and sickness rates; worker exploitation; and rising costs of living which, combined with low wages, can force people into debt, often leaving them struggling to survive. When development leaves communities behind in this way, it is argued that subsequent power disparities and tensions will eventually lead to conflict. It is important to use human rights as a tool to manage these conflicts, to assess the damage already done, and to ensure the proper conduct of those groups working towards development.

Concept Development

The concept of development is open to much debate. The biggest question is: what should be developed? Mainstream development, as carried out by organisations like the United Nations Economic and Social Council (ECOSOC) and the World Bank focus on social and economic development (basically people getting wealthier and having more services). One question with this view is whether political development is included in development. Alternative views come from theorists such as Armatya Sen and Martha Nussbaum who argue that development also refers to building capabilities and developing human potential. In other words, development should not only be about people or countries getting richer, but should also cover access to better services such as education, health, electricity, and roads. In response to this, 'Post Development' thinkers consider development itself to be a western capitalist idea, concerning itself not so much with improving the conditions of the poor but rather encouraging developing countries to align economically and politically with the West. To conclude, social and economic development is currently the dominant model and this chapter mainly discusses it; whether it is the best model, however, is open to debate.



Governments and elites in the region have pursued their vision of development, sometimes at the expense of local communities. For example, in Southeast Asia, dams, roads, building projects, and industrial parks, have directly threatened the rights of communities. The tendency in the region has been to treat development as a purely socio-economic condition, negating the significance of political development. As a result, the region has seen many authoritarian models of development that claim to benefit individuals while at the same time preventing them from participating in the process. Such restrictions, including a lack of transparency and the inability to challenge how development is done, can lead to unjust and unequal development and an unfair distribution of its benefits. For example, forced evictions and relocations, which may lead to the destruction of traditional lifestyles, are a common violation of major development projects in the region.

Marginalization can also occur when the wages of already poor workers are reduced to provide ever lower prices for consumers. Similarly, minimum wages may be kept low to drive up investment and revenue. In addition, rapid development often leads to inflation, resulting in the increases in the cost of food and rent. While these changes are occurring, in some cases State officials and business people escape punishment for crimes committed during development because of lack of accountability and an unwillingness to punish businesses for the development they provide. **Unequal development** in the region has led to increased migration as people move from poorer rural areas to find wealth in the cities or neighbouring countries. And all the while, those who suffer as a result of development efforts are told that the benefits outweigh the costs and that such 'sacrifices' are necessary for the development of the nation.

Concept

Unequal Development

This term is normally used to describe situations where some groups benefit greatly from development (either by becoming richer or getting better access to services) while others become poorer and lose their livelihoods or access to services. Inequalities occur in many areas:

Rich and poor countries: The benefits of development throughout history tend to go to rich countries first. Firstly with colonialism, and later with the expansion of the market economy, rich western countries and corporations from those countries made significant profits. A current concern is trade agreements, with critics saying they tend to benefit rich countries the most.

Urban and rural development: Cities and rural areas develop differently and have different challenges. Bringing services to urban slums, while a difficult task, may not be technically difficult as slums are easily accessible. On the other hand, expanding healthcare to rural areas may encounter challenges of distance and communication. Rural development is often more costly, and therefore slower.

Gender and development: Though more women than men live in poverty, economic development often does not address this. Unless economic development plans consider women's role in the economy, they can make the situation worse for women. Women may find themselves excluded from development.



Are such consequences an inevitable result of development? It tends to be accepted that there will always be winners and losers in development, but the argument is that in the long term, everyone will benefit. From a human rights perspective, this logic is flawed. That improvement in society necessitates some losing their rights or otherwise suffering is false. A government cannot justify breaking laws in the belief that overall, people will benefit. The rule of law should work within development as well. Most current theories of development recognize that development should be equal and based on the rule of law. These theories argue that development projects can be done in a way that fairly distributes benefits without also requiring select groups to carry the burden. When done well, development projects can produce new job opportunities, lead to better infrastructure and public services, and facilitate the sharing of ideas and experiences. Whether development projects help or harm human rights largely depend on how they are implemented and how people are protected in the process. Development should involve and benefit everyone (including future generations) by maximizing both short and long term livelihood improvements. With adequate planning, development can reach this ideal.

Human rights and development relate in a number of ways. Already discussed is the concern that development causes many human rights violations. Another relationship is that they both have the same goals: people can live a life of dignity with access to services security, and freedoms. In addition, as more recent development theories argue, in particular the Rights Based Approach to development (RBA) discussed later in this chapter, human rights should be the standard on which to judge if development is done properly. Also, development itself is seen to be a human right. These relationships are addressed in this chapter. Firstly the impact of development on human rights is discussed by looking at an historical overview of human rights in development from the Cold War period to globalization. Next theories which incorporate human rights into development are considered, especially calls for the Right to Development and then Rights Based Approach to development. Finally, practical aspects of including human rights into the development process are explored by looking at problems and solutions arising in typical development projects.

12.2 The Politics of Development

Concept Poverty

One of the main aims of development is to eliminate poverty. Poverty itself has many definitions, such as the narrow monetary definition of having less than \$1 a day to live on, but it should also be considered more broadly as a lack of access to basic services such as health, education, food, shelter, and so on. While the number of people in poverty has reduced - mainly due to China's efforts to lift millions of its population from poverty - it is still a persistent problem in all countries, including the wealthy ones.



Development has been central to the UN since its foundation, and is still one of its major objectives. Many argue that a cause of World War II was **poverty**, which, in conjunction with a lack of development, drove people towards radical and militaristic ideological beliefs. The UN responded by establishing the Economic and Social Council (ECOSOC) to manage economic and social development. Since then, other development offices, such as the United Nations Development Programme (UNDP), have also been established. Other organizations outside the UN also assisted in international development at this time. In the region, the World Bank, the Asia Development Bank, and government aid programs from the USA, United Kingdom, France, and the Soviet Union were all active. After the upheaval of World War II, development was considered a matter of international interest so much time and resources were invested in developing countries. However, although well-meaning, many problems arose in the 1950s and 1960s connected with these projects. Some of the central problems were:

- **Politicization of development:** during the Cold War, countries had to follow the development theories that corresponded to their political ideologies, so those under Soviet influence would collectivize agriculture and push government-directed national plans, whereas projects supported by capitalist countries tended to embrace the free market and increase trade
- **Focus on the economy:** success (or failure) was measured purely by the wealth of the country's economy and not the happiness or well-being of its people
- **Focus on large infrastructure:** many projects focused on building freeways, electricity stations, factories, and dams. It was believed that improving infrastructure would increase a country's industrial production, in turn encouraging growth in the market economy and increasing national wealth. This ignores the fact that large infrastructure is also bad for the environment and prone to corruption
- **Lawless development:** many countries justified widespread violations of people's rights for the greater good of the nation. Communities whose land had been taken to build dams or electricity stations, or farmers whose crops had been destroyed by pollution, were considered to have made a necessary sacrifice for the benefit of the nation as a whole
- **Trickle-down theory:** many practitioners believed economic development in any part of society would eventually benefit everyone, so that benefits gained by the wealthy would make its way to the poor because the money they spend would trickle down to them. Because of this theory, development did not target the poor, and in some cases even targeted the wealthy. But money did not trickle down to the poor and the result was an increase in poverty as the rich got richer and the poor missed out on development.

12.2.1 The Politics of Cold War Development

Many countries faced a stark choice: to seek assistance from communist countries and develop according to communist theories, or to get assistance from western capitalist countries and embrace capitalism. The features of these two forms of development are as follows:

Communist development: the State organized development and controlled the economy. Sometimes called a 'command economy' because it was commanded by the State, it operated without the use of free markets. The State would decide the amount and cost of goods. A key feature of such developments was collectivization

where individual workplaces, such as farms, were joined together to form a single collective industry. Although collectives can sometimes successfully increase production, it is telling that nearly all collective farms have since been abandoned. This is because removing individual incentives, or an ability to choose one's work, or forcing workers to live together rather than with their families, generally lowers worker output.

Capitalist development: development was enabled by expanding the market economy. Individuals or companies would produce products (such as farmers growing grain, or a family running its own restaurant) to sell on the free market. Alternatively, people could sell their labour by working for companies. Many individuals left farms to work in waged jobs to earn money to buy goods, most commonly in the city. Such a market can generate great wealth as earnings are potentially limitless in capitalist systems. However, not everyone will benefit – poverty is almost always a side effect of such systems. This can be seen by the fact that in the 1960s, poverty grew most quickly in developing capitalist countries.

By the end of the 1960s, many developing countries began to complain actively about the problems of development. Supported by various Third World organizations, such as the Non Aligned Movement (NAM), there was an active criticism of development practices of both western capitalist organizations and communist programs. In countries such as the Philippines, Indonesia, and Thailand serious concerns were voiced about low wages and whether, for example, farmers could earn enough money from their land to survive. In communist countries, different issues surfaced – the poor distribution of basic necessities like, food and a general dislike of collectivized workplaces – made people question the economic and political system. In both capitalist and communist countries, development was seen as being compromised by corruption and collusion. People were looking for new ways to develop which avoided all these problems, and human rights was seen as one potential path. In the 1970s a clear connection between human rights and development had not yet gained widespread acceptance and problems associated with such projects were mainly thought to be economic in nature. However, by the end of the 1970s human rights and development would be closely associated.

DISCUSSION AND DEBATE

How difficult is it to plan a development?

Consider primary schools. Ask yourself what is needed to start a school in a poor area. Attempt to do this by listing everything you'll need to build and run that school including materials, labour, books, furniture, and so on. The list is the beginnings of a map of development, but more is required as the finished school now sits empty. What other developments are necessary to get children into the school? What else is required to fill the classrooms? How can we ensure teachers are qualified? What will they teach? How will the children get to school? What will they eat? What can be done to ensure everyone is safe?

As you begin to sketch the development issues around the right to education, write down all the human rights that impact it (for instance, the right to movement, food, freedom of expression). You will see that a project which may appear simple, like bringing education to a village, is a far larger, and more complex project if it is to



be done well. It must consider not only the economic aspects, such as buying the materials and building the rooms, but also consider social aspects (how to encourage parents that they should send their kids to school?), and cultural aspects (what language should they use?).

This exercise illustrates the *Vienna Declaration and Programme of Action's* (1993) assertion that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”

12.2.2 The Right to Development

By the end of the 1960s, Southeast Asian countries had developed little (with, perhaps, the exception of Singapore). For some countries, this was due to Cold War-related conflicts, but even countries accepting foreign aid and development programs did not see any real change in the lives of its people. Problems arising from poor development planning were serious enough that by the 1970s most major development organizations realized they needed to change strategy.

In the 1970s, a variety of responses changed this situation. Some organizations, such as the World Bank and the International Labour Organization (ILO), decided to focus directly on people's **Basic Needs**. Communist countries began to experiment with market economies and individual farming. It was in this climate that many Third World countries decided to avoid the political divide altogether by calling for a **Right to Development**. This would make development non-negotiable, compelling rich countries to help poor countries develop while setting aside their political or economic values. This right to peaceful development avoided political allegiances and focused on the individual and not the economy. Furthermore, it also requested that all States regard development as a human right, enabling all people to be lifted out of poverty through development.

The Right to Development

This right is for everyone to benefit from development so they can be lifted from poverty, or have access to better schools and hospitals; and may be found in the *Declaration of the Right to Development*, as adopted by the UNGA on 4 December 1986.

Basic Needs

In development, basic needs may be defined as those necessary to keep a person alive, and include food, water, and shelter, but may also be broadened to cover health, security, and clothing.



Concept

Categorizing Countries

Countries are categorized in a number of ways according to their development, including:

First, Second, Third, Fourth Worlds

First World (capitalist West), Second World (communist and Soviet countries), Third World (poor countries wanting independence from the First and Second Worlds), and Fourth World (indigenous and marginalized groups). Such definitions are political in nature, and were rarely used following the demise of the Cold War, which essentially put an end to the Second World.

Developed and Developing Countries

Developed (rich countries) and Developing (poor countries) is used mainly by the UN. The specific categorizations depend on individual organizations, with some using wealth, GDP, or human development as indicators. Further subcategories, such as Less Developed Countries (LDCs), were also introduced to cover the poorest countries (for example, Cambodia, Laos, and Myanmar).

Global South

The North (rich countries) and Global South (poor countries). A political and development categorization from the 1990s which assumes exploitation of the South by the North.

The Declaration on the Right to Development, adopted by the General Assembly in 1986, was the culmination of over a decade of discussion and debate by developing nations. However, the debate is ongoing over its value, as opinions remain deeply divided as to the rights it created. At the UN, most developing countries unified behind the call for a Right to Development. Developed countries, on the other hand, saw it as a political gesture.

The Declaration made some vital advancements to people's rights, especially around development, but it unfortunately did not manage to escape politicizing the issue. On the positive side, it recognized that:

The human person is the central subject of development and should be the active participant and beneficiary of the right to development. (Art. 2.1)

In other words, *people* should be regarded as the object of development, as opposed to capitalist views which highlighted the economy. As such, development should be measured by improvements in people's lives, as opposed to a bigger GDP. Following this, the UN also adopted the person as the central subject with its Human Development Index and *Human Development Report*, which measured development in terms of people's health, education, and personal wealth. Another positive element of the Declaration was that it demanded *participation* in development. Previously, people were rarely consulted about development projects, meaning most were unaware of the impact of development. Similarly, governments rarely consulted people on the development they wanted and rather would merely expect them to accept what was given.

On the negative side, however, the *Declaration on the Right to Development* did not gain universal support. Worried about the claims such rights make on rich countries, developed countries voted against it at the UNGA. For example, Article 7 requires States to strengthen international peace by “complete disarmament under effective international control,” and then to ensure the resulting profits be used for development in developing countries. Although the intentions were good, it seems highly unlikely that rich countries will sell their military weapons and give the money away to poor countries.

Similarly, the Declaration asked all States to eliminate violations such as colonialism, foreign domination, and foreign interference. European countries with overseas territories were obviously concerned about this article, as were many other countries who simply considered the violations too vague: just what was foreign interference? Another concern was that the Declaration’s view of development was too State-centric as there was no mention of civil society and NGOs. This may have been due to the fact these organizations were not common at the time, but regardless, the Declaration assumed all development and development policy would be settled between States; when often it was the State that violated people’s rights.

Finally, the Declaration did little to address the problem of human rights violations occurring in the development process. States want the power to decide where and how development occurs, and as they saw it, the imposition of too many human rights could challenge on their decisions. As a result, the Declaration, and the Right to Development movement, did not successfully incorporate human rights into the agreement. In fact, during the 1990s with the rise of globalization and the establishment of the global economy, human rights violations were just as prevalent, proving that the Right to Development did not do enough to reduce the problems of human rights violations in the development process.

12.3 Globalization and Development

The period of most rapid development in Southeast Asia coincided with the rise of globalization in the 1990s. As the world economy globalizes, more money will flow into the region. As a result, factories will be built, banks will lend more money, and people will buy more houses, cars, and holidays. The 1990s was also the decade that the internet arrives enabling people to communicate across the region, to be more global in their knowledge, and finally also to see how other people lived. All these changes transformed the region.

The global economy also caused new human rights issues to emerge. For example, concerns arose around workers’ rights due to growing inequalities. With the increase in migrant labour, worries also grew about trafficking and slave labour. In addition, it was believed that trans-national corporations (TNCs) could affect local economies. Pollution too became a major problem, as demonstrated by the smog from Indonesia that now annually envelops Malaysia and Singapore. Challenges to traditional values have also surfaced including the push for women’s equality, the desire for democracy, and the younger generation’s questioning of traditional values following exposure to global media. With globalization also came the consequences of the increase in global trade on worker’s rights and the environment (discussed in Chapter 13). The period of globalization is one of significant change, but with change often comes instability and conflict.



Concept Globalization

Globalization is defined as a process whereby the world begins to operate as an inter-connected single global system, rather than as separate local or national units. The system includes the global economy (where economies become interlinked); the global culture (where people around the world begin to practice a similar culture and watch similar media); or global values (such as consumerism, digital cultures, women's rights, or human rights). Globalization has replaced internationalization where different nations were connected. In globalization, the globe is the main structure, not the nation.

For much of the 1990s, development in Asia was considered so successful that in a 1993 report, the World Bank called it the 'East Asian Miracle.' The 'miracle' centred on the growing economies of countries like Singapore, Thailand, Indonesia, and Malaysia (although the report also included Japan, Taiwan, South Korea, and Hong Kong) which led to massive increases in wealth, health, and education. The quality of life improved drastically for many people in the region with almost universal access to primary schools, higher paying jobs, and consumer goods widely available. While benefits increased for people during the 'East Asian Miracle,' some governments in the region avoided many human rights obligations by arguing for **trading off rights**, where human rights were traded off for economic growth. Governments would argue, for example, that political rights and freedom of expression were unnecessary because they slowed economic development. This is part of the 'Asian Values' debate.



Concept Trading Off Rights

When a government argues for trading off rights, they argue that because they provide some rights (most commonly economic rights), they can be excused from providing other rights (commonly political rights) because they are less important. In other words, rights to health, education, and housing are considered a trade-off for political rights, freedom of expression, and other civil rights. Governments fear that personal freedoms will lead to complaints and protests which could destabilize their rule and endanger developments in health, wealth, education, and so on. Countries which have supported this view are Singapore, Malaysia, China, and Indonesia.

There were underlying tensions during this miracle. A growing inequality was emerging at the regional level, with countries like Laos, Cambodia, and Myanmar being left behind. As a result, large numbers of workers began leaving these countries to work for higher pay in wealthier Southeast Asian countries like Malaysia, Singapore, and Thailand. However, even within wealthier countries, the influx of money had not always been invested wisely, and economic problems soon surfaced. This led to the 1997 Asian Financial Crisis, which started in Thailand in May, but by the end of the year had caused financial instability in Indonesia, Singapore, and Malaysia. The crisis was a direct result of the global economy. Vast amounts of money from the global economy poured into these countries in the years before 1997, then was rapidly withdrawn

afterward, causing instability in currencies, stock markets, and the import/export industries. When the crisis occurred, and many lost their jobs and savings, the ‘trade-off’ argument no longer seemed to make sense. If rights were traded off for wealth, then surely the deal is broken when people no longer get wealthier. Such beliefs led to a period of political unrest throughout the region with governments changing in Thailand and Indonesia after people protested.

It was also during this period that people began questioning the popular theory of neo-liberal economic development, as globalization, neo-liberalism, and the economic crisis were blamed for the economic misfortunes. The basis of the **neo-liberal theory** is that State influence over the market economy should be reduced (the ‘liberty’ in neo-liberalism is liberating markets from government control), and that entrance to the market economy should be free, even to people outside the country. Neo-liberal economic theory was strongly supported by rich western countries (the then G8), and also by the World Bank (WB), the International Monetary Fund (IMF), and the World Trade Organization (WTO) which together were known as the Bretton Woods Institute (BWI). Neo-liberalism influenced international aid and trade with an approach known as **The Washington Consensus**.

Neo-liberalism made many rich, but it does not help everyone equally. Some claim neo-liberalism only benefits the elite. Others considered that the wealth created by neo-liberal economic development was so great, affecting so many people, that surely the overall benefits outweighed the costs. The impact of neo-liberalism is still argued today in discussions about development and human rights, or when analysing business and human rights (as examined in Chapter 13).

Neo-liberalism relies on human rights, specifically civil and political rights, because it considers freedom of expression, the rule of law, and political freedoms as necessary for markets to function smoothly. At the same time, reducing the strength of the State will put many social rights (particularly welfare, health, and education) under stress. One side of the debate around human rights and neo-liberalism argues that the benefits of free market development creates more wealth, so even if that wealth is unevenly distributed, the overall growth of a country will lead to more jobs, bigger markets, and more opportunities for all. The term commonly used to express this is ‘a rising tide lifts all boats.’ Conversely, others argue that too often only a small group of elites benefit, leading to growing inequality between the rich and the poor, and instability in society caused by growing poverty and declining access to services. The first time these debates came to prominence was during the anti-globalization movement around the time of the Asian Financial Crisis.

Neo Liberal Theory

Neo-liberalism is an economic theory which holds that economies function best when the market is free from State interference. In other words, markets should be accessible to all, whether local or outsiders, to increase international trade. Consequently, neo-liberalism is considered advantageous for transnational corporations. Markets should not be regulated or controlled by governments, so prices are made by the markets which can lead to an increase in prices.

FOCUS ON

The Washington Consensus and the Bretton Woods Institutes (BWIs)

The Washington Consensus was a term coined in 1989 to refer to this neo-liberal ideology and the organizations which promoted it. The standard, or ‘Consensus,’ came in the form of conditions on banking, finance, and aid to encourage countries to make neo-liberal adjustments, such as the privatization of State-enterprises, opening sectors to Foreign Direct Investment, reducing tax rates and public spending, liberalizing property rights, and deregulating markets. Such a Consensus would increase the ease of doing business and allow free market economies to trade with



less government interference. The belief was it would lift people out of poverty. Organizations that advocated this stance mainly hailed from Washington and consisted of the Bretton Woods Institutes (BWIs), and the US Government's Treasury and State Department to name but a few, although Wall Street in New York was also considered part the consensus. The Consensus was agreed to by major European economic powers, and other wealthy countries. In summary the BWIs are:

Bretton Woods Institutes

The World Bank (WB): not a dingle bank, but at least five inter-connected banks and institutions whose purpose is to assist developing countries by lending money, running development projects, and giving technical assistance

The International Monetary Fund (IMF): lends money to countries in economic crisis. Called the bank of last resort, it is the organization countries turn to when no other options are available. It also provides technical assistance such as economic advice to its members.

The World Trade Organization (WTO): set up in the 1990s as a venue to encourage international trade and reduce barriers to trade such as tariffs, taxes, and embargoes on trading goods and services

The Asian Financial Crisis caused many grievances about development, economic theory, and human rights to the surface. In particular, people complained they had been forced into agreements with the IMF that allowed TNCs to enter their local economies and seize markets from smaller, local businesses. Moreover, concerns were voiced that States were also being forced to privatize industries and reduce spending on education and health. And instead of caring for their unemployed workers, countries were pressured to pay back loans to banks from rich western countries, even though the banks were not poor and often lent money irresponsibly. These concerns were made very public by the **anti-globalization movement**, a broad coalition of people and organizations critical of neo-liberal capitalism and concerned about the actions of the IMF, the WB, and the WTO. The anti-globalization movement was a strong advocate for the rights of the poor, particularly under-paid workers and people losing access to basic needs because of the reduction of State welfare.

Concept

The Anti-Globalization Movement

The purpose of the anti-globalization movement was to protest the impact of the global economy, or more precisely neo-liberal economic theory. It was made up of a diverse range of interest groups from environmentalists, development activists, feminists, peace activists, human rights defenders, and students to name but a few. Their focus was global economic organizations such as the BWIs, but also TNCs and wealthy countries. They were concerned with Third World debt and the exploitation of developing countries by the Developed World, and they held a famous protest in Seattle (1999) against a meeting of these organizations. By the mid 2000s, however, the movement had dispersed. Many shifted their interest to anti-war protests against



the invasion of Iraq by the USA. Others joined the World Social Forum to address issues of inequality between the rich First World and poor Third World.

A more recent version of the anti-globalization movement is Occupy, where many activists occupied public spaces to highlight the growing inequalities in the economic system. The first, and most famous, occupy activity took place in New York, near Wall Street, where thousands of activists occupied a public park for weeks until police finally dispersed the group.

The impact of privatization, the paying off of loans, and increased TNC activity were detrimental to the poor in many cases, but not entirely. Privatization, for example, does not always have to be bad. For instance, private service providers in some cases may be more efficient and effective than the State. Mobile phone networks (usually run by private industry) are often better than government phone services. It is when States privatize services such as prisons, education, and electricity that services can decline. Another concern revolved around the introduction of foreign corporations who were now allowed to compete with local industries. In many countries, the rise of convenience stores (such as Seven Eleven in Thailand, Circle K in Malaysia, and Alfamart in Indonesia) has seen the decline of many locally owned shops. Whether this is good or bad is open to debate. Convenience stores are convenient. But do they support the economy the same way as a locally owned corner shop?

A final pressure created by globalization and neo-liberalism concerns the role of governments in neo-liberal economies. Governments can be placed under pressure because neo-liberal policy forces them to reduce their influence over markets, yet as these markets grow, a greater need for regulation and delivery of services will inevitably ensue. Traditionally, governments have played a vital role in regulating markets by ensuring products are safe, transactions are fair, and labour is well treated. But enforcing such regulations is more difficult in an increasingly powerful market that does not want these regulations. This effect can be seen in the rising amount of pollution created by big business which States have little ability to stop. It can also be seen in the way companies are failing to observe labour regulations which, again, States have been unable or unwilling to enforce. Also, Governments will be forced to deliver services like health and education on ever smaller budgets. In conclusion, the impact of globalization on development and human rights has created many concerns alongside improving the human rights of people.

12.3.1 The VDPA and New Ways of Understanding Development

The relationship between development and human rights began changing in the 1990s. Following the end of the Cold War, arguments over ideological and political differences became less relevant. Rather the issue now revolved around free markets and privatization. Growth in the development sector continued as States began to outsource their development funding to NGOs. There was a substantial increase in the number of active NGOs, partially because of the increased funding, but also because of the changes caused by globalization. Alongside this was a trend for people to talk more about human rights in development. Development organizations realized that human rights were sensible objectives of development and human rights organizations got involved in development activities though economic and social rights.

Though the Right to Development was not universally accepted in the 1980s, by the 1990s it was formally recognised through its inclusion in the Vienna Declaration and Programme of Action (VDPA), and endorsed by the UNGA. This radical shift can be attributed to many factors, including the end of Cold War ideological differences, universal support for human rights, and less obligations on donor States. The VDPA set a new agenda for human rights and development. One of the key statements was:

The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights (Art. 10).

The acrimonious debate in the 1980s around the Right to Development was over and all States now recognized it. The Right to Development was now considered a human right – though what it entailed was not entirely clear. The VDPA also stated:

Democracy, development, respect for human rights, and fundamental freedoms are interdependent and mutually reinforcing (Art 8).

Linking the three goals of democracy, development, and human rights became possible after the Cold War ended because political divisions between communism and capitalism no longer seemed relevant. Three points of interest can be inferred from Article 8. First, development was given the same standing as human rights. Second, these three goals cannot be undertaken independently, but are rather part of the same objective. Development can only work by respecting human rights, and can only effectively occur within the context of democracy. Finally, given the universal support for the VDPA, all States recognized development as a human right, and that democracy and development must be achieved together.

Human Development
Human development examines how human life is improved by development so the subject of development becomes individuals, not the economy. Development should focus on making people's lives better by improving health (measured by life expectancy rates), increasing education (measured by years of schooling), and making them wealthier (measured by personal wealth). As such, the UNDP's Human Development Index, the most well-known and widely used measurement, uses wealth, health and education indicators.

Other developments in the 1990s included a shift to more human-centred development with the rise of the concept, **human development**. The United Nations, through the UNDP, began to produce reports which aimed to measure human development. From 1990, these reports differed because they looked at human indicators of development, and ignored GDP, the economy, or other industrial outputs. The Human Development Report measured development by determining people's life expectancy, education, and income per person. In other words, it examined how development improved someone's life. Countries were then ranked according to their human development (recent rankings are found by downloading the most current *Human Development Report*).

12.3.2 Human Development and Human Security

Development thinking was expanded further in 1994 with the UNDP's Human Development Report which introduced the concept of Human Security. The introductory paragraphs explain why this type of security should be considered part of development:

The world can never be at peace unless people have security in their daily lives. Future conflicts may often be within nations rather than between them – with their origins buried deep in growing socio-economic deprivation and disparities. The search for security in such a milieu lies in development, not in arms. More generally, it will not be possible for the community of nations

to achieve any of its major goals—not peace, not environmental protection, not human rights or democratization, not fertility reduction, not social integration—except in the context of sustainable development that leads to human security.

Under the leadership of Secretary General Boutros Boutros-Ghali, the UN sought to set a new security agenda by changing the way people thought about and discussed the concept of security. For example, it asked if an individual is relegated to silence, or under the control of someone with a gun and uniform, can such a person really be considered secure? The UNDP report proposed that such an arrangement is not security, but was rather insecurity or dependency. Security necessitates situations where individuals feel safe or are able to do as they wish. As the report states, the objective of development is for people to lead secure lives.

Security, in this case, is not about National Security (the most common type of security), but about security for people. National Security is focussed on keeping the nation secure, which means protecting the government, the territory, and perhaps the ideas of the State. These are not protecting people but institutions, land, or ideas. Security at the human level is a different matter entirely. Human security is where people are free from fear, free of want, and are able to take action on their own behalf. Freedom from fear means innocent people should not have to face threats or fear reprisal from State or non-State actors. Freedom from want means people should not have to worry constantly about their livelihoods. Likewise, freedom to take action on one's own behalf means a human who is secure does not have to depend on others, nor ask for permission to pursue their interests or express themselves. Human security is about human development.

The 1994 report outlined seven dimensions of human security, each of which requires a certain type of development. For instance, if someone lacks access to hospitals, they could be said to be facing health insecurity. Food security necessitates assurance that local systems of food production and distribution are effective. Without the development of mechanisms to ensure adequate social welfare and public services, people may live with constant concerns about where they will eat, sleep, and whether their families will have access to services like health and education. Finally, without the development of institutions and processes that facilitate liberties and protect the rule of law, individuals may be unable to pursue the type of life they want to live and may fear their neighbours, their government, or predatory forces in society.

Table12-1: Relationship between the Seven Dimensions of Human Security and Human Rights

Human Security Element	Related Human Rights
Economic	Economic Rights (ICESCR)
Food	Right to Food and Food security (ICESCR)
Health	Right to health (ICESCR)
Environment	Right to a clean environment
Personal	Right to life (ICCPR)
Community	Cultural Rights (ICESCR and ICCPR)
Political	Political Rights (ICCPR)

12.4 Development as Freedom and Capabilities Approach

While many development theories tend to focus on measureable elements of development (money, schooling, or health), others point to a person's ability to act freely as the main objective of development. These theories, such as **sustainable development**, consider the environmental impact and long-term consequences of badly planned development. The two major proponents of these theories are Armatya Sen's (development as freedom) and Martha Nussbaum (development should improve an individual's capabilities).

In his 1999 book, *Development as Freedom*, Armartya Sen argued that for someone to be considered free, they must be able to enjoy both civil and political rights, as well as an adequate level of socio-economic well-being. People living in poverty or forced into dependency cannot be free, because they have no control over their lives. In the language of human security, no person can be considered free if they live in a constant state of want and are unable to take action on their own behalf. As such, Sen criticizes the various ways in which unjust development has compromised freedom. For example, development that is not transparent or participatory must undermine freedom because people are not given choice in the development. Even if basic needs are met, a person may be pushed into silence or dependency. If basic needs are not met and individuals are forced into poverty, this produces what Sen calls a state of "unfreedom" because poverty can lead to feelings of exclusion and vulnerability that prevent people from making choices or pursuing opportunities. Poverty robs individuals of the chance to realize their full potential, and realizing one's potential is at the core of human development.

To better define why development is important, Martha Nussbaum took inspiration from earlier thinkers who considered development to be a precondition of security and freedom when she proposed that development should ultimately promote an individual's central capabilities for them to realize their human potential. A person's capabilities are both what a person is able to do and also what opportunities they have to, for example, become healthier or more educated. Naussbaum proposed a list of central capabilities (detailed in the Focus On box) which should be the target

Sustainable Development

The theory of sustainable development emerged in the 1980s in response to concerns about the overuse of non-renewable resources like oil and coal. It is a theory that development should meet the current needs of people, but should not impact future generation's needs by overusing resources, pollution, and so on.

of development. These capabilities overlap with human rights in that both are about ensuring people live a life of dignity. Capabilities, however, sees the objective of development as the creation of opportunities, and not as the enforcement of government duties and obligations which is the human rights view. Capabilities offer another framework to measure development at the individual level and in terms of specific factors, though some of these factors, such as morality and play, can be difficult to measure and open to much debate. Development of the kind Sen, Nussbaum, and others speak of is about creating the conditions under which individuals can take ownership of their lives and the situation around them. In this way, these theories challenged the more economic focused theories dominant in the development sector.



FOCUS ON

Nussbaum's Central Capabilities

- These are the central capabilities which should be the focus of development, according to Nussbaum
- Life: being able to live a lengthy life
- Health: being able to enjoy a healthy existence
- Pain free: being spared any unnecessary suffering
- Sensory: having the skills and knowledge to think and create
- Material: being able to obtain the things we need and desire, within reason
- Morality: having a clear sense of justice
- Relational: being able to enjoy and care for others
- Contribution: having opportunities to contribute to society
- Environment: being able to interact with nature
- Play: being able to enjoy oneself
- Expression: being able to hold opinions and act on them

12.5 Pursuing Development Goals: the MDGs and SDGs

An innovation in the global pursuit of development came at the end of the 1990s in the United Nations Millennium Development Goals (MDGs), agreed to by all 189 States. The purpose of these goals (launched on 1 January 2000) was to unite the world around a common set of eight goals aimed at mobilizing the poorest in society. The strength of the MDGs is that they encouraged more coordination on the problems of poverty and the education of girls. However, the MDGs have been criticized for focusing on basic needs while avoiding direct mention of human rights. Nor did they reflect on evolutions in the understanding of development as discussed above.



FOCUS ON

Had Southeast Asia Met the Eight Goals of the MDGs by 2015?

The Eight Goals

1. Eradicate extreme poverty and hunger
2. Achieve universal primary education
3. Promote gender equality and the empowerment of women
4. Reduce child mortality
5. Improve maternal health
6. Combat HIV/AIDS, malaria, and other diseases
7. Ensure environmental sustainability
8. Develop a global partnership for development

By 2015, it could be said that the richer Southeast Asian countries (Brunei, Thailand, Malaysia, and Singapore) had reached nearly all their goals. Mid-level countries (the Philippines, Indonesia, and Vietnam) had met over half, and poor countries (Laos, Myanmar, and Cambodia) had met only one or two of the goals. The main problem areas are poverty reduction (goal 1), as many countries have pockets of poverty, often amongst ethnic groups. Maternal care (goal 4) is also weak in most countries. Furthermore, HIV/AIDS (goal 6) has not been reduced, and there is little environmental protection (goal 7).

By 2015, the MDGs were complete and a new set of goals, the Sustainable Development Goals (SDGs), were announced. There are interesting developments including more recognition of human rights. The 17 SDGs that will set development standards for the next 15 years, still do not explicitly use rights language. However, the 2030 Agenda for Sustainable Development Declaration does, stating:

We resolve, between now and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources.

While it is disappointing that human rights cannot be named in the goals, obvious linkages do exist between SDGs and human rights (as can be seen in Table 12.1). For human rights, SDG Goal 16 is focusing on human rights when it demands access to justice and accountable and inclusive institutions. To meet this goal, civil and political rights all must be met, and governments must fulfil their obligations to all individuals in their territory. Many other goals are also connected to human rights, such as the rights to food, education, health, decent work, and gender equality.

Table 12-2: The Connection Between the 17 Sustainable Development Goals and Specific Human Rights

Sustainable Development Goal	Related Human Right Category
Goal 1: End poverty in all its forms everywhere	Livelihood Rights
Goal 2: End hunger, achieve food security and improved nutrition, and promote sustainable agriculture	Right to Food
Goal 3: Ensure healthy lives and promote well-being for all at all ages	Right to Health
Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all	Right to Education
Goal 5: Achieve gender equality and empower all women and girls	CEDAW and CRC: Women's Rights
Goal 6: Ensure availability and sustainable management of water and sanitation for all	Right to Water
Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all	Right to Housing
Goal 8: Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all	Right to Work
Goal 9: Build resilient infrastructure, promote inclusive and sustainable industrialization, and foster innovation	Economic Rights, Social Rights
Goal 10: Reduce inequality within and among countries	Non Discrimination
Goal 11: Make cities and human settlements inclusive, safe, resilient, and sustainable	Right to Housing
Goal 12: Ensure sustainable consumption and production patterns	Livelihood Rights
Goal 13: Take urgent action to combat climate change and its impacts	Rights to a Clean Environment*
Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development	Rights to a Clean Environment*
Goal 15: Protect, restore, and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation, and halt biodiversity loss	Rights to a Clean Environment*
Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels	Civil Rights
Goal 17: Strengthen the means of implementation, and revitalize the global partnership for sustainable development	Economic Rights, Social Rights

*The right to a clean environment, detailed in Chapter 14, is an emerging category of human rights

12.6 Introduction to a Human Rights-Based Approach (RBA) to Development

The Rights-Based Approach to Development

A way to plan, monitor, and undertake development using human rights as its guide. In this approach human rights become the objective (development is to ensure people have their human rights met), the legal basis (development must comply with human rights standards), and principles (development should be undertaken using principles such as participation, accountability, non-discrimination, and rule of law).

The **Rights Based Approach to Development** (RBA) is now one of the dominant theories and practices in this area, with most organizations, and importantly, the UN, agreeing that all development should comply with RBA. The move from a Right to Development in the 1980s, to RBA in the 2000s is an indication of how human rights is becoming a central part of development and a broadly accepted standard in the process. Accordingly, it becomes necessary to detail the meaning of RBA, and incorporating human rights into development activities. This section details a conceptual understanding of RBA, and gives examples of how development actors using RBA.

RBA was taken up, partially, because the Right to Development never received serious support in development activities. Though the Right to Development was accepted in the VDPA, there was little, if any, discussion about what States should do to realize it. There were calls for more international funding and recognition of the importance of development which were not disputed by any State. However, States did not necessarily feel accountable to this. Following the establishment of the Right to Development in the VDPA, interest in human rights and development moved from the right to development, to rights *in* or *during* development. This is an important distinction. The monitoring of human rights in or during development covers the maintenance of rights while developments are occurring. That is, RBA ensures that the projects themselves do not violate human rights. While this is partially addressed in the Right to Development, the 'right' here refers primarily to the right of States to instigate development, not the rights of the person undergoing development. RBA has become the main way in which rights during development are monitored.

A number of factors in the 1990s contributed to the growth of RBA. First, development organizations (such as the UN) saw a greater use for human rights in their development activities, even deciding that projects should be assessed according to how they improved individual rights. These organizations began to consider human rights to be an objective of development. As the sections above illustrate, previously development had been measured by economic growth, a person's human development, increased infrastructure, or by an individual's increased capacity. However, these measurements alone do not guarantee that someone's rights are met.

A need arose to counter the growing lawlessness in development and to ensure that people were protected during development. RBA questioned why governments should be allowed to run projects that violated human rights, and why others were disproportionately affected by development. Another factor was the need to respond to various violations occurring during the development process. Too often governments built large dams or developed industries at great cost to many people, often the poor. Poor people were evicted from inner city housing to build shopping centres, or industrial zones were built that polluted nearby villages. In many such cases, governments justified the violation of rights during development as a sacrifice for the greater good: some people have to sacrifice their resources for the greater good of society. A dam would provide electricity to cities enabling hospitals and schools to operate; industries would bring great wealth to societies. So while some people's rights were violated, it was generally argued that short term problems would lead to better life situations for all. The 'greater good' argument resulted in many people being displaced for development.

A final factor to note is that RBA allowed human rights to engage with development at the level where development activities actually occur. Contrast this with debates on the right to development which mainly discussed how States should act, and how they related to each other as donors and recipients. RBA, on the other hand, is primarily an approach that occurs at the level of planning and programming. Consequently, by using RBA, NGOs can plan development activities to improve human rights. It can also be used to solve problems during development to prevent the erosion of human rights. That being so, RBA can be regarded as a method to understand and examine development at the community level.

12.6.1 Features of RBA

RBA is an *approach*, meaning that it can be used to help conceptualize or understand what development should be doing. An approach is not a code, law, or formula, but a way to think about development. RBA provides a way to approach a problem or plan an activity to ensure human rights remain vital to the process. For this reason, there are as many types of RBA as there are organizations that use it. This variety is not a problem or weakness, but one of its features. While there are many different ways to define RBA (see the Focus On box), there are some key features to the approach. The next sections of this chapter will examine some common features of RBA.

FOCUS ON

Some Definitions of RBA

A rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights (Mary Robinson, UN High Commissioner for Human Rights)

The human rights approach to development means empowering people to take their own decisions, rather than being the passive objects of choices made on their behalf (United Kingdom Development Agency, DFID)

A ... human rights approach translates poor people's needs into rights, and recognizes individuals as active subjects and stakeholders. It further identifies the obligations of states that are required to take steps - for example, through legislation, policies and programs - whose purpose is to respect, promote and fulfil the human rights of all people within their jurisdiction (Swedish Development Agency, Sida 2002: 34)

12.6.2 Core Concept 1: No Human Rights Violations

RBA uses the international legal framework of human rights as the standard which determines what actions are permissible, and what is illegal. Development cannot be used as an excuse to violate people's rights. Clearly, development should obey the law regardless of the benefits it might bring to society. Human rights are legal standards, and to violate those rights is to break the law. To argue that breaking the law is necessary to a project demonstrates nothing more than lazy development planning.





DISCUSSION AND DEBATE

Is development possible without violating rights?

A children's hospital needs to be built in a densely populated part of the city. The hospital has to be near where most children live and accessible to the poorer suburbs. But the hospital will displace people whose homes will be knocked down to build it. These people complain that the building will force them to move from where they, and their families, have lived for as long as they can remember. They refuse to move.

What can be done? The children need a hospital (they have a right to a health service) – but in this case, it is unfeasible to build the hospital elsewhere. Can all these people be forcibly moved for the hospital? All countries have laws which allow for the forcible displacement of people (under very strict circumstances), usually requiring them to be displaced to homes with better access to services.

However, the people refuse to go because they say, quite accurately, that their community will be destroyed. Can this development go ahead? If so, what kind of compensation or provisions would the government need to enact it?

12.6.3 Core Concept 2: The Objective of Development is to Improve People's Rights

Different theories of development have their own objectives. For example, economic theories aim to increase the economy (as measured by the GDP). RBA, on the other hand, has the objective of improving people's rights. If their rights are not improved, why develop in the first place? For example, if a bridge allows people better access to schools, markets, jobs, and health clinics, it makes sense to build the road. But if it merely allows easier access to a casino then building the bridge does not make sense as part of a tax-payer funded or government supported development project. Another element to consider in RBA is to maximise the human rights improved by the development project. For instance, providing free lunches to children at school improves a number of human rights including: ensuring attendance at school (meeting their right to education); ensuring children are not hungry (right to food); supplying nutritious food (right to health); and ensuring girls and boys are equally fed (non-discrimination). Development should have a human rights objective, and if a development does not improve human rights, it should not be considered a development at all.

12.6.4 Core Concept 3: The Rights-Based Approach Differs from Charity and Needs-Based Approaches

Charity is an important, but limited, approach to development. Charity is especially useful for the quick distribution of funds to help people, and is the best method to raise money. However, it does not create sustainable development, nor deliver aid in a transparent and accountable way. An act of charity, for example, giving money to a beggar on the streets, will not stop that beggar from begging. Further, there is no control over what the beggar will do with that money (the beggar may spend it on alcohol). Finally, the beggar's position is entirely powerless. The beggar cannot force the giver to give more or determine when to get the money. It might make the giver feel better, and it may help the beggar's immediate needs (for example, to buy food), but it does not solve the beggar's problem.

Different from charity is the needs-based approach. This is more sustainable as it addresses an individual's fundamental needs. It ensures they have enough food, water, and shelter, and their life is unthreatened. But likewise, it does not always solve the problem. Addressing a beggar's immediate needs (such as food and shelter) will help the beggar, but will not necessarily stop them from begging. Under this approach, the beggar has slightly more power as they can express their particular needs, but the beggar still must rely on the giver to have them met. In a humanitarian context of emergencies and disasters, the needs approach is the best. In the aftermath of an earthquake, many will be left without food, water, or shelter, and they will require these quickly. A needs-based approach would ensure no one starves or has no place to sleep.

Under RBA, the beneficiaries of development are the rights holders, while the developer is seen as the duty bearer. Any person who needs development has a right to the development, and it will then become the duty of developers to ensure they are met. To achieve this, they must first find what rights the beneficiary has been deprived of. For example, the beggar's rights to health, housing, and work have obviously not been met. Preventing these violations will lift the beggar out of poverty. RBA can be seen as a more involved process as it entails identifying missing rights and fixing them. In conclusion, charity and needs-based approaches are quicker, easier, and better suited to humanitarian activities. RBA is more sustainable, transparent, and accountable, but it is also more work and a difficult task.

12.6.5 Core Concept 4: Ensuring All People Participate in the Development Process

To ensure development is people-centred, it should also be participatory. Participation simply requires that those affected by a development be included in its discussion, planning, and implementation. Participation should solve many of development's problems by uncovering a population's needs and reducing conflict by allowing people to discuss and prepare for the costs and benefits of development. Likewise, participation will empower people as they will feel a greater ownership of the development because they can offer inputs and modifications to the development. Participation ensure development has higher levels of **accountability and transparency**, however, participation cannot solve all problems because development leads to changes which will rarely be welcomed by everyone. Good development projects should be aware of these changes and their risks, and as a result, will consider ways to reduce their negative impact. Participation is an important tool to deal with and reduce conflict arising from development.

Another aspect of participation in RBA is to ensure the inclusion of vulnerable or marginalized groups. It is generally more cost effective to develop those segments of the population who are easily accessible – sometimes called the 80/20 rule, as in, it takes about 20% of the budget to reach 80% of the people, but 80% of the budget to reach the last 20%. Budgeting for vulnerable groups (for example, people with a disability or people in remote communities) tends to be more expensive due to greater transportation costs, less infrastructure (such as electricity), or they may even speak another language. Such challenges make development more expensive (see the **Discussion and Debate** box for an example in the field of education). Clearly, organizations will be tempted to show their cost effectiveness by emphasizing the numbers who have benefitted from their development, but these impressive figures are often achieved at the expense of the hard to reach or vulnerable. If development only targets the most accessible, then vulnerable and marginalized groups will always miss out. Development should ensure that the poorest and most vulnerable do not miss out.

Accountability and Transparency

Accountability is where duty bearers are responsible for their actions. Development organizations should be accountable for all direct outcomes of a project and they cannot ignore or dismiss an outcome as not their problem. Accountability may take the form of risk management or compensation for negative outcomes. Transparency refers to the availability and accessibility of information, so as to ensure the participation in development of all stakeholders.



DISCUSSION AND DEBATE

Should development only focus on the poorest people?

A government in a developing country wants to improve the education system by providing computers to a number of high schools across the country. But it turns out the cost of providing these computer rooms to distant rural areas will cost ten times more than in the city because of the need to build new rooms, provide electricity, train the teachers, and transport the computers to these remote locations. So instead, the government decides to build ten times as many computer rooms in the city, claiming that ten times as many children will get access to training computers, and city children are more likely to use computers in their jobs, study, and future work. However, opponents counter this by saying the development project will only increase the disparities that already exist in the levels of education between urban and rural children. Because rural children are not given the opportunity to become computer literate, they will have more trouble getting good jobs or getting into university.

Do you agree with the government's approach? Is it more important that ten times as many children get educated, or is it better to spend the money on getting computers into remote areas to help rural children catch up to city children, consequently reducing inequality?

12.6.6 Core Concept 5: Development Causes Changes in Power Relationships

Power sensitivity is also a significant element of RBA, recognising that those who cannot access development will be disempowered. Violations during development are often carried out by powerful groups over disempowered people. Rectifying these inequalities often becomes an objective of development under RBA which seeks to counter such imbalances by empowering the disempowered by activities such as educating women, introducing capacity development programs, allowing access to finances, and so on. In particular, people are empowered through knowledge, or learning about their rights, or gaining better access to services.

However, empowering one sector of society can often leave another sector feeling left out – for instance, financially supporting women can leave men feeling relatively disempowered because when a husband is no longer the main breadwinner he does not have the same power at home or in the community. For many husbands this may be of no concern if the household is wealthier, but others may feel embarrassed or threatened by the changes. Although developments could be considered successful in terms of wealth and related improvements in health, education, and livelihood rights, it may create unintended consequence such as increased conflict in the household. Conflict because of the changes in power relationships during development should be addressed by those managing development.

These problems of conflict arising from development cannot be ignored, as under RBA, development NGOs must be accountable for changes they cause. NGOs must always be aware of such risks and keep track of them by, for example, examining the risks associated with the increase in domestic violence as caused by disempowered husbands. Risk assessment is part of the NGO's planning processes and should include suggestions as to how risk can be reduced or eliminated. At the very least, risk assessments should ensure the programme will not cause human rights violations

(such as a rise in domestic violence) by seeing to it that everyone participates fully in the development. Only in this way will NGOs be better prepared to deal with problems as they emerge.

The features of RBA (as listed above) are not complete, nor are they universally agreed upon. However, the issues listed here are ones most commonly addressed and debated when organizations carry out RBA programming. In summary, RBA uses concepts and tools to shift the objectives of development towards improving human rights and preventing violations. RBA should ensure developments are more participatory and sustainable by seeing individuals as rights holders which will empower them in the process.

12.7 Conclusion

This chapter has shown how development has been a contested issue throughout Southeast Asia. Even though development is a right and is important for many people in the region, what should be developed, and how development should occur, have been debated for much post World War II history. Development related to human rights in a number of ways: they share similar goals, human rights is a way to assess development, and development is a human right. The final section shows how a common current practice in development is RBA, which brings in human rights standards and principles into the planning and deliver of development, and ensures that rights are maintained during development.

A. Chapter Summary and Key Points

Introduction

The relationship between development and rights covers both rights to development and rights during or *in* development. Rapid development in Southeast Asia since the 1960s has transformed societies and resulted in many changes, both good and bad. Development does not benefit everyone equally. Some become wealthy, while others may be evicted from their homes, or forced to work under poor conditions. Human rights should be protected during development but are often ignored. Human rights and development are related because they both have the same goals, yet development often leads to human rights violations. Human rights should be the standard on which development is judged.

The Politics of Development

Post war international development was overseen at the international level by the United Nations (which established organizations to manage economic and social development) and also by the World Bank and other development banks. However, development has created many problems including: politicization which occurred during the Cold War; excessive focus on the economy that ignored the impact of development on populations; a focus on large infrastructure which damaged the environment and was open to corruption; and the reliance of trickle-down theory. In the Cold War, countries had to choose between assistance from communist or capitalist countries; both models were problematic for development. By the end of the 1960s, many were looking for new ways to develop avoiding all these problems – human rights were seen as one potential path.

History of the Right to Development

The right to development was claimed by many Third World countries as a response to these problems. This right called for developed countries to help undeveloped countries, and for peaceful development. *The Declaration on the Right to Development*, adopted by the General Assembly in 1986, was not universally supported, with some First World countries abstaining or voting against it because they saw it as politicized or unrealistic. The Declaration considers the person as the central subject of development and that participation must be a part of it.

Globalization and Development

New human rights issues emerged because of changes due to globalization, such as the rise of the internet, an increase in women's equality, changes to work practices, and the rise of trans-national corporations. While countries did experience increases in wealth, health, and education, people's rights were sometimes 'traded-off' because governments claimed they wanted to maintain security. The rise of neo-liberal economic models also put a strain on governments and people as inequality grew. This period also witnessed the rise of migrant workers and the global economic crisis which started in 1997. All this led to the anti-globalization movement of the 1990s which addressed many human rights concerns, including the rise of neo-liberalism, privatization, the environment, and the power of the Washington Consensus. The right to development was recognized in the *Vienna Declaration and Programme of Action* which stated that human rights, democracy, and development should be interdependent and mutually re-enforcing. Other developments included the Millennium Development Goals.

Human Security and Capabilities

The 1994 *UNDP Human Development Report* introduced the concept of human security and related this to development. Human Security assumes that the person should be the focus of security, not the nation. Development should ensure human security is respected. Other ways to think about development include Sen's view that freedom is the objective and Nussbaum's capabilities approach.

Human Rights-Based Approach (RBA)

RBA examines how individuals maintain their rights while development occurs. RBA has become a dominant theory in development because organizations now see human rights as central to development and needed to respond to violations occurring during development. RBA is an 'approach,' meaning it can be used to help conceptualize or understand how developments should progress. Common elements of RBA include the goal that no human rights violations should occur during development and that the objective of development is to improve people's rights. RBA differs from charity or rights-based approaches. It considers development should be participatory, accountable, transparent, and non-discriminatory. Also, RBA recognises that development causes changes in power relationships, empowering some and disempowering others, but that the consequences of inequality and disempowerment can be addressed through its methods.

B. Typical exam or essay questions

- Who is affected the most by major infrastructure developments (such as dams, highways, and electricity stations)? By examining one major infrastructure development in your country, determine which groups of people were affected, and how they were compensated.
- What role has your country played in the non-alignment movement? Was it an active participant in debates around the right to development? If so, what did it do? If not, why wasn't it an active participant?
- Globalization brings many positive and negative changes to a country. What do you think are three positive impacts caused by globalization, and three negative impacts?
- What has been the impact on human rights caused by an economic crisis in your country? Did the 1997 economic crisis have a big impact? Or the food and fuel price increases in 2008? Or local economic crises?
- What are some of the major differences between a right to development and a rights-based approach to development?
- What must NGOs do to ensure compliance with RBA when working on development?
- How is participation in development ensured? Who should participate, and how should they participate?
- Should all development focus on society's poorest? Or should all developments attempt to fix inequality?

C. Further Reading

Development

Useful websites on development research and reports are:

- United Nations Development Programme (UNDP): *Human Development Report*
- World Bank: World Development Indicators
- United Nations Conference on Trade and Development (UNCTAD): *The Least Developed Countries Report*

There are a range of textbooks on development. Students can search for the following authors who have examined development:

- Amartya Sen
- John Martinussen
- Vandana Desai
- Paul Collier
- William Easterly

- Arturo Escobar
- Martha Nussbaum
- Joseph Stiglitz
- Dambisa Moyo

Right to Development

The right to development is mainly studied as a part of human rights history.

- Office of the United Nations High Commissioner for Human Rights (OHCHR): a webpage on the right to development can be found at the OHCHR with links to the Task Force and the Working Group on development

Authors who have written about this include:

- Arjun Senguta
- Brigitte Hamm
- Bonny Ibhawoh

Rights-Based Approach (RBA)

- Many organizations have guides to RBA but a useful starting point is the HRBA Portal for Practitioners at the UN which contains a large list of resources, case studies, and introductions. Alongside the guide are many studies on the use of RBA in practice, which can also be found at the HRBA portal

Many organizations provide their own guides to RBA, including:

- UN Women
- UNICEF Finland
- United Nations Population Fund (UNFPA)
- United Nations Development Programme (UNDP)
- United Nations Educational, Scientific and Cultural Organization (UNESCO): Strategy on Human Rights called *The Human Rights-Based Approach and the United Nations System*, which gives an excellent history and overview
- *IDS Bulletin* 36.1 devoted an issue to this topic in 2005

Numerous development organizations have their own guidebooks including:

- Action Aid
- Danish International Development Agency (DANIDA)
- Equitas
- Care
- Save The Children

Little academic work has been done on RBA, although some authors to search include:

- Celestine Nyamu-Musembi
- Andrea Cornwall
- Brigitte Hamm

13

Business and Human Rights*

In some ways, business is good for human rights as it performs a vital function in society by providing jobs, goods, and services.

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13.1 Introduction to Business and Human Rights

People invest a lot of time and education to find work, they even cross borders in search of better-paying jobs, and these jobs can provide money not only for the worker, but for the worker's family and community. Yet, businesses can violate human rights if companies treat workers badly, pollute the environment, engage in dangerous or corrupt business practices, or are involved in development activities that may displace or marginalize communities. Regardless of their type or size, business enterprises will always have some sort of impact, positive and negative, on human rights. The challenge is that human rights, as they now work, mainly protect people from the power of the State, not from the power of business. As economies and businesses grow, more people may potentially have their rights affected by this sector. Yet, around the world, most countries are still debating the human rights obligations of business. Does a business have the same duties towards people as the State? Or is their purpose only to provide a service for profit? How should communities and States stop business from violating rights?

Concept Business

This chapter uses the general term 'business' to cover any profit-making organizations. There are different types of businesses: some are owned by people; others are traded on stock markets (meaning that anyone who can afford shares can be part investor of the business). Businesses can employ one person or thousands across many different countries.

Some common definitions are:

- Firms, companies, enterprises: general term for any profit making organization
- Corporations: a legal entity that has rights and duties in some ways similar to individuals
- Trans-national corporations (TNCs) or Multinational Corporation: operate in more than one country and may employ thousands of people and have an economy similar to a medium-sized country

Southeast Asian States have always attracted foreign investment. Sometimes the relationship is exploitative, as when colonial companies extracted resources from Southeast Asian countries before they gained independence. More recently, business has contributed much to national development, with the richest countries in the region benefiting greatly from growing economies. At the same time, many in the region have had their rights violated by business with States doing little to protect them. As this chapter will discuss, the challenge in the field of business and human rights is to, firstly, assess the negative and positive impact of business on human rights. For example, wages and work conditions can be either exploitative if the workers are not getting paid enough, or an opportunity to improve the quality of life of the worker. If it is clear that businesses are violating or otherwise adversely impacting



human rights, the next challenge is to hold them accountable. But the obligations of business to human rights is still under much debate. This chapter examines these issues by, firstly, detailing how business is accountable. Secondly, by examining the organizations that attempt to hold business accountable. And thirdly, by looking at regional responses to violations by business.

DISCUSSION AND DEBATE

Business as Duty Bearers

What, precisely, are the human rights obligations of business enterprises? Because business enterprises are not States, they cannot sign or agree to human rights treaties. But they must abide by the laws of the country they are in, which includes respecting human right laws. Articles 29 & 30 of UDHR makes it clear that no State, group, or person (which can be assumed to include business) can infringe upon human rights. But what does this mean in practice?

Discussion

- If a social media business does not allow you to express yourself freely on their site, are they removing your freedom of expression? In other words, does the site have a duty to grant you freedom of expression?
- If a hungry homeless person goes into a restaurant and asks for food, does the restaurant have a duty to feed them? Obviously, the person has a right to food and shouldn't go hungry, but is it the restaurant's duty to provide that food?
- If a company supplies water to households, and cuts off people who do not pay their bills, is this denying their right to water? Should the company be obliged to provide water even without payment?

While States must ensure business does not threaten human rights, this duty has been a challenge to enforce. The question is: how to ensure a business respects human rights? While it may not appear difficult for a State to hold a business accountable to national laws, it is also true that companies violate human rights without consequence because of the characteristics of business. If a business is legally a corporation, then it has a legal status which can limit its liability and make it difficult to sanction anyone who may be committing a crime through the business. Businesses can also be very wealthy, enabling them to influence, or even corrupt, government officials. Some types of business, in particular TNCs, can avoid justice because they work across jurisdictions and borders, a feature which can be exploited to protect the business from facing justice. Business enterprises have the ability to keep their management outside the country where they work isolating them from legal sanctions. In many cases they can outsource their work to a third party using foreign labour, isolating them from violations within a particular country. In addition, they can also easily extract their profits from those countries. This dynamic, known as **capital mobility**, allows businesses to move to the State offering the most attractive conditions. As a consequence, business has leverage over States and workers. In particular, they can increase their profits by seeking out countries with the lowest wages and the

Capital Mobility

Capital mobility refers to the ability of business enterprises and investors to move their money (capital) and operations between different countries. Mobility makes it hard to regulate capital or obtain remedy for human rights violations.



Race to the Bottom

This occurs when a business shops around different countries to seek the lowest wages and weakest regulations to maximize profits. This puts pressure on developing countries to lower their wages or weaken environmental protection to attract businesses.

weakest regulations. This is known as the **race to the bottom**. But States and workers are not entirely powerless as there are ways and means to ensure accountability, as this chapter will later detail. Even if some business enterprises appear dismissive of human rights, certain responsibilities and laws must still be adhered to. In general, the trend has been for business to become more responsible, but more work is needed to ensure labour rights are fully protected. This chapter will examine the different ways businesses interact with human rights, and examine the various instruments that help promote business accountability.

13.2 Labour Rights as Human Rights

The International Labour Organization (ILO) plays a significant role in workers' rights (as noted in Chapter 7). As the ILO approaches its centenary in 2019, it is worth remembering its role in labour rights and how this links to human rights. The ILO was founded in 1919 as part of the Treaty of Versailles that brought an end to World War I. During the Paris Peace Conference, the Allied victors saw the need to create a body alongside the League of Nations to protect and promote labour rights, and so the ILO was devised. Significantly, those attending the peace discussions recognised that any chance of a lasting and universal peace would have to promote social justice and safeguard the interests of labour as many believed that the exploitation of workers throughout the world was a major contributor to the outbreak of war. The preamble of the 1920 ILO Constitution notes this by saying:

[W]hereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required (ILO Constitution, Preamble).

FOCUS ON An Overview of Labour Rights

Labour rights are found in a number of human rights treaties, and also in many ILO conventions. While an extensive list of rights would be too long to include here, some core labour rights include:

- The right to work (UDHR Art 23, ICESCR Art 6)
- The right to choose employment (UDHR Art 23, ICESCR Art 6)
- The right to just and favourable conditions of work (UDHR Art 23, ICESCR Art 7)
- Equal pay for equal work (UDHR Art 23, ICESCR Art 7)
- The right to a living wage, or a wage that one can live off (UDHR, Art 23, ICESCR Art 7)
- The right to form and to join trade unions (UDHR Art 23, ICESCR Art 8)
- The right to limited working hours and holidays with pay (UDHR Art 24, ICESCR Art 7)



Additional rights include:

- Maternity leave
- Minimum wage
- Minimum working age
- Equal rights to a promotion at work
- Equal working rights between men and women

Unsurprisingly, the term ‘human rights’ cannot be found in the ILO’s Constitution, given it was written decades before universal human rights appeared in the UDHR. The earliest statement referring to the term can be found in the 1944 Declaration of Philadelphia, annexed to the ILO Constitution, which positions workers’ rights as human rights, stating that “all human beings have rights to ... freedom and dignity.” But it was not until after World War II that the ILO integrated human rights into workers’ rights. As a specialized agency in the UN, the ILO works in parallel with the UN human rights regime. The ILO’s current mandate sees labour rights in a broader context:

The main aims of the ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.

After all, the rights to decent work, fair wages, the freedom of association, and freedom to bargain are crucial for the realization of a range of human rights. Over the years, the ILO’s support of human rights has become stronger. At the UN in 2014, the ILO clarified where it saw its work relative to human rights:

Given the normative role of the ILO, and the reality that labour rights are human rights, we actively support the UN’s human rights treaty bodies and their vital role in promoting and protecting human rights internationally. ... For the ILO, international labour standards are integral to the larger international human rights framework and, for nearly 100 years, have been the principal means through which the ILO has interacted with stakeholders in the world of work.

The ILO has a **tripartite governance structure**, with representatives from governments, employers, and labourers whose roles are to engage in dialogue and resolve issues. Each party has different activities and responsibilities: States have the role of regulator and are tasked with creating and enforcing labour laws; employer groups may query unclear regulations or problematic enforcement, or can be the subject of complaints regarding the violation of rights; and workers should seek to safeguard and promote their own interests through association and collective bargaining. Having said this, the ILO rarely imposes sanctions on governments or business. Rather it registers complaints in order to send a messages to investors, consumers, and workers.

Tripartite Governance Structure

A structure made up of three parts. For the ILO this is business, States and workers.

13.2.1 Challenges to Labour Rights in Southeast Asia

Over the years, Southeast Asia has become a popular site for multinationals to base their manufacturing operations. During the period of globalization Asia gained a status, which some consider undesirable, as the ‘world’s factory,’ or the place where most of the world’s labour is done. This term has negative implications suggesting an oversupply of labour, low working wages, eased regulations, investment incentives, and union restrictions. As such, both local and global business enterprises strive to find low paid workers in these regions, forcing Southeast Asian States to compete with one another to remain business friendly. The result is that States have done little to assert workers’ rights while organizational and collective bargaining rarely occurs, all of which gives power to business and leaves workers at a disadvantage.

When States cannot or will not protect workers, for example, by preventing them from collectively organizing and bargaining, the tripartite arrangement that promotes collective solutions to labour rights protection breaks down. Union restrictions are common in the region, as is State control over unions. This may be because unions are not democratic or representative in the case of government organized unions. Or it may be due to a climate of intimidation or restriction that makes employee representatives unable to protect workers’ rights. Southeast Asia has a long history of intimidation and even the killing of union leaders. This may be due to implied links to communism during the Cold War, or more recently, as an effective way to weaken their power. Countries like Thailand have a very low **rate of unionization** in the workforce because workers fear the consequences of joining a union. Overly assertive workers may be seen as burdens and are often driven out of their jobs. As a result, workers in the region organize and bargain informally, rather than through the formal tripartite scheme. Union action like the recent garment strikes in Cambodia and Myanmar do occur, but they are often treated as illegitimate and criminal. More common are scenarios like the **wildcat strikes in Vietnam** or inconspicuous worker networks that seek informal protections and improvements from local officials and owners. These should not be regarded as failures of tripartism, but rather a failure to uphold the standards for tripartite governance.

Rate of Unionization

The percentage of the workforce in a union. For developed countries this is about 20%. In Southeast Asia the rate is less than 5%.

Complicating efforts to strengthen union rights is the large number of available workers in the region and the ability of businesses to use migrant labour to both undercut costs and to disempower the workforce. Increasing this problem, it is argued that governments are sometimes too responsive to businesses due to economic incentives. In neo-liberal economies States are being dislocated from their role as regulators and protectors of workers, and instead are supporters of business. Measures such as stricter regulations and higher wages, although good for labour and human rights, are bad for business and unlikely to get support. On the other hand, poor working conditions are bad for business because cutting corners may be profitable in the short run, but workers will quickly leave for better conditions once they appear. With the trends in labour shifting towards more accountability, operating in environments where labour and human rights are not being upheld makes business ultimately unsustainable. Situations where regulations are unclear, below standard, or unenforced, leaves businesses susceptible to punishment or other forms of backlash.



FOCUS ON Wildcat Strikes in Vietnam

When faced with unfair work conditions, factory workers in Vietnam often participate in wildcat strikes. Wildcat strikes are not formal or announced, and are technically illegal. They do this because their union, the Vietnam General Confederation of Labour, is a national trade union that falls under government authority. Workers will without warning, but for a specific reason, collectively stop working and go outside, or otherwise bring operations to a halt. The managers find themselves facing a collection of workers and a labour shutdown, which gives more bargaining power to workers in discussions for higher wages or better conditions begins. Brokering may occur through dialogue, or workers may simply hold up numbers showing how much they think they should be paid. It will be up to the managers to choose whether to meet their demands or wait for assistance from the authorities. While risky, these kinds of strikes can be effective.

13.3 Business Accountability

Despite clear legal responsibilities, human rights continue to be violated as a result of problematic business practices. Businesses seeking the most profitable means of production may try to find the cheapest possible labour by using undocumented migrants or even child labour. Further, businesses using cheap materials may cause environmental damage or produce poor quality products which could make consumers sick. This emphasis on profit has led some businesses to gravitate to States that do not monitor or regulate their operations due to weak environmental or labour laws, making it easier for them to cut corners. Some local and multinational enterprises may even encouraged States to **deregulate** labour or environment laws. In addition, large businesses may source products through smaller enterprises, enabling them to deflect responsibility to the outsourced company. But regardless of how disinterested a business may be, human rights compliance is not something businesses can easily avoid.

Businesses, small and large, local and multinational, should consider more than their profits. In fact, there are good reasons for business to care about human rights. First, compliance can lead to better public relations with consumers. Second, compliance avoids the risk of receiving complaints and court cases which can be very expensive in the long run. Third, care for human rights makes business sustainable in the long term. As a consequence, more and more businesses now see the logic in human rights compliance, and as a result, have introduced appropriate policies and practice. Internationally, the trend has been for businesses to face more monitoring, regulations, and sanctions following human rights violations, but while the general trend is for greater accountability, there is still a long way to go.

Deregulation

Deregulation entails the removal of restrictions, regulations, and oversights on private sectors. The logic behind this is to create a freer market, minimize red tape, and attract foreign direct investment.



Concept Business Accountability

To be accountable means to be responsible for something, and to fix the problems caused by one's actions. There is still much debate over the accountability of businesses. Some enterprises claim they are only accountable to their shareholders and to making a profit, while others consider themselves accountable to their workers and the community. How to hold businesses accountable for their actions is one of the biggest challenges.

Horizontal Effects

This occurs where the law of public bodies effects private bodies. For example, human rights law, which governs relations between a State and its people (the *vertical effect*), also effects business because States must ensure rights are respected in the private organization.

The unclear legal status of human rights relative to companies is the greatest challenge facing business accountability. Because business cannot sign human rights treaties, they are not directly accountable to them. However, through **horizontal effects** (the duty of States to protect people from violations by third parties), States must ensure corporations in their jurisdiction comply with human rights standards. And while international human rights treaties apply principally to States, they also govern all humans. Furthermore, business is likewise legally subject to international human rights norms, as enforced by the State. One example can be found in non-discrimination laws. When a company employs workers, it cannot do so based on race, religion, or gender. If it does, they can be legally changed because most States have laws against discrimination. So the question becomes less about whether businesses must comply with human rights, but *how* to comply.

13.3.1 Corporate Social Responsibility

There is a growing movement within the international community, and in particular the UN, as detailed below, for business enterprises to be more directly accountable for their actions. Accountability can be enforced in different ways. One way is voluntary, where businesses choose to hold themselves to human rights standards. Many companies embrace this self-regulation known as **Corporate Social Responsibility (CSR)**, where a business accepts its responsibility to the community and makes pledges on them. CSR is also known as corporate citizenship, though how the concept is actually understood varies between companies. CSR can be simply ensuring policies and practices are compliant with worker, consumer, and human rights standards. Other versions of CSR may involve running charities or engaging in community welfare activities. Yet another makes use of business-led compliance organizations, such as the **Sustainable Palm Oil Initiative**, which attempts to improve environmental and labour standards in palm oil production.

Some practitioners and activists have been critical of CSR initiatives because they often seem more concerned with marketing than substantive social contributions. Critics also note that the focus should be on whether the actions of a business complies with human rights law, rather than the charity it publicizes. In addition, if a business does not volunteer into this system, there is no way to enforce accountability. Voluntary commitments through CSR are especially problematic from a human rights perspective because these obligations are not mandatory, whereas human rights are. The voluntary approach allows a business to choose whether or not to take action, and gives the option of revoking its commitment at any time. This optional scenario contradicts the mandatory, obligatory nature of human rights. Moreover, voluntary approaches often lack substance. Monitoring, even by an external party, can be manipulated. A business may make public pledges and employ community outreach strategies that are more about brand promotion than human rights.

Corporate Social Responsibility

CSR is the belief that business has to be responsible for its actions in relationship to employees and their families, to the local community, to the environment, and so on. This can be achieved by ensuring worker safety, social welfare programs, or running charities, for example.



FOCUS ON Business CSR Initiatives

The following are examples of business-led initiatives in Southeast Asia that address environmental and human rights concerns.

The Sustainable Palm Oil Initiative (SPO)

The palm oil industry is known for its negative environmental impact and its exploitation of labour. As a response, it started the SPO (a major private/public partnership) to find solutions to its own problems through actions like dialogues, certifications, and better planning. This created the Roundtable on Sustainable Palm Oil (RSPO), which led to a number of regional government plans and policy changes.

Shrimp Sustainable Supply Chain Task Force (SCTF)

Another example of an industry-led initiative can be found in the SCTF which operates out of Thailand. This is an international industry alliance of retailers, manufacturers, governments, and NGOs whose purpose is to ensure that Thailand's seafood supply chain is free from illegal and forced labour. The task force has three objectives: (1) to track the supply chain of shrimp and verify the source of shrimps being exported, (2) to improve the codes of conduct in Thai ports, and (3) to improve the sustainability of fishing and reduce its environmental impact.

It should be noted that these types of initiative have attracted criticism. For example, the SCTF has been attacked for selectively excluding certain NGOs and for distracting attention from areas lacking progress. It should also be noted that both the SPO and SCTF were only introduced as their respective industries were facing global scrutiny around worker abuses including forced labour.

13.4 Accountability at the UN

The concern with business accountability is not a new phenomenon. Since the 1970s, there were concerns that Transnational Corporations (TNCs) had been complicit in violating people's rights, engaging in corruption, and otherwise violating consumer rights in developing countries. Bodies in the UN such as ECOSOC commissioned studies into TNCs in the late 1970s, and groups of developing States (such as the UNCTAD and G77) complained about their lack of business accountability. During this period, other developments alongside the UN also occurred. The Organization for Economic Cooperation and Development (OECD) adopted the *Guidelines for Multinational Enterprises* (1976), which comprise part of the *Declaration and Decisions on International Investment and Multinational Enterprises*. Unfortunately, the OECD frameworks are only recommendations and guidelines that do not impose mandatory, enforceable obligations. Yet, OECD member States have employed these frameworks in various ways, and the OECD tends to be useful in directing governments and business towards best practices. The 1976 *Guidelines for Multinational Enterprises* also recognized that businesses should ensure workers' rights are respected, the environment is protected, and corruption does not occur.

Another active organization is the ILO, which adopted the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977). Despite the above improvements, a variety of challenges arose in this period. The UN was unable to reach an agreement because the issue of how to regulate business was too political. Meaningful developments were also halted by the impact of the Cold War, and the developed world's reluctance to agree to new economic regulations as suggested by the developing world. Proposals for a code of conduct were widely debated but never reached the necessary consensus for adoption.

FOCUS ON

Business Accountability at the UN

The *UN Working Group on Business and Human Rights* is an accountability and remedy project of the OHCHR. Currently at the information gathering stage, it intends to strengthen the justice mechanisms in cases of serious human rights abuses by corporations.

Another UN body is the *Working Group on the issue of human rights and transnational corporations and other business enterprises*, established in 2011 by the Human Rights Council. This sought to promote the understanding and use of the UN Guiding Principles to collect information on businesses and human rights, to visit States, and to create a dialogue around the issue.

The *UN Forum on Business and Human Rights* is an annual meeting held in Geneva where business, the UN, and civil society discuss issues on accountability.

The UN also promotes corporate responsibility through its *Women's Empowerment Principles*. One example can be found in the UN Women Private Sector Accountability Framework (UNW-PSAF), which enables businesses to measure and improve gender equality in the workplace.

The *Children's Rights and Business Principles* were guidelines developed by UNICEF, Save the Children, and the UN Global Compact in 2010 to ensure companies do not have an adverse effect on children's lives and to maximize the positive impact. The ten principles include the elimination of child labour, safety assurances, and the need to provide decent work for young workers and their parents.

Many of the *Sustainable Development Goals* relate to business standards and accountability, including goals on:

7. Affordable and Clean Energy
8. Decent Work and Economic Growth,
9. Industry, Innovation and Infrastructure,
12. Responsible Consumption and Production,
13. Climate Action



As the next section will discuss, a form of self-regulation called the UN Global Compact (GC) was finally adopted in 1999, but was widely criticized for being too weak. The Working Group on Transnational Corporations then proposed the 2003 *Norms on the Responsibilities of Transnational Corporations* (the Norms) which was accepted by many NGOs and other human rights defenders, but was widely rejected by business itself. Currently, the UN now addresses the impact of business through the UN *Guiding Principles on Business and Human Rights*, and numerous Working Groups promoting the Guiding Principles. While the Guiding Principles improve on the failure of the Norms, it shows that the monitoring of business's impact on human rights is still under development. Presently, the UN Working Group on Business and Human Rights and global civil society are discussing a UN Treaty on Business and Human Rights. This treaty would enable States and rights holders to make complaints, claims, and demand remedy from business. However, until that treaty comes into force, there is no instrument with an enforceable mechanism.

13.4.1 Global Compact (1999)

After the failure to set up a code of conduct in the 1980s, a different approach was taken by the UN through the promotion of the GC. The GC is voluntary and encourages businesses to increase their CSR in ten key areas. Relying on self-regulation and reporting, businesses themselves study and report on their compliance in these areas. The compact was proposed by the then Secretary General, Kofi Annan, to the business community, who were heavily involved in establishing the GC structure. What makes the GC different from previous initiatives is that it was business-initiated with companies themselves volunteering to participate. They decide on how to implement the principles and undergo a self-reporting mechanism, but no mechanism exists to monitor the enterprise or to criticize it in any way.

Some critics see this as the weakest possible form of protection, while others consider it a first step towards aligning business practices with international human rights and legal obligations. The GC is also different in that it works more as a platform for businesses to highlight their CSR policies and practices. The GC encourages local networks to be established where business and non-business partners can work on best practices to develop their CSR. Further, the GC is explicitly pro-business, as opposed to codes and norms which focus on corporate violations of human rights. The GC has around 8,000 business partners, and another 4,000 non-government partners (such as academics and NGOs). The business partners have committed to principles in the areas of human rights, labour, environment, and anti-corruption, which are listed in the **ten principles**. These principles explicitly mention human rights, noting the major human rights concerns on the effects of business.



FOCUS ON

Ten Principles of the UN Global Compact

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: Business should not be complicit in human rights abuses.

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: Elimination of all forms of forced and compulsory labour;

Principle 5: Effective abolition of child labour; and

Principle 6: Elimination of discrimination in respect of employment and occupation.

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: Undertake initiatives to promote greater environmental responsibility;

Principle 9: Encourage the development and diffusion of environmentally friendly technologies.

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

While there is much support for the GC in the business community and in some sections of the international community, it also faces a number of vocal critics whose concerns are similar to the problems found in CSR. In particular, they point to its voluntary nature, claiming it only ‘preaches to the converted.’ In other words, the only businesses likely to join are the ones that have already met the required human rights standards. Businesses more likely to be involved in human rights violations, especially from the extractive (mining) or military industries, will simply not join the compact. Further, it is possible for businesses to self-report compliance with the principles while hiding violations. An example of this can be seen in the tech industries (like mobile phone makers or social network companies) which often claim to be compliant but actually outsource labour to factories violating these rights, or sell private data to third parties. These actions may not be illegal, but they violate people’s rights. In worst case scenarios, a business may try to use the GC to protect itself from questions or scrutiny.

A second criticism is that the principles themselves are not specific, and the obligations they impose (if they can be called obligations) are minimal. Indeed, concerns have been voiced that businesses can use the GC to improve their image while committing violations. And even if a business has been found to violate rights, little can be done as no sanction mechanism exists to punish it. Finally, buy-in to the GC varies around the world. While many European businesses actively support it, US companies tend not to. Some businesses support it within Southeast Asia but the numbers are low: only six in Vietnam, nearly fifty NGOs, around a hundred in Indonesia, and a hundred in Myanmar, but significantly, most of these are small businesses.

It could be argued that many of these criticisms attack the GC for being something which it is not. The GC is not a monitoring and enforcement mechanism, nor is it supposed to sanction businesses. Rather it is a low cost business initiative whose intention is to encourage companies to develop their CSR profile. In order to increase accountability, other mechanisms are obviously needed, and these were addressed in the following decade with the Norms and Guiding Principles.

13.4.2 UN Norms (2003)

In 2003, a Sub-Commission of the Human Rights Commission endorsed the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. It must be noted that this document is not legally binding, or even necessarily accepted by other bodies in the UN. In the case of the Norms, it was finally abandoned by the Human Rights Commission after its introduction, and the task to make business accountable moved elsewhere in the UN.

The Norms were fundamentally different to the GC in that they were not voluntary and imposed obligations directly on business, not on States. The Norms declare that:

Transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights.

Up to this point, no document had said directly that business had these obligations as normally it was the responsibility of States to ensure business compliance. The Norms did not mention States at all in its obligations which led to much criticism from the business sector, but also from some States. Concerns also arose about the vagueness of the legal obligations, the lack of voluntary buy-in, the sanctions it proposed, and the obligations on business to promote human rights. With current standards now arguably approaching those suggested in the Norms, this document can be considered ahead of its time; back then, the international community was certainly not ready, neither legally nor politically, to accept stronger or direct business accountability.

13.4.3 UN Guiding Principles (2011)

The most recent action undertaken by the UN is the *Guiding Principles on Business and Human Rights*, endorsed by the Human Rights Council on 16 June 2011, sometimes known as the “Protect, Respect and Remedy” Framework, also called the Ruggie Principles. The principles were first introduced by John Ruggie (the Special Representative for Business and Human Rights) in 2007, before being developed into the guidelines. With its 31 principles, the Guiding Principles is the global standard regarding the roles and responsibilities of States and businesses. This framework clarifies how States and business should understand and implement their human rights obligations. The Guiding Principles are a step back from the Norms as States, and not businesses, were given primary responsibility to enforce human rights by stressing in the preamble that “the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State.” Following this is the framework on which the Guiding Principles are grounded:

- (a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

The duties and obligations to protect are more demanding than responsibilities to respect rights. This is clear in the Guiding Principles where an emphasis is placed on the legal obligations of the State, whereas corporations “address” or “may undertake” activities, “avoid causing” or “seek to prevent” violations. For some, this means the obligations on businesses are too weak. The final part of the framework mentions the remedy, which is introduced as:

- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The remedies proposed fall into two categories: (1) State-based legal mechanisms, and (2) alternative justice mechanisms. These alternative mechanisms can address grievances committed by both State and business and allow for violations to be rectified by compensation and other payments, without the need for a court remedy. The three elements of the framework will now be addressed in more detail.

DISCUSSION AND DEBATE

Is it better to compromise or pressure business?

The difficulty faced by the various UN attempts at creating business accountability can be seen in the debate between the need for low entry costs which encourages business involvement and weak obligations (such as the Global Compact or Guiding Principles), and enforceable accountability such as the failed code of conduct and the Norms. Which of these arguments is better?

- It is better to have low entry costs and voluntary participation because business is more likely to work with these. This is done by imposing weaker obligations, and gradually working towards more accountability. Imposing strict standards will only alienate businesses, discouraging them from joining initiatives, and few avenues exist to enforce accountability anyway.
- It is better to enforce the laws because businesses will only comply when forced to. Because business works primarily by profit, they will only become accountable to rights if they have to. Business has no history of voluntarily submitting to regulation. If voluntary, only law abiding businesses will join, not the rights-violating ones, defeating the purpose of a standard.

13.4.4 Guiding Principle 1: Protect

The State has a duty to protect the human rights of people within its territory against human rights abuses by third parties, including business. This duty necessitates policies, regulation, and enforcement. The Guiding Principles provides five specific measures for States, demanding:

- Coherent policies to engage business
- The promotion of human rights in business transactions and operations
- The fostering of corporate awareness of human rights



- Planning policies and guiding measures for conducting business in conflict-affected areas
- Examining human rights in extraterritorial business situations, such as when a business is working in a foreign country

Protection entails active regulation so States cannot avoid responding to violations. Unfortunately, in Southeast Asia and elsewhere, deregulation seems more pronounced than regulation.

FOCUS ON

Guiding Principles on Human Rights and Business – General State Regulatory and Policy Functions

3. In meeting their duty to protect, States should:

- (a) Enforce laws that ... require business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies ... of business enterprises ... do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.



13.4.5 Guiding Principle 2: Respect

Businesses have a responsibility to avoid infringing human rights. This responsibility applies to all aspects of business operations. In order to fulfil it, businesses must act with **due diligence** to ensure that they do not adversely impact human rights. When a business has an adverse impact on human rights, directly or indirectly, it will fail in its obligations under international human rights law. Business cannot simply hope to not undermine human rights. Instead, plans, policies, research, and oversight must occur. Transparency is necessary to ensure due diligence. In other words, businesses have an obligation to take steps to avoid violating rights to prevent human rights violations before they occur.

According to the Guiding Principles, all businesses should have a human rights policy that provides an overview of plans and procedures to ensure that human rights are respected. This means that businesses should review all their activities and relationships to ensure they are not adversely impacting human rights. Further, businesses are expected to mitigate any threats to human rights. These reviews should be ongoing, and any potential areas of concern must be investigated. Should a human rights issue surface, businesses should take a number of steps to ensure due diligence: consultation with all affected groups, dissemination of any findings, remedy of any direct or indirect violations, and follow-up to ensure all human rights issues are adequately addressed.

Due Diligence

This refers to the necessary actions to ensure laws are respected and includes activities such as monitoring environmental impact and workplace safety.

The responsibility of businesses to respect human rights means they should also be aware if it is the State that violates rights. If businesses or investors are in any way involved in violations, even if the State is doing the violating, they are taking part in the violation of human rights. Businesses that profit from oppressive governments are failing to fulfil their responsibility to respect human rights. Investors are attracted to Southeast Asia because of low taxes, low labour costs, cheap land, and relaxed regulations, all of which can increase profits. However, these incentives may be the result of governments violating rights, such as the confiscation of land or the oppression of organized labour. One specific area of concern are Special Economic Zones (SEZs) which attract foreign direct investment through incentives such as tax concessions, less regulations, and other economic advantages. An SEZ may be established to avoid respecting rights, for example by having special weak labour or environmental laws. If this is the case, the business still is accountable for the violations even if it is the government which has created the conditions for them.

13.4.6 Guiding Principle 3: Remedy

Both States and businesses have a responsibility to ensure that victims have access to effective remedies, both judicial and non-judicial if their rights are violated. The State, the business, and the person or community may all have a different notion of justice. Should a human rights issue surface, businesses are to take a number of steps to ensure due diligence such as consultation with the affected groups, dissemination of any findings, remedy of any direct or indirect violation, and follow up to ensure that all human rights issues are adequately addressed. Remedies have been criticized by some observers as reactive, rather than proactive as they do not prevent a violation from occurring and rather only address problems after the violation. Moreover, remediation is often hard to define. Depending on who seeks the remedy, it could be an apology, a fine, a change of business practice, compensation, or a criminal charge.

FOCUS ON

Where do the guiding principles fit?

The Guiding Principles are in an era of new expectations. From a normative perspective, they currently form the established standard in business and human rights. Compliance with the Guiding Principles implies compliance with the UN Global Compact and the OECD Guidelines for Multination Enterprises, but not vice versa. The principles also declare that businesses have a responsibility to respect labour rights (ILO Conventions) and human rights international treaties regardless of where they operate. Compliance with international labour and human rights norms are not optional, and businesses are to uphold these standards irrespective of where they operate. Even if States fail in their duties, as many do, businesses must still ensure compliance with human rights. Until a treaty on business and human rights enters into force, the Guiding Principles will be the standard to which all businesses and States will ultimately be held to.



13.5 Responding to Business Violations in Southeast Asia

Because accountability is still a developing practice, there are a variety of ways to make businesses accountable in Southeast Asia, each with their strengths and weaknesses. The legal system is still commonly used. Legal remedies are a constantly evolving method of accountability at both the domestic and international levels. As previously mentioned, the UN Working Group on Business and Human Rights is also considering a treaty on business and human rights which could significantly expand the possibilities for legal remediation. Another evolving form of legal accountability is the concept of extra-territorial obligations. As detailed below, this is an attempt to enforce business standards across borders to enable States to hold businesses accountable even if violations occur in another country's jurisdiction. In every country in Southeast Asia, attempts have been made to hold businesses accountable to rights, either through the courts, consumers, civil society organizations, or trade unions. The next section will summarize how each of these responses work in practice.

13.5.1 Legal Actions Against TNCs

Over the years, many cases have been lodged against businesses for violating workers' rights, impacting economic and social rights, or environmental destruction. Unfortunately, taking a business to court in Southeast Asia is challenging. Most commonly businesses are not found liable, and courts rarely award compensation to those whose lives have been affected. Even if they do enforcing payment from the companies can take years. Simply getting access to a court can be difficult as there are cases where security personnel employed by businesses have physically stopped people reaching a court. In other instances, businesses have used courts to target individuals or communities through defamation suits, or courts may simply not be willing to hear cases because the law is unclear, a situation common in land disputes in Myanmar and Cambodia. In these countries, many people own their land not through written documents but by customary ownership, meaning they have always lived there. In these cases, governments can simply assert ownership of the land as all land is owned by the State. Even if the case reaches court, claimants may find a justice system more sympathetic to business than local individuals. This may be the result of businesses having money to employ better lawyers capable of intense legal preparations but it may also be due to corruption, or the courts wanting to protect development over the rights of poor people.

CASE STUDY Xayaburi Dam Court Case

Though the \$3.5 billion Xayaburi Hydropower Project officially started in 2012, construction had already been going on for two years leading to the first dam of the Lower Mekong River, affecting the neighbouring countries of Vietnam, Cambodia, and Thailand. The project involves building 12 dams for hydro-electricity, displacing over 2,000 people and potentially affecting the livelihoods of up to 200,000 people. Construction is underway in northern Laos, and the dam is set to open in 2019. Thai officials agreed to the project as financiers, builders, and buyers of the electricity.

Attempts were made to delay the construction in order to understand the impacts, but an environmental impact assessment was never done. The Mekong River Commission (MRC), an international body which manages the river, failed in its attempts to reach an agreement between Laos and its neighbours. As such, the actions taken



by Laos violated the 1995 Mekong Agreement between Cambodia, Laos, Thailand, and Vietnam, which requires agreement with its neighbours before building a dam. Instead, Laos made an agreement with Thailand alone, who helped finance the project and agreed to purchase 95% of its electricity.

In 2014, a suit by 37 villagers in eight provinces in north and northeast Thailand living along the Mekong was filed against five Thai government bodies involved in the project, and was accepted by Thailand's Supreme Administrative Court. They claim these governing bodies violated the Thai Constitution by entering into an agreement without doing due diligence as regards public approval, or its impact on the environment, health, and human rights. On 6 January 2016, the Thai Administrative Court ruled that the governing bodies were fully compliant with the Constitution maintaining that State agencies complied with Thai law by posting project information on their website. However, the plaintiffs appealed the case, calling for an impact assessment, full compliance with Thai law, and consultation with those affected by the project. Overall, this project violates the right to a clean environment, including the rights of individuals and communities to access their natural resources, to conserve the environment, and to participate in decisions that might affect access or conservation. The case is transnational as it will rule on a business project in Laos using Thai law.

A more common kind of court case occurs around labour rights. Most, if not all countries in Southeast Asia have developed labour laws. However, more improvement is needed in areas such as freedom of association and collective bargaining, as well as gender and non-discrimination which often leads to unfair dismissal. Examples of these include women who are sacked after becoming pregnant (a policy of Malaysia Airlines), or after they gain weight (for example, Thai Airlines imposed weight and waist line limits on flight attendants). Another concern involves poor conditions and non- or under-payment of wages, a problem migrant workers frequently face (see Chapter 7). Further, workers may not get access to compensation after accidents, or may be sacked for joining a trade union, or participating in a strike, though both these actions should be protected by human rights.

13.5.2 Extraterritorial Obligations

Another development in the use of court actions against business violations concerns the use of **extraterritorial obligations** (ETOs) linked to the **Maastricht Principles**. This is a very recent development based on the idea that the duty of States to protect rights does not end at the border, and if an organization violates its rights in another country, the State will still have an obligation (an extraterritorial one) to prevent violations. This new development is of particular importance to Southeast Asia because of the Bangkok *Declaration on Extraterritorial Human Rights Obligations*, drafted in the region. Also, extraterritorial obligations are actively used in Southeast Asia. For instance, the Thai National Human Rights Commission is currently investigating four extraterritorial cases: sugar plantations in Koh Kong, Cambodia; the Hat Gyi dam on the Salween River in Myanmar; the Hongsa lignite mine and coal-fired power station in Laos; and the Xayabouri dam, also in Laos.

Extraterritorial Obligations

These are obligations which can occur outside the jurisdiction of the State requiring them. For example, a business, under its national laws, can be legally obligated not to engage in corruption in any country, regardless of its legality in the foreign country.



FOCUS ON

Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights

The Maastricht Principles details the obligations of host States (where business operations occur) and home States (where a transnational business is headquartered or incorporated). Extraterritorial obligations place the primary responsibility for protecting human rights with host States. But home States also have a responsibility to hold businesses under their jurisdiction accountable for their impact on human rights. This puts the primary burden on host States, but asks home States to hold businesses accountable extraterritorially.

Currently these examples are not court cases but rather National Human Rights Commission investigations, and the Commission does not have the power to start a case or compel compensation, as this will be decided by the courts themselves. However, these investigations are a positive step towards increased business accountability by limiting the ability of business to escape sanctions by conducting business in third countries.



CASE STUDY

Koh Kong Sugar Plantations and Extraterritorial Obligations

The Thai Khon Kaen Sugar Industry set up plantations in the Koh Kong region of Cambodia in August 2006 after receiving concessions from the Cambodian Government under the joint ownership of the Khon Kaen Sugar Industry, the Taiwanese Ve Wong Corporation, and Cambodian Senator, Ly Yong Phat. It is estimated that 4000 villagers were forcibly and violently evicted in the setting up of the plantations. They also claimed they were never consulted on the deal. In 2007, a group of villagers filed a complaint to the Koh Kong Provincial Court which refused to hear the case on jurisdictional grounds. The villagers appealed and their case is still moving through the Cambodian judicial system. In 2009, Koh Kong Sugar entered into a five-year contract with Tate & Lyle (a UK-based sugar business that is also a subsidiary of American Sugar Refining). Tate & Lyle began to buy sugar from the plantations. In 2013, 200 villagers filed a complaint in England against Tate & Lyle, arguing they were the rightful owners of the land and sugar. The legal strategy in this case is to focus the complaint more on property and contractual rights rather than human rights violations, though clearly human rights violations are part of the complaint. The lawsuit is ongoing.

13.5.3 Consumer Activism

So far, the focus has been on legal and quasi legal frameworks and responses to business accountability. This final section will concentrate on how social movements have responded to business violations of human rights. These alternative ways of complaint are particularly important if the court system is viewed as unsympathetic. With the rise of social media allowing consumers to easily express their feelings about products and services, businesses have to consider their public image like never before. A company seen to harm the environment, mistreat workers, or marginalize

communities, may face consumer boycotts. Famous protests and boycotts such as those against Nestlé, Nike, and McDonalds, have forced companies to change their practices. This method of accountability can be very effective, but only if consumers with adequate buying power engage in it. Consumer activism, like all types of responses to predatory business, has both potential and limitations.

The most common form of consumer activism is the consumer boycott. Though there were boycotts of sugar produced by slaves in the 1700s, the first modern consumer boycott occurred in the late 1970s against Nestlé for their attempt to persuade mothers to switch from breastfeeding to baby formula despite the fact it was widely recognized that breast milk was nutritionally superior to formula, and it was also free. When it became known that Nestlé was paying nurses and hospitals to encourage women to use formula to the detriment of baby's health, a boycott was organised, eventually forcing the company to change its behaviour.

Other notable boycotts include those of Nike (for the exploitation of workers in Indonesia and other factories) and Shell (for the execution of activist, Ken Sara-Wiwo, in Nigeria who complained about pollution caused by their pipe lines). Sometimes it is a product rather than a single brand which is boycotted. For example, 'blood diamonds' (diamonds originating from conflict zones in Africa and whose value is used to fund armed groups) continue to be targeted. Israeli businesses have also been the target of the Boycott, Disinvest, and Sanction (BDS) movement addressing Israel's mistreatment of Palestinians. Boycotts have spread to entire countries too such as in the 1990s when tourism to Myanmar was discouraged to prevent the profits going to the military government.

Boycotts have a mixed success rate. While Nestlé changed its practice, the boycott of Shell did not have any impact. Though the Nike boycott received much publicity, its commercial impact was debatable, but Nike did eventually change their labour practices. In this sense, even if a consumer boycott does not directly threaten business profits, it can set in motion a process that extends to improvements in human rights. In the same way that trends in legal frameworks now seem to offer more avenues to hold businesses accountable, social media has done the same through consumer campaigns. Platforms like the Centre for Business and Human Rights have become hubs where consumers can gain awareness on products and brands and directly participate in global campaigns against injustices in the field of business and human rights.



CASE STUDY

Boycotts of Thai Fisheries

The Guardian, a UK-based news outlet, ran a series of articles and videos with titles such as ‘Globalised slavery: how big supermarkets are selling prawns in supply chain fed by slave labour’ and ‘Shrimp sold by global supermarkets is peeled by slave labourers in Thailand’ that went viral throughout 2014 and 2015. These stories became the rallying cry around which governments and consumers around the world criticised Thai Fisheries. Governments around the world criticised the prevalence of human trafficking, and the EU gave Thailand a yellow card (or a threat to issue a trade ban) against the industry. Some consumers filed lawsuits against Mars, Procter & Gamble, Nestlé, and Costco Wholesale for selling slavery-tainted seafood products such as farmed shrimp and pet food. Others boycotted products or food retailers buying from Thai Fisheries. The boycotts have since relaxed, but they did compel both government and business action around Thai Fisheries. Whether those efforts will lead to substantive improvements is yet to be seen.

13.6 The Global Economy and Human Rights

A final point to note in the relationship between business and human rights is the role of the global economy. Human rights can be affected by the global economy in many areas, the main ones being international trade and the policies of global economic and financial organizations. The following section will look briefly at these two areas.

13.6.1 International Trade and Human Rights

The increase in international trade itself is not necessarily bad for human rights. For developing countries, increasing the amount of trade can bring wealth, develop industries, and create jobs. On the other hand, an unfair trade system can do exactly the reverse. If developing countries are forced to buy expensive goods from richer countries, and if their local industries cannot compete, jobs will be lost and the cost of living will rise. Though this may not have a direct impact on human rights, there are concerns that a weakening economy will have long term impact on people’s rights. Studies have shown that when developing countries become dependent on food imports, they leave themselves open to many risks. If their agricultural production decreases and the price of food increases, food becomes prohibitively expensive. Such a situation happened in the Caribbean nation of Haiti which lived off cheap American imports, until food prices increased as a result of shifts in oil prices and the agro-fuel industry, causing over a million people to go hungry. Similarly, in Southeast Asia, the 2007 global food crisis (when the price of grain sometimes tripled in cost) led to food riots in Indonesia and shortages in Myanmar. The Philippines was also heavily affected as it is one of the largest rice importers in the world. Other Southeast Asian countries like Thailand and Vietnam benefited greatly from the price increases as they are among the largest exporters of food in the world. This example shows that the benefits of global trade are often not equally shared, some countries can get rich and others poor. Another concern is that countries are now more susceptible to fluctuations in the global markets. Nobody is exactly clear why food prices increased so dramatically in 2007—the theories include stockpile shortages, speculations in the market, an increase in bio-fuel production, and increased production costs—but nobody could stop the increase, leading millions to the brink of starvation.



FOCUS ON

The Trans Pacific Partnership (TPP)

The trade agreement now receiving the most attention is the TPP. Currently, four Southeast Asian States are party to the agreement: Singapore, Malaysia, Vietnam, and Brunei, with the Philippines, Thailand, and Indonesia expressing an interest. There is much debate about the impact of TPP on human rights. While claims have been made that the TPP has led to strong environmental regulations, which is disputed, and reduced tariffs that could potentially improve the economy of many developing countries, concerns exist about weak labour protection, reduced freedom of expression, and the increased enforcement of intellectual property which will impact health through the increased prices of medicine. Concerns are been expressed about the secrecy surrounding its negotiation, leading some to speculate that it gives preferences to corporations and excludes civil society.

The World Trade Organization (WTO), the main body which manages global trade, has been criticised for not taking human rights seriously enough when reaching trade agreements. One of the most vocal concerns is around Trade Related Intellectual Property (TRIPs) and people's access to medicine. During the peak of the AIDS crisis in the 1990s drugs were available to keep people with the HIV virus alive, but at a cost of up to \$15,000 a year per person, which was way out of reach for most people in Southeast Asia. Much cheaper options of only \$1 a day were available, but only because they were produced by companies not paying the associated intellectual property costs. When countries like Thailand chose to use the cheaper medicine the pharmaceutical companies and the United States government protested saying they should pay for the intellectual property rights. Other areas of concern include the weak recognition given to labour rights in trade. There is no incentive for States to avoid using goods produced by slave labour, although some countries and regions have responded in their own way, for example, when the European Union banned the import of prawns suspected of having been processed using slave labour as previously discussed.



DISCUSSION AND DEBATE

Should governments ignore TRIPs when it comes to life-saving medicines?

The case of Thailand producing its own drugs to treat AIDS patients has been the source of much debate. Pharmaceutical companies argue they have invested millions of dollars to develop these drugs and deserve to be reimbursed. Further, if the actual price of the drugs is not met, they argue investment in more research and development will not be possible. On the other hand, Thailand has a duty to provide medicine to its people to ensure their right to health, and these drugs do save people's lives. Because of this, both Thailand and the WTO allow the purchase of drugs without paying intellectual property costs to pharmaceutical companies.

Questions

- Should countries be able to avoid intellectual property costs to buy cheap drugs if it saves people's lives?
- How will new drugs be developed if companies see no profit in investing in the research because of countries will just buy cheaper copies of their drugs?
- On the other hand, pharmaceutical companies claim they investment in research and development but they mostly focus on more 'cosmetic' drugs to aid weight reduction or reduce blood pressure, neither of which are common problems in poorer countries. Does this mean we should not take their claims of intellectual property rights seriously?

13.6.2 Global Finance and Human Rights

Global financial organizations like the International Monetary Fund (IMF), the World Bank (WB), and the Asia Development Bank (ADB) have faced criticism because their policies can lead to human rights violations. So much so that recently, Philip Alston, the United Nations Special Rapporteur on extreme poverty and human rights, said in a report that, "The World Bank is a Human Rights-Free Zone." They are criticized for being dismissive of human rights or having policies, such as the IMF actions after the global financial crisis of 1997, which negatively impact rights (previously noted Chapter 12).

Structural Adjustment Programs (SAPs)

SAPs require States, if they need money from the IMF, to adjust the structure of their economies based on free markets which should also be open to foreign investment.

During the 1980s and 1990s, most criticism was directed at the **Structural Adjustment Programs** (SAPs) which forced some countries' economies to be change their economic structure to be more market-oriented and less government controlled. These changes included opening markets to foreign investors and forcing governments to reduce their involvement in economic activities by **privatizing** some services such as water, electricity, health, and communications. As a result, domestic industries faced increased competition from foreign business and many lost their jobs and livelihoods. Though SAPs have not been used for many years, the policies of these international organizations still tend to prioritize open market economies over States' obligations around health, livelihood, and education. While this does not necessarily mean that the policies will cause violations - for open economies do allow economic growth and increased wealth - the lack of safety mechanisms to protect those most affected by these changes is of concern. To conclude, it can be seen that the IMF, the WB, the WTO and the trade agreements they have brokered may favour business over human rights, and do not do enough to make businesses accountable.



DISCUSSION AND DEBATE

Privatization, Nationalization, and Human Rights

Privatization is the sale of State-owned businesses, services, or resources to the private sector. States may do this if the private sector is seen as more effective or efficient, or if the private sector can generate more revenue. Neo-liberalism promotes privatization because it allows the public to pass costs for infrastructure and services to the private sector through processes like licensing, tax, and cost sharing. The concern with privatization is that benefits may not reach the masses, so, for example, when goods and services are privatised, State may save money but because those goods and services are no longer subsidized, citizens may also see their bills go up.

The arguments for privatization are:

- Private companies are better at running businesses
- Considerable revenue can be raised from the sale of public goods
- There is less corruption in private companies
- The arguments against privatization are:
- Some people cannot afford the costs
- Companies are only interested in profit
- The services provided by profit-driven companies may be inadequate

Discussion

If the below services are privatized, or only run by private companies, what are some potential human rights concerns?

- Public transport
- Prisons
- Water
- Mobile phones
- Internet access

In thinking about these concerns, consider the following:

- Should these services be accessible to everyone?
- What is the impact of the costs of such services on the poor?
- Is the service a fundamental right? Should they always be provided by the State?
- Will the different quality of services make society more unequal?

To sum up, this chapter has shown the many attempts at making business more accountable with varying levels of success. Over the years, while there are a number of UN initiatives, the more successful mechanisms have been initiated by individuals whether they be civil society initiated protests, boycotts, or court cases at the national level. Finally, the significant impact of banks and financial institutions on human rights must also be noted. When a country is in debt, governments may cut spending from much needed public services and social welfare, directly impacting rights.

13.7 Worker Resiliency and Self-Protection

To close this chapter, it would be useful to return to the concept of the worker as a person whose rights can be significantly reinforced or undermined by business. Although different legal frameworks have been introduced to impose obligations on business and States, these can be hard to keep, though more opportunities for legal protection are becoming available. Both the UN and the ILO will play a major role here although local governments and consumers can also be influential. In addition, governments can demand appropriate practices from businesses under their jurisdiction despite adverse impacts abroad. Further, consumers may send a strong message to businesses by simply abandoning their products or brands, threatening the very lifeline of businesses – profit.

For many workers and communities in Southeast Asia, the law may not provide a dependable source of protection or accountability, but this does not leave these groups helpless. When laws or organizations provide inadequate protection, workers and communities can take it upon themselves to protect their own interests which allows Workers and communities that engage with businesses themselves will no longer be passive recipients of protection. By creating informal or formal networks to distribute information and by sharing experiences and ideas, workers can bargain effectively with businesses and protect themselves and others from potential violations. Work and business can be a potent pathway to empowerment allowing workers to save money and send remittances home, so changing not only their lives but also the communities they invest in. Ideally, workers and communities should not have to rely so heavily on self-protection but while formal regimes slowly evolve, the reality is that people will have to continue to find informal ways to protect their rights.

A. Chapter Summary and Key Points

Introduction to Business and Human Rights

Business providing jobs, goods, and services may be meeting people's rights, yet at the same time it can violate rights. Business seeking to maximise profits may use cheap labour, cheap materials, and cheap production causing environmental damage, poor quality products, worker violations, or engage in dangerous or corrupt practices. Since human rights protect people from State and not business abuse, holding businesses accountable has proved a challenge. Business must obey national laws, but as corporations, their legal status and international structure can help them to avoid facing justice.

Labour Rights as Human Rights

The ILO promotes and protects labour rights such as the right to work, the right to just and favourable conditions at work, and equal pay for equal work. The ILO comprises representatives from governments, employers, and labourers. In monitoring labour rights, it can (but rarely does) impose sanctions. Challenges to labour rights in Southeast Asia include: the oversupply of labour, low working wages, weak regulations, and union restrictions. States have done little to assert workers' rights and organizational and collective bargaining rarely occurs. Many unionists are threatened, resulting in weak labour rights.

Business Accountability

Through horizontal effects, States protect people from violations by third parties such as business. But this does not clearly enforce human rights accountability on a business. One response is CSR where a business accepts its responsibility to the community and makes pledges to them. Critics regard CSR as more concerned with marketing than substantive social contributions, and it is also voluntary. Many businesses promote their contributions to society through charity and social events, but the concern is whether they also protect human rights. There are many ways to hold businesses accountable to human rights. One way is to promote self-regulation on a voluntary basis. Another is through the use of judicial or quasi-judicial measures to punish businesses for non-compliance. Finally, consumers, workers, and communities can take it upon themselves to force improvements in the field of business and human rights.

Accountability at the UN

The UN has attempted both voluntary, business-friendly, and mandatory assertive measures. Since the 1970s, concerns about TNCs and violations of consumer rights in developing countries have led to the development of guidelines and declarations on TNC practice from the UN, the OECD, and the ILO. But these are only recommendations and guidelines and are not legally binding. More recently, the UN Global Compact and the Norms were introduced, neither of which were successful. The Global Compact was voluntary and encouraged businesses to increase their CSR in ten key areas. While some saw it as a weak form of protection, others considered it a first step towards accountability. The Norms differed in that they were not voluntary and imposed obligations directly on business, but they were not supported and were eventually dropped. Currently, the UN Guiding Principles which do not impose legal obligations on companies are the authority in this field.

Responding to Business Violations in Southeast Asia

The legal system is still commonly used to enforce business standards, but taking a company to court in Southeast Asia is challenging. Human rights victories in cases involving businesses are few, and rarely is compensation awarded to those whose lives have been affected. Some cases on labour rights have been successful. One legal development involves the use of extraterritorial obligations in court, where a company in one country can be sued for its actions in another. Finally, with the rise of social media allowing consumers to express their feelings about products or organise a boycott of a product, consumer activism has become a successful method of accountability.

The Global Economy and Human Rights

International trade and the global economy have many implications for human rights. International trade is not necessarily bad for human rights as developing countries can increase wealth, develop industries, and create jobs. But an unfair trading

system can do the reverse. Examples such as the 2007 global food crisis show the benefits of global trade are not equally shared, with some countries getting richer and others becoming poorer. The WTO has been criticized for ignoring human rights in trade agreements, especially around Trade Related Intellectual Property. The IMF, World Bank, and ADB are criticized for being dismissive of human rights, especially as regards their Structural Adjustment Programs (SAPs) during the 1980s and 1990s. SAPs led to privatization and open market economies threatening States' obligations around health, livelihood, and education.

Alternative Measures

Consumers and workers have the ability to push back against businesses not fulfilling their human rights duties. Opportunities arise from legal frameworks which seek to hold businesses accountable. In addition, communication technology has created new opportunities for workers and consumers to organize, build awareness, and take action.

B. Typical exam or essay questions

- Examine a court case against a business in your country. What rights did the business violate, and what was the outcome of the case? Do you think it was fair?
- Are transnational companies a necessary evil for developing countries, given that they may provide jobs and economic growth but at the same time violate rights?
- How can extraterritorial obligations be used to increase business accountability?
- What are the strengths and weaknesses of the United Nations Guiding Principles on Business and Human Rights? How can they make companies accountable, and how can companies avoid this accountability?
- Are trade unions active in your country? Why, or why not?
- What is the relationship between global trade and human rights in areas such as access to medicine or communication technologies?

C. Further Reading

Business and Human Rights

For cases, commentary, and general information on development and human rights, an internet search of the following authors will reveal useful articles, books, and other resources:

- John Ruggie
- Surya Deva
- David Kinley
- Andrew Clapham

Web pages with resources include:

- Business and Human Rights Resource Centre: a web page with extensive case studies and news
- Forum-Asia: this NGO has released the report *Corporate Accountability in ASEAN* with many useful case studies on business activities in the region
- *Guidebook for Business and Human Rights for NHRIs*: a useful introduction
- Canadian Human Rights Commission: useful introductions including *Human Rights and Business 101* and *Business and Indigenous People's Rights*
- Human Rights Watch (HRW) and Amnesty International (AI): both these organizations have programs and research on business and human rights
- Office of the United Nations High Commissioner for Human Rights (OHCHR): a number of publications including FAQs and introductions to the Global Compact and Guiding Principles
- UN bodies: UN Secretary General's Special Representative on Business and Human Rights, the Forum on Business and Human Rights, and the Global Compact: all have useful resource material
- International Labour Organization (ILO): has no program on business and human rights, but it covers multilateral enterprises, globalization, labour law, development, and so on
- University research centres: many have research papers, including New York University, Harvard University, the Danish Institute for Human Rights, and the think tank: Institute for Human Rights and Business (IHRB)
- *Business and Human Rights* journal

14

The Environment and Human Rights*

Concern for the environment is a relatively new phenomenon. Although it can be traced back to the late 1800s, it was only during the 1960s and 1970s that the environment movement became a worldwide phenomenon.

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14.1 Introduction to Human Rights and the Environment

Environment Movement

A political movement that emerged during the 1970s aimed at protecting ecosystems from destructive human practices. The movement is now global, and takes the form of political 'Green' parties, environmental NGOs, and protest movements.

Concern for the environment is a relatively new phenomenon. Although it can be traced back to the late 1800s, it was only during the 1960s and 1970s that the **environment movement** became a worldwide phenomenon. Human beings depend on the environment for survival, but it was not till recently that people realized their treatment of the environment, and their pollution, could have a permanent and devastating impact. In the 1960s and 1970s when high profile environmental disasters like the **Minamata mercury poisoning** tragedy in Japan and the **Cuyahoga river fire of 1969** in the United States made people, particularly from industrialized nations, realize the harm caused by environmental degradation. Other developments such as the anti-whaling movement and books like Rachel Carson's *Silent Spring* (1962) which highlighted the dangers of pesticides, also helped to bring the environment into public consciousness. In the decades following, these concerns began to be linked to human rights.

The interaction between human rights and the environment works both ways: a clean environment is a human right and the well-being and protection of the environment depends on the protection of human rights. In other words, human rights are necessary to assert environmental rights. The rights to health, food, and water sanitation depend on a safe, clean, healthy and sustainable environment. The connection between the environment, cultural rights and heritage may be even stronger for groups who have a cultural connection to the land and nature. As this chapter details, the idea that a clean environment is a human right is still open to debate, but it has already been firmly established that how environments are treated will have a significant impact on a State's human rights. This chapter outlines the various efforts to understand the relationship between the environment and human rights, before looking at the experience of indigenous groups and the problem of climate change.

FOCUS ON Major Environmental Disasters of the 1960s

Minamata mercury poisoning

In 1922, Cisso Corporation started manufacturing chemicals for plastic production from their factory in Minamata Bay. During the post-World War II production boom, signs appeared that Cisso's waste water was contaminating the fish and shellfish of Minamata Bay. Dead fish were found floating in the bay, cats and dogs mysteriously died, and an increasing number of children born with deformities. Though complaints were made to Cisso in the late 1950s, and compensation was paid to some victims, the pollution continued until a 1968 court case finally put an end to disposing waste water in the bay. In total, there were over 2,000 victims, with compensation being paid to around 10,000 people.

Cuyahoga river fire of 1969

With a history of fires, the Cuyahoga River was once the most polluted river in the US. One fire in 1959 caused five deaths. The 1969 fire coincided with a society that had become more environmentally aware. The 1969 fire prompted US Congress to pass the National Environment Protection Act in 1970 which led to the creation of the Environmental Protection Agency. This agency's first policy was to enact a mandate



that all rivers in the US be clean enough to allow swimming. Since then, the Cuyahoga River has received billions of dollars in clean up funds and is now home to about sixty species of fish. It has not seen a fire since 1969.

Southeast Asia has a rich history of individuals and communities standing up to environmental degradation as a result of development. The civil society groups that emerged in the 1970s can be separated into two broad groups: those concerned with issues of land and livelihood (mostly consisting of indigenous or poor communities), and middle class groups concerned with quality of life, urban pollution, and environmental protection. In the 1980s, a global social movement took shape around the call for environmental justice in response to some infamous environmental disasters such as the one at **Bhopal**, where a factory leak of poisonous gas killed over 5,200 people. Caused by Union Carbide, the company escaped conviction in part because of its transnational status. Concern also grew over the threat of nuclear energy in response to the **Three Mile Island** and **Chernobyl** incidents. Finally, the **Exxon Valdez oil spill**—at the time, the largest oil spill with the greatest environmental impact—also caused much anger in the community because people felt the corporation had not done enough to avoid environmental destruction.

FOCUS ON

Major Environmental Disasters of the 1980s

Three Mile Island and the Chernobyl disaster

In 1979, a nuclear plant at Three Mile Island in Pennsylvania, US, experienced a partial reactor meltdown resulting in a small amount of radioactive contamination. Studies later showed this accident did not have a major adverse effect on people's health or the surrounding environment, but it did make people aware of the potential threat from nuclear energy. Seven years later, the meltdown of Chernobyl's nuclear reactor in the Soviet Union (now in the Ukraine) had a more disastrous effect, causing a fallout reaching all the way to Norway that affected thousands of people.

Bhopal

In 1984, in Bhopal, India, gas leaked from a plant owned by Union Carbide resulting in 5,200 deaths and causing thousands more to suffer permanent or partial disabilities. In 1989, settlements were reached and approved by the Supreme Court of India and again upheld in 1991 and 2007, although many victims' families never saw any form of compensation. The government closed the site and all operations, preventing a clean-up until after 1994.

Exxon Valdez oil spill

In 1989, the oil tanker, Exxon Valdez, struck a reef as it entered Alaska's Prince William Sound, tearing open its hull and pouring around 20 million gallons of oil into the remote and biodiverse area. The resulting slick damaged more than 1,000 miles of coastline and killed an untold number of animals. Exxon paid billions in clean-up costs and legal court cases. Despite this, pollution can still be seen to this day.



Today, environmental rights are a widespread concern in Southeast Asia because of the impact businesses, agriculture, and development has on the environment. People in Southeast Asia are more aware of the importance of a clean environment, are more likely than ever to oppose developments thought to be dangerous to the environment. For example, people living in cities complain about pollution and air quality. The cross boundary problems like the haze caused by widespread forest burning in Indonesia have forced States to respond through regulation and treaties. Further, indigenous groups now protest when developments encroach upon their customary lands and way of life.

One particular concern is that the benefits and burdens of changes to the environment are not equally distributed. Called **environmental racism**, this is where the extraction and destruction of the environment disproportionately affects certain ethnic, racial, or economic groups to the benefit of wealthier segments of the population. A simple example of this can be seen in cases of **resource extraction** where land is damaged around poor and marginalized areas to provide products and services for the middle and upper classes, the result of which is an inequitable distribution of burden and benefits. On a larger scale, environmental discrimination can occur between countries, when rich countries avoid pollution in their own territories by building factories in poorer countries. Fortunately, there is a growing awareness around environmental justice and the human right to enjoy a safe, clean, healthy, and sustainable environment.

Resource Extraction

The process of taking resources out of the environment, applying particularly to resource extraction industries such as mining and logging.

Environmental Racism

The practice of placing polluting industries next to poor and disadvantaged communities. Sometimes called environmental discrimination, the term is not widely used.

DISCUSSION AND DEBATE

What are the environmental concerns of your country?

How many of the following problems exist in your country or community?

- air pollution
- over-logging of forests
- dirty or contaminated water
- industrial pollution, pollution from factories
- noise pollution from traffic
- contaminated food
- unclean water for drinking or washing
- destruction of natural forests
- agricultural pollution
- destruction of marine environments such as coral reefs and beaches

Do further research to find out the impacts of these concerns. Also, consider who created the problem, and how can they be solved?



Around the world, there is a history of environment rights defenders being targeted, attacked, and killed. The NGO Global Witness details at least 185 environmental activists killed in 2015, with Southeast Asia being one of the worst regions. For example, 33 activists were killed in the Philippines, the second worst country (after Brazil), with deaths also occurring in Indonesia, Myanmar, Cambodia, and Thailand. Environmental activists face threats because they oppose the interests of powerful businesses and challenge the development agenda of governments. In many cases, activists may be villagers who have been forced into become activists because their family and communities are directly threatened by environmental damage. In Southeast Asia and elsewhere, governments have done little to protect these people. Despite the influence of powerful forces and their under-protection, environmental rights defenders and their organizations have continued to protest for their human rights.

FOCUS ON

Extrajudicial Killing of Environmental Activists in Southeast Asia

Hundreds of environmental activists have been killed in the past decades in Southeast Asia. Most of the cases are unsolved, with people yet to face justice for these crimes.

Cambodia: Chut Wutty was an anti-logging campaigner and critic of the military's alleged role in illegal logging in protected forests. He was shot dead while showing journalists a protected forest known for illegal logging.

Philippines: Gloria Capitan was an environmental activist opposed to coal stockpile facilities in Bataan province. She was shot and killed by two unidentified men on a motorcycle who were waiting for her near the entrance to her family's business.

Philippines: Michelle Campos was a member of the indigenous Lumad people from the southern Philippines. Her father and grandfather, who were prominent campaigners for the protection of ancestral lands, were publicly executed by a paramilitary group in front of their village.

Thailand: Taksamol Aobaom was a lawyer campaigning against the mistreatment of an ethnic Karen community by National Park officials. He was shot dead on a main highway in 2011.

Thailand: Boonsom Nimnoi was a member of the Amphur Baan Laem Ocean Conservation Group and leader of a campaign against a petrochemical plant. He was shot dead on a road close to his home in 2002.

Indonesia: Indra Pelani was a 22 year old member of a network of people monitoring illegal activities in the forestry and agriculture sector. He was attacked, beaten, and killed while travelling to the Jambi branch of Friends of the Earth Indonesia in 2015.



14.2 Environmental Standards

Until the 1960s and 1970s, the laws that regarding the environment were less concerned with protecting the environment than protecting those seeking to exploit it. Over the years, such thinking slowly changed leading eventually to the development of jurisprudence on environmental protection. The long history of international laws date from the mid-1800s when treaties managing rivers in Europe were introduced to limit what countries could put in and take out of rivers that flowed between countries. Similar laws exist for the Mekong River, the largest river system in Southeast Asia flowing through six countries.

At the national level, environmental laws were first passed in the late 1800s to establish national parks, firstly in the United States. Similar laws appeared in European countries, Australia, and New Zealand. Other national laws include those managing pollution, for example, the Clean Air Acts (of which the US has one of the strongest and most well-known). Significantly, most countries now have air pollution laws. In Southeast Asia, seven of the eleven countries have air pollution acts, with only Myanmar, Laos, Timor Leste, and Cambodia yet to introduce them. Similarly, laws on water pollution, waste management, the handling of dangerous chemicals, and the protection of wildlife, forest, and other biodiverse areas have also been passed. Although enacted decades after the national laws, many of these provisions can also be found at the international level. Additional international laws include those covering clean air, the dumping of waste in the ocean, and the protection of endangered species. While these laws can protect environmental standards, they do not address the human rights consequences of damage to the environment.

The first major step towards the claim that a clean environment is a human right was introduced in the Stockholm Declaration (1972), at the very first United Nations conference dealing with the environment, called the UN Conference on the Human Environment. Principle 1 of the Declaration reads:

Humans^{*} have the fundamental right to freedom, equality and adequate conditions of life, in an environment that permits a life of dignity and wellbeing, and he [or she] bears a solemn responsibility to protect and improve the environment for present and future generations.

(^{*}Here, the original term 'man' has been replaced)

Although not explicitly recognizing a clean environment as a human right, but rather, as necessary for those rights to be met, the Declaration clearly demonstrates their interdependence. In the decades that followed, both people and States began to recognize a clean environment as their right. The Declaration also accepted a responsibility to protect and improve the environment, not just in the present but also for future generations. This gives rise to the possibility of inter-generational rights, that is to say, people who are yet to be born may have rights against current inhabitants of the planet. Other outcomes of the World Conference include the establishment of the UN Environment Program (UNEP), and the Convention on the Laws of the Sea (UNCLOS). The right to a clean and healthy environment was novel and progressive with potentially far-reaching legal implications. Although the Stockholm Declaration is soft law (that is, a statement with no binding legal force), it is a statement of principles agreed to by its signatories.

The human right to a clean environment did not receive widespread support in the immediate aftermath of the Stockholm Conference. International lawyers felt

the concept was too vague and unenforceable, for example, how to define a 'clean environment'? Does it refer to how clean the air is? Or is it about trees, parks, and animals? Is its intention to restrict pollution to only some areas of the country? Environmentalists also criticized the concept as being too 'human centric,' meaning that protection extended only to humans, not to the environment itself, so the environment is only preserved because humans want it preserved.

In addition, the idea of a human right to a clean environment was also seen as not going far enough because it works within a legal system whose main priority is to ensure developments proceed with as little impact on the environment as possible. Some believe a complete change of practice giving the environment precedence in all endeavours is required before environmental protection can occur. Although the human right to a clean environment is still debated, it has received acceptance in some national and international law.

FOCUS ON

Elements of a Right to a Clean Environment

There is no precise definition to a clean environment, but the elements may include:

Freedom from pollution, which can include:

- pollution in drinking water
- pollution in the air
- freedom from garbage and waste
- freedom from poisons such as insecticides and herbicides

The right to a healthy environment, which can include:

- not getting sick from unclean water, air, or food
- laws banning the use of poisons
- prohibiting factories from polluting

The right to access a clean or a natural environment, which can include:

- the right to parks and playgrounds
- the right to national parks or other natural areas
- the right to access clean public beaches

The right to a sustainable environment, which can include:

- the right to save forests, wetlands, or other areas from destruction
- the right to ensure lands, forests, and rivers remain productive by preventing over-logging, over-fishing, or over-fertilizing



14.2.1 Substantive Right to a Clean Environment

For the right to a clean environment to work, or to be enforceable, two separate but interrelated functions must be present: there must be a law and a mechanism to enforce it. In other words, not only must individuals have the right, it must also be codified into law. A law without legislation to back it up is merely an ideal. Likewise, a right in law but without procedures to enforce it, loses its usefulness. Procedures such as tribunals, court systems, or mediation must be in place to ensure individuals can exercise and realize their rights. To summarise, substantive rights refer to the existence of the right itself, while procedural rights cover the ability to use courts or equivalent mechanisms.

The substantive right to a clean environment exists in different laws, both international and domestic. In international law, apart from soft law documents, such as the Stockholm and Rio Declarations, other treaties provide elements of a human right to a clean environment. The ICESCR made an indirect statement on the issue when it stated:

The State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (Art 12.1)

The steps to be taken by the State parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the improvement of all aspects of environmental and industrial hygiene. (Art 12.2b)

Significantly, the ICESCR did not mention a specific right to a clean environment, but that a clean environment might be necessary to obtain the right to health. It limits State duties to those affecting the right to health, meaning a violation only occur if someone falls sick because of the environment. It does *not* give rights to live in or enjoy a clean environment. Elements of a State's duty towards a clean environment include providing clean drinking water, sanitation, and freedom from pollution as detailed in General Comment 14 to the ICESCR. This right does not extend to a sustainable environment, or preserving and protecting the environment. Other international documents include the *Rio Declaration on Environment and Development* (1992) which discussed the relationship between a clean environment and human rights. As a declaration it is non-binding and does not explicitly recognize a human right to a clean environment. On the other hand, the right to a clean environment does exist at the regional level. For example, the 1981 *African Charter on Human and Peoples' Rights* was more specific when it stated:

All peoples shall have the right to a general satisfactory environment favourable to their development. (Art 24)

Unfortunately, because the African Charter only mentions 'peoples' rights,' it is unclear whether it establishes an individual human right to a clean environment. In Europe, the equivalent document is the Aarhus Convention (detailed below). In Southeast Asia, the *ASEAN Human Rights Declaration* states:

Every person has the right to an adequate standard of living ... including: ... [t]he right to a safe, clean and sustainable environment. (Art 28)

Although the Declaration clearly mentions the right to a clean environment, it is not legally binding but when combined with other constitutional rights, it does form part of a substantive right to a clean environment in Southeast Asia.

The situation is very different at the national level. From the 1980s onwards, a human right to a clean environment was established in many States. Over ninety countries worldwide have accepted this principle. Some established the idea through a broad interpretation of their constitutions. In the Indian case of *Rural Litigation and Entitlement Kendra Dehradun and others v State of UP and others* (1985), the Supreme Court held that Art 21 of their Constitution which reads “No person shall be deprived of his life or personal liberty save in accordance with the law” ought to be given a broad interpretation. They decided that Art 21, commonly referred to as “the right to life,” includes a right to a clean environment, arguing that the concept goes further than the right to merely exist and includes a certain quality of life which necessitates a clean environment.

Similar decisions have also occurred in Southeast Asia. In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Another*, a 1996 ruling about the wrongful dismissal of a school teacher, a Malaysian court held that the right to life includes a right to a clean environment. Other countries have incorporated the right directly into their constitutions. One Southeast Asian example is the 1987 Constitution of the Republic of the Philippines, Section 16, Art II which reads:

The State shall protect and advance the right of the people to a balanced and healthful ecology in accordance with the rhythm and harmony of nature.

The Philippine Supreme Court has interpreted this very broadly. In the case of *Minors Oposa v Factoran* (1993), it was argued that children (as represented by their parents) would be denied a healthy environment if forests were destroyed as a result of timber licenses issued by the government. The court went as far as to hold the right was so fundamental, that even if the Constitution had not recorded it officially, it would still have authority. In other words, in the Philippines, the right to a clean environment is considered an inalienable human right which does not require legislative confirmation to have the weight of law.

CASE STUDY

Minors Oposa v Factoran (1993), Supreme Court of the Philippines

A group of children (some of whom were the children of environmental activist, Antonio Oposa) brought a class action lawsuit to stop the destruction of rain forests, cancel existing Timber Licensing Agreements, and prevent the acceptance of new ones. The case was based on a reading of the 1987 Constitution of the Philippines (Section 16), which recognises the right of people to a “balanced and healthful ecology” and the right to “self-preservation and self-perpetuation.” The concept of “intergenerational equity” was used to argue that natural resources belong to children as well as adults, and by taking all a country’s resources, adults were stealing from their children and from future generations.



The Supreme Court ruled in favour of the children, finding:

- the right to a clean environment and to provide for future generations is fundamental
- there is an intergenerational responsibility to maintain a clean environment

Around the world, most countries recognize the right to a clean environment as a human right, and even though no international laws emphatically say this, soft laws like the *Stockholm Declaration* and hard laws like the *African Charter* and the ICESCR show that the principle is gaining acceptance. But it is at the national level, through constitutional interpretation, specific provisions, or court cases on the environment, that most developments have been made.

14.3 Procedural Right to a Clean Environment

The procedural right to clean environment is summarised in a number of international documents. First, this right is fully elaborated in the **Aarhus Convention**, a legally binding treaty for States in Europe and Central Asia. Also included is the work of the UN's Special Rapporteur on a clean environment (developed in the next section). An early elaboration can be found in Principle 10 of the *Rio Declaration* (1992), which reads:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

When breaking down this principle, it can be seen that a procedural right to a clean environment consists of three main elements: (1) a right to environmental information; (2) a right to participate in environmental decision-making; and (3) access to courts or other forms of administrative mechanisms in the event of a dispute.

FOCUS ON The Aarhus Convention (1998)

This European-based convention is part of the 'Environment for Europe' process. It codifies procedural rights to a clean environment including obligations to enforce a system of governance where citizens have rights to access information, participate in decision-making, and access justice. The Convention has 46 members from Europe and Central Asia and is seen as the best model for procedural rights. It is hoped it can become a regional treaty for Southeast Asia or a guide for domestic legislators.



14.3.1 Right to Environmental Information

Without information, it may be almost impossible to create a coherent and strong argument against a proposal or project which may harm the environment. Without these laws, a situation can occur where people could wake up to find a large construction site next to their house. When attempting to find out what is being built, they may be denied information. If parents, they may be worried about the dangers of pollution or increased traffic on their children. If farmers, they may worry about the impact on their farmland. If business owners, they may be concerned about the impact on their business. Whatever the worry, if denied information, there is no way for any of these groups to prepare for the consequences of the construction. Of course, the consequences may be few, but this is still information that should be revealed. Clearly, access to information should be a requirement to ensure people know about, and can prepare for, impacts on their local environment. Further, information will also enable them to protest or suggest modifications to the construction to reduce its impact on local communities. Such a requirement demonstrates the need for freedom of information laws to make this right readily enforceable.

For example, Indonesia has had a freedom of information law since April 2008. In Thailand, access to information was first guaranteed in Section 48 of the 1997 Constitution which states:

A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.

This constitutional provision is given legislative force through the Thai Official Information Act of 1997. In Malaysia, the states of Penang and Selangor have freedom of information laws but there is no national law. In countries like Singapore, no such law exists at all. A right to information would allow communities to find out about proposed developments and their impact, so, for example, States planning to build a freeway or a new power station would have to inform residents of the exact location and duration of the construction.

Although these laws are a good starting point, there must be caution on their implementation. Being relatively new, the mechanisms for obtaining information from government agencies may not be prompt or accurate. Loopholes allowing unreasonable withholding of information should also be removed. This is particularly true of countries like Malaysia where freedom of information laws in certain States may be impeded by the *Official Secrets Act* (1972) which allows government agencies wide discretion to declare information secret. In fact, the Act has such wide ranging powers that any document may be declared secret, making access difficult and subject to strict liability.

Environmental Planning Regulations

Used to determine what building and developments can occur in certain areas. Common regulations include limiting the number of factories in residential areas and regulating the height and size of buildings.

14.3.2 Right to Participate in Environmental Decision-Making

There are several ways the public can participate in environmental decision-making. Two of the more common methods are through **environmental planning regulations** (sometimes called town and country planning regulations) and **Environmental Impact Assessment** (EIA) regulations, both of which should include public participation. Town and country planning should allow public participation during the drafting of long term plans for a town or city. Provisions should also allow the public to voice their concerns or opposition to more specific planning decisions, especially when their immediate environment is impacted. This would include, for example, opposition to the building of a chemical plant near a housing area.

An EIA is a study, ideally done by a party neutral to the construction, which assesses the environmental impacts of a development. The report should detail how the air, water, and land will be affected. Sometimes, this will also include social as well as livelihood impacts. There is no single standard for EIAs and they can differ greatly between countries. Certain projects, like those which may cause a substantial amount of pollution or larger projects, may require EIAs by law before approval is given. In addition, the EIA should include environmental effects, as well as all mitigating measures taken to lessen that effect, during both building and operation stages. Further, an EIA system should include a public participation mechanism. The EIA in itself cannot guarantee the safety of the environment. In some cases, a company may withhold details of the construction to the assessor, leading to an inaccurate final report, or employ a specific assessor to ensure the impact and environmental damage of a development is not reported. For both systems to work, effective monitoring mechanisms must be in place because without them the law is useless.

Central to human rights, public participation is the most important aspect of environmental planning and the EIA. But to be effective, participation must also be meaningful, which can be seen when input is taken seriously and could influence the final decision-making process. In other words, the right to be heard does not simply entail having those views listened to by the relevant authorities. They must also be seriously considered. In order for this to happen, the entire process must be transparent with the final decision being taken in such a way as to clearly demonstrate how those views were considered. For example, a final report should have a section dedicated to the consideration of public opinion including the reasons why these opinions were accepted or rejected. Participation is only inclusive if it ensures all groups have access to it. As an example, a group frequently left out of participation is women. Women's rights are often violated as a result of environmental damage. This was acknowledged in CEDAW which recognizes in Art 14 that rural women face significant discrimination, and given their role in, for example, agricultural work, they can be significantly harmed by degrading environments. Other work commonly done by women (including the collection of water and the planting and harvesting of crops) will also be affected by environmental damage such as pollution.

Another aspect of participation concerns ensuring the public has sufficient time to do the necessary research to make well-informed and thorough recommendations. Finally, the process must be accessible, meaning the public must have access to relevant documentation which should be presented in a manner understandable to the community. Although extremely technical, efforts must be made to ensure EIA reports are appropriately presented.

States may attempt to limit, or even falsify, participation in a variety of ways. Examples include allowing smaller pro-development groups to participate knowing they will

Environmental Impact Assessment

A report which estimates the amount and type of impact a development will have on the local environment. For example, it can estimate if pollution from a factory will destroy nearby forests, or suggest ways for a development to minimize its impact.

support the project, while preventing dissenters from being heard. Other cases are when States hold public meetings while setting up road blocks to prevent access to the meeting. Similarly, States may delay participation to the point where it becomes meaningless because the development has already started. In worst case scenarios, the public is simply excluded from the entire process.



DISCUSSION AND DEBATE

Meaningful Participation

A government wishes to establish a national park in a rain forest known for its wild species of birds and animals. Many surrounding villages support the development because they believe it will benefit the economy through increased tourism, but hill tribes living alongside or inside the forest, fear they will lose their land and livelihoods because hunting will be prohibited in the park. The first public meeting organized by the government ended with the indigenous and village groups arguing and not finding a resolution. Following this, the government decides it has met its obligation for public participation and begins to evict the hill tribes from the forest to build park facilities.

Questions:

- Has the government met its obligation for participation?
- If the villagers outnumber the hill tribes by at least five to one, is it fair and democratic that the villagers' views be the view accepted in the report?
- Are there alternative solutions to this dispute?

14.3.3 Access to the Court System

Another concern is the procedural right of access to remedy in cases of potential environmental harm or for dispute resolution. The main problem here is that to have the right to appear in court, or to use the legal term, *locus standi*, a person will usually have to prove they have been directly affected by the act through damage to themselves or their property, or through an economic loss. In environmental cases this damage or economic loss may not be obvious because it may not yet have occurred given that deforestation or if pollution may only have long term effects. In such cases, a broad interpretation of *locus standi* is vital. Countries like New Zealand and Holland have laws outlining the scope of groups or individuals who can appear in court to challenge environmental decisions. Other countries like India, have broadened the concept of *locus standi* to allow anyone to bring a case to court, even if they have not been directly affected as long as there is sufficient public interest in the matter. This is called Public Interest Litigation, a type of legal case that does not exist in Southeast Asia. In this way, a socially conscience lawyer can bring a case to court for the public good. For example, the Indian lawyer, MC Mehta, took on many environmental cases in the 1980s in the public interest to protect: the Ganges River from pollution; historic monuments like the Taj Mahal from air pollution caused by iron and glass factories; and to protest the use of leaded petrol, which led to the introduction of unleaded petrol in India.

Locus Standi

Locus standi in Latin means a place to stand and its legal meaning refers to the right to bring a case to court. For most courts, this means a person must have experienced negative consequences because of someone else's actions, entitling them to some form of redress.

In most Southeast Asian countries, the laws of *locus standi* are ambiguous or weak. Generally speaking, a person must prove he or she has an interest in the matter beyond that of the average person. This may include an environmental NGO with a special interest in wildlife or pollution in some jurisdictions. The previously mentioned *Minors Opasa v Factoran* case in the Philippines saw the Supreme Court extending *locus standi* to future generations. In this case, the citizens argued that deforestation would impact the right of future generations to the forest and that future generations have *locus standi* as they would be directly affected by these decisions. The court held that they did have an interest because a clean environment was a human right and deforestation an environmental issue. The court said:

The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines. Consequently, since the parties are so numerous, it becomes impracticable, if not totally impossible, to bring all of them before the court. [...] The plaintiffs' personality to sue (*locus standi*) on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.

Unfortunately, this progressive approach to *locus standi* has not been embraced throughout Southeast Asia. Malaysia, for example, has extremely restrictive rules on *locus standi*. In short, unless one can show a direct relationship to the issue at hand, either through personal damage or monetary loss, the court may refuse to hear the complaint. Restricting access to courts has led some groups to find alternative methods of complaint such as public demonstrations. Some famous protests which have gained worldwide attention include those opposing the **Letpadaung copper mine** in Myanmar and the **Pak Mun dam** in Thailand.

CASE STUDIES

Environmental Protests in Southeast Asia

Letpadaung copper mine, Myanmar

Open since 1996, the copper mine had already displaced around 26 villages and up to 2,500 people, though this number is disputed by villagers, the mine owner, and the Government. Many villagers claimed they were not adequately compensated and their land was polluted from the mine. Although protests had been going on for many years, they were harshly put down by State officials in 2012, resulting in 100 people being hospitalized. More recently, a protestor was shot and killed in 2014. The protests did cause the Government to initiate a parliamentary investigation but this found in favour of the mine.

Pak Mun dam, Thailand

Completed in 1994, fears concerning the environmental impact of the dam on the river, fish, and wildlife came true. Over 20,000 people claimed to have been affected, not only by adverse effects on the fisheries, but also by insufficient compensation. Further, the dam never produced the electricity it had originally been planned for. Ongoing protests at the dam site and in Bangkok culminated in 1999 when more than 5,000 villagers occupied the dam site, setting up the 'Long-lasting Mun River Village No 1.' Relocation compensation has since been paid to many but the Government still faces pressure to open the dam gates, allowing the river to flow and fish stocks to be restored.



Both substantive and procedural rights are key to understanding how the right to a clean environment is put into practice. Similar to the previous chapter on business, legal frameworks on the environment and human rights have come a long way, but there is still some way to go. While formal protections slowly evolve, environmental rights defenders continue to search for new ways to protect the environment and the human rights that depend on it.

14.4 Right to a Safe, Clean, Healthy, and Sustainable Environment

The right to a clean environment is further developed by John Knox, the UN's Special Rapporteur on human rights and the environment, when he outlined the obligations of the State to ensure a safe, clean, healthy and sustainable environment (or the human right to a SCHS environment) by reviewing existing human rights obligations, and highlighting issues in need of greater attention. He acknowledged that this relationship was firmly established because there is overwhelming evidence that human rights are threatened by environmental harm. Moreover, because all UN bodies and all States recognized that environmental harm violate human rights in a variety of ways, States have duties to respond. While the Special Rapporteur's framework maintained the core elements of substantive and procedural obligations, they were further developed.

FOCUS ON State Obligations Relating to Environmental Harm

Developed by the Special Rapporteur on human rights and the environment, these obligations are:

Substantive Obligations

States should have laws against environmental harm that may interfere with the enjoyment of human rights. Examples of these laws are standards for air and water quality, and anti-pollution measures.

Procedural Obligations

States have obligations to:

- (a) make assessments of environmental impacts and make environmental information public;
- (b) ensure public participation in environmental decision-making on the basis of freedom of expression and association;
- (c) ensure there are remedies for people whose rights have been interfered with by environmental harm.

Additional Obligations

- Obligation to Facilitate Public Participation in Environmental Decision-Making
- Obligation to Make Environmental Information Public



- Obligation to Protect Rights of Expression and Association
- Obligation to Provide Access to Legal Remedies
- Obligations Relating to Non-State Actors
- Obligations Relating to Those in Vulnerable Situations
- Obligations Relating to Trans-boundary Environmental Harm

Substantive obligations, as developed under Knox's work, protect individuals from environmental harm interfering with the enjoyment of human rights. States can fulfil this obligation by ensuring a reasonable balance between protecting the environment and the realization of other rights. In addition to ensuring individuals are able to assert their human rights to protect their environment, States also have an obligation to ensure the protection of human rights relative to projects that impact the environment. Knox explained this by stating in a meeting of signatory countries to the Rio Declaration in 2014:

The substantive obligation to protect human rights from environmental harm does not require the cessation of all activities that may cause any environmental degradation. States have discretion to strike a balance between environmental protection and other issues of societal importance, such as economic development and the rights of others. But the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights.

Specifically, States have an obligation to adopt a legal framework that protects against such environmental harm. This obligation includes a duty to protect against such harm when it is caused by corporations and other non-State actors, as well as by State agencies.

There are two important points here. First, while recognizing that development is both necessary and the cause of environmental damage, such damage should be limited when it results in the violation of rights. Second, the obligations extend to private actors and corporations, though it is the State, and not the private sector, which is obliged to monitor and limit the impact of corporations.

Regarding procedural obligations, States must ensure awareness, participation, and access to legal procedures which includes environmental impact studies, public participation processes, and mechanisms for individuals and communities to seek remedy should they experience environmental harm. Procedural rights to SCHS are interdependent with civil and political rights, in particular, freedom of expression (Art 19) and the right to a remedy (Art 2.3). In the field of environmental protection, these procedural aspects are already well-established in principle and practice.

Lastly, because additional obligations in a number of areas are often overlooked, people's rights may not be fully protected. First is the obligation to protect against violations by private actors as covered by the Guiding Principles and other mechanisms ensuring business accountability (mentioned in Chapter 13 on Business). Second are transboundary obligations which can arise when pollution crosses borders, impacting people in neighbouring countries. Examples of this include the **Southeast Asian haze** and the impact of dams. In both these cases, one country's action negatively impact people from neighbouring countries. For example, children in Malaysia and

Singapore could not attend school and fell ill because of the Southeast Asian haze. Knox argues it is when impacted countries are unable to protect people's rights that State obligations should be extended to cover cross boundary pollution through transboundary, or extra-territorial obligations.



CASE STUDY

The Southeast Asian Haze

Caused by the burning off of agricultural land, this occurs every year around August to September. The fires are often started illegally as a cheap way to clean land before sowing another crop. Although palm oil plantations and timber reserves are generally blamed for the fires, recent research now points to other causes as well, including businesses clearing land by fire, conflict over land titles (especially of forests), and ineffective firefighting by the Indonesian government. Much of the haze comes from Indonesia, but Malaysia is also a contributor. Affected countries include Malaysia, Singapore, Brunei DES, and Indonesia, and sometimes southern Thailand and the Philippines. Despite being in existence for over a decade, the *ASEAN Agreement on Transboundary Haze Pollution* (2002) has not yet reduced the size of the haze.

To conclude, States also have a final obligation to groups with particular vulnerabilities or who may suffer disproportionately from environmental destruction. This includes large groups such as women, children, the poor, and indigenous peoples. Women are particularly impacted because in many poorer regions, they do a significant amount of the agricultural and household labour which can be made more difficult by environmental problems. Children are more vulnerable to pollution, as demonstrated by the previous examples of Minamata and Chernobyl where pollution led to deformities in newborns, or the Southeast Asian haze which caused respiratory illnesses.

14.4.1 Indigenous Groups and the Environment

In many Southeast Asian countries, indigenous people face disproportionate violations from development and environmental degradation. These can be caused by large projects such as dams (for example, the Salween dam in Myanmar and the **Son La dam** in Vietnam), deforestation, mining, encroachment by farmers, and forced displacement because of changes to land regulations. Indigenous groups often do not have the same level of wealth or political power as the businesses they are in dispute with, making them vulnerable to exploitation in a number of ways. Their ownership of land may be traditional and not clearly stated in law. In other cases, groups migrating between plots of land in different regions, may return to find someone else in possession of their land. Further, substantially degraded environments can lead to a complete loss of livelihood from hunting, gathering, and cultivating. Land holds more significance than mere property ownership to indigenous groups, as they may have a strong cultural connection to the land so damage to the environment also affects their culture and heritage. For these reasons, special measures are required to protect indigenous groups.



FOCUS ON

Son La Dam, Viet Nam

The building of the Son La dam displaced over 90,000 people, one of the largest displacements of indigenous people in Southeast Asia. While many faced no long term ill-effects, others who lost access to arable land were stripped of their livelihoods. Compensation and housing in some cases was either insufficient or unsuitable, putting stress on communities. Indeed, unable to survive the displacement, many communities simply disappeared.

14.4.2 United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP)

One standard outlining indigenous people's rights can be found in the UNDRIP. Although only a declaration, or soft law, it has been signed by 144 countries, including all Southeast Asian States. Two articles are relevant to the issue of indigenous peoples and their rights to land. First:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and where possible, with the option of return. (Art 10)

The process to acquire free, prior, and informed consent to developments has become important in development. The forced removal of people, the most common way to move indigenous groups blocking developments, should be replaced with a process of gaining consent. This process includes the following elements:

- Free: free of force, corrupt practices, and interference or pressure from outside the community
- Prior: consent must be achieved in a suitable time frame before decision-making
- Informed: all information must be made available to the community in a manner that can be clearly understood
- Consent: following their own decision-making processes, the community must agree

UNDRIP also covers the right to traditional land ownership:

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use. [...] States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples.

UNDRIP not only establishes the right of indigenous peoples to their land, but also a corresponding responsibility on the part of governments to respect those rights. Whether these will be practiced at the national level differ from State to State. Not all States in Southeast Asia recognize traditional ownership of land, for example, while Malaysia and Cambodia do, Thailand does not. And simply because a State recognizes a group as indigenous, does not mean their land ownership will be recognized as well.

While UNDRIP usefully established standards to better protect indigenous rights, indigenous groups in the region continue to be displaced from their land and regularly face violations created by environmental degradation.

14.5 Climate Change and Human Rights

The final section will discuss the relationship between climate change and human rights. Climate change has both long term effects and immediate consequences on people's livelihoods. While the most damaging impacts have yet to occur in terms of rising sea levels, the region is beginning to see extreme weather conditions, and temperature changes. Eventually this can lead to more frequent droughts, water shortages, floods, storms and heat waves. All of these will affect the lives of millions through changes in food production, and humanitarian disasters. In Southeast Asia, one of the greatest concerns is the damage done to river deltas as a result of rising sea levels. For example, the river deltas in Vietnam, Thailand, Myanmar, and in neighbouring Bangladesh are some of the most agriculturally productive and populous areas in the region. Rising sea levels could lead to tens of millions of people being forced to leave their homes, turning them into **environmental refugees**. Further, because these areas produce large amounts of food. For example the Mekong Delta in Vietnam produces half the country's rice crop, shortages in these regions could lead to human rights violations on a massive scale.

Environmental Refugee

A person forced to flee their home because of environmental changes. Currently, there is neither legal recognition nor protection for these people.

Other areas of concern include more extreme weather events, such as stronger typhoons hitting the Philippines, Vietnam, and Myanmar; harsher winters in northern Myanmar, and Vietnam; and droughts. The Maldives and Tuvalu are two countries in the Asia-Pacific that face extinction as rising water level projections place the entire island State under water. All of which goes to show that climate change can alter the realization of human rights.

Despite small pockets of denial, the consensus is that human-made greenhouse gas emissions are a primary cause of climate change. Backed up by the science of the Intergovernmental Panel on Climate Change (IPCC), the worst of these concerns may be avoided if States cooperate. As regards human rights, two relevant actions are required: (1) the prevention of violations to people due to climate change should be a government priority; and (2) countries, industries, and groups most responsible for climate change should be held accountable for their actions. However, States are yet to fully embrace this. Two important gaps are the 'emissions gap,' that is, the difference between what States need to do to reduce emissions and what they have promised. Unfortunately, States are not reducing emissions enough to hold off climate change. The 'financial gap' refers to the difference between the costs brought on by climate change, and the capacity or willingness of States to pay that money. People living in poorer countries will not have the financial or technological protection of those living in rich countries. Since 2006, this growing awareness has led to much action in the UN resulting in a resolution from the Human Rights Council, and more recently, reports from the Special Rapporteur on the environment, and the United Nations Environment Program (UNEP). The original UN Framework Convention on Climate Change (UNFCCC) of 1992 made no reference to human rights, most likely because the impact on human rights had not yet been fully realised. More recently, States party to the UNFCCC have acknowledged human rights implications noting that States should respect human rights in their response to climate change.

Further, the IPCC and the Office of the High Commission for Human Rights (OHCHR)

are developing a rights-based response to climate change (detailed in Chapter 12 on Development). The OHCHR justifies this approach by linking it to environmental discrimination:

Negative impacts of climate change are disproportionately borne by persons and communities already in disadvantageous situations owing to geography, poverty, gender, age, disability, cultural or ethnic background, among others, that have historically contributed the least to greenhouse gas emissions.

The human rights based-approach ensures that States responding to climate change do not violate human rights. It is argued that many plans to mitigate climate change do not fully assess the impact on human rights. For example, closing coal-fired plants or reducing traffic on roads are obvious responses to climate change, yet the impact on people's livelihoods or other rights has not been fully examined. It is these questions that a rights-based response should answer.

Currently, UN bodies are working to incorporate human rights into existing development and climate change documents such as the UNFCCC and the 2030 Agenda for Sustainable Development. In February 2015, eighteen parties to the UNFCCC announced the *Geneva Pledge for Human Rights in Climate Action*, a voluntary commitment to:

Facilitate the exchange of good practices and knowledge between their human rights and climate change experts at a national level with a view to strengthen their capacities to deliver responses to climate change that are good for people and for the planet.

The 2030 Agenda for Sustainable Development has two aims. First, to ensure that States and non-state actors be accountable for their contribution to climate change impacting human rights, and that actors should use human rights as a framework through which to address climate change.

Although a good start, the process of turning pledges and declarations into a legally binding treaty on climate change has been challenging. In the recent 21st Conference of Parties to the UNFCCC (more commonly known as COP 21) in November 2015, there was much debate about the inclusion of human rights. It finally appeared in the preamble which states:

Climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

While some see this as a victory because human rights were finally mentioned, others doubt whether it is legally binding due to its position in the preamble. Further, the wording does not specifically detail the duties and obligations of States. Apart from respecting and promoting human rights, the protection of these rights is not mentioned.



DISCUSSION AND DEBATE

Human Rights Impact of Climate Change

What are going to be the human rights implications of climate change to your country?

1. Look into the consequences of the following climate change implications:

- rising sea levels
- more storms or typhoons
- more droughts
- changes to agricultural production
- diseases such as malaria migrating to new areas
- hotter temperatures and heat waves

2. What can be done to reduce the impact of climate change? Consider the changes that need to occur to reduce the emission of greenhouse gases. Consider the following:

- what can individuals do to change their behaviour?
- what can families do?
- what can communities, villages, and suburbs do?
- what can cities do?
- what should a national government do?

14.6 Conclusion

This chapter has described the links between human rights and the environment. A clean environment is integral to human rights but much still needs to be done to ensure a clean and healthy environment is recognised as a human right. At this time, while many States recognize the human right to a clean environment, it has yet to become an established principle in international law. It is hoped a strong response to the current concerns surrounding climate change will encourage more international bodies to see human rights as a means to monitor and protect people's rights resulting in a wider recognition of the right to a clean environment.

A. Chapter Summary and Key Points

Introduction

Concern for the environment can be traced back to the late 1800s, but it was during the 1960s and 1970s that it became a worldwide phenomenon. High profile environmental disasters made people realize the impact of environmental degradation. Human rights were soon after linked to the environment. The interaction between human rights and the environment works both ways: a clean environment is a human right and the well-being and protection of the environment depends on the protection of human rights. Southeast Asia has a history of environmental activists on issues such as protecting nature and pollution. Pollution is now international with cross boundary haze caused by forest fires in Indonesia. The transboundary haze led to international agreements on the environment in the region. Environmental activism is dangerous with many being attacked and killed.

Environmental Standards

Till the 1960s and 1970s laws regarding the environment were more concerned with the exploitation of the environment. There were national parks laws, and laws on river uses, but during the 1970s many international laws on water pollution, dangerous chemicals, and protection of endangered species were introduced. The first claim that a clean environment is a human right, was in the Stockholm Declaration (1972). The human right to a clean environment did not receive widespread support because some saw it as too vague and unenforceable.

A Substantive Right to a Clean Environment

The right to a clean environment has two separate but interrelated objectives: there must be a law (or substantive rights) and a mechanism to enforce it (procedural rights). Substantive rights exist in both international and domestic laws such as ICCPR, ICESCR, and at the regional level in the ASEAN *Human Rights Declaration*. More substantive rights can be found at the national level in Southeast Asia with rights in the national constitutions of the Philippines, Malaysia, and Thailand.

The Procedural Right to a Clean Environment

The procedural right consists of a right to environmental information, a right to participate in environmental decision making, and access to the courts or other forms of administrative mechanisms in the event of a dispute. Information is needed so people know, and can prepare for, impacts on their local environment. These can be freedom of information laws. Participation can come through Environmental Impact Assessments and participation in town planning. Participation from the public should influence the final decision making. The report on a project should consider public opinion and responses to them. Access to a remedy for dispute resolution or compensation and access to the courts is part of this right, though it can be limited by *locus standi*.

The right to a Safe, Clean, Healthy and Sustainable environment.

Another model from the UN's Special Rapporteur on Human Rights and the Environment details obligations of the State to ensure a safe, clean, healthy and sustainable environment. This includes obligations to protect individuals from environmental harm, ensure awareness, participation and access to legal procedures, obligation to protect against violations by private actors, and to take account of groups who may have particular vulnerabilities or suffer disproportionately from environmental destruction such as women, children, the poor, and Indigenous groups.

Indigenous groups and the environment

Indigenous people face many violations from degradation of the environment through large projects such as dams, deforestation, and mining. There are special measures to protect the indigenous because their ownership of the land is traditional, and in the law they are vulnerable to encroachment by farmers and forced displacement. UNDRIP states indigenous peoples shall not be forcibly removed or relocated from their lands and movement can only be done with free, prior and informed consent.

Climate Change and Human Rights

The changes to climate have long term effects like sea level rise and immediate consequences such as extreme weather conditions. Food prices and availability will be affected through a drought, floods and storms. The result could lead to tens of millions of environmental refugees. The negative impact of climate change will face disadvantaged communities. The worst of these concerns may be avoided if States cooperate though reducing greenhouse gases, but this is yet to be realized. Many plans to mitigate climate change do not fully assess the impact on human rights. While human rights are mentioned in the more recent climate change documents there is no specific details on duties and obligations of States.

B. Typical exam or essay questions

- When did people in your country become interested in environmental protection?
- How does the protection of human rights impact the protection of the environment?
- What are the dimensions of the human rights to a safe, clean, healthy, sustainable environment, and how is each dimension measured?
- How could a human rights based-approach to climate change address responses to environmental refugees or increased disasters?
- Why may a substantive right to a clean environment not translate to a procedural right to a clean environment?
- Examine a protest by an environmental group in your country. This could be a protest about a dam or a development. What do the protestors say and how does the government respond? How can the benefits of the development compare to the environmental impact?
- What will be the major impacts of climate change in your country? Are there any preparations for this?
- What are the challenges in your country for a group of people to bring a court case based on environmental degradation?
- Is there any relationship between the waste produced by students and universities, for example over use of plastic bags and paper, and the human right to a clean environment?

C. Further Reading

Authors on human rights and the environment include:

- James Crawford
- Robert Hitchcock
- Ann Marie Clark
- David Boyd
- John Knox
- Jennifer Clapp
- Rachel Carson

Organizations which have programs and research on human rights and the environment include:

- The Special Rapporteur on human rights and the environment
- United Nations Environment Program (UNEP)
- Stockholm Environment Institute (SEI)
- Greenpeace
- Centre for International Environmental Law (CIEL)
- Centre for International Sustainable Development Law at Yale University
- World Bank reports on development and climate change

Additional resources on human rights and climate change include:

- At the UN there are various programs found at the OHCHR, Human Rights Council, and UNEP.
- Working Group on human rights and climate change has its own website at climatechange.org.
- Reports are available from the UNFCCC, which has a climate change newsroom and a facebook page, and COP 21, which has its own website.

Resources on indigenous groups and human rights include:

- James Ananya
- Paul Keal
- UNEP has a program on Indigenous rights
- OHCHR has a report on *Climate change and indigenous peoples*
- UNESCO has research on indigenous rights, and some on the environment and indigenous groups
- ILO, through its Resolution 169, covers indigenous rights.

- Asian Indigenous People's Pact (AIPP) has an environment program.
- In Thailand there is: Indigenous Peoples' Foundation for Education and Environment (IPF), Inter Mountain Peoples Education and Culture in Thailand Association (IMPECT)
- In Indonesia there is: Alliance of Indigenous Peoples of the Archipelago (AMAN)
- Other indigenous groups include Forest Peoples Program, Assembly of First Nations, and Survival International.

15

Political Rights, Democracy, and the Media in Southeast Asia*

Political rights—which include the right of individuals to participate in the politics of their country—are a small but vital category of rights outlined in the ICCPR.

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15.1 Introduction

While many countries in the region do not fully recognize this, some people in all countries actively use them to participate in politics, meet, discuss, and publicly express their political views. Political rights also include the rights to vote, to use government services, and to stand for public office. Because political rights are about participation, democracy, and government service, and no two States have the same political system, the understanding of these rights varies greatly. The consequence is that political rights are very much open to debate. This chapter will examine the main elements of political rights, focusing particularly on democracy and freedom of expression, and consider how Southeast Asian countries are interpreting and fulfilling them.

The human right to politics has a long history. Because every political system throughout history has experienced conflicts of power there is a need for rules and rights. Many countries in Southeast Asia have written political rights into their constitutions, but even before these came into effect disputes over political recognition during colonialism and self-determination occurred in all countries in the region (discussed in Chapter 8). While the disputes were not understood in terms of human rights, it was generally recognized that participating in public life and engaging in political activities is a right. Some of these ideas come from outside the region, for example, many of the established standards for political rights emerged during the 18th century Enlightenment in Europe. For the first time, the idea that the government should represent the ‘**will of the people**’ was written into various declarations of rights and constitutions. These often came about through people’s revolutions such as the French Revolution against absolute monarchy and the American Revolution against English control in the 1700s; both of which resulted in bills of rights recognizing political participation. This does not mean political rights were invented at this time, for various political units and States have recognized subjects’ or citizens’ rights to participate in politics throughout history. The right to petition, for example, is found in many systems throughout history, but political rights and freedoms before human rights were often extremely limited.

Will of the People

A government based on people’s choice or popular sovereignty. First used in the 17th century Enlightenment, and also found in the UDHR (1948).

The European revolutions and the fight for self-determination in Southeast Asia provide key starting points because they incorporated the idea that politics should be participatory and that participation should be a right. Two important values which ground political human rights are, firstly, that the system is chosen by the people, and secondly, that any political system, whether democratic, communist, monarchic, or religious, must recognize that people have a right to express their political views and participate in political activities. These views have been supported by people in Southeast Asia to challenge colonial governments, military dictators, corrupt leaders, and more recently to express concerns that the ASEAN organization, while declaring itself a representative of “the peoples of ASEAN,” favours governments at the expense of popular participation. Many in the region have been jailed for exercising their political rights and some of the largest social movements have occurred as a result of people expressing their political rights.

Southeast Asia has undergone a slow process of democratization, often involving conflict, which has improved people’s political rights. Recent discussions in the region have focus on democratic rights and freedom of expression (both of which will be discussed in this chapter). This chapter will firstly detail the elements of political rights as found in international treaties. It will then assess the relationship

between democracy and human rights, and examine how Southeast Asia gradually democratized. Finally, the vital roles played by freedom of expression and the media in this area will be discussed. In conclusion, this chapter will argue that while facing many challenges, democracy can be an ideal model for human rights.

15.2 Political Human Rights

Human rights as they relate to politics were first outlined in the UDHR, Arts 20-21, though, as discussed later, Art 19 or freedom of expression is also sometimes considered a political right. Before the UDHR, political rights could be found in a small number of national constitutions but were often limited to citizens. Political rights as granted by the UDHR are codified in the ICCPR and can also be found in other treaties such as CEDAW and the Migrant Worker Convention which both include rights to political participation.

One common limitation of political rights is that some of them only apply to citizens, leaving non-citizens without the some of their rights such as the right to take part in public affairs or to vote. Most human rights are based on being in the territory of the State, but political rights are slightly different. Non-citizens cannot vote in another country's election, nor become a politician, as this is almost always restricted to citizens. This does not mean that non-citizens lose their political rights, but they only have these rights in their country of citizenship. Whether non-citizens can use their political rights outside the territory of their country of citizenship depends on the country itself. For example, while many do allow overseas citizens to vote, others do not. This section will examine these rights before focusing on the rights around democracy.

Table 15-1: Political Rights in the UDHR and ICCPR

Human Right	Elements	Treaty Articles
The right to peacefully assemble	Right to meet publicly and discuss politics	UDHR, Art 20 ICCPR, Art 21
The right to peaceful association	Right to form groups Right to join a trade union	UDHR, Art 20 ICCPR, Art 22
The right to take part in public affairs	Right to take part in government Right to elect a politician Right to be elected	UDHR, Art 21 ICCPR, Art 25
The right to work in the government	Right to access government service Right to be an officer of the government	UDHR, Art 21 ICCPR, Art 25
The right to vote	Right to a participatory political system Right to vote in elections Right to choose a government by election Right to be voted in an election	UDHR, Art 21 ICCPR, Art 25

15.2.1 Right to Peaceful Association and Assembly (Articles 21, 22 of ICCPR)

The right to associate enables people to form groups. While the main focus is on groups of a political nature (for example, political parties), the right extends to, for instance, student groups and those interested in specific issues such as women's rights or sport. The right to associate in order to form political parties is contentious in some Southeast Asian countries. For example, Vietnam and Laos it may not be legal

to form political parties. Although Vietnam's Constitution and law does not explicitly prohibit political parties, the Constitution states,

The Communist Party of Vietnam [is] the faithful representative of the interests of the working class, labourers and the whole nation. [It] is the leading force of the State and society (Art 4).

Similarly, Singapore does not allow unregistered public meetings and can disband parties receiving money from overseas. As can be seen, the trend in Southeast Asia seems to be for States to limit rights to form civil society groups—see the new **Laws of Association** in Cambodia and the similar restrictions planned for Vietnam—due to increasing fears about political opposition and vocal dissent.



Concept

Laws of Association

If a group is to have a legal identity, it must comply with a State's laws of association. Sometimes a legal identity is necessary to enable a group, whether a political party or a NGO, to open a bank account, hire people, pay bills, or raise revenue. Recently, in some Southeast Asian countries, new laws of association have been proposed and passed making it difficult to establish and run associations. These laws can ask for excessive and unnecessary documentation and reporting. They can also require associations to be politically neutral and avoid supporting opposition groups, or criticizing the government, which will especially impact human rights NGOs whose main purpose is to monitor government activity.

The right to peaceful assembly is the right to meet publicly. The main political purpose of this is for people to meet and talk about politics, to protest, or to advocate for specific issues. It also covers non-political meetings such as cultural activities or funerals. In Southeast Asia, some States have severely restricted the freedom to assemble although not all these limitations contravene human rights. Laws which are reasonable and objective may also ensure assemblies are peaceful. In practice, these restrictions have severely limited the ability of people to assemble in public. All countries require authorities to be notified beforehand, and many have broad powers to deny an assembly. Countries with the strictest regulations in the region are Singapore and Vietnam, where protestors are regularly arrested or jailed.

The right to assemble can be abused by States with some groups even being arrested for performing symbolic activities in public. The cover of this textbook illustrates two examples of assembly. The top picture shows a symbolic political protest against the Thai military government's attempt to limit public freedom of expression, which involves the reading a peace and human rights book in public. The second picture shows a group protest against the Laos government's inaction over the disappearance of civil society activist, Sombat Somphone (who was last seen at a roadblock in Vientiane in 2012). The activities in both these pictures is a human right.

In recent years, the right to assemble has been tested to its limits. For example, massive protests across Arab countries (called the Arab Spring) in 2011-2013 led to the fall of many governments in the region. Likewise, Southeast Asian countries have seen large assemblies of people protest against their governments, for example, in Bangkok and the **Bersih** movement in Malaysia. These protests test the rights to assemble when, for example, protesters in Bangkok seized the international airport, stopping travellers from entering or leaving the country. This caused disruption to tens of thousands of people. Similarly, when protestors close off streets, a person's ability to travel to work may be restricted or denied. The question is how to balance this right against the potential disruption and violations caused by the assembly. In the ICCPR, limits to these rights are defined, for example, activities must be peaceful. But if States introduce limitations, they must be in law, and necessary for specific reasons such as public morality, safety, or to prevent interference with another's rights (also discussed in Chapter 3).

Bersih

Bersih is Malaysian for 'clean.' This social movement protests corruption and 'dirty' politics in Malaysia and calls itself the Bersih movement.



DISCUSSION AND DEBATE

Limiting Rights to Assemble

In 2008, protestors seized Bangkok international airport, stranding thousands of travellers and tourists. The occupiers chose this form of action because they claimed closing the airport gave international recognition to their concerns. Although caught up in the affair, the stranded tourists knew little about the government and were unable to return home to their work and families.

Question

- Should this kind of assembly be allowed, or should the State limit such protests?
- Although the people were expressing their right to assemble and actively putting pressure on the government, their ongoing action also affected the rights of others to return home.

15.2.2 Right to Take Part in Public Affairs

This right is expressed in a couple of different ways: the right to stand for office, and to be elected. Citizens have a right to be part of an elected government. It is debatable whether there is a **right to be a politician**, but the right to be elected into a government position is valid. Taking part in public affairs could include participating in referendums or public assemblies. The right to be elected can be subject to reasonable and objective limitations which are common to all countries. Some common limitations include citizenship, age, and residence restrictions. Other limitations are more questionable, such as the need to be a graduate (as was previously the case in Thailand), a member of a political party (Vietnam), follow a certain religion (Brunei), or to be in the military (Myanmar, for 25% of the government). The question is when are limitations justified, and when can they be considered discriminatory?



DISCUSSION AND DEBATE

Is there a right to be a politician?

While the rights to participate in government and to be voted into government are accepted, an individual's right to be a politician is debatable. Under the ICCPR, one has the right to participate in the "conduct of political affairs." This wording is deliberately vague to fit the varieties of political systems around the world. While international standards imply the right exists as everyone has the right to stand for office, how a State defines political office has been left up to individual countries. In some systems, many government offices are open for election (for example, party head, mayors, or judges) but not the offices of politicians or political leaders. No wording insists the head of State must be elected, only that a State's authority must come from the people, or that those in political power be somehow validated by election. This is the case in many parliamentary systems where the Prime Minister is not directly elected by the people, but by the party winning the election.

15.2.3 Right to Access Public Services

This covers the right to work for the government or to take up a public office. Ideally, these jobs (for example, judges, policemen, government broadcasters, teachers, civil servants, and so on) should be accessible to everyone although the government can introduce reasonable restrictions. Violations may arise if States demand that certain positions only be filled by members of the main political party, or by a particular gender. Most violations in this area occur when people lose government jobs because of their political beliefs. This right seeks to prevent elite groups from controlling jobs in **public service** because government employees should be representative of the society they work for, avoiding the exclusion of, for example, minorities or indigenous groups (who are rarely government officers). Countries like India have attempted to remedy such discrepancies by reserving public service positions for people from scheduled castes and tribes, or the most marginalized groups.

15.2.4 Right to Vote

Fundamental to democracy is the assumption that governments serve the people and that people choose how to be governed, resulting in governments that represent the 'will of the people,' a term originating from the European Enlightenment but which has been picked up and used around the world. The 'will' is therefore based on the well known and important political right, the right to vote. However, the right to vote for exactly who is interpreted differently by States. Because there is a great variety of political systems which vote for different positions, this right does not specify which positions should be up for election. Some systems vote for the head of State and some not. Mostly, politicians in the **legislature** are voted in.

The right to vote requires that voting be 'genuine' meaning voting should be done at a fair election. The elements of this right detailed in the ICCPR, are discussed below. Voting rights can be compromised when elections are considered unfair because of restrictions and discrimination on the right to vote. Other examples of violations are more straightforward such as when people's voting rights are removed by undemocratic governments or military dictatorships. While all States place limitations on voting rights, usually relating to age and citizenship, debate is ongoing in many countries as to whether people living overseas or prisoners should be able to vote. This right will be discussed in more detail in the section on democracy below.

Legislature

The body in government, normally filled by elected politicians, which writes, debates, and passes laws. Depending on the political system, the legislature can be known as a senate, an assembly, a house of representatives, or an upper or lower house.

Public Service
Public service can refer to both services provided by the government, such as hospitals or schools, or jobs within the government. Public service positions include teachers or the police. Some countries use terms like 'civil servant' or 'government officer.'

15.3 Understanding Democracy

Democracy attracts much debate as it is assumed to be the best political system, but it faces many problems and challenges. Before trying to understand the relationship between democracy and human rights, it is useful to examine why democracy is considered such an important political concept. Throughout Southeast Asia, people argue about the meaning and value of democracy. Does it just entail holding elections? Or should it also fulfil people's civil and political rights? Is democracy really the best political system? Within this region, States have redefined democracy by using such terms as '**guided democracy**' (in Indonesia) or the '**roadmap to democracy**' (in Myanmar), both of which were used to justify limitations on democracy.

CASE STUDIES

Southeast Asian Versions of Democracy

Guided Democracy

While the term was first used by political scientist, Walter Lippman in the 1920s, it has more recently been associated with the military government in Indonesia, and more recently, in Russia. Guided democracy refers to situations where strong vested interests, for example, the military and business in Indonesia, can hold on to power by weakening the democratic system through modifying the powers of government and reducing people's political rights. Those in power argue that democracies must be guided to avoid conflict and chaos.

Roadmap to Democracy

The Myanmar government used this term to justify delaying handing over power to democratic forces, insisting that seven steps be achieved first. Announced in 2003, the steps included activities like holding a national convention, writing a constitution, and holding an election. The roadmap was used to justify the continuing rule of the military government. Despite the fact the seven steps had been completed as of 2015, the military has still not fully left government.

All actors in human rights accept the positive relationship between human rights and democracy. Democracy is considered the best system to protect human rights because it ensures voices are heard and interests are represented in the political system. This implies individuals know their needs, concerns, and values best and that participation and representation will prevent those in power from imposing their will on the masses. In addition, the presence of opposing voices in a political process ensures that no one person or group can control the agenda because when voices are silenced and people are unrepresented, repression and oppression of human rights is often the result.

There are two methods of understanding how a democracy works. The first is a comparative method which details the different categories or types of democracy. The second method is critical, which assesses if a democracy meets the requirements of being representative of people. In the comparative method, there are many ways



Pluralism

To acknowledge and accept diversity. Political pluralism means to ensure people from different genders, ethnicities, classes, regions and so on, can participate in politics.

to categorize democracies. The simple versions include the ‘minimalist’ model, often called the ‘Schumpeterian model’ (after Joseph Schumpeter who was more famous for his economic theories). Minimalist models argue that popular participation should be limited to people voting in experts to run their governments. Other more expansive and detailed models look at the amount and mode of participation of the people, or the distribution of power, the amount of **pluralism** the key features of democracy. Deliberative and participatory theories (see the box below) consider people have a role not only in the election, but also in popular participation in the decisions of government. Their inclusion is one of the vital aspects of democracy. People’s ability to argue and make decisions is the purpose of democracy, in this model. A variety of titles are used for these different models including electoral, consensus, deliberative, or liberal.

Many studies on democracy focus on quality, but how should this be judged? Common forms of measurement include levels of participation, accountability, inclusion of the rule of law, and competition. Under these types of studies, human rights may frequently be used as a measurement. As a whole, human rights do support democracy which is participatory in nature even if the specific right to democracy (as will be detailed next) is more minimalist and procedural.

DISCUSSION AND DEBATE

Models of democracy in Southeast Asia–minimalist or participatory democracy?

Minimalist Democracy assumes that a simple competition (most commonly an election) is all that is required to form a democracy. What people say, think, and argue is not important because many people don’t know enough, or are driven by individual interest and not the interests of society as a whole. As such, it is best to leave politics up to the professionals.

Participatory and Deliberative Democracy prefers people to play an active role in democracy. People should be involved in deliberations and be able to contribute ideas to the running of the country. An example is Robert Dahl’s theory of *polyarchy*, or the rule (‘archy’) of many (‘poly’) which occurs when a State is ruled by many people. In a *polyarchy*, the government is “completely or almost completely responsive to all its citizens.” Deliberation is the main activity of the democracy, where people are expected to meet, discuss, and debate decisions made by the government.

Representative Democracy is where people elect others to represent them with governance primarily done by representatives. People can be active in the process of choosing representatives, but must trust them to govern in their interest.

Questions

- Which model is better?
- Are people generally interested and intelligent enough to inform government?
- Is it possible for governments to listen to the views of its entire population before deciding what to do?



- Will deliberation lead to long slow debates and deadlocked decisions or higher levels of consensus in the community?
- Is it dangerous to leave all decisions up to politicians, or are they really the best people to do the job?
- Which model respects people's human rights the most?

It is possible to identify a functioning democracy by searching for certain features and practices. Many forms of democracy exist such as presidential or parliamentary systems, but all are based on a particular set of ideals. While most democracies do not reach these ideals, they do influence how people are governed. One ideal is popular participation, allowing people to discuss, debate, and criticize the functions of government. In a good democracy, governments should allow for dissent. Similarly, democracies should foster, rather than inhibit, the flow of ideas, information, and opinion. Democratic institutions depend on an informed electorate, enabling more pluralistic viewpoints and contrasting perspectives. An uninformed electorate will be unable to fulfil its democratic role to decide what is best for the community and country.

Another ideal covers the fair distribution of power. Democracies feature separations of power which work as checks and balances to ensure power does not become centralized into one branch, party, or individual. Separation of power should not only occur within the government, but should also apply to different parts of the country and different groups of people, for example, business, government officers, and civil society. In this respect, an independent judiciary is both a feature of the separation and also a means to monitor it. Without an independent judiciary capable of enforcing the rule of law, human rights will be unprotected. It is important to note that while human rights are better safeguarded in democracies, they can and should be respected and protected in any political system. The next section will examine the process of democratization.

15.3.1 Democratization

Until fairly recently, many Southeast Asian States questioned if democracy is the best method of government and instead claimed that military-led governments are the better political system. The current view that democracy is the best method of government only occurred after a long process of **democratization** which took place both at the domestic level, where people challenging for their political rights, and the international level where other States and international organizations pressured or encouraged Southeast Asian governments to become democratic.

This has had two significant implications. First, the process of democratization has been applauded by the international community including States and international organizations. Indeed, the international community has been very keen to provide support to democratizing countries in the form of aid, political and economic relations, and even military assistance. As an example, Myanmar has recently attracted a lot of support and aid because of its democratization. Second, most countries in the world associate themselves with democracy as a source of their legitimacy, as even North Korea calls itself the Democratic People's Republic of Korea. This is possible because democracy has no single meaning and few, if any, countries openly reject democracy because every country wants to be seen as working in the interests of its people.

Democratization

Democratization is the process of becoming a democracy. Democratization can take many forms, from sudden regime changes through revolution to slow and gradual transitions.

Democracy in the region is a fairly recent trend. As covered in Chapter 8, though there have been democracies and elections from the 1940s, it was not until the People's Power protests of the 1980s and 1990s that democracy became established in most Southeast Asian countries. But the governments which called themselves democratic did not necessarily improve human rights in their countries. For a start, some were not actually democratic despite claims to the contrary. Second, the process of democratization can be difficult and at times violent. States moving from the relative political stability of military dictatorship to the competition of forces vying for election to power often experience a period of protest and conflict. While democracies can become less violent than dictatorships, this is not always guaranteed during the transition.

15.3.2 Current Status of Democratization in Southeast Asia

The democratization of Southeast Asia has already been discussed in Chapter 8 using Huntington's theory of democratic waves. Democratization was rapid. Southeast Asia went from two democracies in the mid-1980s to seven in the early 2000s. In other regions, democratization moved at a much slower pace. One way to assess the status of democracy is by using the categories proposed by Larry Diamond: electoral democracies, liberal democracies, pseudo-democracies, and non-oppositional authoritarianism.

Liberal democracies are the closest to full democracies. In this category, apart from regular competitive contests for power through elections, no political force including the military has privileged access to power. Political participation goes beyond regular elections and there are checks and balances to government power, including the rule of law. Countries such as the Philippines, East Timor, and Indonesia may be considered liberal democracies.

Electoral democracies (also known as formal or procedural democracies) are a minimalist form of democracy characterized by regular elections where parties and candidates compete for power, but popular participation is mostly limited to elections, and the elections themselves are no guarantee of democracy. Countries like Malaysia and Singapore may be considered electoral democracies.

Pseudo-democracies are political systems where regimes mask their authoritarian character by adopting formal democratic institutions and processes. Cambodia and Myanmar may be considered pseudo-democracies because either single parties have control like the CPP in Cambodia, or the military maintains significant power as they do in Myanmar (by controlling 25% of the elected positions in government).

Non-oppositional authoritarian regimes are political systems based on the repression of political opposition, laws which outlaw or greatly limit popular participation in politics, and where there is commonly no strong opposition movement. These regimes may have an appearance of democratic institutions and processes but lack the building blocks of even minimal democracy, such as independent opposition parties. Thailand, Laos, Brunei DES, and Vietnam may be considered non-oppositional authoritarian regimes. In other words, liberal democracy cannot be said to exist in countries where there is single party control (Vietnam and Laos), military control (Thailand), or absolute monarchy (Brunei).

Merely democratizing is not enough to ensure a democratic system because transition does not necessarily lead to the consolidation of democracy. A combination of the failure to consolidate democracy in countries that have experienced democratic

Paris Peace
Accords
(1991)
A peace
agreement
between
the warring
factions to
stop the
decade's long
conflict in
Cambodia. It
was signed
by the State
of Cambodia
and three main
opposition
groups
including
Funcinpec and
the Khmer
Rouge.

transitions and the inability of non-democratic regimes to change has led to a pessimistic view of democratization. For example, less than five years after the introduction of democracy to Cambodia, a coup restored power to the CPP party under Prime Minister Hun Sen, breaking the shared power arrangement as outlined in the **Paris Peace Accords** in 1991. Hun Sen assigned King Norodom Sihanouk of the opposition party only a ceremonial role making Cambodia a country with a single ruling party. In Thailand, the military has interfered in politics a number of times in the past decades, despite the adoption of a democratic constitution in 1997. Twice since democracy was restored in 1992, the military seized power from democratically elected governments. Only the Philippines and Indonesia have not suffered setbacks in their process of democratization although extrajudicial killings in the Philippines and accusations of corruption in Indonesian politics show these democracies are not as robust as they could be.

The transition to democracy in Southeast Asia did not have a contagious effect. The democratization that took place in Indonesia in 1998, spectacular as it was, did not influence its neighbouring countries. After almost three decades since the first transition to democracy in the Philippines, the principle has still not been adopted by all Southeast Asian countries. For example, despite the recent election of the opposition party to government in Myanmar, the military still has not totally relinquished control and the country only has limited democratic characteristics. Neither did the seeds of democracy emerge in other Southeast Asian countries. Brunei Darussalam remains an absolute monarchy while Vietnam and Laos are still under single party communist rule. Formally, Singapore and Malaysia have adopted democratic institutions and processes but beyond formal institutions and procedures, it is difficult to classify the two countries as genuine democracies as the ruling parties are dominant and political rights limited. As such, both ruling parties have won every election since independence, and opposition parties still find it extremely difficult to operate.

Some changes have occurred though, particularly at the regional level. During their 13th Summit in Singapore (2007), ASEAN countries adopted the ASEAN Charter which explicitly established democracy as a principle, even stating that one of its purposes was to promote democracy. The adoption of the Charter can be seen as a radical shift in ASEAN's position. While ASEAN countries have tended to be hostile towards democracy, the adoption of the Charter acknowledges that ASEAN is a collective based on the principle of democracy. Despite their accommodation to this principle, most Southeast Asian States still find democracy a challenge to reach.

15.4 Human Right to Democracy

The object of political rights is to create democratic societies where human rights can be enjoyed. While the word 'democracy' does not appear in the UDHR or the ICCPR, throughout human rights treaties, the term 'democratic society' is used when noting that reasonable limitations are ones acceptable to a democratic society. While there is a clear relationship between human rights and democracy, this does not necessarily equal a human right to democracy. Like the debates around rights to a clean environment or peace, they share a common goal, but this does not imply they are human rights. In addition, democracy is not a necessary condition for human rights because they should be respected regardless of a country's political system. In other words, even in non-democratic situations, for example, a public emergency or an armed conflict, human rights should be protected.



DISCUSSION AND DEBATE

Human Right to Democracy?

The right to a democracy is stated in the UDHR as “The will of the people shall be the basis of the authority of government” (Art 21.3).

Question

- Does this constitute a right to democracy?
- Is it possible to have the government based on the will of the people, but for the government to not be democratic?
- Is there any other way to determine the will of the people apart from elections?

Human rights are both a cause and an effect of democracy. Increasing human rights will lead to a more democratic country, which will in turn improve people's rights. Many of the important principles of human rights are also vital to democracy such as the rule of law, participation, equality, and self-determination. In many ways, human rights and democratization share similar goals. As mentioned in Chapter 1, the VDPA (1993) created a global consensus on a number of human rights debates. Of relevance here is the agreement that democracy and human rights are related. The VDPA states:

Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.... The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world. (Art 8)

This article both restates existing ideas about the relationship of human rights to democracy and also proposes new ones. That democracy is based on the will of the people is already expressed in the UDHR, but the article also adds that human rights and democracy are interdependent and mutually reinforcing. That is, one cannot exist without the other.

Interdependent means that democracy depends on the existence of human rights and vice versa. States cannot propose to have human rights unless they also support democracy. In a sense, this argues for the universal recognition of democracy as the only political system. Article 8 does not, however, define democracy apart from the general points that it is based on the will of the people to decide their own system and economy. The interdependent relationship between human rights and democracy applies to all human rights. If a group's economic or cultural rights go unprotected, that is a failure of democracy. When democratic institutions fail, this will undermine both civil and political rights, and economic, social, and cultural rights. The VDPA makes democracy, development, and human rights equally important.

Mutually Reinforcing means that human rights can only be strengthened by encouraging democratization, and vice versa. With a democratic voice, people will be able to articulate the rights they need and desire. In addition, leaving minority groups out of democratic processes will undermine other human rights. Throughout

Southeast Asia, many politically marginalized groups are also marginalized socio-economically. Human rights can reinforce democracy because, for example, the right to education, women's rights, and freedom to associate make democracies more effective by producing informed citizens. In particular, education can lead to higher levels of political inclusion for groups such as women. Further, by teaching people more about the political process and ensuring the right to associate, political parties can be more active. In practice, the human rights and democracy movements often overlap and share common goals.

Numerous articles in the VDPA mention the importance of democracy, especially to developing countries. The Declaration notes that the process of democratization should be supported by the international community through developmental assistance, and that the UN, civil society, and other organizations need to support democratization throughout the world. The VDPA is the global consensus on human rights and democracy because of its near universal support at the UN.

15.4.1 Key Elements of the Right to Vote

As previously mentioned, the right to vote is the most well-known, and maybe the most important political right. This right is procedural, meaning that it is understood mainly through the process of choosing a government by election. The process is detailed as:

Periodic and genuine elections which shall be by universal and equal suffrage, and shall be held by secret vote, or by equivalent free voting procedures.

The procedure has a number of elements. First, elections must be periodic in that they should occur at regular intervals. While no timescale is given, most countries hold elections every 3-6 years. The election must be genuine, meaning that the results must reflect the will of the people. Non-genuine elections occur when there is no opposition or when a government considers a **referendum** an election. A referendum is not a genuine election because it is not competitive. For example, although voters may be asked to support a president in a referendum, the opposition has no opportunity to gain power. This was a tactic used by Philippines president, Marcos, in the 1970s. Rules governing the right to vote (or suffrage) should be based on every person getting a vote (or universal **suffrage**) excepting reasonable limitations such as age and citizenship. Further, each person's vote should be counted equally, preventing some from gaining more than one vote or having more influence. Finally, voting should be secret to keep political views private and keep the voter safe from repercussions. Examples are that wives should vote separately from their husbands, or villagers from their village leaders, so they both have a free choice and will not be coerced to vote a specific way. Secrecy also protects the voter from being punished for voting a particular way.

Suffrage

Suffrage is the right to vote. The term has been used in women's political rights when women activists were called 'suffragettes.'

Referendum

Where the population is asked to vote on a proposal, for example, to accept a new constitution or to change the political system.

15.4.2 Free and Fair Elections

Although the procedural aspects of democracy are important, in reality, elections are only the start of securing democracy. Elections provide the first step towards democracy because they allow people to vote according to their interests, but elections alone do not make a democracy. Many elections in Southeast Asia do not reach the standard of a free and fair election. The basic definition of democracy as a political system based on the choosing of representatives through popular elections still leaves room for questions about how people choose the system, if the system is fair, and if the choice was genuine. Elections can be abused. Officials can lie, steal, or cheat. They can also withhold information from the people, arrest and silence opposition groups, and manipulate conditions, making fair elections very difficult

indeed. For example, voting for the local member of the communist party counts as democracy in Vietnam, and in Malaysia, although the opposition often wins more than half the votes, this success is not reflected in its number of parliamentary seats. These situations question whether elections really are free and fair.

While there have been elections in most Southeast Asian countries since the 1940s, many were not fully representative, especially during colonialism. In addition, not all politicians were elected as governments frequently reserved seats for special groups. Currently, Myanmar reserves 25% of its seats for the military, and Thailand has at various times in its history. Appointed unelected senators. Further, elections under dictatorships (for example, in Indonesia, Thailand and the Philippines from the 1960s to the 1980s) are rarely free and fair. The famous People's Power movement in the Philippines (discussed in Chapter 8) initiated protests against an election rigged by President Marcos. Likewise, Indonesian elections from the 1960s to the 80s were widely recognized to be seriously flawed as there was no freedom of association or expression, criticism of the government was banned, opposition parties were banned or forced to merge, and some voters, such as government officers, were pressured to vote for the ruling party. Finally, the voting process itself, from collecting the ballots to counting the votes, was questionable with suggestions of **ballot stuffing**. Despite this, the standard of elections in Southeast Asia has improved dramatically with most (although not all) recent elections now considered free and fair. Table 15.2 details the variety of elected positions in Southeast Asian countries from the Philippines which has over eight elected offices from the presidential level down to local councillors, to Brunei where there are no elected officials.

Ballot Stuffing

One way of cheating in elections is to fill the ballot box with votes for a particular candidate. Known as stuffing because these extra votes are stuffed inside the ballot, this has been known to occur in elections throughout Southeast Asia.

Table 15.2: Elected Positions in Southeast Asia (from 2016)

	Legislators	Head of State	Town, city or State level
Brunei DS	None: 36 appointed members	No	No
Cambodia	Lower house: elected Upper house: appointed	Indirectly elected: appointed by winning party	Yes: local communes (council)
Indonesia	Yes: all seats in the lower and upper house	Yes	Yes: local elections
Lao PDR	Yes: National Assembly is elected, but it's a one party State	No	No
Malaysia	Lower house: elected Upper house: 44 appointed and 26 elected by state assemblies	Indirectly elected: appointed by winning party	Yes: State assemblies, but not local governments
Myanmar	Lower and Upper Houses: 75% elected, 25% military appointed	Indirectly elected: appointed by winning party	Yes: State assemblies, local wards (village level)
Philippines	Both lower and upper houses	President and vice president	Yes: governors, mayors, councillors, and local officials
Singapore	Yes	Yes, but mostly uncontested	No
Thailand	Yes	Yes	Yes: local councils
Timor Leste	No	No	Yes
Vietnam	Yes: National Assembly is elected, but it's a one party State	No	Yes: people's (local) council

Election Monitoring

The process of observing all phases of an election, including preparation, the election itself, and post-election procedures to ensure they are conducted according to national legislation and international standards. The task is done by one or more national or international independent organizations, most commonly NGOs.

Given the problems in ensuring free and fair elections, many activities are involved in **election monitoring**. Monitoring can be done by a national body, such as an election commission, although it is common to use international monitors to ensure compliance. Because countries tend to have their own regulations there is no single universal standard, but rather a set of principles and practices. While obviously open to debate, many **standards of a free and fair election** are widely accepted. International standards are outlined in the *Declaration of Principles for International Election Observation* (2005), and more locally, the *Bangkok Declaration on Free and Fair Elections* (2012) offers an exhaustive list including legal standards, universal suffrage, voter education, voter registration, campaign rules, campaign finances, the management of polling stations, counting votes, and complaints mechanisms. As can be seen, there are many elements to a free and fair election.

Concept Standards of Free and Fair Elections

Because elections involve many people, regulations, and interests, there is no uniform way to define a free and fair election. Although certain elements are necessary, the vital ones and their precise definition will vary depending on the political system in question. Some of these elements include:

Universal suffrage: to ensure everyone can register to vote, and that voter records are accurate. There are limitations found in Southeast Asia including: prisoners, those living overseas, unregistered people, and monks.

Secret ballot: to ensure people can vote in secret and will not face repercussions because of who they voted for

Freedom of information: to allow people to gain accurate information on political parties and their policies. In places where a government owns the newspapers and television stations, monitors can see if the opposition is given similar coverage to the government

Fairly structured electorate: to ensure electorates are divided equally so everyone's vote counts the same, and that whoever receives the most votes wins. Problems in some Southeast Asian countries are that parties winning most of the votes have still lost the election

Transparent counting of votes: to prevent cheating in vote counting. Monitors will look for ballot stuffing, or ballot boxes disappearing from areas where the opposition is likely to win

Periodic election: to ensure elections occur at regular intervals, normally around 3-6 years

Campaigning: to enable all parties to campaign and talk to the public about their policies and ideas, and to ensure rules for campaign finances are fair and transparent

Complaints: to ensure there is a body that will receive and act on complaints from the electors and political parties.



Independent election body: to ensure there is an independent body, such as an election commission, to manage the election according to the above standards, and that will possibly re-run an election if it is not considered free and fair

Independent monitoring: to ensure elections are open to independent and international monitors

ANFREL, the main regional monitoring organization behind the Bangkok Declaration, is active in most, if not all, national elections in the region. Other international monitoring organizations include the United Nations, the European Commission, and the US based, Carter Centre. In some instances, individual governments (for example, the United States, United Kingdom, or Sweden) have previously sent observers to the region.

The monitors have many things to observe. Monitors should arrive months before the actual election to observe the campaigning process and the organization of the election. The election body, commonly called an election commission, should also play a role here. In addition, the voter registration process has to be monitored to ensure legitimate voters are not kept off the rolls, or false voters included. On election day observers should ensure ballots are secret and there is no threat or intimidation of voters or candidates. Further, they should also look out for election frauds such as the payment of voters, ballot stuffing, and miscounting. After the election, monitors commonly release a report assessing the freeness and fairness of the election. For example, in the 2015 Myanmar national election, ANFREL widely supported the election process and the work of the Election Commission, but did note that activities such as voting by the police and the military, which were conducted on bases and not open to monitoring, could have allowed for fraud or misconduct.

FOCUS ON

ANFREL (Asian Network for Free Elections)

The first NGO in Asia working on election monitoring, ANFREL was established in November 1997. ANFREL's activities include to observe pre and post-electoral processes, and to train civil society groups actively working on democratization in their home countries. Developing the capacity of these organizations is one of the most important elements of democratization. ANFREL also carries out research and advocacy on good governance issues in Asia. Its long-term aim is to build expertise on elections and governance in the region, ensuring a culture of democracy that is both locally developed and integrated with internationally recognized standards.

ANFREL has observed more than 40 elections in 15 countries across Asia, including Nepal, Sri Lanka, Papua New Guinea, Afghanistan, Myanmar, and Thailand. Election observers working for ANFREL come from civil society organizations in Asia, and these observers may be posted to observe the election for weeks before and after the actual election.



15.5 Freedom of Expression

Freedom of expression is one of the more famous human rights. It has a long history, with earlier versions appearing in the US Constitution and the French *Declaration of the Rights of Man*. It also appears in many constitutions around the world and is a right most people know they have. Freedom of expression has limitations. Most people know they cannot say anything to anyone, anywhere. For example, one cannot cry 'fire' in a crowded theatre, nor do people have the freedom to abuse each other, or express views which may be considered violent, pornographic, or discriminatory. These limitations make freedom of expression open to debate. This section will detail the main elements of freedom of expression, and consider legitimate limits to this right before looking more closely at how it relates to media.

15.5.1 Elements of Freedom of Expression

Freedom of expression is in Art 19 of both the UDHR and the ICCPR. The UDHR simply states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers (Art 19).

Though the UDHR clearly outlines the right, ambiguity still exists as to its elements. First, opinions and expressions are considered distinct in this article but no clarity is provided as to the meaning of either. If opinions cover what one believes, and expression covers what one says, does this mean these rights are the same? Importantly, nothing is said on the limitations to this right, (although Art 29 of the UDHR clearly states that all rights have their limits). In the process of codifying this right into the legally binding ICCPR, modifications to the article were made, fixing some of these concerns. The first two sub-paragraphs detailing the elements of the right state:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Freedom of opinion is now separate from expression. The ability to interfere with someone's opinion, or forcing people to change opinion, is difficult as they concern private thought processes. It is only when opinions are given expression that rights are violated. While there have been cases on freedom of opinion at the UN level – on different treatment given to prisoners holding certain political opinions – because violations of this right are rare, they will not be addressed here. Rather, the focus will be on freedom of expression.

Second, Art 19.2 outlines the main elements of freedom of expression: people have a freedom to express, and also a right to seek, receive and impart information, and this is not limited by the kind of expression.



Concept

Standards of Free and Fair Elections

Opinions are beliefs or values that are mostly internal and involve what a person thinks. It can be difficult to determine someone's political opinions just by looking at them.

Expression is any form of communication that a person engages in, whether speaking, writing, dancing, painting, sign language, or dress.

15.5.2 Right to Seek, Receive, and Impart Information

Freedom of expression can be divided into three rights: to seek, to receive, and to impart information. The right to seek information implies that States should not prevent people from accessing available information. This could be as simple as offering access to libraries, newspapers, books, radio, or television. Information about government services is also something people should have access to, including how to obtain a driver's license, vote, or start a business. There are limitations on the access to private and secret information. This right obligates States to not interfere with people accessing information, which is known as a negative duty or a duty to not act. Blocking the media, censoring the internet, or banning radio or television channels could be seen as a violation of this right. An important recent question is: **is access to the internet a human right?** Given that most, if not all, information is available on the internet, should governments ensure people have access to it? Debate is still ongoing on this issue.



DISCUSSION AND DEBATE

Is the Internet a human right?

In 2011, the Special Rapporteur on Freedom of Information argued that the internet is the “key means by which individuals can exercise their right to freedom and expression.” While this does not say that the internet itself is a human right, others have interpreted it this way.

Questions

- If essential government services like registering to vote were only available on the internet, does this mean States would have to ensure universal access to it?
- Should it be the duty of States to ensure universal access to the internet, or should it be considered a commercial service which people must buy?
- Do people with access to the internet have more freedom of expression than those without access?

The right to receive information implies a right to receive certain types of information, for example, warnings about the weather if a cyclone is coming, or health information to help people avoid diseases. Such rights could also include political information enabling people to know when and how to vote, or receiving information about

their political choices. But what are States obligate to tell people? One example is sex education (as discussed in Chapter 10). For some, sex education is a reproductive right, but the religious and moral values of some countries may prohibit teaching people about sex. Another example can be found in the field of healthcare. Should people be informed about healthy and unhealthy activities? Should governments inform people that sugary drinks are bad for their health? Similarly, should people receive information about government hospitals and schools? Closely linked to this right are freedom of information laws which ensure public access to government information (as discussed below).

DISCUSSION AND DEBATE

How much information should the government tell you about smoking?

Research clearly proves that smoking causes cancer and most people are aware of this, but how far should governments go to prevent people smoking? Cigarettes are not illegal to buy or sell. While cigarette advertising is either banned or limited in all Southeast Asian countries, it is still permitted in certain situations. Some countries, like Thailand and Singapore have banned all forms of cigarette advertising. Others, like Indonesia, permit it in cinemas, billboards, and at the point of sale.

Questions

- Do cigarette companies have freedom of expression to advertise their products?
- Is it the government's duty to inform people that cigarettes are unhealthy, or should that be left up to the consumer?
- Does banning advertising make a difference when people are still free to decide whether or not to smoke?
- If advertising influences children to start smoking, should it be banned?
- Given that banning advertising does reduce the number of smokers, is this enough evidence for a ban?
- Given that smokers will fall ill and the government will have to spend money on their health services, does this justify an advertising ban?

The last element is the right to impart information, which basically is the freedom of expression. This allows people to express anything, whether ideas, views, or just talking. Most commonly, violations of freedom of expression involve politics and morality. The right to impart information mainly requires negative duties on States, that is the duty not to not interfere, but there are positive duties as well, including to educate people enough to express their views, for example, by teaching people how to read and write. States should also provide venues where people can talk, for example, by having a media that allows for public participation, or even public spaces where people can simply express themselves. Expression can take many forms beyond writing and speaking. Art is a form of expression, as is film, dance, theatre, music, and dress.



15.5.3 Limiting the Freedom of Expression

It is generally agreed that limits to freedom of expression are necessary. Even though censorship is controversial, many consider it necessary to protect groups such as children from violent and sexually explicit material. Similarly, others believe speech which may insult or incite violence should be prohibited. The challenge is where to draw the line between the artistic or political and something which is considered pornographic or dangerous. These are noted as 'special duties and responsibilities' in Art 19.3.

19.3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In order to limit freedom of expression, three criteria must be met. First, limitations must be written in the law and cannot be based simply on a person's or a State's opinion or belief. Second, there must be a valid reason for the law beyond personal or State preference. In other words, the law must serve a purpose in society. Third, these necessary limits must be for one of five reasons:

- **To ensure the rights of others:** expression cannot interfere with someone's privacy or publicly defame them. People cannot talk or write about others if it damages their image (for example, by wrongly calling them a criminal)
- **To protect national security:** State secrets and peace in society must be maintained. As such, treasonous speech is prohibited (for example, by calling for the violent overthrow of a government)
- **To maintain public order:** expression cannot incite people to disorder or threaten the safety of others (for example, by asking people to riot)
- **To maintain public health:** spreading information that may create health problems is prohibited (for example, by claiming that sleeping with a virgin will cure AIDs)
- **To maintain public morals:** laws on morality must be respected (for example, the distribution of pornography is prohibited)

These limitations are based on the rule of law, preventing States from arbitrarily limiting expression, and are only acceptable if all three conditions have been met. These limitations also apply to other rights such as association, assembly, and movement (detailed in Chapter 3).

15.5.4 Freedom of Expression in Southeast Asia

Every country in Southeast Asia has debates on freedom of expression. Laws setting limits on freedom of expression include libel, defamation, slander, treason, pornography and other indecency laws, intellectual property, and copyright. Some Southeast Asian countries have a reputation for being liberal in this area, while others are considered much stricter, but all have some limitations on expression. The next section will explore these limitations and the ensuing debates in Southeast Asian States.

Across Southeast Asia, the production and sale of pornography is illegal, although many States do not enforce this law. The strongest pornography laws can be found in Indonesia where the Bill on Pornography was passed in 2008 (a modified version of the 2006 Bill against Pornography and Porno-Action). While many of the harsher laws in the 2006 version were dropped, the law still criminalized a wide range of activities. Debate over this bill was heated because it could be used to criminalize fairly innocuous activities which most people do not consider to be pornography, such as kissing in public or dancing in a night club. The debate mainly took place between conservative religious groups who supported the bill and wanted stricter moral standards in society, and opposing them where women's groups, artists, and supporters of freedom of expression. The concerns were not so much about 'hard' pornography which may be downloaded from the internet, but about social activities such as dress and dancing. The concept of 'porno-action,' which remains in the Bill, expands the definition of pornography from media and images to behaviour. Cases on this law include the imprisonment of the editor of *Playboy* (who was released on appeal) and another resulting in the arrest of four night club dancers. Examining the limitations which a State can put on freedom of expression, it is questionable if the law is needed. While the State justifies the law as necessary for public morals, it does not represent the standards of morals for society in general, but only for a smaller group of religious conservatives. It cannot be argued that there is a human right to pornography, yet there is a right not to be treated as a criminal because clothes of behaviour is not considered socially by a religious group. Other countries in Southeast Asia have pornography laws, mainly on sale and distribution, and on personal use (though personal use is criminalized in Malaysia). There are few, if any, cases of people being jailed for pornography, though seizures of pornographic movies are common perhaps due to copyright or illegal sales and not necessarily the content. Similarly, most countries have public obscenity laws which criminalize public nudity, though these laws are rarely used. One example was the fining of three young women who danced topless at the Songkhran festival in Bangkok. They were fined 500 baht and told they were tarnishing the image of the festival.

DISCUSSION AND DEBATE

Pornography and Freedom of Expression

The Indonesian "Bill on Pornography" has been criticized for having too wide a scope. In particular, some definitions of pornography have caused ambiguity. For example, pornography is defined as:

Images, sketches, illustrations, photographs, writings, voice, sounds, images of movements, animation, cartoons, speech, body movements, or other messages transmitted by various communication media and/or performances before the public that contain obscenity or sexual exploitation and violate moral decency within society.

Question

Under this definition, discuss whether the following can be defined as pornographic?

- A sexually explicit joke
- A kiss in public



- Information on family planning such as how to use a condom
- A tourist sunbathing topless on a public beach
- Arabic belly dancing
- A hip hop video featuring dancers wearing bikinis

One of the most draconian laws challenging freedom of expression can be found in Thailand's **Lese Majeste** laws. Intended to protect members of the Thai Royal Family from abuse and thereby the stability of the country. The law is similar in effect to Malaysia's sedition laws or Singapore's ISA laws which criminalize some anti-government messages. Laws like Lese Majeste have existed in many monarchies around the world, but most have since fallen out of use or been repealed, as in England and Japan. Since 2006, over 400 cases a year under Lese Majeste have been heard in Thailand because it is mainly used as a political weapon by governments or politicians. Insulting the monarchy in Thailand has resulted in jail sentences of over 30 years, even though the law states a maximum penalty of 15 years. Similarly, Malaysia's **sedition laws** have been used against political opponents, or even people merely expressing political opinions which were interpreted as critical of the government. Up to 2015, nearly 50 people were charged with sedition for expressing political or legal views which the government disagreed with.

Lese Majeste

The crime of offending the dignity of a Monarch, or in some cases, a head of State.

Similar laws can be found in Vietnam where **Art 88 of the Penal Code** makes a crime of "conducting propaganda against the Socialist Republic of Viet Nam." Propaganda is often defined broadly as can be seen by the number of bloggers and political commentators who have been jailed (there are around 100 prisoners of conscience in Vietnam). These three laws, Sedition, Lese Majeste, and Art 88, all demonstrate how States use laws to criminalize political opinions while justifying limits to freedom of expression.

CASE STUDIES

Laws Criminalizing Anti-Government Expression

Malaysia's Sedition Laws

Sedition is the action of trying to incite a revolution or insurrection. The Malaysian Sedition Act was originally written by the British colonizers but has since been taken on by the Malaysian government. It defines sedition as creating "hatred or contempt or to excite disaffection" against the government. It can also mean to incite race riots, to own a seditious publication, or to excite disaffection against the government. Given the broad nature of these definitions it can be easy for the government to define criticisms of the government as sedition, as has frequently done in recent years. People have been charged for saying "damn UMNO" (the ruling party), or for a law academics to write an accurate legal analysis which criticized a Sultan.

Singapore's ISA (Internal Security Act) laws

Singapore's ISA laws were originally used by the Colonial British government to fight the communist insurgency in the 1950s. They have been kept and updated to be used as anti-terrorism laws, though for much of their history they have been used to jail political opponents. There have been around 2,400 people arrested under the ISA law,



and in some cases such as Operation Spectrum in 1987 a number of social workers were accused of planning a communist insurgency and arrested. They claimed they were coerced into signing confessions while in detention. Political arrests under ISA have not occurred in recent decades.

Vietnam's Penal Code, Art 88

Art 88 of the criminal code prohibits the distribution of 'anti-government propaganda.' This has been broadly defined by the government as any criticism of government activities. It has been used to jail government critics, land rights activists, bloggers, pro-democracy activists and human rights defenders. A number of bloggers writing on corruption, environmental damage caused by mining, and Chinese activities in the South China Sea were arrested and jailed for between 5-15 years. Vietnam is only second to China in the number of online activists it jails.

Another trend in the region is the use of defamation laws by companies and individuals to limit criticism. Previously, such opinions had been protected under freedom of expression. Recent cases have included a woman in Indonesia complaining about bad hospital service who was sued by the hospital (the charges were eventually dropped); a student complaining about Jogjakarta who was sued by the city (and found guilty); Thai human rights defenders who were sued by a Thai mining company for alleging human rights violations; and a researcher in Thailand who was sued by a fruit canning company when his research alleged migrant workers violations.

Governments also use defamation to silence critics. For example, an author of a book on the death penalty in Singapore was charged with criminal defamation because the book claimed that in some cases, the courts were not free and fair. He was jailed for 5 weeks. In another case, two journalists from the Thai newspaper, *Phuket Times*, were sued by the Royal Thai Navy for reporting on their treatment of the Rohingya. In a number of countries such as Singapore, Malaysia, and Thailand, defamation is a criminal offence subject to jail time as opposed to civil cases where the guilty are mostly fined. Human rights bodies argue in General Comment 34 to the ICCPR that defamation should not stifle freedom of expression and that defamation should be heard in civil court. Such an argument was directly pointed out to the Philippines in 2012 when an individual complaint was made to the Human Rights Committee, which is the treaty body of the ICCPR, by a journalist who was jailed for two years for writing a story about an alleged adulterous politician.

Early use of defamation laws can also be found in Singapore where politicians sued the media for defamation. Some famous cases include Singapore president, Lee Kuan Yew's actions against international magazines like the *Far Eastern Economic Review* and the *International Herald Tribune*; both of which he won. Similarly, Thailand's Prime Minister, Thaksin Shintawat sued human rights defenders for, among other claims, accusing him of corruption. Generally speaking, the use of **defamation, libel or slander** has been an effective economic measure to silence the media. These cases can award huge amounts of money, effectively bankrupting media organizations. The use of defamation by companies is worrisome because it can limit people's rights to express their views about the quality of service, or the activities of the company. Preventing people from expressing their views limits a consumer's rights. The final section of this chapter will examine the relationship between the media and human rights.



Concept

Defamation, Libel, and Slander

An untrue statement which harms someone's reputation is known as defamation. Importantly, the right to be protected against attacks on one's honour and reputation is also a human right (as found in both the UDHR, Art 12 and ICCPR, Art 17). In some places, spoken comments are known as slander, and written statements as libel.

15.6 Human Rights and the Media

A vital component of freedom of expression is freedom of the press, more generally known as media freedom. This is distinct from Art 19 which is a human right protecting individual expression. Media, as for example a magazine or website, is not an individual. But these rights are mutually re-enforcing: a free media is necessary to uphold human rights, and violations of media freedom will involve human rights violations of journalists, bloggers, readers, and so on. Media freedom relates to the right of journalists or media owners, and also impacts the public which has a right to receive credible information. Attempts to adopt press freedom and media rights at the UN in the past decades have faced much difficulty because they are considered controversial. Most States like to keep their power to limit press freedom. As a result declarations and treaties have not gained the necessary agreement to become legally binding. Yet, media freedom is still seen as a necessary component for a fully functioning democracy.

Media has always provided the strongest responses to dictatorships, non-functioning democracies, and human rights violations. Media freedom is vital to the development of liberal democracy. As a social institution, the press continues to play an important role in informing the public, shaping public opinion, and checking abuses of government power. Sometimes called the 'Fourth Estate,' ideally, the press should act as a fourth, 'unofficial check' on the three official branches of State (that is, the executive, judiciary, and legislature). The press also helps to express public views on the economy, development, and political change. All these activities relate directly to the status of human rights in a country. The better the media is at reporting on society, the more chance there will be of improving human rights standards.

This freedom has contemporary resonance because of profound changes to the media through the developing technology of digital media, social media, and widespread access through mobile technology. And now anyone can post information on the web, media freedom should not only cover journalists or publishers, but also individuals. The following section will look at the history of media freedom and the censorship regimes that limited them in Southeast Asia, before examining human rights challenges in new media, and freedom of information laws and their importance to a democratic society.

15.6.1 Traditional Media in Southeast Asia

Traditional media, meaning newspapers, radio, and television, has an important role to play in society. As mass media, they are particularly effective at distributing information and monitoring governments, although with the rise of the internet, social media, and smart phones, this role has been somewhat diminished. Despite this, traditional media does continue to play a vital role. In particular, the press in Southeast Asia has been crucial in monitoring government activities.

In most countries, the first media were newspapers but these were often more concerned with shipping news and other commercial interests (hence, the Straits Times was about shipping arrivals in the Straits) than political engagement. Some media took on highly political roles during the battles for independence, for example, the Indonesian press and radio strongly supported independence, while other media did not debate political issues. The development of media is considered a crucial component of a country's development, to the extent that the UN and UNESCO supported projects to develop the media, believing in the need for a strong national media. In the 1980s and 1990s, concerns over media imperialism, or the power of western media to influence public views and values, led to the development of national media and programming. At this time, 'foreign' cultural values, especially around sexuality and individuality, were considered a threat. Governments were concerned about creating rising consumerism through the influence of American TV shows where everyone owned expensive cars and houses, and parents were concerned that their children were listening to western music. Mostly though, States worried about political news in the foreign press which could encourage people to demand a change of government or more democracy. Countries like Burma, Vietnam, and Singapore responded by placing severe restrictions on foreign media. Southeast Asian countries were not unique in their response to foreign media as most States in the world were active censors.

After independence, most traditional media throughout Southeast Asia became either government-owned or very sympathetic to the ruling party. The major newspapers and television stations in Singapore, Malaysia, Laos, Vietnam, and Cambodia can all be described as pro-government. Opposition or critical media was limited, banned, or pushed outside the country. Traditional media commonly does not play a significant role in monitoring governments, the reasons for this will be examined later. As Table 15.3 shows, Southeast Asia has a poor record in terms of media freedom. No country is considered fully free with even the best rated countries still in the bottom half of worldwide rankings.

Table 15-3: Ranking of Media Freedom

Ranking in Press Freedom Index (out of 180 countries)*	Freedom House: Freedom of the Press Marks out of 100**
99: Timor Leste	35: Timor Leste (Partly free)
128: Cambodia	44: Philippines (Partly free)
130: Indonesia	49: Indonesia (Partly free)
136: Thailand	67: Malaysia (Not Free)
138: Philippines	67: Singapore (Not Free)
143: Myanmar	69: Cambodia (Not Free)
146: Malaysia	73: Myanmar (Not Free)
154: Singapore	76: Brunei DS (Not Free)
155: Brunei DS	77: Thailand (Not Free)
173: Lao PDR	84: Lao PDR (Not Free)
175: Vietnam	85: Vietnam (Not Free)

* The Press Freedom Index is a ranking done by Reporters Without Borders which looks at the amount of freedom journalists and online media have. It is based on a questionnaire sent to experts.

** The Freedom of the Press Index is compiled by Freedom House. This ranks countries according to a range of indicators from legal context to civil rights and expert opinions. The countries are measured from 0 (totally free) to 100 (no freedom). These are grouped as: 'Free' (0 to 30), 'Partly Free' (31 to 60), or 'Not Free' (61 to 100).

15.6.2 Censoring Traditional Media in Southeast Asia

The dominance of pro-government media in Southeast Asia can be linked to three causes. First, from the beginning, media was nationalized. Once independence had been gained, governments invariably established television stations, banning or only giving limited rights to non-government television. Only in recent decades has non-government television been allowed. Second, while many newspapers predated the establishment of the newly independent States, newspapers critical of the government faced harsh punishment, forcing many to shut down. Finally, given the technology at the time, the variety of media available was limited to television, radio, and print media such as newspapers, magazines, and books. Only print media, and to a lesser extent radio, was accessible to poorer socio-economic groups. Radio and television station were more commonly found in cities, and large parts of rural Southeast Asia did not get electricity till the 1970s. Only governments had the resources to run television stations.

Freedom of the media in Southeast Asia is limited, most commonly, by censorship. All Southeast Asian countries have media censorship laws. Often these laws are written vaguely enough to ensure States can fine newspapers for 'anti-government' viewpoints. Examples of these laws (as detailed above) are the Sedition Law in Malaysia, Art 88 in Vietnam, and criminal defamation laws. Places like Myanmar

had even stricter controls where all publications had to be read and approved by censorship boards before publication. This meant there could be no daily newspapers as the censorship board often took a couple of days to review and edit the news, so newspapers tended to be weekly. Under this kind of censorship, anything could be cut. For example, news about Hilary Clinton and Condaleeza Rice was frequently censored because these stories featured a strong and effective female leader, which could be interpreted as being supportive of (the then) female opposition leader Aung San Su Kyi.

Many journalists have been jailed for expressing their views in the region; in 2015, an estimated 200 journalists were jailed, and of these 11 came from Southeast Asia (Myanmar, Vietnam, and Thailand). A typical way censorship works is through journalists who do not want to risk losing their jobs by publishing something which may be interpreted as anti-government or politically sensitive, as the repercussions for them, and for the newspaper, could be severe. States can also punish newspapers after publishing a story, resulting in fines or even a jail sentence for writers. This situation has been called **self-censorship**, and can be found in the media throughout the region.

Self-Censorship

Where a journalist chooses to censor their own work without State pressure for fear of repercussions to them and their workplace.

Media freedom can also be limited through intimidation and threats. In some countries, being a journalist can be a very dangerous job. While not all deaths of media figures are due to intimidation, many did result from reporting on corruption or government abuses of power. Sometimes, the intimidation comes from paramilitary groups or the private security groups. Further, journalists can be killed while reporting in conflict situations. In Southeast Asia, the Philippines is recognized as being the most dangerous country for journalists, with seven being killed in 2015 and 34 in the **Maguindanao massacre**, the single greatest massacre of journalists in the world. Such intimidation can very easily stop media reporting on topics like corruption or human rights violations which, in turn, can hinder democratization.

CASE STUDY

The Maguindanao Massacre



In 2009, during a mayoral election for the town of Ampatuan, one candidate called on journalists and supporters to travel into town to file the certificate for his candidacy. On the way, the convoy of cars (including journalists, lawyers, and family members) was stopped by armed men from the rival Ampatuan faction, who then murdered and buried them. A total of 58 people were murdered. The alleged organizer of the massacre is in jail facing murder charges, but he claims the massacre was committed by the MILF – an assertion that has been widely rejected. Of the 198 suspects, currently only a small number are in jail and no one as of 2016 has been found guilty of the massacre.

A final way to limit the media is by having strict rules on ownership and registration. In recent decades, obtaining a license to print a newspaper in Indonesia, Vietnam, Myanmar, and Laos has been very difficult, though laws in Indonesia and Myanmar have relaxed substantially. Further, private television stations are rare in the region,

mainly because of the cost but also due to government monopolies over television licenses. However, the introduction of cable television, satellites, and the internet have meant free-to-air television is not nearly the dominant media that it once was.

Some countries have outlawed or severely limited access to media technology. Fax machines and photocopiers had to be registered in Myanmar, and satellites were not readily available in many Southeast Asian countries. The rise of the internet has helped the situation though. Even in countries with highly restricted media such as Myanmar and Vietnam, States cannot stop access to long wave radio broadcasts which originate from abroad, or from internet sites. In the late 1990s, underground media through cheap CDs became a common way to distribute information. But thanks to the internet, the more physical forms of censorship, for example, preventing a newspaper from printing or blocking a radio broadcast, have disappeared with States now realizing the near impossibility of stopping information from crossing borders. Such developments have led to a new concerns around media freedom and human rights in the internet age.

15.6.3 Freedom of Information

Freedom of information can be seen both as a human right and a tool of democracy. It is a right through the right to seek information as detailed in Art 19, and it is a tool of democracy for requires governments to be more transparent by making information public. Governments with freedom of information laws are required to release information on certain budgets, policies, government decisions, and programs. They are not required to release information if it is considered related to national security or private concerns. In Southeast Asia, only Indonesia, the Philippines, and Thailand have these laws. The Philippines law is rather weak as it exists only as a small section of the constitution. A pending Freedom of Information Act has been debated in government for five years already. By making information available, governments become more accountable for the money they spend. This should make corruption more difficult. An example of this from outside the region can be seen in India's *Right to Information Act* (2005). Previously, local governments could receive public money for undertaking projects like building a road or dam. In some cases, government officers pocketed the money instead of doing the development. They were able to keep the money hidden because budgets were not publicly available and it was not feasible for central government to check thousands of small projects. It was only when this information finally became public that villagers realised they had been cheated of promised developments. Within two years there were around two million requests for information through the Act, and many cases of corruption were uncovered. It was hoped these kinds of actions would also occur in Indonesia after it introduced a freedom of information law and Freedom of Information Commission in 2008.

CASE STUDY

Thailand's Official Information Act (1997)



Thailand's freedom of information law, called the Official Information Act (1997) was first used by a mother of a student who asked to see the exam results when her daughter failed to qualify for a selective school run by a government university. The university refused, arguing the information was private. Suspecting it was awarding positions based on how much the parents were paying, and not on exam results as it claimed, the mother used the Act to request to see the exam results. The court agreed

the university was subject to the freedom of information laws and allowed the mother to see the results. As it turned out the mother was correct and her daughter should have been admitted, and further the practice was found to be common to many other university-run schools in Bangkok. As a result, universities changed their entrance requirements and now access to these schools is not influenced by cash payments.

Some governments see themselves as separate and above society and able to make decisions without public input. Although freedom of information laws encourage such governments to be more transparent and participatory in their activities, certain challenges must first be overcome. First, there are few freedom of information laws across the region. Second, existing laws tend to be weak and do not guarantee access to information. Third, the laws are underused, either because journalists are unaware of the laws, or they do not engage in the type of investigative journalism that requires accessing information, or the process is too difficult.

More recently, with the development of digital media, news agencies are now swamped with information, and the task has become not to access information, but to verify the information they receive. With most people carrying mobile phones which can record sound and video, it has become easier than ever to capture information. In conclusion, although freedom of information laws may be undeveloped in the region, they can still play an important role in the reduction of corruption and the increased accountability of governments.

15.6.4 New Media Issues

New media and human rights have a complicated relationship. New media refers to any form of digital media including websites, online newspapers, social media such as Facebook and Instagram, blogs, comments on web pages, videos on YouTube, and so on. The internet has done much to promote and protect human rights and it is an invaluable tool for human rights defenders to distribute information, raise awareness, and more effectively monitor State activities. On the other hand, the internet has also been a source of human rights violations, for example, when privacy is violated, reputations are attacked, and people unfairly persecuted or threatened online. The issue is complex because technology develops faster than the laws and protection can keep up. Social networks are only ten years old and apps such as Line are about five years old. Although States have introduced and experimented with new laws in recent decades, much development is still needed to better protect rights and criminalize activities on the internet. Another factor is that because the new media is global, information can be posted from anywhere and read anywhere so is not limited by national borders and State laws.

The news industry has transformed radically under new media. Previously, news came from media companies and was limited to newspapers, radio broadcasts, or the television. Now, news can be posted by anyone via a picture on Instagram, a Facebook comment, or an individual's blog. This **amateurization of the news** has both positive and negative aspects. It is positive because it allows citizens to easily complain about petty corruption or governments failing in their duties. It is now unusual for violations to occur in public and *not* be recorded on someone's telephone, so instances of officials abusing citizens or teachers slapping students quickly reach the public. Though at the same time the technology also allows for cases of individuals inciting racial hatred, encouraging violence, attacking gays, lesbians, Muslims, and sexist abuse of women.



Concept

Amateurization of the News

Previously, news reporting was a profession done by journalists who worked for newspapers, or television and radio stations. Nowadays, any individual can write their own blog and publish their own news without the need of a media corporation. Although, often a valuable alternative to the mainstream media, allowing for a diversity of views and citizen participation, amateur news can also be based more on personal opinions and biases than fact.

There are many issues around freedom of expression on the internet, and this section will briefly discuss just four of them: jurisdiction, defending **netizens**, privacy and cyberlaws. The debate about the jurisdiction of online media is a complex one. What law should govern the internet: the law of the country where the post was written, where it is read, or where the story is based? Or should it be the law of the country where the web site is hosted, where the writer holds citizenship, or the company that own the webpage or domain name? Most States consider the law where the post is read (which is their own country) to be the governing law. But this would mean a person in Europe posting a comment about a politician from, for example, Cambodia, would have to obey the censorship laws of Cambodia and not their home country's laws. In one such case, a US citizen posted material on Thai politics in the US which was legal there but not in Thailand. Later he was arrested and charged with Lese Majeste when he travelled to Thailand.

Netizens

A citizen active in the internet. A netizen can be a blogger, journalist, programmer, gamer, video poster, and so on. The term netizen is used in this textbook because it is broad enough to include anyone who should have freedom of expression on the internet.

DISCUSSION AND DEBATE

Jurisdiction on the Internet

Someone in country A posts a message on social media which criticizes a government in country B by quoting from stolen government documents. The government of country B considers that person to have committed a number of crimes: releasing stolen government documents, defamation, and criticism of the government. The blogger's post has been read in country B where he has broken laws, but he has not committed a crime in country A where he lives and which will not arrest him for the action. The problem is one of internet jurisdiction.

Jurisdiction refers to the region where a law is applicable (literally, *juris* – the law, *diction* – speaks with authority). The laws governing jurisdiction on the internet are complex and, at times, contradictory. If a State decides to initiate a case, it must demonstrate that the crime, or the person violated, was within its jurisdiction. But different States understand jurisdiction differently, for example, the jurisdiction can be:

- the territory of the sender
- the location of the servers
- the location of the internet company sending the message
- the location of the owners of the domain name or social media site
- the citizenship of the person sending the message



Question

- Has a crime occurred?
- What should be the jurisdiction (from the list above)
- Should the government of country B be able to bring a case against the person using the stolen documents?
- What is your country's laws on internet jurisdiction?

One particular area for concern is the threat posed to netizens, or online media journalists such as bloggers. In Singapore, Vietnam, Thailand, and Malaysia, netizens have faced legal action by governments because of their comments. Some are individuals simply voicing their opinions, as is more the case in Vietnam, while others may work for established online news companies such as *Malaysiakini* in Malaysia. A problem arises in the monitoring comments on blogs and Facebook pages. Besides the content they post themselves, authors can also be liable for comments their audience posts onto their pages. In some cases bloggers have been arrested for comments made on their blog. The comments are not made by the blogger, they may not agree with the comment, and even if it quickly deleted it is not guaranteed the post will disappear. So are bloggers or web hosts responsible for the comments left on their pages, or would this be like to charging the owner of a wall for something written by a graffiti artist?

Another concern is the right to privacy. The internet can (and does) record a lot of information about its users such as a person's internet searches, web pages visited, photos taken, and any online communication. With smart phones, where a person has been, their call history, and even how they travel can be determined from the telephone, wifi, and phone reception. While much of this information is harmless, most people do not know that machines or people are keeping this data which leads to several questions. First, can the government monitor this information in the name of security? Some Southeast Asian countries have considered monitoring the location of tourists through phone GPS tracking to counter terrorist activities, but as yet none have formally done this. Linked to this is the ability of governments to read emails, listen to conversations, and track user's web use. The fact they had this ability first became known when Edward Snowden leaked information about the global surveillance of people's private information by many governments including the US, UK, Australia, and Canada.

People's data can also be used to target advertisements or to refine internet searches. Many young people input a lot of data into their social media accounts, recording their web searches, purchases, travel, location, likes and dislikes, all of which is useful information to advertisers. Social media companies can sell this information to potential advertisers or other vendors. Similarly, most people are aware that conducting a Google search will result in pop up advertisements that may be linked to that search or content they have previously written in emails. This is good business, as the advertisements are generally closely related to their interests, or is it a violation of privacy because their personal information was used for commercial purposes?



DISCUSSION AND DEBATE

How private should your Internet use be?

Should everything you post on the internet be available for all to see and use? Or should you be the only one to decide who has access? For example, after lunch at a restaurant, you post a picture of the food on social media because it was a good meal and you'd like your friends to know. The restaurant sees your picture and links to it, using it in an advertisement, but another group comments that the restaurant may have nice food but they are known for using child labour and paying their workers low wages. You get criticized for eating there.

Questions

- Is it wrong for the restaurant to repost your message?
- Is it wrong for people to criticize your choice of restaurant?
- Should you just accept the criticism and comments as part of being a netizen where anyone can comment on anyone else's post?
- Is it best to just not post pictures?

The protection of human rights in new media continues to be an area of complexity. Not only is international law struggling to keep up with the technology but countries across the region also have different views on the laws. The UN's Human Rights Council states that human rights which are applicable offline must also be protected online, although in the relevant resolution it only referred to freedom of expression. It may be assumed that such rights would also extend to work, association, and so on. For example there are cases of online assembly where avatars on massive multiplayer role playing games (like *Fantasy Westward Journey*, *World of Warcraft*, and *Second Life*) have assembled to protest. The reactions have differed. In some cases the company owning the game have blocked the subscribers so their avatars were shut down for some time, and in others the protests were respected and allowed to continue. The question here is, as the Human Rights Council notes, are the rights to assembly and express applicable to people playing these games? Or can the company, which owns the servers, codes, and rights to the game, also have the power to decide what rights the avatars get?

Similarly, in the near future it is possible that workers' rights of game players (for example, virtual real estate agents in *Second Life*) and 'gold farmers' (players who collect gold in games to sell for real currency as a form of employment) will need to be considered.

Cyber Law

The law regulating the internet, and covering issues such as use, censorship, privacy, jurisdiction, e-commerce, and cyber-crime..

The development of **cyber law** in the region has answered some of the above concerns although because there are a number of different laws governing the internet, they are not always in agreement. Concerns have been raised about the use of cyber crime laws to jail political opponents, conduct surveillance on government opponents or civil society activists, or to force content to be removed from the internet for political or moral reasons. Cyber law covers areas such as privacy (for example, personal data protection), online commerce (for example, managing electronic transactions), and security (for example, cyber security and cybercrime). To conclude, human rights legislation as it relates to the internet is still under development, requiring much infrastructure in terms of laws and user education before it can be considered truly effective.



CASE STUDY

Internet Laws in Southeast Asia

Most countries have a range of bills governing the internet. The following list is not exhaustive, as a number of e-commerce laws not related to human rights have been omitted. The only Southeast Asian country without a specific cyber law is Cambodia, although they have an updated 2009 penal code and a law being debated in government.

Brunei DES

- Electronic Transactions Act 2004 (revised in 2008)
- Computer Misuse Act (revised in 2007)

Indonesia

- Law on Information and Electronic Transactions 2008

Lao PDR

- Cybercrime Law 2015

Malaysia

- Electronic Commerce Act 2006
- Electronic Government Activities Act 2007
- Personal Data Protection Act 2010
- Communications and Multimedia Act 1998
- Computer Crimes Act 1997

Myanmar

- Computer Science Development Law 1996
- Electronic Transaction Law 2004

Philippines

- Cybercrime Prevention Act 2012 (R.A. 10175)
- Data Privacy Act 2012 (R.A. 10173)
- Electronic Commerce Act 2000 (R.A. 8792)

Singapore

- Computer Misuse and Cybersecurity Act 1993 (Revised in 2007, and to be revised in 2017)
- Electronic Transactions Act 1998 (Updated in 2010)
- Personal Data Protection Act 2012
- Spam Control Act 2007

Thailand

- Electronic Transaction Act 2001
- Computer Crime Act 2007
- National Cybersecurity Bill 2015

Vietnam

- Law of Information Technology 2007
- Law on E-transactions 2005
- Law on Protection of Consumers Rights 2010
- Law on Cyber-Information Security 2015

15.7 Conclusion

Politics and freedom of expression remains a sensitive issue within the region. While governments would like to appear democratic, in practice, their actions are not always based on the 'will of the people.' At some point, every State in the region has limited freedom of expression whether it be to quell political opposition or to incite racial hatred. This chapter has highlighted the relevant human rights standards, and outlined problems in defining and then protecting these standards. This task has perhaps is most difficult in the area of human rights and the internet where protection of rights has many challenges.

A. Chapter Summary and Key Points

Introduction

Political rights are a small but important category of rights. These include rights to political participation, meet, discuss and publicly express political views, vote, use government services, or stand for public office. All are in active use in the region. People have claimed political rights during colonialism, self-determination, anti-dictatorship movements. The concept of the 'will of the people' as the basis of government emerged during the 18th century European Enlightenment and still forms the basis of political rights.

Political Human Rights

The human right to politics is found in the UDHR (Art 20-21), the ICCPR, national constitutions, and numerous other treaties. Key elements include the right to associate or to form groups which is challenged in the region by one-party political systems and laws of association which limit the freedom to form groups. The right to peaceful assembly covers the right to meet publicly, and is limited by the potential disruption caused by the assembly. Another element is the right to stand for office, and to be elected, meaning that citizens have the right to be a part of government, and to work for the government as judges, policemen, teachers, and so on. The right to vote is the most well-known political right, but which office gets voted in is unspecified.

Understanding Democracy

Democracy is assumed to be the best political system, but it is much debated. Democracy is not considered the best system of governance by everyone. People question if it just elections, or if democracy means wider participation. Southeast Asian countries have tried to limit it by calling for guided or Asian style democracy. The different categories of democracy include: minimalist, pluralist, participatory, deliberative, and representative. A functioning democracy must include: participation, fair distribution of power, and effective monitoring of the government. Although Southeast Asian States are democratizing and some may be liberal democracies, many are not fully democratic. Failure to consolidate democracies is a problem, although the ASEAN organization explicitly promotes democracy.

Human Right to Democracy

Although there is a clear relationship between human rights and democracy and they are considered interdependent and mutually reinforcing. Yet this does not mean there is a human right to democracy. Rights do lead to a more democratic society, and people's rights are mostly improved under democracy. The right to vote is the most recognized political right and comprises choosing a government through election. Further, elections should be genuine, periodic, and the votes of universal and equal value. Southeast Asia has a history of unfair elections where opposing politicians have been jailed, votes manipulated, and counting rigged. This conduct can be countered by election monitoring carried out by national and international bodies who assess the election's compliance with approved standards including the fair counting of votes, fair campaigning, and independent monitoring.

Freedom of Expression

Freedom of expression dates back to the 1700s and includes the right to seek information (for example, by allowing access to libraries, newspapers, or the internet), the right to receive information (for example, on health, government, or safety information), and the right to impart information (or to express oneself). Limitations include that it must be: written in law, necessary to ensure the rights of others, and the expression must not go against public morality, health or safety. Every country in Southeast Asia has debated freedom of expression and has limited it through the use of libel laws, intellectual property laws, and national secrecy acts. Examples of strict laws include Thailand's *Lese Majeste* laws, Malaysia's sedition laws, and Vietnam's Art 88 in the Penal Code. Defamation laws have been used to limit expression to either criminalise the act or inflict high fines which, following conviction, can bankrupt individuals or media companies.

Human Rights and the Media

Freedom of the press covers the right of journalists and media to express credible information. Though not clearly a human right, it is necessary for a functioning democracy. As a social institution, the media plays a vital role in informing the public, shaping public opinion, and checking abuses of government power. Throughout history, some media has played a political role during the battles for independence, although mass media in the region is no longer critical of government. Media is limited by censorship and can also be constrained by harsh penalties, intimidation, and violence. In some places, strict rules govern ownership and registration. The public's right to freedom of information refers to the duty of government to ensure public access to information on decisions, budgets, and government programs. These laws encourage governmental transparency.

New Media issues

The internet has done much to promote and protect human rights. It is an invaluable tool for human rights defenders but can also be used to violate people's rights to privacy, safety, and reputation. New media (that is, any digital media) allows amateurs, bloggers, and netizens to be active on rights issues although many have been threatened with prosecution. The right to privacy is challenged when governments monitor people's information, movements, and internet use. Across the region, cyberlaw is still under development and is open to misuse by governments.

B. Typical exam or essay questions

- What features of democracy are based on human rights, and which arise from a State's political history and culture?
- What are reasonable and objective limits to public protest? Have limitations been put on protests in Southeast Asia restricting people's rights to assemble?
- What has been more difficult to establish in the region: democracy or human rights?
- In what ways have groups tried to interfere with elections throughout history? Is such conduct more difficult to get away with nowadays?
- Should political speech ever be limited?
- How free is the media in your country? What are limitations on the media because of by political, economic, or moral issues?
- Analyse the main cyber security laws in your country and assess if they comply with human rights standards.
- Should access to the internet be a human right?
- What are the main concerns around privacy and the internet for university students?

C. Further Reading

Theorists of democracy and democratization include:

- Robert Dahl
- Larry Diamond
- Samuel Huntington
- Jurgen Habermas
- Joseph Schumpeter
- Seymour Lipset
- Fareed Zakaria

Authors writing on the status of democracy in Southeast Asia include:

- Farish Noor
- Amit Acharaya
- Amek Laothamatus
- Duncan McCargo
- Kevin Hewison
- Mark Beeson
- Clive Keesler
- Donald Emmerson

Writers addressing the relationship between human rights and democracy include:

- David Beetham
- Daniel Bell
- John Donnelly

Organizations with rankings or measurements of democracy include:

- Freedom House
- The Economist: Democracy Index
- Democracy Ranking

Freedom of Expression, the following organizations have reports and other resources:

- Reports Without Borders
- Index of Freedom in the World
- Freedom House
- Article 19
- IFEX
- Southeast Asian Press Alliance (SEAPA)
- Southeast Freedom of Expression Network (SAFENET)

The following address the Media in Southeast Asia

- Shelton Gunaratne
- William Atkins
- Krishna Sen
- David Hill
- Yao Souchou
- Asian Media Information and Communication Centre (AMIC): includes many resources and also publishes the journal, Asian Journal of Communication

New Media and Human Rights

- Reports from UN's Special Rapporteur on freedom of expression
- Internet Society
- New Media Advocacy project
- Global Internet Freedom Consortium
- Centre for International Governance Innovation (CIGI): hosts the Global Commission on Internet Governance
- Speak Up, Speak Out website: includes a program on media, journalism, and human rights
- United Nations Educational, Scientific and Cultural Organization (UNESCO): includes programs on internet freedom with research publications

List of Abbreviations

ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
ADB	Asia Development Bank
AI	Amnesty International
AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
BWIs	Bretton Woods Institutes
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CP	Corporal Punishment
CPP	Cambodian People's Party
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate Social Responsibility
CSW	Commission on the Status of Women
DAW	Division for the Advancement of Women
DV	Domestic violence
ECOSOC	Economic and Social Council
EIA	Environmental Impact Assessment
ETOs	Extraterritorial obligations
FGM	Female Genital Mutilation/Cutting
GBV	Gender Based Violence

GID	Gender Identity Disorder
HRW	Human Rights Watch
IANWGE	UN Inter-Agency Network on Women and Gender Equality
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHL	International Humanitarian Law
ILO	International Labour Organization
INSTRAW	International Research and Training Institute for the Advancement of Women
IMF	International Monetary Fund
ISA	Internal Security Act
LDCs	Less Developed Countries
LGBTI	Lesbian, Gay, Bisexual, Transgender, and Intersexual
MDGs	Millennium Development Goals
NAM	Non-Aligned Movement
NGO	Non Government Organization
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP-CRC-AC	Optional Protocol to the CRC on the involvement of children in armed conflict
OP-CRC-SC	Optional Protocol to the CRC Child on the sale of children, child prostitution and child pornography.
RBA	Rights Based Approach to Development
SAPs	Structural Adjustment Programs
SCHS	Right to a Safe, Clean, Healthy, and Sustainable Environment
SDGs	Sustainable Development Goals

TNC	Trans-National Corporation
TPP	Trans Pacific Partnership
TRIPs	Trade Related Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Emergency Fund
UNIFEM	United Nations Development Fund for Women,
UNFCCC	United Nations Framework Convention on Climate Change
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
USA	United States of America
VAW	Violence Against Women
VDPA	Vienna Declaration and Programme of Action
WB	World Bank
WHO	World Health Organization
WTO	World Trade Organization



ASEAN University Network
Human Rights Education (AUN-HRE)

About AUN-HRE

Realizing that human rights and fundamental freedoms is one of the key principles for ASEAN Community building, the ASEAN University Network-Human Rights Education Theme (AUN-HRE) was formally established in 2009 by the ASEAN University Network Board of Trustees to promote human rights and research opportunities in the areas of human rights, to serve as a platform for collaboration and capacity building amongst member-institutions, and to strengthen existing cooperation and enhance human rights education for ASEAN people.

Mahidol University was appointed as the focal point for the theme The Institute of Human Rights and Peace Studies has been assigned to coordinate the network and implement relevant activities in cooperation with members of the network.

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About SEAHRN

The Southeast Asian Human Rights Studies Network (SEAHRN) was born out of a common dream, among its 14 founding members, to enhance and deepen the knowledge and understanding of students and educators as well as other individuals and institutions from Southeast Asia in human rights. This goal will be achieved by engaging in collaborative research, improving course curricula and training programmes, sharing of best practices and conducting capacity building training of educators, staff and students and other interested individuals and institutions. Furthermore, it seeks necessary regional academic and civil society cooperation to sustain the effective promotion and protection of human rights in the Region. The Network desires to open its doors to interested institutions and individuals who share its vision for human rights and peace in Southeast Asia.

Member institutions and individuals of SEAHRN are aiming to achieve the following core objectives:

- To strengthen higher education devoted to the study of human rights in Southeast Asia through faculty and course development;
- To develop deeper understanding and enhancement of human rights knowledge through collaborative research;
- To achieve excellent regional academic and civil society cooperation in realizing human rights in Southeast Asia; and
- To conduct public advocacy through critical engagement with civil society actors, including inter-governmental bodies, in Southeast Asia

In pursuit of these objectives, SEAHRN has expanded its membership to 22 academic institutions. Moreover, it has successfully organized three international conferences on Human Rights and Peace & Conflict in Southeast Asia (Bangkok, 2010; Jakarta, 2012; Kuala Lumpur, 2014). It has also done training both seasoned and emerging scholars in human rights based research and instruction. It has also published an academic series containing relevant researches on some human rights and peace issues in the Region. It is currently developing a human rights and peace textbook which features various themes written for and by Southeast Asian academics and scholars.

In terms of resource material development, SEAHRN has already published Human Rights in Southeast Asia Series 1: Breaking the Silence (October 2011), Human Rights and Peace in Southeast Asia Series 2: Defying the Impasse (September 2013) and Human Rights and Peace in Southeast Asia Series 3: Amplifying the Voices (September 2013). and Human Rights and Peace in Southeast Asia Series 4: Challenge the Norms (August 2016). Its Members involved in producing the first ever university-level textbook on human rights and peace and conflict in Southeast Asia.

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About SHAPE-SEA

The Strengthening Human Rights and Peace Research and Education in ASEAN/Southeast Asia (SHAPE-SEA)

SHAPE-SEA aim and objectives:

- Overall Aim: To contribute to the improvement of the human rights and peace situation in ASEAN/ Southeast Asia through applied research and education.
- It 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 ASEAN/Southeast Asia.

Main Components of the SHAPE-SEA

- **Research** : Support and contribution to the existing knowledge through high quality research on human rights and peace in ASEAN/ Southeast Asia.
- **Capacity Building and Outreach** : Create spaces for knowledge building and dissemination amongst the academic community and other human rights and peace stakeholders
- **Education** : Directly involve and engage ASEAN/Southeast Asia universities 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
- **Publications** : Production and dissemination of research to wider audience

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