

Human Rights and Peace in Southeast Asia Series 3

AMPLIFYING THE VOICES

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Southeast Asian Human Rights Studies Network
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The Southeast Asian Human Rights Studies Network (SEAHRN) is an independent consortium of academic institutions and research centres which provide human rights and peace education through study programmes, research and outreach activities within the Southeast Asian region. The Network, which was established in 2009, currently has 20 members from seven countries: Cambodia, Indonesia, Lao PDR, Malaysia, The Philippines, Thailand and Vietnam.

SEAHRN was born out of a common dream to enhance and deepen the knowledge and understanding of emerging and seasoned scholars, educators, researchers and advocates as well as other in stakeholders from the Region about human rights and peace. The goal will be achieved by engaging in collaborative research, improving course curricula and study programmes, sharing of best practices and conducting capacity building training of educators, staff and students. Furthermore, it seeks to strengthen regional academic and civil society cooperation to sustain effective promotion and protection of human rights and peace 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.

Human Rights and Peace in Southeast Asia Series 3: Amplifying the Voices

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FOREWORD

While other regional organizations in Europe, America and Africa have established their own human rights mechanism, until a couple of years ago, the Association of Southeast Asian Nations (ASEAN) has appeared to be lagging behind its counterparts.

Fortunately, things started to change with the adoption of ASEAN Charter, a legal binding treaty between ASEAN Member-States in 2007, forty years since the establishment of the Association in 1967. The process of drafting this Charter was neither a simple nor an easy task. This Charter has somewhat changed ASEAN from a loose organization into a rule-based regional entity. Moreover, the Charter has stipulated a number of significant mandates, including the commitment to establish an ASEAN Human Rights body.

Scepticism about the establishment of this body spurred from the Region and other parts of the world. Yet, they were proven wrong. In October 2009 at the 15th ASEAN Summit held in Thailand, the Terms of Reference (TOR) of an ASEAN Human Rights body was finally adopted, and the ASEAN Intergovernmental Commission on Human Rights (AICHR) was formally established. The main purpose of AICHR as prescribed in the TOR is to promote human rights and fundamental freedoms of the peoples of ASEAN within the regional context, bearing in mind national and regional particularities. It also characterized the AICHR as intergovernmental in nature, a consultative body composed of representatives appointed by Member-States.

To fully achieve the mandate of AICHR and The ASEAN Charter's human rights and peace purpose, Member-states need to work hand in hand with civil society in order to actualise a *people-centred and -driven ASEAN community*.

It is worthy to note a crucial sector of civil society who has been contributing to the promotion of human rights and peace in the Region through education and research. Academics, throughout decades, have been focussing their efforts to enhance knowledge and skills of various stakeholders to effectively address human rights and peace in Southeast Asia. The Southeast Asian Human Rights Studies Network, established in 2009, has consistently been committed to provide human rights and peace education through study programs, research and outreach activities. Departing from the long-held tradition of university as an ivory tower, this independent coalition of academic and research institutions pledges to underwrite the development of human rights, peace and conflict resolution.

SEAHRN's most recent achievement is conducting the Second International Conference on Human Rights and Peace & Conflict in Southeast Asia on 17-18 October 2012 held in Jakarta, Indonesia. This Conference succeeded in bringing together more than 400 scholars, researchers, activists and advocates to explore and articulate on various relevant issues of human rights and peace and conflicts in Southeast Asia and beyond.

To achieve the Network's purpose of sustaining public interest and fully enhancing knowledge on human rights and peace, SEAHNRN has again initiated the production of an indigenous knowledge material that consists of some of the most important academic papers presented at the Jakarta Conference. The Human Rights and Peace in Southeast Asia Series 3 entitled "Amplifying the Voices" is a concrete testament to this commitment.

All eight articles chosen for this Series depict the condition, challenges and development of human rights and peace in Southeast Asia through the perspective of Southeast Asian people themselves. While it is true that ASEAN has made a significant leap with the adoption of the ASEAN Charter and the establishment of AICHR, nonetheless, challenges are still abound. Needless to say, participation of the civil society is direly needed, in particular to provide feedback to the governments in the Region for the full achievement of the promotion and protection of human rights and peace. Hence, partnership between the government and the civil society in each country becomes an important strategy to achieve the desired condition where all people in ASEAN fully enjoy and exercise their human rights and peace. "Amplifying the Voices" also points out the significance of collaboration among those professed in academic world and the human rights activists advocating human rights at the grass root level. No more shall there be a divide between the so called "Ivory Tower" and other sectors of civil society. Instead, alliance shall be the key word to achieve common goals of fulfilment, promotion and protection of human rights and fundamental freedoms.

It is hoped that this Series be read by both the civil society and government officials, for not only they reveal the information and analysis of actual human rights condition on the ground, but there are also feedbacks that could be of some perusal for the policy makers to address the relevant issue. I sincerely hope that this publication would be able to convey the relevant messages about human rights and peace to its readers. Most importantly, it is my fervent wish that the spirit ignited by this material would touch and inspire every Southeast Asian of this and the coming generations.



Prof. Harkristuti Harkrisnowo, Ph.D
Director General of Human Rights
Ministry of Law and Human Rights of the Republic of Indonesia

A MOMENT OF REFLECTION AND GRATITUDE

The Southeast Asian Human Rights Studies Network (SEAHRN) launched its first publication, *Human Rights in Southeast Asia Series 1: Breaking the Silence* in Yogyakarta, Indonesia in October 2011. The SEAHRN Editorial Team had meticulously compiled, selected, and edited 12 best papers featured at the First International Conference on Human Rights in Southeast Asia (Bangkok, 2010). Taking advantage of the momentum, in less than two years, the Editorial Team moved on to develop the next sets of the Human Rights and Peace in Southeast Asia Series. The immense number of excellent academic work led the team to produce two equally important volumes. All 16 articles were selected amongst more than 90 papers presented at the Second International Conference on Human Rights and Peace & Conflict in Southeast Asia (Jakarta, 2012).

Both second and third Series, respectively christened as “*Defying the Impasse*” and “*Amplifying the Voices*,” are impossible without the generous support from the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI), Swedish International Development Cooperation Agency (SIDA) and Canadian International Development Agency (CIDA). We are particularly most grateful to CIDA for respecting, trusting and supporting SEAHRN’s academic and management objectives and freedom in achieving these two new Series. Our utmost appreciation is given to Dr. Dewi Anwar Fortuna and Prof. Harkristuti Harkrisnowo for sharing their invaluable time, expertise and insights on the themes tackled in these two Series.

It is also important to recognize the hardworking and committed members of SEAHRN who engaged in the merciless tasks of reviewing and selecting the best 16 papers for the two Series. The list is long but indispensably essential:

- **Kamarulzaman Askandar** (University Sains Malaysia, Malaysia)
- **Melizel F. Asuncion** (SEAHRN Secretariat)
- **Saifuddin Bantasyam** (Syiah Kuala University, Indonesia)
- **Inge Christanti** (University of Surabaya, Indonesia)
- **Majda El-Muhtaj** (State University of Medan, Indonesia)
- **Michael George Hayes** (Mahidol University, Thailand)
- **Rosewitha Irawaty** (Universitas Indonesia, Indonesia)
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- **Herlambang Wiratraman Perdana** (Airlangga University, Indonesia)
- **Hadi Rahmat Purnama** (Universitas Indonesia, Indonesia)
- **Eko Riyadi** (Islamic University of Indonesia, Indonesia)
- **Ray Paolo Santiago** (Ateneo de Manila University, Philippines)
- **Heru Susetyo** (Universitas Indonesia, Indonesia)

We are also grateful to the Institute of Human Rights and Peace Studies (IHRP) at Mahidol University for hosting SEAHRN's permanent secretariat and consistently supporting editorial team meetings. Otherwise, publishing and distributing these two series would never appear on the horizon. Just to remind ourselves, the common dream shared by the SEAHRN Members is 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 and peace. These two Series are crucial steps to achieve this and, hopefully, the aspiration of a people-centred and rights- & peace-fulfilling Southeast Asian community.



Azmi Sharom

Chief Editor

on behalf of the Editorial Team

SEAHRN Human Rights and Peace in Southeast Asia Series 2: Defying the Impasse

SEAHRN Human Rights and Peace in Southeast Asia Series 3: Amplifying the Voices

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INTRODUCTION

OF ENGAGEMENT, EMPOWERMENT AND BELONGING

When a young Singaporean lady, who is currently taking her Bachelor's degree and also had recently volunteered at the Second International Conference on Human Rights and Peace & Conflict in Southeast Asia, was asked about her views on human rights and peace in the Region, she responded;

"I definitely feel that we're lacking in efforts to better the rights and welfare of Southeast Asians. We chase after development and modernity, but this usually only translates to economic growth. There are too many government-perpetuated infringement of rights, or the government just doesn't care."

Sharing the same time zone with and 1,486 miles from Singapore, a Filipino Marketing Communications Manager who recently graduated from college, replied to the same inquiry with;

"Human rights and peace situations in Southeast Asia are far from the utopian notion of peace. In a macro level, a lot still needs to change: the unmet basic necessities to live, the way officials lead nations, and the manner society seems to just revolve around an idealistic sense of how life should be lived. In a micro level though, human rights and peace seem to be evident; there are people who still fight for the right of others, which leads to hope—hope that all things may change one day. It may be too grand to say, but with that sense of hope, with that bit of movement, human rights and peace situations may still change for the good of all."

In the midst of the upcoming shift towards political and economic integration in Southeast Asia in 2015, it gets more difficult to deny the voices of those who are currently being (will directly be) affected by its impacts. Moreover, their stories, perspectives and feelings provide a glimpse on how the fulfilment of rights, freedoms and peace in the Region is being (and will be) reconstructed, sustained and embraced by its peoples.

By integrating them in this rather intricate discourse, the focus on human rights, peace, security, development and freedom goes beyond territories, state and regional levels of power, policies and legislation. At this stage where the Silence has been broken and the Impasse has been defied, this academic exercise has gone to a whole new level.

1. Redefining a Human Rights - and Peace - centred Southeast Asia

For the past 46 years, Southeast Asia has normally been identified with a political-economic cluster consisting of ten countries, the Association of Southeast Asian Nations (ASEAN). From the Bangkok Declaration (1967) to its very own regional Declaration on Human Rights (2012), ASEAN has been setting the path towards its peoples' destiny in terms of economic prosperity, social security, and political identity.

Through countless declarations, agreements and documented engagements, the ASEAN had manifested itself as the powerful centre that binds and connects the Region amidst diversities in political regimes, economic capacities and historical experiences. This is very much revealed in its mantra: "One Vision, One Identity, One Community." This reminds us of some assertions made by Benedict Anderson in his book "Imagined Communities." He stressed that "all communities larger than primordial villages of face-to-face contact... are imagined. Communities are to be distinguished not by their falsity and/or genuineness, but by the ways in which they are imagined." (Anderson, 2003: 6). The ASEAN had forged a regional "identity" by adopting several rules of engagement and agenda aimed at achieving progress and harmony.

To sustain such control, Member-States, as stated earlier, have to pursue documents to ensure that everyone commits to the principles of the Association. Anderson confirms this. In preserving this mode of regional community, printed materials serve as "... technical means for 're-presenting' the kind of imagined community ..." (Anderson, 2003: 25). Imagination, in this case, has definitely turned into concrete endeavours (policies, agreements and direct impacts in the lives of Southeast Asians)—and these are, most of the time, in favour of ASEAN and its members.

The ASEAN Charter of 2007 is by far the most important binding document delivered by the Association. It is monumental in many ways. It sets in stone rules and principles that identify ASEAN's structure and priorities. Article one stipulates the Purposes of the Association. It includes poverty alleviation (para. 4) and strengthening of democracy, good governance (and rule of law) and promotion & protection of human rights (para. 5). In anticipation of ASEAN's economic integration in 2015, another milestone is stated in Paragraph 13 of the Charter;

"To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in and benefit from, the process of ASEAN integration and community."

While this presents a promising paradigm shift in terms of regional governance, Paragraph 2 of Article 2 somewhat waters down the core worth of the said purpose. In summary, it asserts that ASEAN must respect the principles of sovereignty, non-intervention, territorial integrity, national identity and independence of all Member-States. This is reinforced in Paragraph 8 of the newly adopted ASEAN Declaration on Human Rights' (AHRD) General Principles:

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

The current ASEAN human rights mechanisms are a proof that State-leaning values are still of top priority. Their limited independence and weak protective mandates pose as great threats to human rights, peace and fundamental freedoms in the Region. Civil society movements in most Member-States also find restricted spaces to negotiate for people-centred regional and national policies. Worse, many forms of abuses and human rights violations still remain undocumented and unsolved, most of which are still in perpetuation as of this writing.

In light of the forthcoming ASEAN social, economic, and political integration, how do we ensure that a people-driven Regional organisation is achieved and that the rights and freedoms of the peoples of Southeast Asia are fully enjoyed?

Brazilian Liberation philosopher Paulo Freire asserts that the inability to address repressions leads to the transformation of the oppressed into the oppressor. He adds that “the oppressed, having internalised the image of the oppressor and adopted his guidelines, are fearful of freedom. Freedom would require them to eject this image and replace it with autonomy and responsibility. Freedom is acquired by conquest, not by gift. It must be pursued constantly and responsibly. Freedom is not an ideal located outside of man; nor is it an idea which becomes myth. It is rather the indispensable condition for the quest for human completion” (Freire, 2005: 47). Weffort echoes that, “the awakening of critical consciousness leads the way to the expression of social discontents precisely because these discontents are real components of an oppressive situation” (Weffort in Freire, 2005: 36).

Freire further believes in the crucial role of education through dialogue in empowering one’s agency to fight any form of oppression. It is also imperative that educators must be fully aware and active in facilitating the liberation of the people. One must remember that “the starting point for organising the programme content of education or political action must be the present, existential, concrete situation, reflecting the aspirations of the people” (Freire 2005: 87-95).

Members of the Southeast Asian Human Rights Studies Network (SEAHHRN) greatly understand Freire’s prescription for empowering agencies facilitated by academic activism. The Second International Conference on Human Rights and Peace & Conflict in Southeast Asia aimed to embrace all sources of seasoned and emerging knowledge on human rights and peace in the Region without fear and bias. It is the Network’s prime commitment to perpetually amplify not just cries of violations but also voices that celebrate justice, equality, and empowerment.

Faithful to Anderson, as a printed material itself, this Series is desired to catalyse the movement towards an academic, research and activist (and hopefully multi-stakeholder) community that passionately monitors, exposes, criticises, and supports local, national and regional efforts to promote, fulfill and protect human rights and peace in Southeast Asia. “Amplifying the Voices” is SEAHRN’s way to help unleash the potential human rights defender and peace builder in each one of us.

2. Synthesis of Selected Papers

The papers contained in this Series are broken into quite distinct themes and this synthesis will briefly articulate them one by one accordingly. The beginning step of the papers under “Amplifying the Voices” is naturally to emphasise the ubiquity of human rights struggle through the struggle of people living directly on the other side of the (politically imposed) border of the westernmost Southeast Asian country, Myanmar. The people of Manipur, one of the “Seven Sisters” of the Northeast Region of India (NER) have been living in the midst of armed conflicts since the last days of British imperialism over India in 1947. Homen Thangjam’s paper on “Militarism and the Issue of Human Rights and Democracy in Northeast India” narrates and analyses this journey. This paper represents the chapter of “Expanding Boundaries: Human Rights and Southeast Asia.”

Homen Thangjam believes that the on-going trend of state-sponsored violence and the armed opposition groups’ activities has led to the acceptance of aberration of principles and practices of democracy. The legacies of the earlier British—empires, royalties, rituals of exaltation, and subordination—administration, political order, rules, and defiance have not completely vanished by remained in a structure of political world. Manipur was taken over through a militaristic manoeuvre through the Merger Agreement (15 October 1949) that dissolved a democratically constituted Legislative Assembly. This dissolution of the Manipur State Constitution and its democratic government is claimed by Homen Thangjam as the starting point of armed conflicts in Manipur whose fighters have picked 15 October 1949 or the end of political existence of Manipur as the political landmark.

Respects to Human Rights and Democracy have been the collateral damage of this struggle. When the Indian State justifies the use of violence to maintain security of the “nation state,” it adopts militarism as an important means. In fact the Indian Army had begun a counter-insurgency campaign against the Naga tribesmen in Northeast India since 1955. Once embraced, violence becomes a juggernaut that overruns the rule of law, tolerance, dignity of life, and human security that are flattened into mere utopian ideals. Losses in terms of human rights, peace, and justice have become a lightly viewed “collateral damage.” The numbed Manipurese population in turn has embraced violence as acceptable practice when they take justice into their own hands.

The next batch of papers falls under the chapter of “Negotiating in Pursuit of Human Rights and Peace.” Matthew Mullen’s “Brokering for Human Rights in Burma/Myanmar” claims to find among the threatened Myanmar people a practice called brokering for their [human] rights. After a year of ethnographic interviews throughout the country until the end of 2011, the author reports the position of villagers and community members that demanding human rights is implausible compared to utilising a brokerage, a game of sell, give, and take as a means of grabbing their rights. As a form of game laden with ethical and practical dilemmas that must be resolved, neither the brokerage follows a conventional rights holder-duty bearer arrangement nor involves clear commitment to human rights or systems of standards, institutions, or organisations.

First, individuals broker for rights with no human rights lingo and thus attracted no unnecessary attention. Second, the process is non-adversarial; the State has been ready to crush enemies but less ready to deal with people acting friendly or indifferently. Third, brokering is an effective disguise for the pursuit of human rights through which people repackage projects and goals and ‘sell’ them to state officials. Fourth, brokering does not implicate the system as a whole. Individuals are able to use brokering to target what they described as the soft or weak parts of the state.

When it comes to the time to cast a verdict whether brokering is legitimate path to reach human rights and feasible as a means to mobilise human rights, Matthew Mullen reminds the readers the usefulness of the human rights-based approach’s emphasis on local ownership. Citing the conclusion of Hughes and Wheeler (2003) that human rights-based approach is powerful since it allows stakeholders to rewrite the rules of the game, the author stands steadfast that individuals can realise human rights in the face of the worst oppression; brokerage for human rights should be investigated further.

The next paper by Nicole Ostrand, “The Role of Environmental Attributes in the Thai Government’s Policy towards Displaced Persons from Myanmar,” reveals the fate of those who cannot afford to broker for their rights and instead have to leave their native land to wander into Thailand. Receiving the displaced Myanmar people at the rate of 150,000 persons from 1984 to 2004 alone, the Thai government must juggle between its desire to minimise the dark consequences of housing these displaced persons and the environmental attributes beyond desire. To shed the light onto the case, the author compares the policies of the Thai government towards the displaced persons during the late 1980s and those in 1997. Central to this paper is the argument that external context matters when government policies are evaluated.

Earlier in the 1980s the temporary shelters were distinguished as safe and relatively small village-styled located which promoted self-sufficiency and exhibited open movement in and out of the areas (Banki and Lang, 2008). This distinction, however, was altered from the mid- to late-1990s when temporary shelters were large, highly populated, and heavily protected. Around 1995 the more frequent cross-border raids on shelter locations

consolidated the heavier security measures around the shelters. Therefore the shelter locations were merged into larger areas further away from the border and their numbers were also simplified. From more than 30 locations in 1995, the number of shelters went down to 12 in 2000. The Thai government also implemented new security measures through fencing, security personnel, and strict control of movements around shelter areas since early 1997.

The Thai government also tended to repatriate more displaced persons throughout 1997; Amnesty International (1997) reported over 4,000 persons were returned to Myanmar from February to March 1997 alone. The increase of persons living in temporary shelter areas was only 61 persons from July to December 1997, which stood starkly contrast against 14,778 of incoming displaced persons in the first half of 1997. Anxiety of the Thai government regarding security around temporary shelters was expressed by new emergency procedure in 1997 through which NGOs working on the border must submit monthly supplies for the approval from both the Ministry of Interior and the Royal Thai Army. To conclude the paper, the author offers three environmental attributes that affect the Thai government's policy towards the displaced persons: a continued influx of people into the country, heightened security dimensions on the border, and a shift towards official diplomatic relations with the government of Myanmar. At the end, as the author puts it, policy is frequently a compromise between different pressures.

The next paper in this Chapter is entitled "Power and the Pitfalls of Capacity Building: Perspectives from the Locally-led Struggle for Human Rights in Eastern Burma" by Sam Moody. It discusses about the locals who stand betwixt the brokers and the displaced. These locals who live in Eastern Burma have been tapping local and non-local sources to resist abuses. Local sources appear as locally-led organisations that work across a range of different issues like, inter alia, the Karen Human Rights Group that supports villagers to improve their lives amidst the rampant human rights abuses. Many of these organisations, however, need supports from partners from Western countries. Having worked together for such a long time, the organisations and their supporters build the quality of relationship and effectiveness in their works. Something else, however, has gone wrong after all these years.

The author notices that the nature of these relationships is such that power is not equally divided. Through 'democratisation' and 'opening up' the Western organisations develop their strategies through agreements with the government, opportunities to reach some areas, and some interventions. In working with these non-local sources, local organisations need to build their capacity to manage the partnerships and projects linked to them. This is where things go wrong when the inherent imbalance in power relation creates pitfalls in 'capacity building' through which the local organisations in Eastern Burma lose their abilities to react to local situation and to support villages they are supposed to protect. The author conceptualises the pitfalls as "professionalization of resistance."

Using a vivid example of interaction between—presumably fictional—a selected local human rights organisation and a donor, the author explains the process of this “professionalization of resistance” that begins when the donor needs a local organisation to carry its so-called grassroots projects. The donor sends programme officers to build local capacities with the local organisation, i.e. baseline data gathering, qualitative/quantitative data gathering, etc. When the officers left Burma, the local organisation becomes unsure on how to apply the training onto their more complex and richer local situation less understood neither by the “programme officers” nor “experts” whose local knowledge are limited. Ever worse, the local organisation gets no idea how to monitor the activities in the future or to map the impact of activities already launched.

Lost in confusion, the local organisation resorts to much easier action to apply the training from capacity building workshops to one of their activities, which not only easy to plan but also convenient to monitor and measure for impact. The equally happy donor and local organisation continue the cooperation not knowing something is missing under their nose: the local organisation limits their activities in the future. Juxtaposed with the fact that the strength of local organisation is its abilities to respond to rapidly evolving context of Burma and communities’ needs, this deliberate limitation of activities is tantamount to losses. The author even states strongly that “the ‘capacity building’ from the donor has damaged the effectiveness of the local organisation.” By implication, the ‘capacity building’ activities will in some important aspects *weaken* local civil society rather than *strengthening* it.

The next Chapter, “Reconstructing Labour and Business through the Human Rights Lens,” will cover two papers that amplify the suppressed voices of the women toiling in manufacturing industries: (under)garment based in Thailand and the Philippines. The capital finds the backdoors through which their labour rights are deprived through locally-sanctioned legislations. The first research-based paper, “Labour Protection in Thailand: A Case Study of Triumph International and Labour Union,” of this genre done by Nussara Meesen aimed at retelling a story of a successful decimation of a labour union through dirty manipulation of local laws to sack its leader followed by massive lay-off against the leader-less union. The second one represents the rather similar story from Manila’s sweatshop. This is made known in Melizel Asuncion’s “Labour Flexibility in the Philippines and the Challenges to CSR Compliance.”

The flourishing Triumph International Labour Union was formed in 1980 or 33 years after the company’s establishment in Thailand. Led by a notable lady Jitra Kotchadet who had worked in the undergarment factory since 1993 and took Union leadership from 2006 to 2008, the Union strived. In 2008, for example, the company agreed to the Union’s demands to raise wages from 203 baht a day to 399 baht (plus 1,100 baht of living allowance and 3,000 baht of medical allowance). Also in 2008 the workers complained about the factory’s intolerable production standard time system that was set up to actually increase labour outputs—and to restrict leaves—but to reduce salaries (although the system apparently

worked otherwise). The labourers retaliated by slowing down production to protest. The company decided to resort to more radical series of moves to undermine the Union's strong leadership.

Once Ms. Kotchadet was on a television programme wearing a T-shirt claiming “those who don't stand [to anthems] are not criminals; thinking differently is not a crime” in her support to a defendant of *lèse majesté* case, the company took its chance. Out of nowhere, a conservative local newspaper focused its fire on Ms. Kotchadet and her T-shirt to provoke anger reaction from pro-royalist public that later campaigned for a boycott against Triumph products for Ms. Kotchadet's mistake. The company (The Body Fashion Thailand) quickly sought a local court's ruling to terminate Ms. Kotchadet's employment in the company for “damaging” the company's reputation. The Court quietly made the favourable ruling for the company on 8 July 2008 to “damaging” the company's reputation and only later on 29 July informed the unknowing and defenceless defendant Ms. Kotchadet about such ruling. (Strangely, years later in 2012 the public prosecutor dropped the charges against the original *Lèse Majesté* case related indirectly to Ms. Kotchadet's T-shirt.)

Having knocked down the Union's strong leadership, a year later after the quiet court ruling the company ran amok to lay off 1,959—including the sick, the pregnant, the disabled, the veterans from Ms. Kotchadet's swimwear section—out of 4,200 workers at the Samut Prakarn plant, citing ‘global economic downturn’ as the pretext. The cost for this overhaul was 262 million baht of severance pay to the laid-off workers as required by law (around 100,000 baht per workers). Snatching 75.5 million baht from the Board of Investment, The Body Fashion Thailand relocated its plant to Nakorn Sawan where the daily wage was 155 baht with no Union in sight. (The old Samut Prakarn plant was moved to Sri Lanka.)

Ms. Kotchadet became an officer of Triumph Union to deal with administrative work and provision of advice to union committees and ran a small business called “Try Arm” with 20 labourers. In terms of human and labour rights, the company's sins are multitude despite the blunt impunity. First, The Body Fashion Thailand robbed workers' fundamental rights to freedom of association and wage negotiations as enshrined in the Universal Declaration of Human Rights 1948. Second, the company deprived Ms. Kotchadet her freedom of expression when she was punished for showing support to a defendant of *Lèse Majesté* case who was later released from the charges. Third, the massive lay off against almost half of the whole labourers who happened to work in Ms. Kotchadet's section is a blunt violation of the rights not to be discriminated and the rights to work. These violations, ironically, are possible since the labour court fails to uphold the Thailand Constitution, Labour Protection Act, and Labour Relations Act.

Given this case of Thai labourers, the case against the garment labourers in Manila-based Nouvelle Industries Inc. appears like a *déjà vu*. Melizel Asuncion's article captures the phenomenon of leaderless labourers' deprivation of rights through what she terms ‘labour flexibility’ borrowed from Kugler (2004). This concept represents the employer's strategy

to vary labour inputs according to the state of external demands through classification of the workforce into core regular staff and casualised labourers. The earlier model of labour casualisation took the practice of assigning production work to seasonal, contractual, casual, part-time, and home workers whom the facilities hired or contracted. Later, the casualisation evolved into a practice of hiring labourers from labour outsourcing agencies known as trilateral labour employment: the principal company, the labour outsourcing agencies that served as direct employers, and the workers without formal relationship with the principal company. In fact recently most of the garment factories in the Philippines maintain a ratio of 40 per cent of core regular staff against 60 per cent of non-regular workers fluidly moving from one employment to the next.

Founded in the 1970s as a steam laundry enterprise, Nouvelle Industries Inc. grew from washing of denim garments, dry finishing (in 1989), sandblasting (1991), into cut-and-sewn operation (in 1996). In 2007 Nouvelle suggested its employees and workers who were about to lose their jobs to up the cooperatives with which Nouvelle could subcontract some of the works. Thus in that year Nouvelle (230 employees of which 160 were operators) began to subcontract its works to two in-house workers' cooperative named "Handsewing Coops" (180 employees of which 160 were operators) and "Fancy Pants" (80 employees of which 60 were operators). (The proportion of probationary employees in these entities was around 20 to 25 per cent of all employees.) Most workers of Nouvelle were paid daily and monthly (30 were paid at piece-rate). In Fancy Pants 80 per cent of employees were paid at piece-rate. Nouvelle could pay its employees lower rate than the legal minimum wage under the Barangay Micro-Business Enterprise Program.

In spite of the Philippine Department of Labor and Employment's Incentivising Compliance Program (ICP) in 2011 to raise compliance by enterprises to core labour laws and other labour standards, Corporate Social Responsibility or CSR remains customer-driven and inorganic. Labour flexibilisation and casualisation remain the biggest threat to labour rights realisation and protection when labourers are decoupled from their worksites through a separation of productive and contractual engagement between the principal company and the workers. The paper has shown how easy it is for corporations to evade its social responsibilities to workers who are producing their products. At the global level, the UN Protect, Respect, and Remedy (PRR) Framework for Business and Human Rights is shown to have a superficial understanding about this process.

The next two papers fall under the fourth and final Chapter, "Embracing Rights: Women and Children," of this Amplifying the Voices series. Both papers amplify the voices of the most vulnerable members of our societies: poor migrant women and children facing an [in]justice system. Kristy Ward's "Negotiating Agency, Exclusion and Power: Rural-Urban Migrant Women in Phnom Penh's Informal Settlements" exposed in an up close and personal accounts of the lives of hopeful rural women who want to improve their fate in urban concrete jungle. If the common neoclassical wisdom states that women

who move from rural villages to urban centres get benefits, Kristy Ward finds that more often than not this wisdom evades those who migrate into informal settlements in Phnom Penh urban centres.

In-depth interviews and focus group discussions with rural-to-urban migrant women reveal that the opportunity represented by mobility and choice is constantly revoked by persistent denial of various rights in their low-income settlements such as labour exploitation, inadequate housing, sexual- and gender-based violence, etc). In conceptual terms, poverty, migration, and gender in poor settlements have produced wonders to conjure social exclusion and imbalanced power relations upon these women. Forty-nine women living in six poor settlements (aged between 20 and 62, migrating for 1 to 5 years, none finishes second grade) are victims and witnesses of economic vulnerability, poorly paid works, sexual violence, and isolation and exclusion that force them to negotiate for small gains. When the dust of the neoclassical calculation has subsided, what's left so conspicuous is Wolf's (1992) protest that migration is not really a 'strategy' but better explained a 'short-term coping mechanism' in response to external shocks and vulnerabilities (like failed crops and emergency medical care) with blurred outcomes.

The paper by Joti Kohli and Tess van der Rijt, "Juvenile Justice in Malaysia," truly amplifies the hidden voices of children who are [mis]treated under a system whose careful and deliberate processes still offer loopholes through which things can still go awry. The "sin list" is quite extensive. The most important internationally acknowledged principle that the Juvenile Justice System in Malaysia—spearheaded by the Juvenile Court Act of 1947—fails to respect is the principle of "detention as last resort" (Article 27 of Child Rights Convention or CRC of 1995)—the first sin. Under the Malaysian's Child Act of 2001, statutory expression of the principle of "institutionalisation as a last resort" is clearly missing; the Child Act states five provisions for "out-of-home care" for both children in conflict with the law and children needing protection of the law (added with probations hostels, approved schools, and Henry Gurney Schools—for juvenile criminals). The second sin is the failure of the officials and stakeholders to interpret "last resort" properly when they understand it as permission for custodial sentences whenever a parent is refusing or perceived as unable to provide appropriate level of supervision over the child. Decisions around sentencing are unfortunately centred on the [in]capacity of parents, the child's physical living environment, and the willingness of parents to sign a bond or take the child back.

The third sin is the lack of protection over children from the place where they are most likely to become victims of torture or other forms of cruel treatment: police custody. Despite the fact that the Child Act of 2001 requires a child arrested to be brought before a Court for Children (or Magistrate) within 24 hours and must be released upon bail, the common practice is the police officials' requesting remand of the child pending trial. Reports of children being held on remand for lengthy period of time are rampant. The fourth sin is the failure of the system to respect the CRC's stipulation on "child well-being

and proportion [of offense]” to ensure the children are not severely punished beyond what their offenses warrant. In fact, from 2003 to 2009 around half or 52 per cent of children convicted by the Court of Children were for theft and for a lengthy period (three years or more).

The best way to avoid the children from getting into troubles in Courts is not to have them there in the first place. The CRC already demands States to promote establishment of laws, procedures, authorities, and institutions for children without resorting to judicial proceedings. The fifth sin of the Malaysian juvenile justice is thus the failure of the Child Act of 2001 to include globally known strategies like diversion and restorative justice; since its inauguration in 1947 the juvenile system adheres to Court-based interventions and institution-based rehabilitation. The sixth sin is the failure of the system to prevent secondary abuse or abuse that occurs when the children who have already suffered from abuse or neglect are further victimised while liaising with the authorities (police, courts, or other institutions). An NGO working against child sexual abuse reports that between 2007 and 2011 only three of the police force’s Victim Care Centres were active. Although the sin list is hardly exhaustive, the failures of Malaysia’s Juvenile Justice system still leave so much to desire.

3. “Etherealising” our Space

Echoing Freire, “dehumanization, which marks not only those whose humanity has been stolen, but also (though in a different way) those who have stolen it, is a *distortion* of the vocation of becoming more fully human” (Freire 2005, p. 44). While it is vital to religiously monitor treaties, policies and legislations, we, as academics and researchers, possess the duty to document and analyse stories and various revelations of truths—especially of those who have been silenced, frightened and disempowered. We, therefore, contribute to the reinforcement and expansion of the concept of “human” in human rights. The sonic waves of reported and amplified the otherwise stifled human voices should have turned into an etheric agent that seeps through to fill the empty and void space attempted by the anti-human rights agencies. Like an inflammable gas used as an anaesthetic and solvent, this etheric agent will be the catharsis to purify the convoluted practices of human rights denials into a new pure atmosphere to allow clear and resounding voices of innocent and repressed demands of those who have suffered for so long.

At the end of the day, amplifying voices may not be enough to totally achieve a human rights and peace driven Southeast Asia. This is a constant challenge. So far, SEAHRN and its members are currently forging ways to reach out to various stakeholders through trainings, dialogues, and home-grown resource materials. In the past four years, we have seen massive improvements in building capacities and rousing interest amongst academics, researchers, and practitioners. Yet, localising the language and internalising principles of human rights and peace require time, energy and more spaces to collaborate. We are getting there and our pleas for a people-centred Southeast Asia are being heard—and gets even louder by the second.

References

ASEAN Charter, 2007.

ASEAN Declaration on Human Rights, 2012.

Anderson, Benedict, 2003. *Imagined Communities*. Anvil Publishing: Pasig City.

Banki, S., and Lang, H., 2008. Protracted displacement on the Thai-Burmese border: the interrelated search for durable solutions. In: H. Adelman, ed. *Protracted displacement in Asia: no place to call home*. Ashgate Publishing Limited: Hampshire, pp. 59-82.

Freire, Paulo, 2005. *Pedagogy of the Oppressed*. Continuum International Publishing Group: New York City.

Hughes, A., J. Wheeler, R. Eyben, and P. Scott-Villiers, 2003. *Report on Rights and Power Workshop*. 17-20 November 2003. Institute of Development Studies. Available at: http://www.powercube.net/wp-content/uploads/2009/11/rights_and_power_workshop_report.pdf (accessed on 12 June 2012).

Kugler, A., 2004. *The Effect of Job Security Regulations on Labor Market Flexibility: Evidence from the Colombian Labor Market Reform*. Available at: <http://www.nber.org/chapters/c10070.pdf> (accessed on 30 April 2012).

Wolf, D., 1992. *Factory Daughters: Gender, Household Dynamics and Rural Industrialization in Java*, University of California Press: Berkeley.



**EXPANDING BOUNDARIES:
HUMAN RIGHTS AND
BEYOND SOUTHEAST ASIA**

MILITARISM AND THE ISSUE OF HUMAN RIGHTS AND DEMOCRACY IN NORTHEAST INDIA

Homen Thangjam*

Armed conflicts certainly have detrimental effects on the lives of people. Militarism and violence perpetrated by conflicting parties lead to violation of human rights, loss of lives and destruction of livelihoods. Drawing on the experience of the Northeast India, this paper identifies the genesis and nature of the armed conflict in the region, and the trend in which violence has also been accepted by the larger society both as a practice of resistance as well as a method of settling dispute or any issue. It argues that these trends lead to the acceptance of aberration of principles and practices of democracy. Further, the paper discusses the juxtaposition of the Indian State (with a civilizational narrative) with other erstwhile independent nations such as Manipur finds mismatches. Timely intervention is required to address the issue. This analysis enables one to better understand the distinct nature of armed conflict in Manipur in particular and Northeast India in general. At the same time, it will also enable to precisely show how a cycle of violence is in operation in the region; human rights are violated and put at stake democracy both in its condition as well as principle.

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1. Introduction

In a memorial lecture delivered on June 30, 2013 at Imphal, scholar and creator of alternative theatre, “theatre of the earth,” Padma Shri, Shri. Heisnam Kanhailal observed:

Simmering discontent that started from around 1960 finally erupted into a war of independence against India in the 70s. Manipur became a contested land for both the Indian army and the liberation army. Even today, the Manipuri society exists amidst confusion and mayhem. Government’s imposition of various types of laws to subjugate the people has become the burning issues and resulted into existential crisis. It has been nearly 50 years since people have been living in this manner. ... Brutal oppression continues (Kanhailal, 2013:2).

Further he remarked:

On a daily basis there are *bandhs* and ceaseless economic blockades for more than 100 days. All this happens in the midst of armed-conflict between the State armed-forces and armed opposition groups. All of us are living, leading the lives of victims... Violence has become a characteristic feature, embraced and practiced, for any activity. Whenever there is a *bandh* or a strike, instead of seeking solidarity from the public, *bandh* supporters warn the people to follow their *diktat*, if not, they have to face the consequences on their own.... Are these verdicts non-violence or violence? There is no respect for human life any more. There are no qualms in taking away a life. Where can one find a more decadent society than ours? (Kanhailal, 2013:5 & 12).

Heisnam Kanhailal clearly captures the popular angst as well as the existential reality of the Northeast region of India (hereafter NER) in general and the state of Manipur in particular. It would not be an exaggeration to add that in contemporary Manipur, violence influences not only the high politics but also the everyday life of the common people. In fact, the prolonged and continued armed conflict in NER has impacted onto the social, economic, political and everyday life shaping into a practice. This is reflected in three visible trends. On one hand, State enjoys impunity to violence under the cloak of the Armed Forces Special (Powers) Act, 1958 (hereafter AFSPA). The Act, which was imposed initially in the hill areas of Manipur in 1958 and all over the state in 1980, provides immunity to the state actors and they cannot be tried in civilian court of justice.¹ And on the other hand, armed opposition groups continue to rely on violence either to achieve the goal of independence or to enforce their mandate upon the people. Moreover, we witness seeming acceptance of violence by the people both as a means of resistance against the excesses of the armed groups (state and non-state actors) as well as a method of settling disputes amongst themselves, and thus caught in the grips of the cycle of violence.

1 In 2004, after a state-wide protest against the rape and murder of Th. Manorama Devi by the Assam Rifles, AFSPA was partially lifted from the Imphal Municipality areas.

My argument is that these trends have led to the acceptance of aberration of principles and practices of democracy. And human rights violations are considered to be collateral damages. In order to put the issues into perspective and understand the prevailing malaise of militarism as well as the democratic condition in the state, the paper focuses on the genesis of the armed conflict in Manipur. Further the paper proposes that the juxtaposition of the Indian State (with a civilizational narrative) with other erstwhile independent nations such as Manipur, which was once a sovereign kingdom in the Southeast Asia, finds mismatches. In this midst, what has become an alarming trend is the practice of violence, which has captured popular imagination and used in dealing with any issue.

2. Contesting Narratives & the Armed Conflict

The genesis of armed conflict in Manipur may be traced back to the last days of British imperialism. The Asiatic kingdom became a colony of the British after its defeat in the Anglo-Manipur War of 1891. End of British colonialism in the Indian Sub-continent in 1947 the provided the historical context for the emergence of conflict situation in the state. In fact, the conflict in Manipur is rooted in the contested merger of Manipur with India Union in 1949. A pertinent demand of the armed opposition groups in Manipur has been the restoration of the pre-1949 sovereign status of Manipur. Since then, the narrative of “nation” and “sub-nation” becomes a major point of contention among different political and cultural positionalities, which has rendered the erstwhile kingdom in a cauldron of violence.

2.1 The Nation Narrative, Nation Building & the Enemy Within

The modern idea of nation state was introduced in India through colonial intervention. The post-Enlightenment ideals of value-neutrality, objectivity, impersonal and bureaucratic structures of governance and representative rule, developed in western countries as a part of reform movements and protests, had a basis in popular thought. In India, such ideals, which became the basis of nationalism, were a gift from the modernity package brought by colonialism.

In rejecting the colonial rule, Indian nationalism had to assert its distinctive identity by differentiating itself from the identity of the colonial masters, while simultaneously internalizing the Enlightenment rationality of western thought for its own formation. But as Bikhu Parekh (1997) notes, the cultural limitation of liberal democracy imposes certain constraints upon those imitating the same both in terms of skills as well as the craft. Out of such emplacement emerged the Indian dilemma: a contradictory and conflicting nation-self in which the nation state had to be at once itself and the other than itself. This dilemma leads the Indian State appropriating the colonial character, questioned and rejected during the freedom struggle, thus resulting into a situation of state-linked “internal colonialism” (Nandy, 1983:12). The state uses legitimizing core concepts like

national security, development, modern science and technology as justificatory ideologies for domination. Violence is used to sustain these ideologies. Legitimacy to this violence is drawn from the accepted dominant theory of state so as to monopolise absolute violence.

At the policy level, what was followed by the political elites, following the withdrawal of the colonial state, was the tendency to take an excessively constitutional or constructivist view of the political dynamics. It was widely believed, in the Indian nationalist circles as elsewhere, that the making of a successful nation state was basically a matter of legal and political construction. In spite of differences on principles for the creation of a new society, the constructivist premise went unquestioned among the political elites. Legacies of administration, political order, rule and defiance surviving from earlier political formations – empires, royalties, rituals of exaltation and subordination, *etc.* – thus, have not completely vanished but remain in something like a substructure of the political world (Doornbos and Kaviraj, 1997:12). Administrative convenience once decried against the British colonial rule was continued and legal homogenization of the political world entirely structured by the institutions and initiatives of the ruling elites, who went all out to serve their own interests. The materiality of having a physical nation (territoriality) whose resources could be exploited for the elites' benefits, under the garb of social equity and redistributive justice could only be envisioned by the educated elites at the expense of illiterate masses.

Over the years, what has occurred in India is the resurgence of historical legacies often as memories, which do not have any definable locus in institutions but pervade the political world, subtly altering the meanings and results of political actions (Doornbos and Kaviraj, 1997:12). For example, the recent period in India has witnessed an increasingly lucid appreciation of the subtle ways in which historical past remain active through their effects. The patterns of traditional politics operate as deeper, subterranean influences on the formal architectures of modern parliamentary politics. Caste and religious politics have in recent times developed forms which are impossible to describe in terms of the dichotomy between the “traditional” and the “modern.” In the case of the Northeast, ethnicity have emerged as historical units vying for space both in the mainstream politics as well as serve as canons for self-determination. Whether ethnic groups in the Northeast are historical entities or these are modern political constructs shall be deliberated in the subsequent sections. It is worth noting that the politics of identity revolves around these structures, which are responsible for most of the violence in the region.

The story of the political integration of India as a nation state was through the logic of citizenship and economics. The ideas were mainly borrowed from the (western) modern paradigm of nation state theory. In this enterprise, what was inculcated is the principle of individuating the individuals whose locomotion in life is propelled by self-interest and profit. While this is true for most part of India, the Northeast and some parts of India had a different story to tell. The logic of “strategic importance” was given paramount significance over those two processes. For example, Manipur was “taken over” through a militaristic manoeuvre. The enforcement of Merger Agreement on October 15, 1949 led

to the dissolution of a democratically constituted Legislative Assembly. In Manipur, after the departure of the British in 1947, elections based on universal adult franchise was held in June 1948 and the Maharaja inaugurated the first Assembly Session on October 18, 1948.

The state, as a social and political practice and as a system of inclusion and exclusion *par excellence*, has tried to solve the problem of conflicting identity claims by producing precise distinctions and differences between citizens and aliens, by domesticating particular identities and by creating a coherent sovereign identity. As Bauman describes the modern state:

National states promote “nativism” and construe its subjects as “natives.” They laud and enforce the ethnic, religious, linguistic, cultural *homogeneity*. They are engaged in incessant propaganda of *shared* attitudes. They construct *joint* historical memories and do their best to discredit or suppress such stubborn memories that cannot be squeezed into a shared tradition - now redefined in the state-appropriate quasi-legal terms, as “our common heritage.” They preach the sense of *common* mission, *common* fate, and *common* destiny. They breed, or at least legitimize and give tacit support to, animosity towards everyone standing outside the holy union (Bauman, 1991:64; emphasis by Bauman).

This state has become more and more a contested space. As Appadurai notes, the “nation state” is a battle of imagination with “state and nation seeking to cannibalise each other” (Appadurai, 1990:304). Groups with ideas about nationhood seek to capture or co-opt state power, and states simultaneously seek to capture and monopolise ideas about nationhood. Thus, a platform is set for separatism and micro-identities to become political projects within the nation states. Ideas of nationhood appear to be steadily increasing in scale and regularly crossing existing state boundaries.

At the same time, logic of citizenship, although the constitution provides the parameters, remains questionable when seen in the context of the state’s relation with its minorities. The application of a western worldview of state formation in the developing countries with ideals of singularity – single identity, single source of sovereignty, single legal system, a single system of rights and obligations, a unitary conception of citizenship, and a single mode of relating to the state – presupposes that members of the state are all agreed in defining themselves primarily as individual citizens rather than as members of specific ethnic, religious or other communities. The presupposition is that members of the state form a single and homogenous people, and qua people they are sovereign. Since, they form a homogenous unit, the majority is entitled to speak and act in the name of them all (Parekh, 1997:192). Any attempt to develop or sustain loyalties to their pre-modern identities, other than given by the state, or go against the majority principle, are viewed with suspicion and hostility. For the state, these minorities are the “Others” - the enemies within or the “objective enemies.” Take for instance, when movements are initiated demanding autonomy in the form of recognition of language, culture, or in more radical terms, self-determination, they are viewed as anti-national. Catalytic explosions of such demands are

not viewed as failure of the state to provide a framework for order and justice. Thus, the very idea of turning the Northeast into an “alien space” where martial law like AFSPA operates suggests that people of the region is closer to Hannah Arendt’s “objective enemies”² whose definition is created by virtue of their existence in a particular position at a historical moment in time, and that they do not fall within the self-definition of a state. The idea of “national security” which the Indian State emphatically nurtures may in the long run create incurable conflicts where the state starts subscribing to totalitarian ideology of creating “Others” within the country. From the perspective of the “nation state,” an ethnic group claiming a right to produce difference and make distinctions which transcend the official state ideology is treated as an “enemy within.” The state enacts several suppressive methods to deal with these “enemy within.” In India, AFSPA seems to be a pointer towards this method. The hardening character of the state emerges in reinforcing greater violence at the moment of slightest opposition. Ethnic communities in India’s Northeast have been targets of such violence, not only officially at the hands of powerful state machinery, but also at the hands of all those who take their legitimation from state ideology.

Economic logic of integration is also used as another tool for nation building. This was successfully achieved through the development of capitalism across nations. In the developing countries, too, economic integration formed a compulsory component of the nation building process. In India, the idea of economic integration was associated with the concept of “planning.” However, official justification of “planning” was projected as a means to achieve social justice. There seems to be inconsistency in what the Indian State intends and what it projects. While the intention of the Indian State is to achieve economic integration, it projects a different picture of targeting social justice as its goal. The result is quite imminent. Each stage of planned economy produced elites which sought to benefit the most from the state. They developed the idea of India as a nation state based on “materiality.” Instances are that of the neo-rich peasants in the Green Revolution belt, and emerging new elites in other regions of the country at recent times.

What is being achieved in this entire process of legal, political and economic integration is a strong Indian State, whose military play a substantive role in safeguarding the “national interest,” which only endorses the unitary spirit of a nation state.

2.2 Counter Narrative: The Manipuri Discourse

Assertions and demands for self-determination mainly by the Manipuris harp back to the historical legacies – of an autonomous kingdom with a civilizational foundation or having been the constant defenders of the territory against the marauding Burmese, or most recently of the story of defiance against the British colonial rule – which they believe was undone through merger with the Indian Union (Oinam and Thangjam, 2006:123).

2 “Objective enemies” or “enemies of the people” refer to classes of people who are liquidated simply because of their group membership.

Although ascribing to different political ideologies and method of armed struggle, a common narrative shared by the valley based armed opposition groups³ is that Manipur was a sovereign kingdom where different ethnic communities existed harmoniously and was never a part of the British India that ruled over India for more than 400 years. Such an articulation has produced a nationalist discourse that fits into an imagination of nation and territoriality. First claim is that Manipur has a 2000 years old political history and one of the most ancient kingdoms in the Southeast Asia (Akoijam, 2002). When British Paramountcy lapsed, the first political act committed by the people of Manipur was the promulgation of the Manipur State Constitution Act, 1947 and adoption of a partially democratic government by holding an election based on universal adult franchise in 1948. Thus, Manipur had the distinction of possessing a constitution based on free will with the king as its constitutional head. However, the democratic sovereign status ended with five initiatives taken up by the Indian Dominion.

First, Manipur was made to send its representative to the Constituent Assembly of India by entering into a secret agreement with the Manipur State Durbar on July 1, 1947 (Singh, 2009:61–62). Second, the Standstill Agreement and the Instrument of Accession were signed on July 11, 1947 (Singh, 1988:70). Third, Government of the Indian Dominion had stationed an extra-constitutional entity known as Dewan in Manipur on April 10, 1949 (Singh, 1988:95). Fourth, the controversial Manipur Merger Agreement, 1949 was signed on September 21, 1949 and subsequently integrated Manipur into the Indian Union on October 15, 1949 (Singh, 1988:93). Fifth, the democratically adopted Manipur State Constitution Act, 1947, and the Manipur State Assembly were dissolved by promulgating two orders, namely, the Manipur (Administration) Order 1949 and the State's Merger (Chief Commissioner's Provinces) Order, 1950 (Singh, 1988:125 & 127).

The dissolution of the Manipur State Constitution and its democratic Government eventually has led to one of the most protracted armed conflict in Manipur. As a matter of fact, the armed opposition groups or insurgent groups of Manipur have been resisting the presence of Indian State in Manipur. They are fighting against the Indian military forces to restore the pre-1949 political status of Manipur with the ultimate aim to reconsolidate the democracy that had existed then. The armed opposition groups pick up October 15, 1949 as a specific historical moment when the independent political existence of Manipur came to an end. As such, the day is observed every year as “National Black Day.” They are demanding the revocation of the Merger Agreement. It may be recalled that the Manipur Merger Agreement which was signed on September 21, 1949 became operative on October 15, 1949.

3 By valley based armed oppositions groups I am referring to those which are largely derived from the Meetei ethnic stock. However, this is not to deny the presence of membership from other communities. Major valley based armed opposition groups include the United National Liberation Front, Revolutionary Peoples Front, People's Revolutionary Army of Kangleipak-Pro, Kangleipak Communist Party, Kanglei Yawol Kanna Lup, *etc.* which at present forms the CORCOM (Coordination Committee) to wage a unified war against India.

Resistance to the Indian State is articulated as a national liberation struggle by claiming that it is not even a demand for independence. It is instead, as the Chairman of the United National Liberation Front (UNLF), RK Sanayaima, who is currently in prison, asserts, “A question of regaining the lost sovereign independence of Manipur by driving out the Indian Occupation Forces from the soil of Manipur” (Annual Statement of the Central Committee, United National Liberation Front on its 41st Foundation Day, 2005 in *The Sangai Express*, Imphal, November 24, 2005).⁴ Similarly, Revolutionary People’s Front (RPF) and its military wing People’s Liberation Army (PLA) also claims that the existing issue is not an internal matter of India as the Government of India (hereafter GOI) understands, but purely a conflict between two nations. The conflict, according to RPF, is between Manipur and India and this is due to the annexation of Manipur by India in 1949. It, therefore, considered it irrational to hold unemployment and underdevelopment as factors responsible for launching the liberation movement. RPF also holds the view that their struggle is not a separatist or secessionist movement on account of the fact that they are not asking or demanding even an inch of the Indian Territory that existed as in 1947. Claiming that Manipur was never a part of India, the armed opposition group insists that their resistance is a movement for national liberation which is aimed at restoring the independence of Manipur.

2.3 Counter Narrative: Multiple Ethno-discourses⁵

Manipur is a multi-ethnic state. Major ethnic groups are the Meeteis, Nagas and the Kukis and officially thirty-three tribes are recognised as the scheduled tribes. The Manipuri discourse is regarded to be nationalist and representing only the Meetei ethnic group by other ethnic groups such as the Nagas and the Kukis. At the same time, they also reject the idea of India. What we witness in Manipur, at the micro level, is an ongoing process of identity constructions and reconstructions resulting into clashes, both physical and otherwise. It is in a way, the invigoration of Appadurai’s (1990) nation-state as the battle of imagination or platform for separatism and micro-identities to become political projects within the nation states. In other words, undercurrent of ethno-nationalism marks demands for separatism and such political projects operate within the discourse of the nation-state.

Though ethnic consolidation began during the colonial period, emergence of ethno-nationalism is a post-colonial development. The democratic and representational form of government that was adopted in the newly independent countries has substantially influenced the process. In the case of Manipur, it was only in the 1990s that ethnic and religious strife of various shades became prominent with the heightening of ethno-nationalist assertions. Unification and formation of ethnic identities, today, have balanced the control of political space, which Meeteis as an ethnic community has been enjoying

4 UNLF made its visible presence as an armed opposition group only in 1991 after nearly three decades of establishment.

5 This section is largely developed from the subtheme titled “problem of the periphery” of an earlier published work co-authored by the author (see for details Oinam and Thangjam, 2006: 60–66).

for long. In spite of the recent consolidations, population are known by their tribe identity. In fact, the number of scheduled tribes in the state has increased to thirty-three not out of migration but out of division into sub-tribes. This is not to suggest that there is no migration at recent times. While tribes split into sub-tribes largely for administrative benefits, they also consolidate into larger ethnic identity in the political domain. These ethnic conglomerations, which are very recent, have not only brought new equation of power, but also added newer dimension to the concept of the “other.”

Both the terms Naga and Kuki as functional categories came into use with records of the British military officers and administrators (Mackenzie, 1884, reprint 2001). Though the names may be in use earlier, self-appropriation of identities with these names came much later. Take for instance, the name Naga, which is more of a British creation in the 1880s, though the term existed before the British came to the Northeast (Thangjam, 2008). The name was identified with a large number of tribes for better administrative purposes – to club different tribes under one administrative umbrella. It was much later that the first self-appropriation came into being with the creation of the Naga Club. This name as a political identity became clearer in 1947 when the British left its Southeast Asian colonies. Phizo, as the champion of Naga self-determination, called for a separate Naga state outside the Indian Dominion. Thus the term got projected by the Naga national workers that Nagas achieved independence one day before India did. Creation of Naga political identity is still in process, latest being the inclusion of tribes like Anal, Moyon, Monsang, Maring, *etc.* in 1990s into a common Naga identity. This is a major achievement of the NSCN (IM). In spite of inter-tribal rivalry (Singh and Singh, 1989) the appropriation of Naga as a political identity shaping on a common political platform has enabled to seek for “equal” participation of the constituting tribes.

Identities are continuously negotiated in encounters, which are political and involve power.⁶ Arendt (1970:52) also notes that power “springs up whenever people get together and act in concert.” Furthermore, ethnicity is employed in order to draw boundaries as to who belongs to the group and who does not. An ethnic group is about boundary maintenance; ethnicity is a way to structure interaction, which allows the persistence of differences. Ethnic communality is, therefore, always an artefact of boundary-drawing activity: always contentious and contested, glossing over some differentiations and representing some other differences as powerful and separating factors (Barth, F. (ed.), 1969; Bauman, 1992).

The problems with the Kukis are, however, different. Though the term Kuki is also a creation of the British, the tribes constituting this category has close cultural affinity - linguistically as well as by custom. Of course, it would be an exaggeration if one projects these tribes under one cultural head. Unlike the Nagas, Kuki as a political identity has not yet been fully appropriated. It remained more as a convenient name coined by the British administrators. Though attempts were made for unification of all the tribes under Kuki, it

6 On the political nature of human encounters, see Hannah Arendt, 1958.

was short-lived. Controversies over the nomenclature to identify the various tribes under a single name have been the major problem inhibiting the consolidation of these tribes. Failure to integrate the Kuki tribes, either through equal participation or dominance of one over others, also shows the thin fabric, which fails to tie them as a cultural unit or block. It further shows the difficulty of seeing Kuki as a cultural identity before being a political one. Recent attempt by some scholars to float the concept of “Zale’n-gam” (Haokip, 1998) by including all these tribes into Kuki is yet another attempt to create Kuki both as a political and a cultural identity. Success or failure is yet to be seen.

These new identities-in-formation uses the discourse of western liberal democracy and its ideological constructs though it is hard to presume if those values have really been internalised. Political consciousness in its collective form becomes not only exclusive in approach, but also takes violent turns – ethnic conflicts being its outcome. “A factor which, perhaps, contributes towards a violent expression of aspirations for political independence is the absence of a language native to a community in terms of which to generate a complex, nuanced, authentic and imaginative articulation of the idea of freedom. In the absence of such a language, the articulation takes place in the language of ideologies fashioned elsewhere and not internalised to any appreciable degrees” (Miri, 1999:14). Rise of violence in its varied forms emerges mainly because of non-internalization of the borrowed discourse. This doubt on internalization remains even after conceding the arguments by many in the “South” that borrowed categories from the West no more remains the same while in operation in the developing countries. That concept like “secularism” in the Indian context has to be understood differently for the discourse has totally changed from the place of its origin. This line of argument has already been conceded while studying the idea of nation as used in the political discourses in the region. However, the success or failure of these identity formations in terms of achieving the spirit of democratic values is yet to be accounted.

The ideas of nation, self-determination and human rights that all the major tribes and communities in the state used in their respective discourses are within the firmament of strong tribal kinship and bond. The idea of a Naga nation or a Kuki (and for that matter, pan-Manipuri) draws legitimacy from the same discourse, that of the western liberal democracy. Interestingly, each of these identities emerges with consciousness, which is opposed to the idea of India as a nation state, though both the Indian State as well as these ethnic nations borrows their legitimacy, again, from the same discursive context (Akoijam, 2002). The very complexity of these identities lies where Naga “nation” and Kuki “nation” operating within the territory of Manipur are, in addition to their opposition to the Indian nation state and the Manipuri “nation,” mutually opposed and antagonistic. This is indeed alarming that instead of being accommodative these identities have turned exclusive and hostile. At present, the wider “world view” remains more in symbolism than in content (Bhagat and Thangjam, 2006: 66). Yet, this should be seen, particularly of the Nagas and the Kukis, as a struggle to come out of tribal moorings, failure being only a pathway.

3. Militarism and Counter Insurgency Operations

Violence has become the *ultima ratio* of (late) modern politics, because “subjectivation” has liberated political understanding and framed the world in a “technological” and instrumental manner. The basic political subject is violent by virtue of its very composition (Campbell and Dillon, 1993). According to them, security is the foundational value around which the political subject revolves. Security is not merely the main goal of the political subject of violence; it is, rather, the very principle of formation of that political subject. The political subject of violence, invoking constantly security, comes in a variety of forms: God, rational subject, nation, state, people, class, race, *etc.* (Campbell and Dillon, 1993). The Indian State justifies use of violence to maintain security of the “Indian nation state” and adopt militarism as a means. Militarism here is understood as a behaviour or condition in which states resort quickly to the use of their armed forces in response to international or domestic threats or go to great lengths to mobilize people and resources for war. Militarism is also the belief that military responses are usually the best ones, and that the military is the most important institution in the state (Vagts, 1959).⁷ Or in other words, “It is the extension of military thinking over civilian institutions and civilian planning and over civilian authority” (Regehr, 1980:129–30).

The fragility of the foundation on which the Indian State rests necessitates the invocation of a sense of “supreme national interests” in its citizen vis-à-vis other interests and its corollary obsession with security. This is the outcome of a “deeply wounded” memory of partition and subsequently, wars with its neighbours after Independence.⁸ One of the unfortunate fallout of these events is the collective psyche that treats the minorities with eyes of suspicion. What follows is the denial of alternate voices and interests. The homogenising trend (dealt above), in interest and value, of the Indian nation state, has increased all the more ignoring competing and contradictory interests that exist in societies. Such homogenizing tendencies justify the adoption of militarism and use of violence while dealing with ideologies or movements interpreted to be inimical to national sovereignty. That in recent times there is a constitutive relationship between politics and violence has become more glaring if one takes into account the unfolding events in NER.

Pervasiveness of militarism with regard to NER can elucidated from the very framing of the region itself. In the 1950s, GOI evolved and adopted an approach towards NER, which was founded on two edifices. First is the Nehruvian model of non-interference into the traditional socio-economic structure of the region and second is the national security perspective. Given the low level of understanding and appreciation of the region among the policy makers in Delhi, the surest shortcut to policy was one based on security by virtue of the region sharing international boundary with Myanmar, China, Bangladesh and Nepal. So security emerged as the guiding principle for all policy interventions, development or otherwise, in the region. But the question is – security for whom?

7 In feminist analyses, intellectual and cultural histories, or “bottom-up” historical accounts, militarism is a factor of inequality or an aspect of cultural hegemony (See, for example, Enloe, 1983).

8 In 1905 partition of Bengal took place. Again in 1947 British India was further fragmented into India and Pakistan, and part of Bengal went to present day Bangladesh.

The security principle, or rather the insecurity of GOI, drove it to adopt AFSPA (Assam and Manipur) way back in 1958 when there was hardly any insurgency in the region. According to Amar Yumnam, “The Government of India could never get rid of its insecurity and abandon the security principle even when it belatedly realized that the Northeast Region needed a development agency for transformation” (Yumnam, 2005:201). As a result, when the North Eastern Council (which should have been there in 1958 instead of AFSPA) was established in the early 1970s, it was placed under the Home Ministry. But the Home Ministry, Yumnam adds, could never evolve a development strategy for the region as it is neither competent nor oriented for such a task. This “politicization of economic issues” has reached its height recently with the requirement of certificates from the Home Ministry for the provincial government to get funds sanctioned from the Ministry of Finance (Yumnam, 2005:201).

The battle of imagination envisioned by Appadurai (1990) where groups with ideas about nationhood seek to capture or co-opt state power, and states simultaneously seek to capture and monopolise ideas about nationhood is clearly manifested in the form of armed conflict. Precisely on this account, armed liberation movements in India by different insurgent groups and ethno-nationalism that has emerged and shaped the course of these movements found a strong response from the Indian nation state. The Indian State comes ever more strongly with its military might. Equally, the logic of military employment rests on the notion of security. As far as Manipur is concerned, the government had granted full-fledged statehood to Manipur in 1972 as a response to subversive activities undertaken by the Revolutionary Government of Manipur in the late 1960s and early part of the 1970s. It was also a pre-emptive strategy of the Government to prevent further escalation of subversive activities in the state. But from the 1980s when armed opposition escalated, militarism marks the government’s efforts to contain the liberation movement. Since then the Indian State has been routinely propagating national/internal “insecurities” to allow the Indian State to exercise its monopoly over violence. Imposition of AFSPA in the region is to ensure India’s sovereignty and territorial integrity.

3.1 Counter insurgency operations

As against the intermittent commitment in conventional wars, the Indian Army has been fighting insurgency almost continuously since independence. As early as 1955, Jawaharlal Nehru ordered “the Indian Army to conduct a counter insurgency campaign against the rebel Naga tribesmen in Northeast India, a campaign that has since haunted the region” (Cohen and Dasgupta, 2010:4). And since then it has been involved in counter-insurgency operations in almost all of Northeast in an ever escalating area of operations. In fact, counter-insurgency operations have provided the staple operational fare for the Indian Army more than any other, except, perhaps, the Israeli Army (Sinha, 2006).

Different types of counter insurgency operations undertaken in NER are discussed briefly in the following sections:

- a) **Isolating the Populace from Armed opposition groups (Grouping of Villages):** Drawing on the British experience in Malaya in the 60s, Indian Army tried the concept of grouping of villages as a means to isolate the rebels from the populace. It was tried out both in Nagaland and Mizoram. In Nagaland it was given up in the face of fierce opposition from the moderate Nagas. In Mizoram the experiment produced mixed results. S.P Sinha opines, “A study of the existing literature on the Indian experience leads one to conclude that such measures may have been acceptable means by colonial powers to quell insurgencies, but the fallout of adoption of such measures against own people is extremely contentious and repugnant” (Sinha 2006:3).
- b) **Employment of Air Power:** Air strafing was resorted to in Nagaland at Purr and in Mizoram at Aizwal and Lungleigh Districts to save the Assam Rifles posts from being run over by armed opposition groups. Since the 60s, helicopters have been used extensively for movement of troops, casualty evacuation and reconnaissance as integral part of counter-insurgency operations. In Operation Stinger conducted in October 2005 and Summer Storm in April 2009, drones were used to locate hideouts of rebels in Loktak Lake in Manipur.
- c) **Political and Diplomatic Initiatives:** Counter-insurgency operations are politico-military in nature. In the context of Northeast insurgencies, political initiatives have been taken at two levels, internal and external. At the internal level, peace talks are underway with National Socialist Council of Nagalim-Isaac and Muivah and United Liberation Front of Asom (ULFA). In the case of Manipur, there has not been peace talk or political initiative to end the armed conflict. However, Suspension of Operation (SoU) prevails. Under this model, peace talks do not occur but surrendered militants are given shelter by the government. At the external level, political and diplomatic steps have been taken to deny safe sanctuaries to the armed opposition groups in neighbouring countries such as with Myanmar, Bhutan and Bangladesh.
- d) **Re-organising of Infantry Battalions for Counter-Insurgency Operations:** One of the earliest attempts to reorganise the infantry battalions for counter-insurgency tasks was the creation of I-Battalions in the 1960s by converting some of the existing battalions drawn from some selected regiments. These units were to be permanently deployed in the Naga Hills and Tuensang Area with their personnel being periodically turned over from within their respective regiments. In the early 90s when the requirement of forces for internal security duties increased, it was envisaged to raise “a paramilitary force with Army’s ethos” under the Ministry of Defence, designated as Rashtriya Rifles (Roychowdhury, 2002:219). It has been deployed exclusively in Jamu & Kashmir (J&K), except for a very brief period in the Northeast. Today, there are Indian Reserve Battalion and Village Defence Force, exclusively created to combat insurgency in the Northeast.

- e) **Composition of the Assam Rifles:** Assam Rifles was raised primarily for deployment in Northeast and comprised men from these areas. In 2004, Gen. V.P. Malik, former Chief of the Army, recommended that the force should comprise 60–70 per cent of its personnel from the Northeast.
- f) **Military Civic Action Programme:** In the expanding American empire after 1898, civic action went hand in hand with military measures in the Philippines, which included a variety of public works projects to improve communication and health (Beckett, 2001:36-37). It was practised in Malaya in counter-insurgency operations against the communist guerrillas in the sixties by the British forces. Over the years the Indian Army has expanded the scope of civic action. In official parlance it is known as “Winning the Hearts and Minds” of the local population. It has moved beyond initiatives by local commanders to deploy resources for creating the basic infrastructure like provision of potable water, primary health centres, primary schools and improving village roads. Operation Good Samaritan in Manipur and Sadbhavna in the Kargil sector of J&K are examples. This method is perceived by the people as an attempt on the part of the Indian Army and para-military forces to prevent the armed opposition groups from penetrating the local population and procure intelligence.
- g) **Unified Command:** One of the cardinal principles of counter insurgency operations is the unity of command. At the operational level it means integrated civil-military operations under one military commander appointed by the civil government. The concept of unified command in counter insurgency-operations was first experimented in Kashmir. In Assam a three-tier system was evolved. At the top was the Strategic Planning Group (under the Chief Secretary) to lay down the policy. The second tier, the operation group, was headed by General Officer Commanding (GOC) 4 Corps, the senior military commander in Assam. The third tier was headed by the District Collector, supported by the battalion commander and the superintendent of police of the area. The strategic group at the top had GOC 4 Corps, State Director General of Police (DGP) and Inspector General of Police of Border Security Force and Central Reserved Police Force as members. GOC 4 Corps attended the meeting whenever the chief minister chaired it (Roychowdhury, 2002:121). In Manipur, the Chief Minister insisted that the DGP of the state head the unified headquarters, which resulted in the Army keeping out of it. In Tripura the situation was different; there were no army formations in Tripura. The Deputy Inspector General of Assam Rifles, who, if he was a serving brigadier, had army battalions serving under him. Tripura, too, adopted a unified headquarters model headed by the Chief Secretary.

What has emerged in the militaristic approach is that the agents of the State (the army, para-military forces and police), rather than approaching the affected people as citizens, treats them as “subjects.” Thus, military and paramilitary forces are “deployed” for the maintenance of “law and order” in the region. An unofficial report puts that there are more than 60,000 security personnel deployed in Manipur (Rupachandra, 2012). According to Namrata Goswami, a defence analyst, “The overt presence of the armed wing of a democratic state like India, i.e. its army, has fostered the idea of a militarised India amongst the population” (Goswami, 2010:11).

Deployment of the state security personnel such as the army, para-military forces and state police, as a part counter insurgency operation can be read as “interventionist policy” in an alien space. While not questioning the merit of such approaches, rather the very premise of treating the people of the region as aliens is itself questionable. Incursion of the military into the civil spheres and violence meted out through counter insurgency strategies, despite the motto of use of minimal force, tells a lot about the nature of the Indian State. The terms of engagement formulated in the past, that is use of minimal force, is deemed to be no longer valid and needs to be redefined. General Shankar Roy Chowdhury, a former Army Chief, defines it as “adequate minimum force, the adequacy of weapons and firepower for each situation to be determined by the field commander. This included heavier weapons like mortars or artillery whenever required” (Roy Chowdhury, 2002:98).

4. Practice of violence

As much as the State discourse is built on violence, its counterpart, the non-state armed groups are also built on the same logic. The “non-state” if understood as “State in becoming” highlights interesting trend that is near equivalent to the State discourse – of monopolising violence. But more alarming trend is the “non-state” discourse that no more seems to confine to its “classic” opposition to the State, but more so towards the contending groups and the people. Propaganda warfare, intimidation, extortion, *etc.* have become the hallmark of their operation over the latter. Militarism is largely reflected through these operations. In the militarized situation, ordinary people are caught in the crossfire, lives remain dear, and human rights continue to be violated. Table 1 shows the number of people killed in Manipur from 2001 to 2011.

Years	Civilians	Security Forces	Militants	Total
2001	70	25	161	256
2002	36	53	101	190
2003	27	23	148	198
2004	40	41	127	208
2005	138	50	143	331
2006	107	37	141	285
2007	150	40	218	408
2008	131	13	341	485
2009	77	18	321	416
2010	26	8	104	138
2011 (till December 4)	22	10	27	59

Table 1: Insurgency related Fatalities in Manipur: 2001-2011

Source: South Asia Terrorist Portal, 2011. <http://www.satp.org> (accessed on Saturday, August 3, 2012, 2:30:16 PM).

From the Table, we can see that a total of 2,974 persons were killed in the stated period of time. More than 60 percent were militants and civilian casualties constituted nearly 30 percent. We witness escalation of fatalities from 2007 to 2009. A disturbing feature of the armed conflict is the kind of impact it has on the demographic profile of the indigenous population. More than 90 percent of the victims were from the indigenous stock.

One of the major problems associated with tabulation of casualties related with insurgency is that very often, civilians killed in fake encounters or extrajudicial encounters are grouped in the category of militants. Such instances are high in compilations (insurgency related statistics) done by Government officials or organizations sponsored by the Government. Take for instance, *The Sangai Express* reported that altogether 1,528 people including 31 women and 98 children were killed in fake encounters by the security forces in Manipur between 1979 and May 2012. Of these, 419 were killed by the Assam Rifles, while 481 were killed by the combined teams of Manipur Police and Central Security Forces (*The Sangai Express*, Imphal, 19 June 2012). In October 2012, a Public Interest Litigation was filed by NGOs – Extra-judicial Execution Victims' Families Association of Manipur and Human Rights Alert – to the Supreme Court of India against extra judicial executions carried out by the police and the security forces in Manipur. The petition gave details of each of the 1,528 people killed in fake encounter since 1979. The Court randomly

selected six cases out of the 1,528, and found the security forces to be guilty. In order to address such issues, as recommended by the international community, India needs to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as the International Convention for the Protection of All Persons from Enforced Disappearance.

At another level, the apprehension expressed by Campbell and Dillon (1993) that the political subject of violence constantly invokes security, amongst others, holds true in the case of Manipur. What has aggravated the situation in the region (largely in the state of Manipur) is the prolonged and continued armed conflict. Violence has impacted onto the social, political and everyday life shaping into a practice. Take for instance, civil society bodies very often resort to non-violent methods such as *bandhs* and economic blockades to voice their grievances or resist against excesses committed by the State actors or non-state armed opposition groups but ultimately take recourse to violence. Heisnam Kanhailal (2013) correctly captures the popular angst and predicament. “Groups of *bandh* supporters move around in vehicles and raze down commuters’ vehicles, innocent people are beaten up with sticks for defying their verdict” (Kanhailal, 2013:12). This elucidates the fact that impact of militarism in the functioning of civil societies has become highly pronounced.

At the societal level, violence is also constantly used to settle dispute or any issue. Take for instance, houses of suspects in any crime is dismantled and razed to the ground. The family members of the suspects or accused are expelled from the locality by Kangaroo Courts. There are incidences in which self-styled moral cops raid restaurants and parade young girls and boys before the public for allegedly indulging in “immoral activities.” In the more extreme cases, suspects behind the killing of any person are publicly lynched. These are the classic cases of mobocracy hijacking the rule of law and the role of police, judge and executioner, *etc.* Editorial of the *Huyen Lanpao* (April 03, 2011) affirms that the conflict situation which has besieged our society has given rise to the concept of street justice. It states that this is no longer a law and order problem. It is a problem of a society where ethical and social values are being spurned and mocked at. In the year 2012, when unabated crimes continued in Manipur, editorial of the *Sangai Express*, Imphal (21 August 2012) expressed that the definition of an “anarchic state fits Manipur to the T.” The editorial was written on the occasion of lynching of a suspect in the murder of girl child.

5. Conclusion: Issues of Human Rights & Democracy

The foundations of democracy in the Northeast are based not so much on values and principles but on political expediency (Goswami 2010:12). When violence has been embraced and accepted as a practice in contemporary Manipur, the notion of rule of law, ethos of tolerance, dignity of life and human security have become utopian ideals. Although a civilian government is in place, elected through periodic elections, militarism continues to be the guiding principle. As a result, human rights continue to be violated and lives extinguished. Such losses are regarded to be collateral damages by the state actors.

At the same time, these are considered to be “objective” casualties to achieve the political goal of self-determination on the part of the armed opposition groups. Finally, to the common people who have embraced violence as a practice, even if dreadful, and become vigilantes, such dealings are about “justice” as law keepers are unreliable, corrupted and too engaged in fighting the armed opposition groups. The prolonged and continued armed conflict in NER sees no immediate end. The Indian State as arbiter of conflict continues to refrain from bringing about a peaceful political solution, other than employing a militaristic approach. Militarism and use of violence has been to neutralize the fighting power of the armed opposition groups as witnessed in its counter insurgency operations. In fact, it has not abandoned its homogenising tendencies both at the ideological level as well as practice. On the part of the non-state actors, too, they are unwilling to come to the table for negotiations. State impunity to violence and seeming acceptance of people to embrace violence has led to the acceptance of aberration of principles and practices of democracy.

References

- Akoijam, A. Bimol, 2002. Cry for Homeland: A Political Psychology of Identity Politics. *MRFD Bulletin*, 2 (3), pp. 12–23.
- Appadurai, Arjun, 1990. Disjuncture and Difference in the Global Cultural Economy. *Theory, Culture & Society*, 7 (2-3), July, pp. 295–310.
- Arendt, Hannah, 1958. *The Human Condition*. New York: A Doubleday Anchor Books.
- _____, 1970. *On violence*. New York: Harcourt, Brace & World.
- _____, 1968. *The Origins of Totalitarianism*. Revised edition 1973. New York: Harcourt, Brace Jovanovich.
- Barth, F. (ed.), 1969. *Ethnic Groups and Boundaries: The Social Organization of Culture Difference*. Boston: Little, Brown and Company.
- Bauman, Z., 1991. *Modernity and Ambivalence*. New York: Cornell University Press.
- _____, 1992. Soil, Blood and Identity. *The Sociological Review*, 40 (4), pp. 675–701.
- Beckett, Ian F.W., 2001. *Modern Insurgencies and Counter-insurgencies*. London: Routledge.
- Campbell, D and Dillon, M., 1993. The End of Philosophy and the End of International Relations. In: Campbell, D and Dillon, M. (eds.). *The Political Subject of Violence*. Manchester and New York: Manchester University Press, pp. 1–47.
- Cohen, Stepen P. and Dasgupta, Sunil, 2004. *Arming Without Aiming: India's Military Modernization*. New Delhi: Penguin/Viking.
- Doornbos, Martin and Kaviraj, Sudipta (eds.), 1997. *Dynamics of state formation: India and Europe compared*. (Indo-Dutch Studies on Development Alternatives–19). New Delhi & London: Sage.
- Enloe, Cynthia, 1983. *Does Khaki Become You?: The Militarisation of Women's Lives*. Boston: South End.
- Goswami, Namrata, 2010. India's Northeast 2020: Four Alternative Futures. *IDS:A Occasional Paper* 13, July, pp. 1–26.
- Haokip, P.S., 1998. *Zale'n-gam: The Kuki Nation*. Delhi: KNO Publication.

- Kanhailal, Heisnam, 2013. Manipuri Society and Its Art & Culture: Contemplation of a Victim Artist. Translated from Manipuri by Thangjam, Homen and Khuraijam, Senate for DTKF. Fourth Dr. Thingnam Kishan Memorial Lecture, 2013. Imphal: DTKF.
- Mackenzie, Alexander, 1884. *The North-East Frontier of India*. Reprint 2001. New Delhi: Mittal Publications.
- Malik, V.P., 2004. Security on the Borderline. *The Indian Express*, 18th Sept. Available at: <http://www.theindianexpress.com> (accessed on 10 September 2012).
- Miri, Mrinal, 1999. Welcome Speech: India's North-East and North-East's India. In: Aggarwal, Kailash S., (ed.). *Dynamics of identity and intergroup relations in North-East India*. Shimla: Indian Institute of Advanced Studies, pp. 13–16.
- Nandy, Ashis, 1983. *The Intimate Enemy: Loss and Recovery of Self Under Colonialism*. Delhi: Oxford University Press.
- Oinam, Bhagat, 2005. Receiving Communities: The Encounter with Modernity. *Eastern Quarterly*, 3 (II), July–September, pp. 86–96.
- Oinam, Bhagat and Thangjam, Homen, 2006. Indian 'Nation State' and Crisis of the 'Periphery'. In: Biswas, Presenjit and Thomas, C.J. (eds.). *The Meaning, Metaphor and Method of Peace in India's Northeast: Essays of Concern and Commitment*. New Delhi: Regency, pp. 49–78.
- Parekh, Bikhu, 1997. Cultural Diversity and the Modern State. In: Doornbos, Martin and Kaviraj, Sudipta (eds.). *Dynamics of State Formation: India and Europe Compared*. (Indo-Dutch Studies on Development Alternatives–19). New Delhi & London: Sage, pp. 177–203.
- Regehr, Ernie, 1980. What is Militarism? In: Eide, Asbjorn and Thee, Marek (eds.). *Problems of Contemporary Militarism*. London: Croom Helm, pp. 127–139.
- Roy Chowdhury, Shankar, 2002. *Officially at Peace*. New Delhi: Viking.
- Rupachandra, Yumnam, 2012. UNLF Owns up Manipur Blast. *Seven Sisters Post*, September 6. Available at: <http://www.sevensisterspost.com> (accessed on 9 September 2012).
- Singh, H. Bhupon, 1988. *The Merger of Manipur*. Imphal: Pritam Haobam.
- Singh, L. Ibungohal and Singh, N. Khelchandra, 1989. *Cheitharol Kumbaba* (Manipuri text), Imphal: Manipur Sahitya Parishad.

- Singh, Y. Mohendra, 2009. *The Status of Manipur (1823–1947)*. Imphal: Yumnam Indira Devi.
- Sinha, S.P., 2006. C. I. Operations in the Northeast. *India Defence Review*, 21 (2), April–June, pp. 1–6.
- Thangjam, Homen, 2008. Colonial Administration, Knowledge and Intervention: Colonial Project of Ethnicization in Manipur. *Alternative Perspectives*, III (IV), July–September, pp. 18–31.
- Vagts, Alfred, 1959. *A History of Militarism: Civilian and Military*. Revised edition 1967. New York: Meridian.
- Yumnam, Amar, 2005. Development Intervention in the Northeast: A Critique. *Eastern Quarterly*, 3 (III), October–December, pp. 196–205.



**NEGOTIATING IN PURSUIT
OF HUMAN RIGHTS AND
PEACE**

BROKERING FOR HUMAN RIGHTS IN BURMA/MYANMAR

Matthew Mullen*

Individuals who are isolated, impoverished and threatened may see little benefit in standing up and claiming their human rights. This does not necessarily mean, however, that these individuals do not seek alternative pathways to their human rights. When conducting ethnographic interviews throughout Burma/Myanmar from the start of 2010 to the end of 2011, people from all walks of life explained why they avoided human rights claims, and, instead, opted to broker for their rights. Villagers and community members who felt that it was implausible to demand their human rights instead utilized brokerage – a game of sell, give and take – as a means of realizing their human rights.

This paper works through a fundamental question: what should stakeholders, including human rights activists and practitioners, observers and academics, make of this brokering practice? There are complex ethical and practical dilemmas which need to be considered. On one hand, the brokerage does not follow a rights holder – duty bearer arrangement. Brokerage does not involve any articulated commitments to human rights, and the international human rights system of standards, institutions and organizations is largely ignored. Moreover, brokering often involves bribery and some type of compliance with oppressive authority. On the other hand, brokerage could be seen as an innovative way to realize rights in the face of even the worst oppression. All of this considered, this paper proposes that brokerage should be tapped into as a means of mobilizing human rights to those who are not reached through the existing human rights system.

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1. Introduction

I know I have human rights. I understand what all of that means. But, I don't think the world really understands how it works here. If I stand up and start talking about my rights I will be arrested, or worse. Talking about human rights is the quickest way to lose all of your rights here. You can't demand things here. You have to be willing to trade something. You have to give something to get something.

-Middle aged male taxi driver near Mandalay

No one should have to broker for their human rights. Human rights are not to be earned or lost because they are inherent; we all have them by virtue of being human. All people should be able to claim their rights against duty bearers. When the rights holder-duty bearer relationship breaks down a robust international human rights system of standards, institutions, organizations and individuals, can be activated. Rights holders can reach out to this international system by making claims – in the form of formal and informal appeals or demands for human rights. However, when individuals are unable to reach this system, due to isolation, oppression or other factors, they may seek alternative pathways to realize their human rights. The people of Burma/Myanmar who inspired this paper forged their own pathway to human rights: brokering.¹

This paper is based on ethnographic data which was collected in Burma/Myanmar from the start of 2010 to the end of 2011. This was a time when thousands of political prisoners were in jail, and political opponents were targeted as enemies of the State.² In total over 330 ethnographic interviews were conducted throughout the country with people from all walks of life. This research was conducted for a PhD thesis, *Contrasting Pathways to Change in Burma/Myanmar: From Bullets to Bribery*. The research targeted citizens who were not plugged into formalized civil society or political parties, in an effort to obtain perspectives that may not be accounted for in dominant discourses. In addition to interviewing these everyday citizens, over 30 State informants, including soldiers, judges

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- 1 The use of Myanmar or Burma, writes Steinberg, “has become a surrogate indicator of political persuasion and even projected legitimacy, causing considerable antipathy and confusion in both official and popular circles” (2006, p.xx). This research uses Burma/Myanmar as opposed to either Burma or Myanmar as a way of protesting this binary. Both names were used by informants in the research, so both names are used in this paper.
 - 2 ‘State’, with a capital ‘S’ is used to describe an administrative system, and the sovereign territory that administrative system controls. This concept of a State is different from the concept of a nation. A nation suggests a unified identity and a level of popular approval and perceived legitimacy (Anderson, 1991, p.5). A State does not suggest necessarily a unified identity, or popular approval.

and other officials, were interviewed.³ These ethnographic interviews were supplemented by formal interviews with formal civil society actors in Burma/Myanmar, Thailand, and elsewhere. The research covered all of the States and Divisions of Burma/Myanmar, except Rhakine State. However, individuals from Rhakine State were interviewed elsewhere.⁴ Many of these informants did not believe that the international human rights system was capable of protecting them in their communities. These individuals explained that rights claims, and the human rights language in general, led to threats and reprisals from State authorities. Alternatively, they explained, many people preferred more hidden pathways to human rights, such as brokerage.

The brokering process which informants described entailed tactics ranging from calculated compliance and compromise, to relationship building, to bribery. These tactics were used by people who faced intense oppression, many of whom lacked access to the international human rights system. The notion that there are people around the world who are brokering for their rights may be unsettling. However, the notion that people around the world who lack access to the international human rights system have found less formal, more flexible pathways to human rights is a good reason for interest and further investigation. Individuals and communities throughout Burma/Myanmar were able to realize their human rights,

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- 3 The research design was inspired by human rights based approach (HRBA) principles. The HRBA designates that individuals who are impacted by programs, policies, and research have a right to participate, as agents who should be empowered. The research engaged informants throughout Burma/Myanmar as rights holders, as agents whose insights needed to be mobilized. The informants wanted speak for themselves, but they were rarely given the opportunity to do so. Basic precautions were taken to ensure the safety of informants. Firstly, most of the interviews were conducted with the assistance of translators or friends, who were familiar with the local dynamics. In some cases, friends and colleagues who wanted to assist in the research conducted interviews in their communities with the guidance of core questions. Secondly, the ethnographic interviews all began as ordinary conversation. Informants who seemed interested in the conversation were asked if they were willing to be interviewed and informed that they could avoid any questions or stop the discussion at any time. The nature of the interview questions were guided by the nature of the feedback from informants. In many cases few questions were needed, as one question would stimulate a monologue. Thirdly, potentially damaging or traumatic topics were avoided. Thus, informants determined the direction and length of the interview. Fourthly, interviews were conducted in locations that were deemed safe by informants, and informants were assured that full confidentiality would be upheld; specifically names and personal information that may reveal the identity of individual informants or their communities were avoided. This methodology promoted the right to participate, avoided potential distress, and, thus, had an empowering effect.
- 4 The field research consisted of six, one month trips in Burma/Myanmar as well as follow ups with contacts in the field. The first trip to the field was a preliminary field visit, which occurred in October 2009. This preliminary trip included conversations with individuals about sanctions and the socioeconomic and political context in Burma/Myanmar. This preliminary trip included trips to Yangon, Mandalay, Bagan, and Shan State. The second field trip occurred in August 2010. This trip included time in Yangon, Bago, Mandalay, Ayerwaddy Division, Sagaing Division, Magwe Division and Shan State. The October 2010 included time in Yangon, Bago Division, Kayah State, Karen State, Mon State and Tanintharyi Division. The January 2011 trip included time in Yangon, Mandalay Division, Magwe Division and Sagaing Division. The March 2011 trip included time in Yangon, Mandalay, Bagan, Bago Division Chin State, Sagaing Division, and Kachin State. The July 2011 trip focused on organizations in Yangon. Continuous interviews were conducted through research partners distributed throughout Burma/Myanmar.

in spite of facing isolation, impoverishment, and a State that openly hunted those who pursued human rights. Rather than criticizing the pathway they chose, it seems fitting to learn more about why and how they used this pathway to realize their human rights.

2. Responses to Rights Claims

The world that America seeks is not one that we can build on our own. For human rights to reach those who suffer the boot of oppression, we need your voices to speak out. In particular, I appeal to those nations who emerged from tyranny and inspired the world in the second half of the last century - from South Africa to South Asia; from Eastern Europe to South America. Do not stand idly by when dissidents everywhere are imprisoned and protesters are beaten. Because part of the price of our own freedom is standing up for the freedom of others.

-President Barack Obama Address to the UNGA (23 September 2010)

The international human rights system seeks out and responds to human rights claims, but so too dictatorships. A claim can be as informal as a person saying “this is my human right” to local officials, or as formal as submitting a complaint to a human rights body. Rights claims involve the use of rights language, they designate a rights holder and a duty bearer, and they can be seen and heard. When an individual living under a dictatorship makes a human rights claim, the dictatorship sees and hears the same visible and verbal cues as the international human rights system. While the international human rights system responds by attempting to deliver protection, dictatorships often respond with reprisal.

When this paper refers to the international human rights system this is meant to include the governments, organizations, and activists that work to promote the human rights principles and standards set in national and international law.⁵ When these principles and standards are threatened the international human rights system can respond in numerous ways. Complaints can be filed in national courts and commissions, or submitted to Regional or United Nations treaty bodies. Governments can pressure other governments through shaming or sanctions (Shelton, 2008, p.581). Organizations and activists can raise awareness and mount public pressure against governments. At the local level, campaigns and complaints can hold the local authorities accountable. The system is extensive, and the power of the system can lead to direct changes in policies and practices. This is not to say that the international human rights system functions solely on claims, civil society and international human rights mechanisms have monitoring and reporting procedures, such as the Universal Periodic Review, treaty body reporting obligations, and ongoing human rights research and reports, which do not depend on claims (Mertus, 2009). However, claims play a crucial role in delivering protection to specific individuals and communities.

5 Much of the literature in the field of human rights specifies different human rights systems, whether they be UN, Regional or National. This paper uses “international human rights system” in an attempt to be encompassing of all formal governmental and non-governmental human rights channels. This is done to enable the paper to investigate the role of claims in formal human rights protection in the broadest sense possible.

Human rights claims alert domestic and international human rights networks, and allow them to respond to specific situations. Claims can be made by individuals, or on their behalf. The human rights claims made by and for people do three important things: they reinforce the rights holder-duty bearer relationship, they harness the power of the human rights language, and they carry information about violations or threats to human rights.

Human rights cannot be realized without the contribution of a duty bearer. Human rights claims establish the terms of a relationship between those who have claim to rights (rights holders) and those who have obligations (duty bearers). Hence, human rights promotion is an attempt to strengthen the “capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations” (UNICEF, 2004, p.92). Rights claims are a way of establishing, or re-establishing this relationship. Rights claims effectively show that the rights holder recognizes that they possess rights, which they can exercise against duty bearers. Additionally, claims ensure that duty bearers are aware that the rights holder possesses human rights, and are conscious of their obligations to respect, protect and promote those rights.

By making claims, rights holders are able to harness the strength of the human rights language, which is summarized by Gasper:

Human Rights discourse has enormous strengths. It appears readily understandable and near universally acceptable as a format, by ordinary people as well as officially by governments...Further, in operational terms, HR discourse provides a rallying call and a set of benchmarks, which have definite, specific content, that do not allow the normative thrust to dissolve into nothing. It is connected to a vast legal apparatus, and is yet at the same time more struggle oriented than most development discourse (2007, p.23).

Thus, rights claims are a way of tapping into a system that is internationally recognized as legally, politically and morally legitimate. Wood (2003, p.23-24) makes an important observation: “typically the poor must confront the privileged and act with strength in order to be able to turn claimed or declared rights into delivered, honoured, entitlements.” Through rights claims those who are marginalized may be able to even imbalanced power relations.

Rights claims carry important information about what and whose rights are under threat, and who is threatening or failing to protect these rights. A rights claim may be the only way of knowing that human rights are being threatened or violated. Domestic and international viewers can take the initiative to search for concerning indicators of a human rights crisis, but rights claims provide tangible evidence. When rights claims surface, domestic and international viewers can respond accordingly.

Rights claims reveal an injustice and bring the legitimacy of a duty bearer into question. In other words, rights claims can challenge the legitimacy of local and national policies and practices. Rights claims can threaten the power or image of a system. The notion that rights claims can threaten power helps to explain why some people stand up and speak out when their rights are threatened or violated, and others do not. Standing up and speaking out is a public challenge. In ideal scenarios, organizations and governments are able to intervene, resulting in protection and accountability. At the same time, public challenges do not always yield favourable results.

Dictatorships see rights claims as threats and respond accordingly. Dictatorial systems, by definition, attempt to control populations. The rights holder – duty bearer relationship is dismissed. Furthermore, laws are enacted to ensure that human rights are limited, and opposition is outlawed. Rights claims are codified as illegal and dictatorships often boast their capacity and willingness to punish those who stand up and speak out. In addition, dictatorships often provide incentives to their supporters. Analysing the various carrots and sticks dictatorships have used in an attempt to control populations would be beyond the scope of this paper. However, it is safe to conclude that dictatorships attempt to deter rights claims by simultaneously promising punishment to individuals, families and communities who stand up and speak out, and offering incentives to those who protect the regime.

Dictatorships attempt to discourage rights claims by promising pain and suffering, but impoverishment and isolation are also important factors. For an individual to make rights claims they have to see the benefit, they have to believe in the possibility that the rights claim will be heeded. Many people living under dictatorships lack the necessary resources, networks and freedoms to be seen and heard by domestic and international viewers. A convenient illustration of this is the hypothetical farmer in rural North Korea.⁶ What will likely happen to this farmer if he or she makes a rights claim? The farmer likely struggles to feed his or her family. It is unlikely that the farmer has any disposable resources to fall back on should his or her food rations get cut. The farmer is likely unable to organize other farmers to gain power in numbers. The farmer has no social safety net, nor access to any channels of protection. And, finally, the farmer knows that whole families have been imprisoned or executed for asserting their rights. The probable outcome of a rights claim in this situation is awful.

In ordinary circumstances rights claims are made to gain protection, but in milieus such as dictatorial Burma/Myanmar, rights claims and the human rights language in general may be adamantly avoided. The perspectives of individuals who are in such circumstances are rarely considered. The ramifications of this are many because, as this paper will show, these individuals possess unique insights on attaining human rights in even the most oppressive contexts.

6 For dynamics and depictions of life in rural North Korea access Demick (2009) *Nothing to Envy: Ordinary Lives in North Korea*.

3. Agency and the Human Rights Language in Burma/Myanmar

I don't think people understand the consequences of walking up to a soldier or policeman and saying 'I have this right' or 'I deserve this.' You reveal yourself as a problem that they want to wipe out. Talking about human rights and telling the military what to do gets you a lot of bad attention here, for you and your family.

- Female teacher and community organizer in Karen State

The fight for human rights in Burma/Myanmar has evolved into an international movement. Following the brutal crackdown on a student led uprising in 1988, a mass migration of activists fled to the Thai-Burma border where they linked up with refugee communities who had fled military offensives occurring in their ethnic lands. Out of the 8/8/88 uprising came horrific stories of *Tatmadaw* (Burma/Myanmar Armed Forces) brutality, as well as stories of heroism, and the emergence of a soon to be international human rights icon, Aung San Suu Kyi. Domestic activism continued, and in 1990 Aung San Suu Kyi led the National League for Democracy to a sizeable victory in a democratic election. However, the military junta refused to hand over power. People in Burma/Myanmar continued to stand up and demand their rights, however domestic dissent was harshly punished. Thousands of political prisoners were locked up, others were tortured, threatened or killed. And, the world watched as Aung San Suu Kyi faced decades of threats and numerous bouts of extended house arrest. This oppression was being watched by human rights activists around the world.⁷

The border movement had formalized, grew and expanded its reach to the point that Burma/Myanmar campaigns in foreign capitals were commonplace. Activists from Burma/Myanmar joined forces with activists, diplomats and celebrities all over the world to spread the word. The international campaign was not only about building awareness, activists worked to guide foreign policies towards Burma/Myanmar by establishing lobbies in DC, London, Canberra, Brussels, and a range of other governing hubs.

The international movement for human rights in Burma/Myanmar shaped the world's understanding of what the fight for human rights in Burma/Myanmar entailed. The normative portrayal of this fight was channelled through two themes: brutality and bravery. While the political climate in Burma/Myanmar has recently changed for the positive, the Burma/Myanmar that this research focused on was one where the State was prepared to respond brutally to those who stood up and spoke out.

⁷ Much has been written on the 8/8/88 uprising and the struggles that continued in its aftermath. Notable literature on the dynamic discussed above include: Boudreau, 2004; Ferrara, 2003; Fink, 2001; Steinberg, 1999; Tucker, 2001; Wintle, 2007.

Informants from the field explained that the State was capable of punishing those who talked about human rights in a number of ways. Prasse-Freeman describes the system in Burma/Myanmar from that period as “a military-state with hybrid-imperial structures, characterized by high despotic but low infrastructural modes of power, and fuelled by rent-extraction” (2012, p.371). This type of system is capable of threatening people by targeting their bodies, their minds and their livelihoods. This type of system also proactively seeks out threats. A young woman who worked as a tourist guide in Yangon noted: “If you talk about human rights, they will see you as an opponent. If you reveal yourself as an opponent of the regime you should expect three things: you will be hurt or killed, your family will be hurt or killed, or you will be poor and lonely.”

Bravery and sacrifice is at the centre of the dominant discourse surrounding human rights in Burma/Myanmar. As many activists explained, a favourite saying in the international movement is “I would rather die on my feet than live on my knees.” An NGO worker from Bago Division analysed the dynamics surrounding the accentuation of brave stances: “Burma is famous for people sacrificing for human rights. That is what people think about when they hear Burma. There are a ton of organizations which are dedicated specifically to people who have been arrested or displaced. The headlines are all about sacrifice. There are all types of awards for those who are willing to face punishment.” It is understandable that those who stand up and claim their human rights receive a great deal of attention. However, when the focus on those who claim their human rights becomes exclusive there is a risk of ignoring and undermining the agency of those who avoid claims.

Burma/Myanmar organizations and analysts have recognized that some voices have been left out of the conversation. One such organization is Karen Human Rights Group (KHRG). KHRG consistently criticized the dismissal of often rural voices:

International journalism and advocacy around Burma has often contributed to portrayals of rural villagers as helpless victims passively terrorized by the Burma Army. By marginalizing the agency of rural villagers in this way, such portrayals have perpetuated the exclusion of these individuals from the ongoing political processes which affect them (2008, p.1).

In an interview, a representative from KHRG explained further: “A situation can develop where entire populations are painted as passive victims. Passive victims have no agency or capacity to respond. Passive victims can only be worked for, not worked with. Furthermore, when individuals are portrayed as agent-less their suffering can be used for political purposes.”

This research gathered the perspective of individuals who were often portrayed as passive victims. These individuals avoided rights claims for a number of reasons. Avoiding human rights claims was not only a means of avoiding punishment; informants avoided claims so that they could work towards change and human rights without tipping off the State.

Certainly, the fear of punishment is one reason people throughout Burma/Myanmar avoided human rights claims. Nay Win Maung, who founded Myanmar Egress, noted:

Not all of us are Daw Suu [Aung San Suu Kyi], if we disappear nobody will know and the international community won't care. Opposing the government is not a 'choice' if opposition leads to certain harm. While I'm talking about myself here I am talking more about my students. For some of them, asking them to join the democracy movement is like asking them to walk through a mine field.

While the fear of punishment is an important factor in avoiding rights claims, informants throughout Burma/Myanmar focused on other motivation.

A community organizer in Mingun who makes a living as a teacher explained: "If you don't talk about human rights, you have a lot of opportunities to improve things here. You can really improve the human rights situation for a lot of people, as long as you don't call it human rights work. The government doesn't interfere. You can even get some officials on board. But, the minute that you say 'human rights,' you're going to be shut down." Informants from all walks of life echoed this notion. For them, human rights claims were only one of many pathways to human rights. These individuals had little interest in symbolic gestures or protest which did not improve their lives or the lives of people around them.

Informants saw avoiding rights claims as a tactic. These individuals went out of their way to appear non-adversarial. Aung Naing Oo, founder of Vahu Development Institute noted: "This is a military government, their looking at the situation from a security point of view. When an initiative or a group appears to challenge the legitimacy of a duty or authority, we have a problem." As informants explained, when the human rights language was used the lines of communication between citizens and officials often closed, and instead of easing restrictions, State officials would put up more obstacles. One private English teacher in Karen State illustrated such a scenario. She was highly politically motivated, and explained that she had read about human rights online. She began to use her English classes as a platform to communicate what she had learned. She explained: "Like the word equal, I would spend thirty minutes talking about freedom and rights, without using those words. Sometimes local officials monitor my classes, but they never catch what I'm doing."

4. Brokering for Rights

Human rights are not meant to be realized through a process of give and take. However, when a State's mode of governing is to dictate who does what when, people are forced to deal with what is, not what should be. The State in Burma/Myanmar decided to play by its own rules. While some people attempted to challenge these rules, others sought ways to find a way around the rules. Those who did not claim their rights or publicly challenge the State were hard to punish. The challenge was to find a way to pursue and realize rights without making claims or using the human rights language. Brokerage, transactions involving gives and takes, was used to simultaneously avoid the human rights language, disguise any challenge to the State's power, and make advancements towards human rights.

Brokerage is something of an anti-thesis to rights claims. Brokering is about making a deal. With a rights claim, there is no deal to be made, because the terms of the deal are already set. Through brokering, people throughout Burma/Myanmar were able to negotiate the relationship with State officials. The concept of a rights holder – duty bearer relationship remains relevant, however rights holders work to convince duty bearers to fulfil their obligations, or at least to not interfere.

Informants explained that brokerage fit the Burma/Myanmar milieu for a number of reasons. Firstly, individuals could broker for rights without using the human rights language, allowing them to avoid unwanted attention. Secondly, the brokering process is non-adversarial. The military State in Burma/Myanmar fed off making enemies (Callahan, 2004), but the State was less prepared to deal with people who acted indifferent or friendly. Informants explained that soldiers had no code for how to react to non-adversaries, and this made it possible to restructure the citizen-State official relationship. As one young woman at a train station in Shan State noted: “No matter what, the soldiers have the guns. If they see you as an enemy, you will have no chance. If you want them to leave you alone or help you, they have to see you as a friend, or as a person with no agenda.” Thirdly, brokering was an effective disguise for the pursuit of human rights. People could repackaging projects and goals in order to sell them to State officials.

Fourthly, brokering does not necessarily implicate the system as a whole. A rights claim may focus on a local human rights crisis, but even this implicates the State system as a whole. The State is responsible for ensuring redress and restoration of the situation. This is a good thing, unless the State’s system of oppression radiates from the centre. Individuals throughout Burma/Myanmar were able to use brokering to target what they described as the soft or weak parts of the State. As an NGO worker in Yangon, who is from Irrawaddy division concluded:

These people recognize something that most analysts and researchers miss, the government is strong in the middle and weak on the outside. What I mean is that the laws and orders come from the centre, but these things can be thrown out by a local soldier or official. The people target the local authorities because they can manipulate them. I don’t mean this in a bad way. The soldier’s life here is really hard, and people know that if they can find a way to make the soldier’s life easier, they will have more opportunities. You can get really far with one of these local guys, but if you try to go up through the ranks you will be screwed.

This quote leads into the fifth benefit of brokering, brokerage can be used to create a mutually beneficial relationship. Even if a State official refused to do something favourable for an individual or a community, that individual or community could do something to convince the official that it was in his or her best interest. This could involve offering tangible things, such as money or food, or intangible things such as cooperation.

Brokerage for human rights occurred at many different levels of the Burma/Myanmar political system. Brokerage occurred in villages and communities throughout Burma/Myanmar, as well as at the highest level of the State. The so-called Third Force, a group of organizations and individuals which adopted an engagement approach to the military dictatorship, used brokerage to expand the presence of civil society in Burma/Myanmar and negotiate economic, social and political shifts towards human rights at the highest level of Naypidaw. This is not to say that the recent transitions were directly a product of the Third Force's brokering, there were many important forces involved, but there was some type of influence being exerted within the regime.

In an effort to illustrate how brokering can lead to the realization of rights, it is useful to look at different brokering techniques in action:

Calculated compliance: All informants who brokered for rights in Burma/Myanmar utilized calculated compliance. Calculated compliance involves actual compliance, however compliance is used as a means of avoiding unwanted attention and gaining something. The idea is to comply one minute as a distraction, or as a way of gaining something the next minute. A food stand owner in Mandalay explained: "Everyone in this market actually pays tax to the government. We know the tax is unfair, but we want to keep the suspicion low. We do a lot of things here that the government wouldn't like. As long as we pay the tax we are able to do what we want."

By actively complying at certain times individuals gain what a young lady in Karen State called "some free passes." She explained: "It is about making life easier for everyone. We do what we're told some times, so that we can do what we want most of the time. Soldiers will make your life easier if you make their life easier." One soldier, a low ranking officer who was stationed in Rakhine State, spoke to this same notion: "When I receive an order I tell people that if they cooperate with me I will cooperate with them." Through calculated compliance individuals attempt to minimize tension, lending to more space for different actions.

Negotiation: In order to gain access to opportunities and power in a dictatorial system individuals are often forced to negotiate. In some cases, very basic needs and services such as food and schools can only be secured through extensive negotiation. Hence, negotiation is not always an option. A Karen Women Organization report entitled *Walking Amongst Sharp Knives* highlights the use of negotiation by Karen women village chiefs. The report presented numerous cases of negotiation including a woman who appealed to monks who helped her talk to local soldiers and a village chief who agreed to some of the demands of the SPDC to ensure peace in her community. The personal courage these women displayed is, however, not appreciated by all, as the report notes that members of the armed resistance groups in the area criticized and threatened the women for making concessions with the enemy (KWO, 2010).

Numerous community leaders, as well as less influential community members, used their existing influence and resources as leverage during negotiations with local officials. These individuals gave something to gain something. Often times, individuals who yielded significant power with a community, such as an elder, or the member of a head family or a popular community member, could use their influence in the community as collateral. As a young man in Yangon who was a leader in his church explained: “The officials want to be respected and they know that an easy way to get support is through getting approval from the most active people in the community.” For example, one young man in Saigaing Division wanted to start up a number of projects including a local school, a garden project, and an income-generation project. He explained to the local authorities that if they would allow him to start these projects, he would give them credit for any achievements of the projects. He had already made a deal with a foreign investor who he befriended in Mandalay. A year after the projects were completed the local authorities hosted a number of ranking officials to show them their successes. Though this was an unjust arrangement, by positioning the activities as a win-win opportunity the community was able to change the human rights climate.

Relationship building: Individuals from all walks of life posited that the key to brokering for rights in Burma/Myanmar was the ability to redefine the relationship between the citizen and the State official. A taxi driver in Mon State noted: “Everything comes down to personal relationships. The rules really mean nothing here, if you have the right friends. I know many officials in Mon State and Karen State, so we can do whatever you want.” One young man in Bago concisely explained that the right relationships could be significantly useful: “It’s good if they don’t bother you or come after you. It’s good if you don’t have to ask them for permission. But, you can do even better. You can get them to work for you.”

In some communities the relationship between the citizens and the authorities could have been described as a friendship, though many of these friendships were forged. However, in other cases, the citizens and the authorities simply agreed to work with one another, to benefit from one another, and that was the extent of their bond. A villager in rural Karen State stated: “We hate everything they [the local authorities] represent, and they definitely don’t like Karen people. But, we are both hurting, we [both parties] don’t like the way things are right now. We know that we need to work together, even if we don’t want to.” This man promoted cooperation, in part, because he secured what he described as a good income by trading black market goods from Thailand. Such activities required collaboration with local officials.

Bribery: Bribery takes all involved parties into precarious moral territory. Many informants knew that bribery was not accepted internationally, but, at the same time, they explained that bribery in Burma/Myanmar was both prevalent and powerful. This is not to say that everyone in Burma/Myanmar engaged in bribery, nor is this to suggest that the use of bribery in the struggle for human rights is unique to Burma/Myanmar. A young man in Mandalay, who had worked in the UAE, summarized his view on bribery: “The world talks

about feeding the regime, but the military leaders are terrified of bribery. They know that if the young soldiers are offered a bribe for a favour, they will do it.” Many informants pointed out that most State officials had fragile allegiances to the generals in Naypidaw, producing a situation where opportunities and officials were up for sale.

While some informants appeared hesitant when they talked about engaging in bribery, others were unapologetic. These informants posited that bribery could be used to transform power relations in Burma/Myanmar. A village head in rural Shan State stated: “Bribery can get anything done. It can keep the government away and it can get you anything you want.” At a table full of taxi drivers in a Yangon pub an older man at the table declared: “Sure, I pay bribes, you would too. It’s pretty damn simple, if you want to get something done you have to make the payment. If you don’t bribe you can’t get anything done... then what good are you doing.” A business owner in Mandalay provided a strategic perspective on bribery: “You have to bribe them at first, but then you have a partnership. They stand to make money from you and they will work for you instead of working for the government.” However, a range of questions remain unresolved: If human rights are realized through the exchange of goods and resources, are these human rights dependent on bribery? If a human right is bought, does it lose its essence as a human right?

The above techniques were used by individuals to gain opportunities, space and commitments from State officials, all of which took informants close to the realization of human rights. Using these brokering techniques, community organizers gained permission to start local livelihood and education projects. Hindu, Muslim and Christian communities negotiated improvements in religious freedoms and civil rights. And, communities throughout the country were able to exercise their rights to: assemble, hold community trainings, start businesses, trade black market resources, teach in their ethnic languages, openly read and listen to forbidden media sources, travel freely, and live more free secure lives.

5. Foreseeable Scepticism

People on the outside cringe at the idea of working with the government, most people on the inside don't so much as question it, because that is how you get things done. It isn't held in a negative light.

-Mael Raynaud , Yangon Based Foreign Political Analyst

Some may cringe when hearing that people are brokering for their human rights. The response from human rights activists and practitioners could range from interest to outrage. This section considers why there may be resistance to the notion of brokering for human rights. Brokering is a radical step away from both rights claims and the legal positivist rationale of human rights, leading to both practical and ethical uncertainty.

Unfamiliarity underlies many foreseeable critiques of brokerage. It is difficult to find literature relating to the notion of people brokering for their human rights. This is, in part, because the dominant human rights discourse focuses on claims and a formalized legal and political infrastructure. Accordingly, brokering for rights may be seen as an illegitimate practice because "...a certain understanding of science, modernity, and development has so successfully structured the dominant discourse that all other kinds of knowledge are regarded as backward, static traditions, as old wives' tales and superstitions" (Scott, 1998: 331).

Brokering for rights exists in the realm of 'everyday politics,' which is often overlooked. Henry states that everyday politics: "is present everywhere, in every society, but is resistant to many traditional research methods that are geared more towards tracing and explaining the changing dynamics of formal politics and towards understanding the strategies, motivations, and effective influence of elite actors" (2011, p.142).⁸ Those who research everyday politics in Burma/Myanmar have spoken out against the tendency to ignore this political realm, despite the fact that most people in Burma/Myanmar live in it. Malseed argues that by overlooking everyday politics viewers were missing peoples' efforts to "evade and undermine state control over their lives, showing that the military regime's brutal tactics represent not control, but a lack of control" (2009, p.365). Similarly, South, et al. concludes that "greater attention should be paid to local 'behind-the-scenes' advocacy activities undertaken by community leaders" (2010, p.3).

Even after stakeholders become familiar with the practice of brokerage for rights scepticism may remain. From an ethical perspective, concerns may be raised about the brokering process itself. Considering that brokering involves deception, often supplemented with bribery, and some type of compliance with oppressive authority, the ethics of brokerage could be brought into question. Informants from Burma/Myanmar offered both ethical concerns and ethical justifications.

An elderly man from Rakhine State noted: "These people who do what the government tells them and pay money to officials, these people are as much the problem as Naypidaw. They know that what they are doing is wrong and they do it anyway. There is no excuse." This position is understandable if bribery is seen as feeding a dictatorial system and compliance is seen as legitimating it. However, this position does not appear to consider

8 Kerkvliet provides the following summation of everyday politics in Vietnam: "Sometimes such politics shade into the formal, state sanctioned forms of participation, and sometimes they tilt the other way into unauthorized, illegal activities. Everyday politics includes trying to live within, bend, or modify the prevailing contours as well as engaging in subtle, non-confrontational everyday resistance to slip under or to undermine them. In such everyday politics in Vietnam, villagers may have no expectations, perhaps even no intentions of affecting national policies, though they might well be trying to modify, even subvert policy implementation in their locality. But cumulative such actions, even though not organized and coordinated, can have an impact on state agencies when done in large enough numbers, in generally the same direction, and 'read' or understood by higher officials to mean that it is in their interest of the interest of the state to change" (2005, p.67).

the pragmatic side of bribery and compliance. A Yangon based individual who helped with many interviews for this research concluded: “I think all of it comes down to the end goal. Everybody bribes here. Everybody does what they have to do to make it. All that matters is that you’re fighting for something good. Bribery is an uncomfortable topic, but it is a part of survival, and if you do it correctly, you can do a lot of good things.”

There is no clear way to reckon with the ethical dilemmas associated with the pursuit of human rights in the face of systematic oppression. Fink notes that “people [in Burma/Myanmar] have to face choices that are hardly imaginable in a free society. Should you take the high road and be honest or engage in corruption so your family can make ends meet?” (2001, p.7). Those who adopt a deontological view of ethics, which looks at ethics through a lens of prescribed rules and judges the ethics of an action based on its adherence to those rules, will surely argue that brokering is unethical. However, consequentialism posits that the ethics of an action is judged not through the action itself, but through the consequences of the action. A consequential measure of brokering for human rights may equate that the end justifies the means. The question of ethics has no clear answer. As an exile practitioner who started a cross-border education and development organization in Thailand explained: “I support efforts on the inside. And, I understand why people do things a certain way. But, I think there is a fine line between working around the government and using the government, and working for the government, either directly or indirectly. The challenge is to not mistake one for the other.”

From a practical perspective, there may be concerns about the substance of human rights that are realized through brokering. Rights claims have a certain force behind them, and it is unclear if brokering can produce imitate this. Rights claims delegitimize perpetrators and unjust systems, brokering does not involve public delegitimation. Rights claims reinforce the rights holder-duty bearer relationship, brokering does not work through this arrangement. Rights claims can be traced to root causes and systemic problems, brokering could be seen as dealing with symptoms but not diseases. Rights claims feed directly into the international human rights system of advocacy, standards and organization, brokering does not appear to feed into this system in any way.

An 88 generation student activist in Mae Sot noted, “. . .if you don’t talk about human rights then how do you know who is at fault? How can you really talk about what is wrong and how to fix it?” The practical concerns about brokering for human rights are well founded. However, these critiques are based on the assumption that human rights depend heavily on formal relationships and systems. Informality allows for flexibility and innovation. As the section above illustrates, some of the most marginalized communities in Burma/Myanmar found ways to game the system of oppression. These individuals managed to transform the status quo in their communities. They restructured local relations between the people and State officials. They constructed a situation where State officials were serving the interests of the people. And, ultimately, they created the space and opportunities necessary for people to realize their human rights, in spite of the oppressive State. All of this was

accomplished by following an organic formula to change. Hannum observes that “[h]uman rights advocates are often adversarial” and seek to protect rights ‘the old fashioned way’, through courts, adverse publicity, and public pressure” (2006, p.592). The people of Burma/Myanmar who brokered for their human rights showed that the old fashioned way is not the only way to rights.

In considering whether or not brokering should be treated as a legitimate pathway to human rights and tapped into as a means of mobilizing human rights to those who lack old fashioned channels, it is useful to remember the human rights based approach’s emphasis on local ownership. Hughes et al. (2003) conclude that the human rights based approach is powerful, in part, because it allows stakeholders to rewrite the rules of the game in order to strategically exploit entry points. Rights holders throughout Burma/Myanmar who chose to pursue their human rights through brokerage found entry points in a calloused system and exploited them. These individuals hold invaluable insight about how human rights can be realized in the face of even the worst oppression. Brokerage for human rights should be investigated, rather than criticized. There is no better illustration of why this is so than the one provided by Scott:

When a larger freighter or passenger liner approaches a major port, the captain typically turns the control of his vessel over to a local pilot, who brings it into the harbour and to its berth...This sensible procedure, designed to avoid accidents, reflects the fact that navigation on the open sea (a more ‘abstract’ space) is the more general skill, while piloting a ship through traffic in a particular port is a highly contextual skill...The pilot’s experiences is *locally superior* to the general rules of navigation (1998, p.316-317).

References

- Boudreau, V., 2004. *Resisting Dictatorship: Repression and Protests in Southeast Asia*, Cambridge University Press: Cambridge.
- Callahan, M., 2003. *Making Enemies: War and State Building in Burma*. Ithaca, NY: Cornell University Press.
- Demick, B., 2009. *Nothing to Envy: Ordinary Lives in North Korea*, Spiegel and Garu, New York City: Random House Publishing.
- Ferrara, F., 2003. Why Regimes Create Disorder: Hobbe's Dilemma during a Rangoon Summer. *The Journal of Conflict Resolution*. Vol. 47, No. 3, pp. 302-325.
- Fink, C., 2001. *Living Silence: Burma Under Military Rule*, New York: Zed Books.
- Gasper, D., 2007. Human Rights, Human Needs, Human Development, Human Security: Relationships Between Four International 'Human' Discourses. *Working Paper No. 445, Institute of Social Studies*. July 2007.
- Hannum, H., 2006. Peace versus Justice: Creating Rights as well as Order out of Chaos. *International Peacekeeping*. Vol. 13, No. 4. December 2006, pp. 582-595.
- Henry, N., 2011. *People Power: The Everyday Politics of Democratic Resistance in Burma and the Philippines*. Wellington: PhD Thesis submitted to Victoria University of Wellington.
- Hughes, A., J. Wheeler, R. Eyben, and P. Scott-Villiers, 2003. *Report on Rights and Power Workshop*. 17-20 November 2003. Institute of Development Studies. Available at: http://www.powercube.net/wp-content/uploads/2009/11/rights_and_power_workshop_report.pdf (accessed on 12 June 2012).
- KHRG, 2008. *Village Agency: Rural Rights and Resistance in a Militarized Karen State*. Available at: <http://www.khr.org/khr2008/khr0803.html> (accessed on 12 June 2012).
- Kerkvliet, B., 2005. *The Power of Everyday Politics: How Vietnamese Peasants Transformed National Policy*. Ithaca, NY: Cornell University Press.
- KWO, 2010. *Walking Amongst Sharp Knives: The Unsung Courage of Karen Women Village Chiefs in Conflict Areas of Eastern Burma*. February 2010. Available at: <http://www.karenwomen.org/Reports/WalkingAmongstSharpKnives.pdf> (accessed on 5 June 2012).

- Malseed, K., 2009. Networks of Noncompliance: Grassroots Resistance and Sovereignty in Militarized Burma. *Journal of Peasant Studies*. Vol. 36, No. 2, pp. 365-391.
- Mertus, J., 2009. *The United Nations and Human Rights: A guide for a new era*. 2nd Edition. New York: Routledge.
- Prasse-Freeman, E. 2012. Power, Civil Society and an Incoherent Politics of the Daily in Burma/Myanmar. *The Journal of Asian Studies*. Vol. 71, No. 2, May 2012, pp.371-397.
- Scott, J. 1998. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*, New Haven CT: Yale University Press.
- Shelton, D. 2008. *Regional Protection of Human Rights*. New York: Oxford University Press.
- South, A., M. Perhult and N. Carstensen, 2010. Conflict and Survival: Self-protection in south-east Burma. *Asia Programme Paper: ASP PP 2010/04*. September 2010. London: Chatham House.
- Steinberg, D., 1999. A Void in Myanmar: Civil Society in Burma. *Strengthening Civil Society in Burma*. Burma Centrum Nederland. Chiang Mai, Thailand: Silkworm Press.
- Tucker, S., 2001. *Burma: The Curse of Independence*. London: Pluto Press.
- UNICEF, 2004. Annex B: The State of the World's Children 2004. *Developed at the Inter-Agency Workshop on a Human Rights-Based Approach*. 3 to 5 May 2003. Available at: <http://www.unicef.org/sowc04/files/AnnexB.pdf> (accessed on 15 June 2012).
- Wintle, J., 2007. *Perfect Hostage: A Life of Aung San Suu Kyi, Burma's Prisoner of Conscience*. New York: Skyhorse Publishing.
- Wood, G., 2003. Governance and the Common Man. In P. Mosley and E. Dowler, eds, *Poverty and Social Exclusion in North and South*. London: Routledge.

THE ROLE OF ENVIRONMENTAL ATTRIBUTES IN THE THAI GOVERNMENT'S POLICY TOWARD DISPLACED PERSONS FROM MYANMAR*

Nicole Ostrand

Thailand hosted over 150,000 displaced persons from Myanmar between 1984 and 2004 (Burmese Border Consortium, 2005). Generally, the Thai government was accommodating towards these people, however the government's course of action fluctuated overtime (Banki and Lang, 2008; Sciortino and Punpuing, 2009). The following paper attempts to appreciate alterations in the course of action applied by the Thai government regarding displaced persons from Myanmar. It does this by considering alterations in environmental attributes which surrounded the situation. It is argued that the Thai government's desire to minimize the negative consequences of housing forced migrants, shaped their policy toward displaced persons from Myanmar. It is further proposed that different environmental attributes affected the perceived outcome of providing shelter. As these attributes shifted and the consequences for providing shelter changed, the government's course of action has reflected this. Notably, this resulted in a response that was less consistent with the human rights principles and standards.

The environmental attributes considered are: the security setting on the Thai-Myanmar border, the number of displaced persons in Thailand, and the relations between the central governments in Myanmar and Thailand. Specifically, the paper looks at the course of action by the Thai government during 1997. To identify alteration in the government's response, 1997 is contrasted to the mid-and late -1980s.

* Whether to call the country 'Burma' or 'Myanmar' provokes controversy. In July 1989, the State Law and Order Restoration Council (SLORC) changed the name of the country, along with several other large cities and administrative divisions. The United Nations and many governments recognized these name changes, although some countries (such as the United States, several European countries and Australia) continued to refer to the country as Burma. The opposition movement called a boycott of the name 'Myanmar' as a form of protest against the central government. Nevertheless, Myanmar is more commonly used in Southeast Asia and will be utilized in this paper.

1. Introduction

The story of refugees is intertwined with the evolving political and military context of the border, and it is not possible to understand the refugee predicament without detailed consideration of this context in which sanctuary is configured (Lang, 2002:159).

Thailand hosted over 150,000 'displaced persons'¹ from Myanmar between 1984 and 2004² (Burmese Border Consortium, 2005). Generally, the Thai government was accommodating toward these people, however the government's course of action fluctuated overtime (Banki and Lang, 2008; Muntarbhorn, 2004; Sciortino and Punpuing, 2009). What influenced the government's response toward displaced persons from Myanmar? How did environmental attributes shape the level of shelter available?

The paper attempts to appreciate alterations in the policy³ applied by relevant Thai authorities regarding displaced persons from Myanmar. It does this by considering alterations in environmental attributes which surrounded the situation. It is argued that the Thai government's desire to minimize the negative consequences of providing shelter shaped their response toward displaced persons from Myanmar. It is further suggested that different environmental attributes affected the perceived outcome of providing shelter. As these attributes changed and made the provision of shelter more arduous, the government's course of action altered. Notably, this resulted in a course of action that was less consistent with human rights principles and standards. The environmental traits considered are: the security setting on the Thai-Myanmar border, the number of displaced persons requesting shelter, and official relations between the central governments in Myanmar and Thailand.⁴

One aspiration of this paper is to demonstrate the important role of context when considering government policy towards displaced persons. It endeavours to achieve this by illustrating how environmental attributes shaped to the degree of shelter by influencing the perceived cost of sheltering displaced persons. Specifically, the following paper looks at the course of action by the Thai government during 1997, a year marked by notable

1 The term 'displaced persons' will be used throughout this paper except when citing a direct quote. 'Displaced persons' and 'temporary shelter areas' are the official parlance used by the Thai government for people from Myanmar seeking shelter in Thailand (Tangseefa, 2007).

2 The number of displaced persons from Myanmar continued beyond 2004. The population was recently estimated at 135,619 in June 2012 by the Thailand Burma Border Consortium.

3 Both the term 'course of action' and 'policy' will be used throughout the paper. It ought to be noted that formal policy was difficult to ascertain. According to Muntarbhorn (2004), the Thai government rarely detailed specific policy regarding displaced persons from Myanmar in publicly available ways (i.e. Cabinet decisions). Instead, there was a tendency to have low profile policies set between the key security agency and relevant ministries with a 'policy acquiescence' to allow displaced persons from Myanmar stay temporarily in Thailand (Muntarbhorn, 2004: 28).

4 It is acknowledged that these are not all of the attributes which may have influenced the Thai government's behaviour toward displaced persons from Myanmar. For instance, both domestic and international pressure likely contributed as well. These additional traits are not considered in detail.

alteration in the government's response. To illustrate alteration in the government's response, 1997 is contrasted to the mid - and late -1980s, the period when the first semi-permanent temporary shelter areas were established.

First, a section detailing the analytic framework describes the underlying assumptions throughout the paper. Constraints of this paper are also identified in this section. Second, the courses of action applied by relevant Thai authorities toward displaced persons from Myanmar are described. Specifically, a comparison between the 1980s and 1997 is considered. It was assumed that the differences in the degree of shelter between these two periods indicated variance in the Thai government's inclination to accommodate displaced persons from Myanmar. Degree of shelter is determined by: 1) the characteristics of temporary shelter areas, 2) the reported accessibility of temporary shelter areas for displaced persons, and 3) accounts of repatriation. Secondary sources were utilized to ascertain this information.

Third, evidence to indicate relevant Thai authorities acted to mitigate negative repercussions of housing displaced persons will be presented. The Thai government's desire to abate the negative cost was exhibited by communications, such as letters and guidelines, from the Thai government to the Committee for Coordination of Services to Displaced Persons in Thailand (CCSDPT) (Burmese Border Consortium, 1988). As the perceived costs and benefits of housing displaced persons altered, the Thai government's course of actions also reflected this. Generally, individuals were not accorded the rights and protections required by human rights principles and standards. This included their rights to: 'life, liberty and security of person' and to 'seek and to enjoy asylum from persecution' (Universal Declaration of Human Rights, articles 3 and 14).

The fourth section details how different environmental attributes augmented the perceived negative consequences of harbouring displaced persons. The environmental attributes which shaped the perceived costs and benefits include: 1) the security setting, 2) the number of displaced persons, and 3) the relations between the central governments. It is argued that as these traits altered the negative costs increased. Subsequently, the inclination of the Thai government to provide the same degree of shelter previously available decreased. This resulted in a course of action that was less consistent with the human rights principles and standards. As negative costs increased, displaced persons from Myanmar were not accorded the rights and protections required by human rights. Finally, the paper closes with a brief conclusion.

2. Analytic framework and constraints

The following paper was grounded on an article written by Karen Jacobsen (1996) detailing factors influencing the policy responses of host governments to refugee influxes. Her article indicated that the policy making process was influenced by a range of considerations, both international and domestic, and the government weighted the costs and benefits of these

considerations when making decisions. A similar type of reasoning was utilized in this paper. It was assumed the Thai government evaluated different conditions when determining implications for the state⁵ regarding displaced persons from Myanmar. Furthermore, this evaluation shaped how they responded. Fundamentally, the government weighted the costs and benefits of various circumstances to minimize the negative consequences of the situation. The factors Jacobsen considered were: the positives and negatives of accepting international assistance, relations with the sending country, political calculations about the local community's absorption capacity, and national security considerations (1996). This paper deviated from these factors slightly. It took into account the security setting on the Thai-Myanmar border, the number of displaced persons requesting shelter, and the relations between the central governments of Myanmar and Thailand.

Three challenges encountered during the research for this paper deserve mention. They were: 1) determining the actual perception of the Thai government, 2) inaccessibility of primary sources and 3) deciding which environmental attributes to include in the analysis. First, it was impossible to know the actual perception of relevant policy actors without direct contact and involvement in the process. Since this was not the case, claims about the perception of the Thai government could not be verified and may not reflect the intentions of the policy actors. This analysis assumed the Thai government's perception and course of action was discernible by the degree of shelter available for displaced persons from Myanmar. The degree of shelter was determined through secondary reports on: the characteristic of temporary shelter areas, the accessibility of these areas, and accounts of repatriation.

The second challenge was the limited availability of primary sources. This was likely a result of both language constraints and the general absence of transparency and availability in documents relating to policy decisions on the Thai-Myanmar border. The research for this paper relied solely on material written or translated into English. It is acknowledged that these sources may have been biased. In addition to language constraints, in general there appeared to be limited transparency and availability of primary documents regarding decisions about displaced persons on the Thai-Myanmar border. For instance, Vitit Muntarbhorn (2004) said, the Thai government rarely delegated specific policy regarding displaced persons from Myanmar in publicly available ways such as Cabinet decisions. Instead, there was a tendency to have low profile policies set between key security agencies and relevant ministries with a 'policy acquiescence' to allow displaced persons from Myanmar to stay temporarily in Thailand (Muntarbhorn, 2004: 28). This was reinforced by an interview with Veerawit Tianchainan⁶ in August 2012. He said,

5 The term 'state' throughout the paper refers to a perceived unitary interest for the country. Thus, it is assumed the interest of the Thai government and all of the citizenry coincided. The problem with this assumption will be briefly discussed in this section.

6 Veerawit Tianchainan was the founder and executive Director for the Thai Committee for Refugees. He also worked with UNHCR in Thailand for 9 years (1999-2008) and spent five of those years working specifically on the Thai-Myanmar border.

official policy documents on displaced persons in Thailand were kept largely confidential and he identified an absence of transparency in decisions relating to displaced persons on the Thai-Myanmar border. Consequently, secondary sources were relied on. In an attempt to verify the information used, when possible, the material applied in this paper was validated among two or more sources.

The last challenge that will be mentioned, was deciding which environmental attributes to include in the analysis. Even though it is acknowledged by scholars that external attributes contribute to policy decisions⁷ (Malkki, 1995), it is difficult to determine which and to what degree these characteristics impacted the government's course of action. It is expected various attributes contributed in different ways depending on the specific context of the country and situation. As previously mentioned, three environmental traits are considered in this paper (security, number of displaced persons, and interstate relations). It is recognized other environmental traits influenced the decision making process, such as domestic and international pressures. It is infeasible, however, to cover all the environmental qualities in one paper. It is also unrealistic to determine the degree of influence or draw direct causal relationships between the government's course of action and the environmental attributes.

The purpose of identifying the limitations of this paper is to highlight practical constraints of policy analysis relating to displaced persons on the Thai-Myanmar border. As Jacobsen pointed out, a multitude of factors create countervailing pressures which lead to clashes between different actors and the 'end result is not a neat solution yielding a rationally evolved refugee policy' (1996:647). This statement underpinned the difficulty and challenges of understanding different attributes which influence policy. Policy making is not a precise or simple process, nor does it necessarily produce 'rationally evolved' outcomes. Recognizing the limitations also underscore the need to consider state action, via the government, from many different angles. One analysis is not sufficient to provide a comprehensive understanding of the government's course of action.

The central argument of this paper is external context matters when evaluating policy applied by governments. In theory, it is easy to reconcile this claim. In practice however validating the role of specific environmental attributes proved more problematic. It is proposed that environmental attributes contributed to the course of action taken by Thai authorities because they shaped the perceived outcome of providing shelter to displaced persons. As these attributes shifted, the costs and benefits of the situation altered. The response of the Thai government reflected this. Regrettably, their course of action became less consistent with human rights standards and principles. The remaining portion of this paper tries to expound this.

7 Additionally, several scholars identified the political connotation connected to displaced persons (i.e. Haddad, 2008; Nyers, 2003; Newman, 2003; Greenhill, 2011; Zolberg, 1999). This suggested the environmental context in the form of political connotation mattered and played a role in a country's reaction toward refugees seeking shelter.

3. Change in shelter: 1980s and 1997

During 1997 the degree of shelter in Thailand, for the people fleeing from Myanmar, was more restricted than previously available.⁸ The level of shelter is determined by the characteristic of temporary shelter areas, the reported accessibility of these locations for displaced persons, and accounts of repatriation. It is proposed the reduction in the degree of shelter was a result of a decline in the government's willingness to accommodate displaced persons. This section identifies alterations between the 1980s and 1997.

The characteristic of temporary shelter areas was markedly different in 1997 than it was throughout the 1980s and early 1990s. Initially, temporary shelter areas were distinguished as safe and relatively small village-styled locations which promoted self-sufficiency and exhibited open movement in and out of the areas (Banki and Lang, 2008; Burmese Border Consortium, 1984; Burmese Border Consortium, 1995). These qualities altered in the mid-to late-1990s. Throughout this period, temporary shelter areas were: larger, more populated, and retained heightened security measures (Lang, 2002).

Noticeable alterations in temporary shelter areas developed in 1995, following the initiation of cross-border raids on these locations. As a result of these raids, security measures were progressively placed around temporary shelter areas and shelter locations were consolidated. This was an effort to protect both the Thai country and residents living in the temporary shelter areas from cross-border incursions (Ball, 2003; Lang, 2007). It was believed the larger temporary shelter areas and smaller number of locations would be more easily defended. From 1995 to 2000, shelter locations were merged into larger areas further away from the border. By 2000, the number of areas were reduced to twelve from the over thirty at the beginning of 1995 (Burmese Border Consortium, 2000:1).

In January 1997, following major attacks on two temporary shelter locations in Tak province, the Thai government implemented new security measures. Thai authorities applied fencing, security personnel, and strict control on movements in and out of all temporary shelter areas in Tak province (Burmese Border Consortium, 1998a; Burmese Border Consortium, 1999a; Lang, 2002). The smaller village-styled character of the original areas took on a larger, more strictly guarded, and aid dependent structure⁹ (Banki and Lang, 2008; Burmese Border Consortium, 1999; Lang, 2007:115).

8 It should be noted that alterations in the level of shelter gradually declined overtime especially starting in 1995 following the initiation of cross border raids on temporary shelter areas. For the purpose of this paper, the year 1997 will be focused on because several substantial changes were documented by refugee and human rights organizations.

9 The limited movement inhibited their ability to access supplementary livelihood methods previously available to them. Foraging for food in the surrounding forests or working in neighbouring communities were no longer viable options. In addition, ethnic opposition groups inside Myanmar were unable to provide the same level of support to the camp residents. This increased the aid-dependency of the camp populace (Burmese Border Consortium, 1999).

In addition to the shifted disposition of temporary shelter areas, reports of repatriation ensued throughout 1997. The Thai government appeared increasingly inclined to return people to Myanmar during this period.¹⁰ Amnesty International, for example, estimated the Thai military returned over 4,000 displaced persons from Myanmar during the months of February and March 1997¹¹ (1997:3). Additional reports from the Burmese Border Consortium (1997; 1998a; 1998b), and Human Rights Watch (1998) documented high levels of repatriation during this period as well. Repatriation, or the return of people to their homeland, reduces the number of people and the obligation of the host country.

The increased number of repatriations in 1997 signalled that the Thai government was less willing to provide shelter. Because repatriation reduces the number of displaced persons, the obligation of the host country is reduced. When conditions permit repatriation can be a desirable solution. However, this was not the situation in 1997. The international standard advocated by the United Nations High Commissioner for Refugees (UNHCR) is 'voluntary, safety and dignity' in the return of individuals to an environment in which 'the causes of flight have been definitively and permanently removed' (UNHCR, 1993:104). The environment which displaced persons from Myanmar were returned to, throughout 1997, proved to be unsafe in many occasions (Human Rights Watch, 1998). The Thai government's response was incompatible with human rights standards and principles.

Not only were a high number of returns documented throughout the year, but it was reportedly difficult to seek entry into temporary shelter areas during the second half of 1997. This was manifested by the small number of displaced persons admitted. The net increase of people living in temporary shelter areas, from the start of July to the end of December 1997, was only 61 people.¹² This was a marked contrast to the influx of 14,778 during the first half of 1997. Despite the small number of displaced persons admitted, there were accounts of an accumulation of persons from Myanmar along the Thai-Burma border. For instance, the Burmese Border Consortium extended provisions to an additional 7,000 people living outside the formal temporary shelter area structure (Burmese Border Consortium, 1998a:2). This demonstrated people still experienced insecurity in Myanmar during this period. Moreover, it revealed an inability by a number of people on the border to access temporary shelter areas.

The reduced accessibility for displaced persons to obtain shelter in Thailand during the second half of 1997 also suggested the government was less disposed to provide shelter during this period. Evidence of this was manifested by the closure of the border in

10 This is not to say incidents of repatriation did not occur prior to 1997. However, more incidents were publicized and reported than previously. This was especially contrasted to the 1980s when few reports on repatriation were made. One notable exception was the return of pro-democracy advocates to Burma/Myanmar between 22 December 1988 and February 1989 (Asia Watch, 1992: 2).

11 The report specifically accused the 9th Infantry Division of the First Army. The repatriated displaced persons were staying in Thailand's western provinces of Kanchanaburi and Raatchaburi.

12 The population was 116,203 at the end of June 1997 and 116,264 by the end of December (Burmese Border Consortium, 1997:2).

June 1997 (Human Rights Watch, 1998). It was also supported by reports of the Thai government strictly adhering to the criteria of 'displaced persons fleeing fighting'¹³ when admitting people into temporary shelter areas in 1997.

Overall, the degree of shelter provided by the Thai government diminished in 1997. The degree of shelter narrowed and accessing protection was more precarious than it was prior to this period. Displaced persons were no longer liberally permitted to stay temporarily in the country. The inclination by the Thai government to accommodate displaced persons from Myanmar appeared to decline and relevant authorities seemed more reluctant to continue the same level of accommodation previously employed.

What changed between the 1980s and 1997? Why did the degree of shelter diminish? This paper will contemplate the larger environmental context and consider why it was less favourable for the Thai government to shelter displaced persons during this period. First however, support for the assumption that the Thai government's interest was to mitigate negative repercussions for providing shelter is detailed.

4. Government interest: reducing the cost of providing shelter

Evidence indicates relevant Thai authorities' were concerned with the negative costs of housing displaced persons from Myanmar (Hyndman, 2001; Lang, 2002). This was exhibited in communications, such as letters and guidelines, from the Thai government to the Committee for Coordination of Services to Displaced Persons in Thailand (CCSDPT). Specifically, the government expressed anxiety regarding both political repercussions and domestic problems (Burmese Border Consortium, 1988). It is believed the environmental attributes during the 1980s permitted government to abate the negative consequences and still provide sufficient shelter despite concerns expressed in official communications (Lang, 2002). In the mid-1990s the attributes changed and it was not as feasible to mitigate the negative repercussions of harbouring displaced persons (Lang, 2002). As the perceived negative costs of housing displaced persons increased the Thai government's course of action reflected this.

Beginning in 1984, the response of the Thai government indicated a desire to avoid interstate tension associated to harbouring displaced persons from Myanmar. From the perspective of the host country, displaced persons may be regarded as a visible diplomatic liability and potential source of strain between sending and receiving states (Lang, 2002:85). The circumstance in Thailand proved no different. Official strategy reflected this concern. For example, the Ministry of Interior in December 1984 stated:

13 According to reports from Amnesty International (1997), Burmese Border Consortium (1998a), Human Rights Watch (1998), and Lang (2002, p. 122) the official terminology of 'displaced persons' shifted to the more restrictive term 'displaced persons fleeing fighting'. However, no primary documents were found to verify this.

The Thai Government has considered the provision of assistance to the Karen and Mon based on humanitarian principles, while at the same time keeping in mind the diplomatic relations between the Thai and Burmese authorities (Ministry of Interior, 1984 cited in Lang, 2004:84).

This statement depicted concern about damaging relations between the two countries. Further, the emphasis on providing humanitarian shelter stressed the non-political character of the act.

Thai authorities attempted to keep their provision of shelter to displaced persons from Myanmar non-internationalized in order to evade unnecessary political connotation. International agencies were prevented from being involved in the border relief effort because it was believed they would draw unwanted attention and politics to the situation¹⁴ (Hyndman, 2001:44; Muntarbhorn, 2004:27). The Ministry of Interior guidelines regarding policies for NGOs dealing with displaced persons from Myanmar required all NGOs to be small local organizations. It also stated, 'assistance may be given to civilians only and there is to be no publicity' (Ministry of Interior, 1991: guideline 3.2).

In an interview conducted by Lang, Khun Wannida Boonprarong, Chief of the Displaced Persons Subdivision of the Ministry of Interior said, the Thai government pursued low-key sanctuary as it wished to prevent diplomatic 'misunderstandings' with Myanmar¹⁵ (Lang, 2002:92). The attitude of relevant Thai authorities was to avoid internationalizing provisions of shelter to displaced persons from Myanmar. The border relief effort was deliberately kept local and small scale, in part, to evade unnecessary disagreement with the central government in Myanmar.

In addition to evading political tension, concern for the domestic cost was also evident. Communications between the Ministry of Interior and the Committee for Coordination of Services to Displaced Persons in Thailand (CCSDPT) highlighted the aspiration to minimize the domestic sacrifice. The 1984 Burmese Border Consortium report stated that the Ministry of Interior restricted aid to 'emergency provisions.' In part, this was applied to prevent resentment from the local community.¹⁶ The NGOs working on the border were required to consider the impacts of their aid on the surrounding populace (Burmese Border Consortium, 1988). For example, guideline 3.3 in the Ministry of Interior document regarding policies for dealing with displaced persons from Burma stated:

14 For example two major international organizations, UNCHR and ICRC, initially were not permitted a role. However, UNHCR was eventually allowed a permanent role on the border in 1998.

15 The interview was conducted in Bangkok, 9 March 1998

16 This was reinforced by unpublished meeting minutes from the Coordinating Committee for the Services to Displaced Persons in Thailand. 'Karen Emergency: Notes on a meeting in Mae Sot, August 10, 1984' (cited in Lang, 2002:84).

The social and psychological effects on (citizens of) the Kingdom of Thailand in the areas concerned must be taken into consideration. If necessary, assistance will have to be provided to the Kingdom of Thailand as well (1991).

Both the emergency aid restriction and guideline 3.3 illustrated concerns by the Ministry of Interior for the impact temporary shelter areas could have on its local constituents. By attempting to preclude resentment from the surrounding populace, the government acted to reduce the domestic repercussion of housing displaced persons from Myanmar.

Since the beginning, the Thai government revealed concern regarding negative repercussions for housing displaced persons from Myanmar. Despite anxieties expressed, in practice the Thai government provided sufficient space for people seeking refuge (Burmese Border Consortium, 1995; Lang, 2002). It was believed the environmental attributes during this period allowed the government to mitigate negative repercussions and still provide adequate shelter. As Lang (2002) indicated, during the 1980s and early-1990s Thailand was in a position which allowed it capacity to accommodate displaced persons as long as their presence remained unobtrusive. Throughout this period, the population size remained small¹⁷ and there were no security concerns connected to temporary shelter areas (Ball, 2003; Lang, 2002:9). These characteristics allowed the Thai government to abate negative consequences of harbouring displaced persons and at the same time provide adequate accommodation. By demanding low publicity around temporary shelter areas, the government could temper political tensions with Myanmar. In addition, the provision of basic aid helped the country pacify domestic resentment and reduce the economic burden connected to offering accommodation. While the localized, small-scale, and low-publicity atmosphere persevered, the Thai government maintained a flexible and obliging situation for displaced persons from Myanmar (Lang, 2002).

In the mid-1990s these characteristics changed and it was not as feasible to lessen the negative repercussions of harbouring displaced persons (Lang, 2002). The attributes which permitted the Thai government to hedge some of the negative costs for sheltering displaced persons altered. The next section will look at the context surrounding shelter in more detail.

5. The context surrounding shelter

This section details how different environmental attributes augmented the perceived negative consequence for harbouring displaced persons. The attributes focused on include: a continued influx of people entering the country, heightened security dimensions on the border, and a shift toward official diplomatic relations with the central government in Myanmar. Specifically, it addresses how these environmental traits changed the perceived consequence for housing displaced persons from Myanmar.

17 The population sized ranged from 9,502 in 1984 to 19,675 in 1988 with an average shelter population around 2,000 people (Burmese Border Consortium, 1989).

The altered security atmosphere along the Thai-Myanmar border had substantial impact on the context surrounding temporary shelter areas in Thailand. As a consequence, it influenced the Thai government's course of action toward them. Prior to the mid-1990s Thai-based temporary shelter areas were stable and presented no security concern for the government (Banki and Lang, 2008; Lang, 2002:91). During this period, the Thai-Myanmar borderland was comprised of territories controlled by different ethnic insurgent armies opposed to the central government in Myanmar. The ethnic minority groups had amiable relations with the Thai government and security personnel.¹⁸ Furthermore, many of the ethnic minority groups were linked to displaced persons residing in temporary shelter areas.¹⁹ These attributes enabled relative security within the temporary shelter areas and along the Thai-Myanmar border.

The transition in the borderland security was particularly striking when the *tatmadaw* obtained a permanent foothold in the formerly ethnic minority controlled borderland periphery. This was achieved by the overthrow of two ethnic insurgent bases, Manerplaw and Kawmura, in 1995. After the fall of Manerplaw and Kawmura, the *tatmadaw* and its 'proxy' army, the Democratic Karen Buddhist Army (DKBA),²⁰ subjected the previously stable temporary shelter areas in Mae Hong Son and Tak province to regular attacks and raids. One source estimated 152 cross-border incursions into Thailand between January 1995 and April 1998 (Images Asia & Borderline Video, 1998:2).

As a result of raids, temporary shelter areas presented a major security concern for the Thai government in the mid-to late-1990s (Ball, 2003; Banki and Lang, 2008). This was exemplified by initiatives to consolidate temporary shelter locations as it was believed the larger shelter areas and fewer locations would be more easily defended (Ball, 2003; Lang, 2007). It was also demonstrated by Thailand's official Ministry of Defence report for 1996. This report specifically identified the suppression of minorities by the Myanmar government as a security threat to the country (Ministry of Defence, 1996:8).

In 1997, security dimension on the border amplified as *tatmadaw* forces gained effective control over the entire border region for the first time in history. In January 1997, following major attacks on two temporary shelter locations in Tak province, new security

18 For instance, many of the ethnic insurgent groups assisted Thailand in its fight against communism (Chongkittavorn, 2001). See Litner (1995) for more information on the relations between Thailand and the ethnic insurgent armies along the border.

19 For example, displaced persons in temporary shelters received support from the ethnic resistance groups inside Myanmar who traded on the black market and grew crops (Burmese Border Consortium, 1995).

20 The recently established Democratic Buddhist Army (DKBA) was a breakaway fraction of the Karen National Union and it played an important role in the capture of Manerplaw at the end of January 1995. It was also involved in the assault and occupation of Kawmura in February 1995. The DKBA was known to function as a proxy army for the *tatmadaw* in some situations and to function independently in others (Lang, 2002: 155).

measures were employed by Thai authorities.²¹ They applied fencing, security personnel, and increased control on movements in and out of all temporary shelter areas in Tak province. Consequently, the smaller village-styled character of the original camps took on a larger, more strictly guarded, and aid dependent structure (Burmese Border Consortium, 1998a; Lang, 2007: 115).

Anxiety by the Thai government regarding security associated to temporary shelter was expressed by new 'emergency procedures' which were implemented in 1997 for NGOs working on the border. The Thai government required all organizations who provided relief efforts in 'sensitive areas' to submit monthly supplies for the approval from both the Ministry of Interior and the Thai army²² (Burmese Border Consortium, 1998a: appendix a). Previously, the Ministry of Interior had sole discretion over the approval and administration of supplies to displaced persons. However in 1997, the 9th Infantry Division had the mandate to override the Ministry of Interior in matters relating to temporary shelter areas and, according to the Burmese Border Consortium report, on occasion exercised this prerogative (Burmese Border Consortium, 1998a: appendix a). The 'emergency procedures' represented concern by Thai authorities and illustrated the heightened role of the Thai military regarding temporary shelter areas. The temporary shelters areas were 'sensitive high-priority security matters' for Thailand making the army one of the strongest actors in displaced person policy (Lang, 2002:97).

Displaced persons from Myanmar were a central part of national security for the Thai state. Temporary shelter areas were identified by both the *tatmadaw* and DKBA as being connected with opposition armed groups. Consequently, raids and attacks ensued and they presented a direct security liability for the Thai government. Not only were temporary shelter areas deliberately targeted for cross-border incursions, but the intrusions endangered local Thai citizens, and security personnel as well²³ (Ball, 2003; Lang, 2007). As an outcome of the altered security environment, the responsibility of providing shelter for displaced persons was more onerous for the Thai government. Consequently, the degree of shelter provided was restricted.

Relevant literature reinforces this assertion and scholars maintain that security threats are likely to make authorities less willing to admit displaced persons and more prone to expel those admitted.²⁴ For example, Caballero-Anthony noted, when the security of the state was seen as vulnerable by the influx of non-citizens, individual security of the individuals

21 During the night of January 28th, the DKBA attacked and destroyed Wangka and Don Pa Kiang camps in Tak province. The attacks left around 7,000 refugees without homes inside Thailand (Burmese Border Consortium, 1997).

22 The 'sensitive areas' were the Kanchanaburi, Ratchaburi and Prachuap Khiri Khan provinces. Specifically, monthly supplies were submitted to the 9th Infantry Division of the Thai 1st Army.

23 For example, reportedly 53 villagers and 5 security personnel were injured and 23 villagers and 9 security personnel died as a result of cross-border incursions between 1995 and 1998 (Images Asia & Borderline Video 1998:2).

24 For more literature see Davies, 2007; Grundy-Warr and Rajaram, 2005; and Lohrmann 2000.

was often compromised (2008:168-169). Jacobsen further argued security negatively affected displaced persons because it often meant the army became more influential. Army personnel tend to be more concerned with containing security threats than with the welfare of displaced persons²⁵ (Jacobsen, 1996:673). All of these traits were exhibited in Thailand throughout 1997.

As the *tatmadaw* occupied greater control of the border region in Myanmar, Thailand's border environment was substantially impacted (Lang, 2007). It positioned temporary shelter areas as a prominent element in a deteriorating borderlands' security environment (Ball, 2003). The Thai military's role regarding displaced persons increased and it prompted the Thai government to implement security provisions around the temporary shelter areas (Lang 2002). Furthermore, the government was less inclined to admit displaced persons and more prone to return them to Myanmar. Clearly, the altered security attribute influenced the Thai government's course of action toward displaced persons from Myanmar.

At the same time the security dimension on the Thai-Myanmar border transformed, the number of displaced persons continued to increase. From 1995-1997, the number of displaced persons rose from 77,107 people in January 1995 (Burmese Border Consortium, 1995:2) to 116,264 by the end of December 1997 (Burmese Border Consortium, 1998a:4). The first half of 1997 saw one of the largest influxes in displaced persons from Myanmar since 1984. The refugee population increased 14,778 from January to June 1997 (Burmese Border Consortium, 1997). As the influx of displaced persons from Myanmar grew, the perceived affliction for providing shelter also increased. A member of the Ministry of Foreign Affairs demonstrated this. He wrote:

... the influx of displaced persons has entailed huge cost for Thailand in terms of administration and personnel, environment degradation, deforestation, epidemic control and the displacement of the affected Thai villages as well as the psychological impact on the local population' (Kbun Surpong Posayanond, 2000 cited in Lang, 2001:5).

The burden placed on Thailand cannot be ignored and the continued rise in the number of displaced persons only augmented this weight. As the cost of housing more people rose, the Thai government was less disposed to provide the same level of shelter. According to a Human Rights Watch report, the Thai government was more concerned with preventing a massive influx of refugees than protecting displaced persons from Myanmar (1998).

The last environmental attribute considered is official state relations between the governments of Thailand and Myanmar. It was believed the warming of relations between the two nations put displaced persons from Myanmar in a more 'negotiable' position (Buszynski, 1998; Hyndman, 2001; Human Rights Watch, 1998). A reorientation in relations between the central governments occurred during the late-1980s and early-

25 Jacobsen believed containment frequently meant controlling displaced persons by denying admission, restricting them to camps, and/or practicing repatriation (1996:673).

1990s. Previously relations were marked by a period of distant association between the two governments. In 1962, General Ne Win gained power in Myanmar through a military coup. He remained effectively in control until 1988.²⁶ During this period, formal dialogue and bilateral relationships, for the most part, were non-existent between the central governments (Chongkittavorn, 2001). Thailand's cross-border relationship focused largely, albeit unofficially, on supporting various armed ethnic minority groups inside Myanmar.²⁷

In 1988 the dealings between the governments in Thailand and Myanmar reoriented itself away from distant relations to one of greater official interaction.²⁸ Following the 'crackdown' on pro-democracy protests and the initiation of the State Law and Order Council (SLORC) in Myanmar, Thailand was the first state to develop positive official ties with the new SLORC government²⁹ (Lang, 2002).

The diplomatic rapprochement between the central governments in the two countries was tied to business opportunities in the border region. On 14 December 1988, Thailand's General Chavalit Yongchaiyudh, then Commander-in-Chief of the army and foreign minister, met with the new SLORC. The primary reason for General Chavalit Yongchaiyudh's trip was to negotiate 'lucrative timber and fishing deals' for Thai companies in Myanmar. The Thai government's rapprochement was predicated on the pursuit of 'constructive engagement', a policy associated with closer business and military ties between Thailand and the SLORC³⁰ (Buszynski, 1998; Lang, 2002).

The reorientation of relations coincided with a shift in Thailand's priorities which emphasized economics over politics. The 1988 Prime Minister Chatichai Choonhavan explained his foreign policy rationale as one in which 'politics will take second place to economics' (Innes-Brown and Valencia, 1993:334). Thailand was interested in establishing a strong economic position in the region and the enormous resource and economic potential in the Myanmar border region fit this objective (Innes-Brown and Valencia, 1993).

26 Ne Win retired as president in 1981, but continued to be powerful as Chairman of the Burma Socialist Programme Party until he stepped down on July 23, 1988.

27 See Lang (2002:139-142) for a detailed account of Thailand's border relations prior to 1988.

28 Despite the renewed engagement the relationship between the two countries fluctuated and at times remained tense. Some of the matters which contributed to hostilities from the Myanmar side included: dissatisfaction with Thailand as an 'insurgent sanctuary', boundary disputes, and illegal fishing across maritime boundaries. From the Thai perspective two issues of particular concern involved: periodic cross-border incursions by *tatmadaw* and DKBA forces and the large drug flow into Thailand from Myanmar (Lang 2002:153).

29 The 'People's Uprising', for restoration of democracy and human rights, on 8 August 1988 was followed by the killing of hundreds of protesters and a military coup led by the Burmese army. See Lang (2002:166) for more detail on SLORC instalment and the 'pro-democracy' movement.

30 Constructive engagement was a policy which advocated political coexistence rather than enforced isolation of Myanmar. It was based on the assumption that constructive engagement was the most effective means to influence positive change in the country. The policy also promoted Thai and ASEAN economic strategy interests by disregarding sensitive issues in the short-term including the refrainment of international condemnation for the SLORC's human rights record.

Logging enterprises in Myanmar overlapped with a domestic problem in Thailand's natural resource base. Within Thailand there was strong local pressure to cease logging because of flooding caused by excessive deforestation. Engagement with Myanmar's vast logging resources permitted Thai authorities to appease the domestic critics of logging while maintaining the burgeoning timber industry in the country.³¹ Thai-Myanmar relations corresponded with Thailand's need to find alternative sources for its timber. Engagement with Myanmar was an ideal solution. Subsequently, increased interaction between the two countries ensued.

It is suggested that increased economic interest in Myanmar by Thai authorities, inclined the government to appease the government in Myanmar and, consequently, be less disposed to provide shelter for displaced persons. This assertion was supported by Human Rights Watch (1998). For instance, they accredited a 'lack of protection' for displaced persons from Myanmar to strategic and economic interests of the Thai government (1998:47). Furthermore, Buszynski and Hyndman argued the engagement with the Myanmar's central government negatively shaped policies toward displaced persons seeking shelter in Thailand (Buszynski, 1998; Hyndman, 2001).

6. Conclusion

This paper argues the degree of shelter provided to displaced persons from Myanmar altered in response to environmental attributes which evolved during the mid-1980s and early-1990s. The attributes specifically discussed included: the number of displaced persons entering the country, the security dimension on the border, and official relations with the central government in Myanmar. It is believed these attributes shaped the cost of harbouring displaced persons from Myanmar. The parameter of shelter for displaced persons was predicated on the government's aspiration to abate the negative impact of housing displaced persons. Subsequently, as the perceived negative outcome for housing displaced persons increased, relevant Thai authorities' predisposition to accommodate these people diminished and the degree of shelter lessened. Essentially, the context around displaced persons in temporary shelter areas affected, to some degree, the course of action applied by the Thai government.

Significantly, the changes in the Thai government's course of action had negative implications for the human rights of displaced persons seeking shelter in Thailand. Individuals' safety and dignity were not accorded the rights and protection required by human rights standards and principles. As aforementioned, repatriations during 1997 did not abide by the international standard advocated by UNHCR. There were not conducted

31 After Thailand received concessions with Myanmar, the country imposed a logging ban in Thailand on 15 January 1989. The nation-wide logging ban effectively closed Thailand's forest frontier and Thai companies 'scrambled for access to Myanmar's forests' (Buszynski, 1998: 293). The logging concessions with Myanmar enabled the country to impose a moratorium on the felling of its hardwood trees and still keep its timber mills running (Lintner, 1995: 290).

in 'voluntary, safety and dignity' to an environment in which 'the causes of flight have been definitively and permanently removed' (UNHCR, 1993:104). Furthermore, access to safety in temporary shelters was precluded for many individuals in 1997. Displaced persons from Myanmar were excluded from their rights to: 'life, liberty and security of person' and to 'seek and to enjoy asylum from persecution' (Universal Declaration of Human Rights, Articles 3 and 14).

The central argument of this paper is external context matters when evaluating policy applied by governments. Policy is frequently a compromise between different pressures. Importantly, a comprehensive understanding of the government's course of action facilitates the ability to establish persuasive counter arguments. Counter arguments based on an understanding of the context surrounding policy decisions are more likely to be received by relevant policy makers. Subsequently, such arguments could positively shape governments' responses toward displaced persons making their course of action more humane and one which abides by human rights.

In theory, it is easy to reconcile the claim that context matters in shaping government policy. In practice, however, validating the role of specific environmental attributes proves more problematic. The constraints and qualifications of this paper were identified to illustrate this. As Jacobsen pointed out, a multitude of attributes create countervailing pressures (1996). There are considerable difficulties and challenges in understanding attributes which influence policy. The traits which mould decisions are varied and not easily identified. Moreover, policy making is not a precise or simple process, nor does it necessarily produce 'rationally evolved' outcomes. This underscores the need to consider government action from many different angles. One analysis is not sufficient to provide a comprehensive understanding of the government's course of action and more research needs to be undertaken.

References

- Amnesty International, 1997. Fear for safety / fear of refoulement. Document released on 12 March 1997. Bangkok: Amnesty International.
- Ball, D., 2003. Security developments in the Thailand-Burma borderlands. *Working Paper Series: Working Paper No. 9*. Sydney: Australian Mekong Resource Centre University of Sydney.
- Banki, S., and Lang, H., 2008. Protracted displacement on the Thai-Burmese border: the interrelated search for durable solutions. In: H. Adelman, ed. *Protracted displacement in Asia: no place to call home*. Hampshire: Ashgate Publishing Limited, pp.59-82.
- Burmese Border Consortium, 1984. Burmese border consortium refugee relief programme: programme report for period January to December 1984. Bangkok: Burmese Border Consortium.
- Burmese Border Consortium, 1989. Burmese border consortium refugee relief programme: programme report for period January to June 1989. Bangkok: Burmese Border Consortium.
- Burmese Border Consortium, 1995. Burmese border consortium refugee relief programme: programme report for period January to June 1995. Bangkok: Burmese Border Consortium.
- Burmese Border Consortium, 1997. Burmese border consortium refugee relief programme: programme report for period January to June 1997. Bangkok: Burmese Border Consortium.
- Burmese Border Consortium, 1998a. Burmese border consortium refugee relief programme: programme report for period July to December 1997. Bangkok: Burmese Border Consortium.
- Burmese Border Consortium, 1998b. Burmese border consortium refugee relief programme: programme report for period January to June 1998. Bangkok: Burmese Border Consortium.
- Burmese Border Consortium, 1999. Burmese border consortium refugee relief programme: programme report for period July to December 1998. Bangkok: Burmese Border Consortium.
- Burmese Border Consortium, 2000. Burmese border consortium refugee relief programme: programme report for period January to June 2000. Bangkok: Burmese Border Consortium.

- Buszynski, L., 1998. Thailand and Myanmar: the perils of constructive engagement. *The Pacific Review*, vol. 11, no. 9, pp. 290-305.
- Chongkittavorn, K., 2001. Thai Burma relations. In: *Challenges to democratization in Myanmar: perspectives in multilateral and bilateral response*. Stockholm: International Institute for Democratic and Electoral Assistance, pp.117-130.
- Davies, S., 2007. Seeking security for refugees. In: A. Burke and M. McDonald, eds. *Critical security in the Asia-Pacific*. Manchester: Manchester University Press, pp. 152-166.
- Freeman, G., 2005. Political science and comparative immigration politics. In: M. Bommers and E. Morawska eds. *International migration research: constructions, omissions, and the promises of interdisciplinary*. Burlington: Ashgate Publishing Company, pp. 111-128.
- Greenhill, K., 2010. *Weapons of mass migration; forced displacement, coercion, and foreign policy*. Ithaca: Cornell University Press.
- Grundy-Warr, C. and Rajaram, P., 2005. Protection or control?: global migration policies and human rights. In: F. Bertrand, ed. *International migration and human rights*. Singapore: Asia-Europe Foundation, pp. 72-109.
- Haddad, E., 2008. *The refugee in international society; between sovereigns*. New York: Cambridge University Press.
- Human Rights Watch, 1998. Burma/Thailand unwanted and unprotected: Burmese refugees in Thailand. *Human Rights Watch*, vol. 10, no. 6.
- Hyndman, J., 2001. Business and bludgeon at the border: a transnational political economy of human displacement in Thailand and Burma. *GeoJournal*, vol. 55, pp. 39-46.
- Images Asia & Borderline Video, 1998. *A question of security: a retrospective on cross-border attacks on Thailand's refugee and civilian communities along the Burmese border since 1995*. Chiang Mai: Images Asia.
- Innes-Brown, M. and Valencia, M., 1993. Thailand's resource diplomacy in Indochina and Myanmar. *Contemporary Southeast Asia*, vol. 14 no. 4, p. 332-351.
- Jacobsen, K., 1996. Factors influencing the policy response of host governments to mass refugee influxes. *International Migration Review*, vol. 30, no. 3, pp. 655-678.
- Kibreab, G., 1991. Integration of refugees in countries of first asylum: past experienced and prospects for the 1990s. *Paper commissioned by the Program in International and U.S. Refugee Policy*. Medford: Tufts University.
- Lang, H., 2001. The repatriation predicament of Burmese refugees in Thailand: a preliminary analysis. *New Issues in Refugee Research Working Paper No. 46*. Canberra: Australian National University.

- Lang, H., 2002. *Fear and sanctuary: Burmese refugees in Thailand*. New York: Southeast Asia Program Publications.
- Lang, H., 2007. Freedom from fear: conflict displacement and human security in Burma. In: A. Burke and M. McDonald, eds. *Critical security in the Asia-Pacific*. Manchester: Manchester University Press, pp. 105-120.
- Lintner, B., 1995. *Burma in revolt: opium and insurgency since 1948*. Colorado: Westview Press.
- Lintner, B., 1995. Building new bridges with a former foe. *Jane's Defense Weekly*. 9 September 1995.
- Lohrmann, R., 2000. Migrants, refugees, and insecurity: current threats to peace? *International Migration*, vol. 38, no. 4, pp. 3-20.
- Malkki, L., 1995. Refugees and exile: form "refugee studies" to the national order of things. *Annual Review Anthropology*, vol. 24, no. 1, pp. 495-523.
- Minister for the Deputy of Interior Ministry, 1991. The provision of assistance to Burmese Minorities who have fled into Thailand. Ministry of Interior letter to CCSDPT 31 May 1991 (unofficial translation).
- Ministry of Defence, 1996. *The Defence of Thailand 1996*. Bangkok: Ministry of Defence Strategic Research Institute.
- Muntarbhorn, V., 1992. *The status of refugees in Asia*. New York: Oxford University Press.
- Muntarbhorn, V., 2004. *Refugee law and practice in the Asia and Pacific region: Thailand as a case study*. Bangkok: UNHCR.
- Newman, E. and Selm, J., eds, 2003. *Refugees and forced displacement: international security, human vulnerability, and the state*. New York: United Nations University Press.
- Sciortino, R. and Punpuing, S., 2009. *International migration in Thailand 2009*. Bangkok: International Organization for Migration.
- Tangseefa, D., 2007. Temporary shelter areas and the paradox of perceptibility: imperceptible naked-Karens in the Thai-Burmese border zone. In: C. Grundy-Warr and P. Rajaram, eds. *Borderscapes: hidden geographies and politics at territory's edge*. Minneapolis: University of Minnesota Press, pp. 231-262.
- UNHCR, 1993. *The status of the world's refugees: the challenges of protection*. London: Penguin.

POWER AND THE PITFALLS OF CAPACITY BUILDING: PERSPECTIVES FROM THE LOCALLY- LED STRUGGLE FOR HUMAN RIGHTS IN EASTERN MYANMAR

Sam Moody

The purpose of this paper is to encourage an open debate about the way that non-local organisations engage in ‘capacity building’ activities with local human rights organisations. The central argument is that unbalanced power relationships between local organisations and their non-local partners affect the capacity building strategies employed by non-local organisations. The result of this is not only that the capacity building activities entrench these unequal power relationships but that there are negative implications to the effectiveness of the local organisations as they seek to support communities that are resisting abuse. Recent developments in Myanmar have meant that non-local organisations have opportunities for engagement in areas of the country that they previously could not reach. One of the implications of this is that local organisations already working in those communities face the prospect of developing partnerships with non-local organisations for the first time. Capacity building activities will likely form an important part of the mechanisms through which these relationships develop in the short to medium-term. This paper illustrates ways in which the greater opportunities for non-local organisations to exercise power can permeate these capacity building strategies. It suggests that the ‘professionalization of resistance’ reflects the power imbalance and is central to notions of capacity building that will be employed. The paper presents a cautionary tale of how capacity building activities can damage the effectiveness of local organisations by eroding their ability to dynamically react to the local community. Recommendations are offered to guide organisations that are constructing capacity building strategies so that the negative consequences can be avoided and local resistance can be strengthened rather than undermined.

1. Introduction

For decades, Myanmar's government was widely condemned by the governments of "Western" nations for its perceived lack of democracy, militarisation and abuse of human rights. Recently, government-led reforms have complicated the picture with positive news coverage in the Western media and positive statements by Western leaders suggesting that *things are getting better* (BBC, 2012; Guardian 2012). In an effort to make sure that the continuing human rights abuses of the Myanmar government are not forgotten, human rights organisations are redoubling their efforts to bring stories of human rights abuse into the public domain (Burma Campaign UK, 2012; Human Rights Watch, 2013). It is a keen contestation of a narrative; crudely put, one side is saying 'the Myanmar government is getting better...' whilst the other side is saying '...but remember that they still abuse human rights'. It is not the purpose of this paper to pass judgement on the human rights record of the Myanmar government; it is well documented that abuses have been perpetrated over decades of military rule. The limitation of this narrative, however, is that it only mentions one agent that controls the human rights situation in Myanmar: the Myanmar government. Central to the arguments contained in this paper is the realisation that whenever there is human rights abuse in Myanmar, local people are using their agency to resist abuse, and they are often receiving support from local and non-local sources.¹

In eastern Myanmar, there are a number of locally led organisations that work across a range of different issues, all of which can be said to be supporting villagers as they choose strategies to protect themselves from abuse. The Karen Human Rights Group (KHRG) is an example, and the approach of this organisation with its focus on Village Agency is the main inspiration for this paper (KHRG, 2008). KHRG, however, is not the only local organisation that is supporting villagers' resistance. For example, the Mae Tao Clinic and the Backpack Health Worker Teams (BHWT) offer primary healthcare outside of the structures of the Myanmar government, providing options for villagers to defend their right to health (Mae Tao Clinic, 2013; BHWT, 2013). They have a clear strategic focus on health rather than human rights per se, but nevertheless these organisations are supporting the agency of villagers who are resisting abuse. The organisations sprang from the determination and creativity of people in eastern Myanmar reacting to local concerns and relying on local understanding. They implicitly or explicitly share a belief in the capacity of local people to make decisions that improve the quality of their lives in the face of abuse.

1 This paper refers to 'local' and 'non-local' organisations rather than other possibilities such as 'Western organisations' or 'donor organisations'. This is to take into account the diversity within non-local organisations. For example, whilst many of the relevant 'non-local' organisations are based in Western countries, others may be based in Bangkok or Yangon. Although there may well be differences between organisations based in Western countries and, for instance, those based in Southeast Asian capitals, the key distinction is between organisations that emerged out of local-level resistance and those that did not.

All of the abovementioned organisations, and others like them, are supported by partners based outside of the local context. Many of these organisations have enjoyed fruitful, supportive partnerships over a significant number of years and understanding between partners has grown as time has gone on, improving the quality of the relationship and the effectiveness of the work in which they engage. Nevertheless, the nature of these partnerships is such that power is not equally balanced. This is no secret; donor partners recognise the fact that local partners rely on the support of a small number of donors and that this fact partly characterises the relationship. Nevertheless, it is this power imbalance that is the central focus of this paper. With the ‘democratisation’ and the related ‘opening up’ of Myanmar, some non-local organisations are developing their strategy to operate through agreements with the Myanmar government, creating opportunities to reach areas and implement interventions that were previously not possible. With this, comes the likelihood that locally-based organisations that had not previously engaged in partnerships with non-local organisations will find themselves with opportunities to do so. These organisations will need to ‘build their capacity’ to manage these partnerships and the projects that are linked to them. This paper examines this, arguing that the nature of the inherent power imbalance is such that there are pitfalls to ‘capacity building’ activities that can result in dynamic local organisations in eastern Myanmar diminishing their ability to react effectively to the local situation and support villagers as they seek to protect themselves from abuse.

The paper begins by looking more deeply into the power dynamics within local to non-local partnerships, showing that in relation to both the direct and the indirect exercise of power, the relationship is skewed in favour of non-local organisations. When considering the indirect exercise of power, it is argued that there is a ‘professionalization of resistance’, which is an important part of this unequal power dynamic. Following this, the paper describes the current context in Myanmar and the practical implications of this to the work of organisations to support villagers to resist human rights abuse. Building from this understanding is a description of how in this context new partnerships are likely to be established between local and non-local organisations and that this will give rise to ‘capacity building’ activities. The paper then goes on to illustrate that if these capacity building activities are not carefully managed, they will endanger local organisations’ connection to the local dynamism and creativity that had previously been a core strength. This is a pitfall that arises out of the nature of the power dynamic and in particular the ‘professionalization of resistance’. Following this description, some recommendations are given so that this pitfall may be avoided and that local to non-local partnerships can be as effective as possible in supporting local communities as they seek to defend their human rights.

2. The power dynamics of local to non-local partnerships

2.1. Theoretical framework of power

The concept of power is intrinsically linked to human rights. However, the consideration of power is most often crudely focussed on the power relationship between ‘perpetrators’ of abuse and its ‘victims,’ ignoring the way that power relates to other relationships that affect the lives of marginalised communities that struggle against abuse. Central to this paper is an account of how power imbalances inherent within relationships between local and non-local actors affect capacity building activities. It is important, therefore, to briefly set out the theoretical framework that underpins the claims made. There are two key points relating to power that are central to the analysis of capacity building in local human rights organisations in eastern Myanmar that follows in later sections of this paper:

1. Power is characterised by a complex interplay between structures and agents.
2. The exercise of power can be through direct influence but it can also be exercised indirectly to great effect.

We will approach these two points in turn, before applying them to an analysis of the nature of power relationships between local and non-local actors.

The ‘structure/agency’ debate is one of the central debates within the discussion of power. At the basis of the debate is the question of the extent to which power is located in the people who exercise it as they see fit, and the extent to which it is located in the contexts within which it is exercised. Of course, within this, there are many sub-debates. For example, when we discuss agents, are we talking about individuals or communities? (Connor, 2011). Equally, when we discuss structures, are we talking about economic structures, political structures or even social structures of norms and values? (See for example Doyle, 1998 and Marx, 1887). The structure/agency debate, however, is not characterised by two opposed camps; namely those that emphasise structure and those that emphasise agency. It is largely recognised that there is a complex interplay between structure and agency. To set out a detailed framework of the varying significance of different structures and their interplay with different actors would go far beyond the bounds of this paper. However, it is important to identify some pertinent aspects that are important to the analysis that follows.

The first important facet is that there are bidirectional links of influence between structures and agents (Brass and Burkhardt, 1993). Agents always have a choice of action, but the options open to them and also the decisions that they ultimately make, are influenced by structures. At the same time, the relevant structures are developed and maintained by agents and are therefore not constants in the equation. What this means is that structures skew the distribution of power so that some agents have more options open to them than other agents. Nevertheless it must also be recognised that the fact that power is unequally

distributed does not mean that in any relationship, power is held by only one actor and not the other. In short, power is *unequally distributed* rather than *completely monopolised*. The second important facet is that structures can include more than just the formal, open systems that are designed to influence behaviour (for example, systems of law that formally penalise certain actions). Structures can also include less concrete aspects of social organisation such as the narratives that contain value-information about what is desirable and what is not (Lukes, 2005; Ransome, 1992 and Reddy, 2000). Decisions are influenced by efforts to control the feelings and ideas that people have towards their situations.

This brief illustration of the varying nature of the relevant structures leads us onto the second key point that underpins the analysis in this paper. Power can be exercised directly but it can also be exercised indirectly. We can illustrate this using examples from human rights in Myanmar. When the Myanmar military shelled villages in the non-government-controlled area of Karen state, it was a clear action intended to influence the villagers to re-locate to government controlled areas (KHRG, 2008 and 2011). Violence and the threat of further violence is one of the crudest ways in which power is exercised. It is an attempt to influence decisions by skewing the cost-benefit analyses such that rational actors will choose one option over another. However, we can also see that the Myanmar government has also used their power to constrain the options that people recognise as open to them. For example, the government's controls over what is discussed in the media are part of an effort to suppress debate about the government's actions, including the military activities in Karen State (Crispin, 2011). This second example shows that power can be exercised not only directly by openly controlling the implications of certain decisions; in this case, power is exercised indirectly as part of a strategy to stop people making decisions about certain issues or even to understand that such issues exist to be decided upon. This is an important element of power that should be taken into account when discussing power's application.

To summarise the understanding of power that underpins the arguments made in this paper, we can say the following: society is characterised by unequal power relationships that are perpetuated by structural inequality and also by the actions of individuals and groups of individuals. Although in all cases, agents of all sides of the power relationship have the ability to make decisions that affect their situations, those agents that hold more power are more able to influence these decisions. They can do this directly, by constraining the practical options available to those with less power and also by presenting risks related to undesired behaviour and by presenting rewards for desired behaviour. Crucially, they can also do this indirectly, by controlling the narratives relating to circumstances in order to influence thoughts and beliefs towards the unequal power relationship.

2.2. The power relationship between local organisations and non-local partners

Using the understanding of the dimensions of power described above, we can examine the power relationship between local organisations and their non-local partners. We saw that

the exercise of power in a two-party relationship can relate to differing abilities to exert direct influence over the other party. We also saw that there are more subtle nuances to power balances, where influence can be exerted indirectly. Both of these aspects of power can be examined in relation to local organisations and non-local partners.

In terms of direct influence, there is a clear bias in favour of non-local partners. Relationships are often financial, with local organisations receiving grants from non-local partners. In many cases, local organisations come to rely on the funding that they receive from their donors; without this funding, they would not be able to pay core costs including salaries, and rental of a premises. Funding can give activists the opportunity to focus full-time on their work supporting local communities, and the resources to scale-up the impact of their work. If a major donor decided to stop funding work in a region, it can have a devastating effect on local organisations that do not have adequately diverse income streams. Donor organisations also rely on their local partners, recognising the fact that if they do have a real commitment to making a practical difference in specific local situations, then they require assistance from local actors. The relationship, therefore, is one in which both sides can benefit and so both sides hold some direct influence over the other. Nevertheless, the reliance on the financial resources provided to local organisations by non-local organisations means that the costs of terminating the relationships will be felt much more keenly by local organisations. This indicates that the power relationship is unequal.

Turning to the indirect exercise of power, this paper puts forward the theory that a phenomenon of the more subtle dimensions of the unbalanced power relationship can be identified: the 'professionalization of resistance.' As has already been described, in eastern Myanmar, organisations that support villagers to resist abuse have grown out of the efforts of locally-based people using locally-relevant strategies. Moreover, the villagers that use their agency to resist abuse are in large part using strategies that were developed at the village-level. This is resistance, and its place in the pantheon of human rights defence is a legitimate as the letter-writing campaigns of Amnesty International or cases brought to the European Court of Human Rights. Despite this, the language of resistance is dominated not by local actors but by non-local actors. Effective local actors use information available to them to decide on strategies of resistance that they believe to be most appropriate. The practical work of doing this, however, has been professionalised, with technical language being attached to it. For example, a human rights professional might use the phrase 'project planning is a fundamentally important element of project-cycle management. A baseline survey must be carried out and SMART objectives must be set'. Suddenly the intuitive, accessible logic of understanding the situation and deciding a strategy based on that understanding becomes a complicated mass of technical terms.

The use of such technical language is esoteric, and the legitimacy of the resistance work of both local and non-local actors is in part defined by their ability to master these terms. It is here that we can identify the further power imbalance. Local actors do not have the

same opportunities as non-local actors to shape the language around resistance. Whereas local actors are assessed, both formally and informally, on their mastery of the constructed narratives of ‘professional’ resistance, local actors are not in the position to question the legitimacy of non-local actors who do not recognise the narratives used by those engaged in locally-based resistance. The nationally-recruited professionals that hold important positions within non-local organisations are more likely to be members of a relatively privileged, educated urban elite than they are to be villagers who have resisted human rights abuse themselves. This is in large part because their greater access to education gives them the skills they need to master the technical narratives of resistance. What this means is people that are already relatively privileged are more likely to occupy highly paid, influential positions in human rights resistance. This is an example of the perpetuation of power imbalance and, as such, local actors have far greater inducements to conform to narratives controlled by non-local actors than non-local actors have to conform to narratives that they do not control.

It is here that we can bring in the focus of this paper, which is ‘capacity building’. ‘Capacity building’ refers to activities that are ostensibly aimed towards building the effectiveness of organisations. It takes as its basis the intuitively defensible point that it is desirable for those that intervene in the lives of marginalised people to seek to improve their ability to bring about positive change. In practice, however, ‘capacity building’ is the name given to activities whereby non-local organisations engage with local organisations in a bid to influence the working practices of that organisation. The very fact that the direction of capacity building activities is most often local to non-local rather than vice versa is an indication of the unequal power relationship described above. Furthermore, we can link capacity building activities to both the direct and the indirect exercise of power.

When we consider capacity building in relation to the direct exercise of power, it is important that in many cases capacity building activities focus on project cycle management. It is no coincidence that funding proposals, interim reports and evaluation reports gather information based on three stages of project cycle management: planning, monitoring and evaluation. As such, capacity building activities are explicitly linked to the processes by which decisions are made relating to the provision of financial resources to the local organisation. Because of this, local organisations will recognise that conforming to the lessons provided in the capacity building activities has implications to their ability to continue to receive vital financial support. In terms of the indirect exercise of power, it is argued above that organisations are formally and informally assessed on their mastery of a ‘professionalised’ narrative of resistance. Capacity building can entrench these narratives, strengthening the impression that ‘local’ strategies are less sophisticated and less likely to succeed than the ‘professional’ methods outlined by non-local actors during capacity building activities. We can see therefore that capacity building activities, whilst ostensibly seeking to build skills that local actors will find useful, can in reality be affected by, and in turn entrench, power imbalances. This is clearly a negative phenomenon and one that can be avoided, as will be discussed in recommendations provided later. However, as this

paper will further show, these capacity building activities risk not only the entrenchment of unequal power dynamics but can actually damage the effectiveness of local organisations by undermining a core strength.

3. Recent developments in Myanmar and the opportunities for engagement

It is well documented that Myanmar has been going through a process of political reform in recent years. The elections of 2010 were widely regarded as neither free nor fair, with Freedom House accusing the Myanmar military government of “thoroughly rigging the process to ensure a sweeping victory for the pro-military Union Solidarity and Development Party” (Freedom House, 2011). Nevertheless, the USDP-dominated government led by President Thein Sein surprised many by bringing in reforms that could have a tangible positive effect on the human rights situation within Myanmar. Many of the most widely-reported reforms will have a greater impact on life within urban centres than in eastern Myanmar. For example, in August 2012, the government reformed media censorship laws (Raybould, 2012). However, in eastern Myanmar where decades of war and a lack of basic infrastructure have meant that villagers’ access to the news media has been limited, this reform will have a much less notable effect than in Yangon. Nevertheless, the signing of initial ceasefire agreements, such as the one that was signed with the Karen National Liberation Army in 2012, has had a wide-ranging effect on the situation in eastern Myanmar.

Because of the specific situation in eastern Myanmar, it was very difficult for organisations to support villagers struggling against abuse. Villagers who remained in hiding sites, refusing to move to government-controlled areas were subject to violence from the army when their villages were discovered (KHRG, 2008, 2011b). Any organisation supporting these villagers did so at great risk and without the acquiescence of the government. Organisations like the Karen Human Rights Group, Back Pack Health Worker Teams and the Free Burma Rangers brought assistance to these villagers within Myanmar, whilst establishing bases outside of the country, unable to operate freely from within. It was unthinkable that these organisations could register as organisations with the Myanmar authorities, openly establish an office within the country and begin bringing assistance with the full knowledge of the Myanmar government.

Because of the harsh restrictions on activities, many non-local organisations were unwilling to focus their attention on activities under agreements with the Myanmar government, preferring instead to support organisations administered from other countries. The reforms in Myanmar have caused organisations both local and non-local to re-assess this approach. The majority of the local organisations that have been administered from other countries have yet to move inside, having weighed up the risks and opportunities presented by recent changes. Non-local donor organisations, however, are presented with a different set of risks and opportunities and more financial support is being targeted at organisations that operate under agreements with the government. This has created the likelihood that a

number of new initiatives will be established, reaching areas of eastern Myanmar that were previously unlikely to be reached. The shift in focus is due to a number of factors: the improved security situation resulting from the ceasefire; a perceived increase in freedom to operate; a decrease in pressure from the Western media and public to refuse to engage with the government and, perhaps most crucially, an increase in opportunities to gather large grants from Western government donors who have themselves shifted focus towards engaging with the Myanmar government.

The effect of this is that it is likely that local organisations in eastern Myanmar that had previously operated within villages with little or no support from non-local partners will have an increased opportunity to enter into partnerships with those organisations that have shifted focus to working under agreements with the government. Local organisations may quite suddenly be faced with the possibility that they can access significant amounts of money in grants as donors take advantage of new access to the areas in which the local organisations work. This opens up the prospect of a considerable strengthening of local civil society, with organisations having the financial means and the support to continue and build on their work. However, whilst many local organisations that had operated from outside Myanmar have had long experience of establishing and managing relationships with non-local donor organisations, in many cases the local organisations who are now finding new opportunities from within Myanmar will have limited experience with these relationships. In this situation, non-local organisations will often seek to ‘build the capacity’ of their new local partners in an attempt to make up for this lack of experience. The remaining sections of this paper engage with the danger that these ‘capacity building’ activities will in some important respects *weaken* local organisations rather than *strengthening* them.

4. Damage caused by poor capacity building

In a previous section, it was shown that non-local organisations have a greater ability to exercise power both directly and indirectly over local organisations than vice versa. The effects of this power imbalance can be seen within capacity building activities undertaken by non-local organisations. This section will show that these same effects do more than just entrench unequal power dynamics but also can have a damaging impact on the practical work of local organisations.

Relationships between local organisations and non-local organisations can be very beneficial to both groups. Because of this, they can also be beneficial to the local community that are the targets of their activities. As noted previously, capacity building activities aimed at local organisations can strengthen their ability to provide effective support to communities resisting abuse. However, we have also seen that capacity building can reflect the power-imbalance between local and non-local actors. In this section we will look more practically at how capacity building strategies can be detrimental not just in regards to whether they reflect and entrench unequal power dynamics, but also in regards to the danger that they

can actually decrease the effectiveness of the local organisation. If local organisations act as bridges between a local community and non-local actors, heavy-handed capacity building strategies can strengthen the link between the local organisation and a non-local partner, whilst actually *undermining* the local organisation's ability to link to the local community. This section will show that in such cases capacity building does not so much improve the effectiveness of the bridge; in reality it moves the bridge closer to one side and further away from the other.

4.1. Fictional case study: the BHRC and the GHRI

A local human rights organisation, over a number of years, has engaged in a set of dynamic activities which respond to the needs of the local community. These activities are varied; they distribute leaflets among the local community which include information about their human rights, they conduct trainings with villagers about how to make use of local mechanisms when their rights are abused, and they facilitate advocacy by members of the local community towards local and national decision-makers. These activities are largely ad hoc, undertaken when a specific opportunity arises. They have a significant degree of success because they are able to react to local needs and local opportunities quickly. We shall call this organisation 'Burma Human Rights Centre' (BHRC).

An international human rights organisation becomes interested in the work of the BHRC. We shall call them 'The Global Human Rights Initiative' (GHRI). GHRI have become concerned at the situation for members of a local community within Myanmar. They are cognisant of the fact that they are unable to carry out grassroots projects themselves within this community and so look for a local partner with whom they can cooperate to deliver effective activities. During a fact-finding mission, they meet a member of staff from the BHRC, recognise their shared commitment towards human rights in that community and are impressed by their ability to carry out activities within the local community. The two organisations agree to a formal partnership. This exists around a proposal for funding document that the BHRC submits to the GHRI. GHRI staff award funding to BHRC and enter into an agreement with them because they recognise what the BHRC can deliver to the partnership. Nevertheless, they are disappointed with the quality of the project plan, as evidenced by the proposal. Furthermore, as the grant cycle progresses, they are even more disappointed with BHRC's ability to identify and describe the progress and impact of their project, as evidenced by the reports that they submit.

GHRI's grant for the BHRC originates within a much larger grant that was made by the foreign aid department of the government of a Western state to the GHRI. The GHRI has a heavy burden in terms of the reporting requirements for this grant and the information submitted to them by the BHRC is not as helpful as it could be. The GHRI worries that if they are unable to prove that the project is successful under the harsh measurement criteria that their institutional donor mandates, then they will lose the funding. However, they still value the partnership with BHRC. For this reason, instead of deciding to end

their relationship with BHRC, they decide that it would be better for all parties if they engage in capacity building activities with them, teaching them the type of project-cycle management skills that will allow them to submit much better proposals and reports. If they do this, then it is expected that it will in turn improve GHRI's reporting to their Western donor and increase their chances of receiving further large grants from them.

GHRI's programme officer travels to eastern Myanmar to carry out capacity building activities with BHRC. When he arrives, he gives a training presentation that explains how to gather baseline data, which includes some reference to qualitative and quantitative data gathering. He also describes what makes a good objective, making use of the 'SMART' acronym ('objectives should be Specific, Measurable, Achievable, Relevant, and Time-bound').² He then goes on to talk about how progress should be monitored, again making reference to techniques of gathering data. Finally, he talks about the requirements for proposals and reports, explaining that making use of the information provided in the training would improve the quality of the BHRC's proposals and reports and improve their activities. The programme officer is friendly, intelligent and professional and clearly has a commitment to improving the lives of those resisting human rights abuse. He leaves Myanmar satisfied that the BHRC understood his training.

A few months later, the time arrives for the BHRC to submit a new proposal to GHRI. They have come to rely on the money that they receive from GHRI and are determined to receive a new grant. They are also proud of the recognition that their partnership with GHRI represents and are excited about the prospect of their increasing professionalism. When it comes to writing their new proposal they attempt to put what they have learned from the capacity building training sessions into practice. Unfortunately, when it comes to the way they had worked in the past, identifying local opportunities and responding to them quickly, they are unsure how to apply their learning. Because their activities were varied according to the local situation, they find it hard to define exactly what kind of baseline data they should be gathering. Equally, when they try to imagine objectives that would allow the kind of varied activities that they have found to be so effective in the past, they cannot think of a way of wording them so that they meet the 'SMART' criteria. Furthermore, they are not sure how they will monitor such activities in the future as some of their activities represent just one contribution in a complex context and they do not feel confident that they will be able to accurately map the direct impact of what they have done.

Faced with this difficulty, they recognise that it is much easier to apply their learning from the capacity building workshops to *one* of their core activities. They realise that with their training workshops, they are much more confident. They can interview a sample of community members to understand their current understanding of their human rights, and this will fulfil their requirement to gather baseline data. When it comes to setting 'SMART' objectives, they understand that they can write an objective for the workshop

2 Many organisations use this tool as a way of setting useful objectives (See for instance Ambler, 2010).

that satisfies the criteria, and set the following objective: '400 members of the local community, including at least 200 women, understand their rights under national and international law.' They also feel confident to monitor this as they can easily count the number of workshop participants (disaggregated by gender), and hand out a follow-up questionnaire to participants to find out how their knowledge has changed. Thus, BHRC decide that these workshops will become the basis of their next funding proposal to the GHRI. When GHRI receive the proposal, they immediately see it as an improvement on the previous documentation received from the BHRC, and recognise it as evidence of their increased capacity. They quickly agree to further funding and heap praise on the BHRC for their improvement. The BHRC and GHRI are both happy throughout the next year, implementing the human rights training workshop project.

4.2. The erosion of responsiveness to the local community

If both the local organisation and their non-local partner are happy and the partnership moves forward, then what is the problem? The problem is that in their desire to respond to the capacity building training provided by the GHRI, the BHRC actually limited the scope of their activities in the coming year. When we consider the fact that their strength came from their ability to respond to the rapidly evolving context in Myanmar and the needs of the community, then we can question whether what the BHRC has gained is worth what was lost. The BHRC was dynamic; the fact that they engaged in many ad hoc activities meant that there was a significant chance that some of their activities would be less effective than others, due to their haste to respond quickly. However, their previous approach also allowed them to make some very creative and effective interventions. The problem is not that the trainings that they have committed to providing are not valuable, and in fact they can be very effective. The problem is that previous to BHRC's capacity being 'built,' they engaged in creative, responsive activities designed largely through an understanding of evolving community needs. After their 'capacity building' they engage in activities that, whilst useful, are essentially conservative and yet both the GHRI and the BHRC do not recognise the damaging implications of this development. If the BHRC is a bridge between the local community and non-local actors, they have undeniably improved their ability to connect to non-local actors. However, in doing so, their ability to connect to the local community is undermined. The 'capacity building' from the GHRI could actually be said to have damaged the effectiveness of the BHRC, hollowing out their greatest quality.

Underpinning this is the unbalanced nature of the power dynamic. The decisions made by the BHRC that led to the erosion of the organisations' responsiveness to the local context were clearly influenced by the GHRI's greater ability to exercise power both directly and indirectly. The BHRC considered the fact that they relied on the financial resources provided by the GHRI and believed that changing their programming in response to capacity building would improve their chances of maintaining this funding. The BHRC also looked to the GHRI for legitimisation, recognising that they were being assessed on their use of the narratives of professionalised resistance that the GHRI routinely

employed but that were new to the BHRC. Their programming was changed partly in relation to how easy it was to articulate the projects using the narratives learned through the capacity building activities. This fictional case study, therefore, illustrates the negative practical implications to effectiveness that capacity building activities can have, if those activities reflect the power imbalances inherent within the relationship.

5. A Model for Effective Capacity Building

Non-local actors wishing to engage in capacity building should recognise the effects that such capacity building can have. They must understand that being too focussed on teaching technical skills related to project management can have unintended consequences when it comes to connecting effectively with the local community. If a local human rights organisation has strong links with the local community, then this strength should be recognised and safeguarded when a capacity building strategy is designed.

5.1. The way forward

At all levels, interventions have the opportunity to improve people's lives but also have the power to bring even more harm. All organisations that claim a mandate to intervene in the lives of those that are affected by human rights abuse have a responsibility to continually seek to improve, and this is equally true whether they are local or non-local. This is also true regardless of what the established orthodoxy of professionalised project management says about the way projects should be designed and implemented. When non-local actors engage in capacity building activities with local organisations, they should not seek to improve project management for its own sake. The focus should be on practical skills to improve interventions. There is, of course, a link. Theory on how best to manage projects in development and human rights has moved forward largely with a focus on how to ensure the greatest positive impact on the lives of beneficiaries. If an organisation consistently and systematically achieves success in its activities, then it can be said to be strong in terms of project management, regardless of how easily they use the language and technical processes of professionalised human rights resistance. When a local organisation is already effective then when it comes to donor documentation they simply need to ensure that they are able to clearly articulate what effect they have had and how.

As explained previously, at the centre of good relationships between local and non-local actors is a common desire to improve lives within a community. This should be understood by all parties and is the common ground upon which capacity building should be based. There are simple steps that organisations that want to bring positive change to a local community should go through as they make interventions, and their skill at going through these steps will in part determine whether they are successful. Vitaly, these simple steps follow a clear logic that is equally accessible to local and non-local actors and is not the exclusive domain of technocratic Western-developed project management. Understanding the simple logic, it is not the place of non-local actors to 'build' the capacity of local

organisations. Instead, it is important to engage in an open discussion about how the organisations plan to go through these logical steps and articulate the information that emerges from going through them.

Any organisation that is likely to be able to implement an effective strategy should have strong knowledge of the following:

- The issues faced by the local community, their causes and their effects
- The change that they want to make, based on the causes that they have identified
- The practical steps that they can take to make the changes that they have targeted, based on a practical understanding of the capacities within the organisation

Likewise, as organisations and the individuals within them gather experience of implementing a strategy, they should have mechanisms for recording the following:

- What happened as a result of the activities, and whether activities are having the planned effect.
- What was successful and what was unsuccessful.
- What could be done to be more successful in the future.

Organisations should have systems for generating and recording this information. In many cases, local organisations do know all of these things, but are not systematic in the way that they gather and use that information. Non-local actors should engage in a discussion with their local partners about how they can develop strong systems so that they can make sure that they have gone through the steps that will give them the best chance of bringing about change within the local community. Non-local actors will find that if their local partners go through the steps effectively, then they will be in a much better position to create good proposals and reports. This, however, must be a secondary consideration, otherwise the discussion will no longer be about how best to serve the local community, but how to navigate donor requirements; the end result will be very different.

It is very important that capacity building comes through discussion. Whilst it is vital for local organisations to have strong systems for going through the key stages of designing their strategy for intervention, these systems cannot simply be taken from a different context and handed to a local organisation. A mistake that non-local actors often make is that they have seen a group of planning tools being used effectively by one local organisation and assume that another local organisation would use them in the same way. In reality, every local organisation is unique and they must be given the opportunity to design the systems that they feel would be most useful to them. Even if the systems that they design are not as sophisticated as they could be and could even legitimately be said to require improvement, local organisations will be well-placed to deliver this improvement. If the local organisation is trying to make use of a system that is alien to them, then they may well be reticent to change it to make it more useful to them. If they are using a system

that they themselves designed, then they are much more likely to have the confidence to make changes to the system to improve its effectiveness. Capacity building activities should not attempt to deliver perfection immediately. Through encouraging and facilitating discussion based around an easily-accessible logic, the capacity building achievements can primarily be said to have been delivered by the local organisation rather than a non-local partner. Ultimately, this is much more sustainable and the result will be more effective interventions for the local community.

6. Conclusion

Human rights and power are fundamentally interlinked; wherever one can identify the instance of human rights abuse, it will not take long to recognise that power imbalance has been central to that occurrence. However, as this paper shows, the power imbalances that permeate human rights abuse can also be identified as occurring within the world of human rights resistance. Those working within human rights resistance often do not recognise how power imbalances are affecting their day to day work, and this has implications to the effectiveness of this work at bringing about real and lasting change at the local level. This paper has focussed on ‘capacity building’ activities as an example of how this can happen.

It is important to recognise that any actors that claim to have a mandate to intervene in the lives of people struggling against human rights abuse must critically analyse their strategies to ensure that they are as effective as possible. Organisations that have emerged at the local level, and have sprung from the same community as those struggling against human rights abuse, are *not* exempt from this. They must go through processes of reflection and self-criticism, recognising where they can improve and taking practical steps to make these improvements. Any organisation that is not able to do this can legitimately be said to lack capacity, and in such circumstances practical action should be taken to build that capacity. ‘Capacity building’, therefore, has a potentially vital role to play in effective local level human rights resistance. However, this description of the essence of capacity building does not take into account the effects of power imbalances in the practical processes of capacity building as it occurs in the world of professional human rights resistance. In reality, power imbalances can skew the capacity building activities, having a detrimental effect on local organisations’ effectiveness in supporting local responses to human rights abuse.

There is a diverse array of local organisations working within eastern Myanmar. However, the situation of conflict, repressive laws and a lack of infrastructure has meant that many organisations that have sprung from and work at the local level have had to go about their work with little support from outside. More recently, reforms within Myanmar have changed the context to the extent that non-local organisations are moving to engage in areas where they had previously not be able to engage. This brings about the prospect of new partnerships between local and non-local actors. The new relationships with non-local partners can be the basis of great benefits for local organisations that may have increased access to resources that allow them to improve the impact of their work. However, many

of the local organisations will lack experience of working with non-local partners and will work in ways that make sense from the local perspective. In this situation, non-local partners may seek to 'build the capacity' of their new local partners in a belief that it will be mutually beneficial.

We can see therefore, that the issue of local organisation capacity building is pressing in the current situation in eastern Myanmar as new partnerships are established and developed. This paper describes how the unequal power balance that characterises these relationships can affect the practical strategies of capacity building. This can be related to imbalances in the opportunities to directly exercise power, with a focus on the financial component of relationships. It can also be related to imbalances in the opportunity to indirectly exercise power, with a focus on the 'professionalization' of resistance. The fictional case study is a cautionary tale of how the capacity building activities can have the consequence of influencing local organisations feel under pressure to change their working practices in response to capacity building activities because of they recognise the financial implications of not doing so and also to seek legitimacy in the eyes of non-local partners by conforming to the professionalised narratives of resistance, and the systems that link to them. This can ultimately have the effect of making the local organisation less responsive to local need and less able to support the efforts of local people to protect themselves from abuse.

The aim of this paper is not to frighten local and non-local organisations away from 'capacity building' as a concept. Rather, the paper seeks to draw the possible effects of power imbalances on capacity building activities into the open so that they can be discussed and taken into account in the development of capacity building strategies. Just as local people have the agency and creativity to decide strategies to protect themselves from abuse; local organisations have the potential to understand the need for critical reflection on their performance. Encouraging them to build and strengthen systems to do this is important and can be done by appealing to a logic that is universally accessible. On the other hand, doing so by emphasising the importance of professionalised skills in resistance may actually entrench the power imbalances that underpin the human rights abuse that the organisations claim to be attempting to end.

References

- Ambler, G., 2010. "10 Steps to Setting SMART Objectives," *ProjectSmart.co.uk*, 8 March 2010. Available at: <http://www.projectsmart.co.uk/10-steps-to-setting-smart-objectives.html> (accessed on 15 August 2013).
- Backpack Health Worker Teams, 2013. "Executive Summary of BPHWT," *Backpack Health Worker Teams Website*. Available at <http://www.backpackteam.org/?p=195> (accessed on 22 July 2013).
- BBC, 2012. 'Burma ex-general Shwe Mann rides wave of change', *BBC News Online*. Available at: <http://www.bbc.co.uk/news/world-asia-19739376> (accessed on 22 July 2013).
- Brass, D.J. & Burkhardt, M.E., 1993. 'Potential Power and Power Use: An Investigation of Structure and Behaviour' in *Academy of Management Journal*, 36(3), pp.441-470. New York: Academy of Management.
- Burma Campaign UK, 2012. "The European Union Must Note Abandon Human Rights Bench Marks," *Burma Briefing*, 22. London: Available at: http://www.burmacampaign.org.uk/images/uploads/EU_Must_Not_Abandon_Human_Rights_Benchmarks.pdf (accessed on 26 July 2013).
- Connor, S., 2011. "Structure and Agency: a Debate for Community Development?" in *Community Development Journal*, 46 (2), pp.97-110. Oxford: Oxford University Press.
- Crispin, S., 2011. *In Burma, transition neglects press freedom*. New York: Committee to Protect Journalists.
- Doyle, J. 1998. "Power and Contentment" in *Politics*, 18(1), pp.49-56. Oxford: Blackwell
- Freedom House, 2011. "Freedom in the World 2011," *Freedom House Website*. Available at: <http://www.freedomhouse.org/report/freedom-world/2011/burma> (accessed on 23 July 2013).
- Human Rights Watch, 2013. "EU: Ending Sanctions Undercuts Burma's Rights Progress," *Human Rights Watch Press Release*. Available at: <http://www.hrw.org/news/2013/04/22/eu-ending-sanctions-undercuts-burma-s-rights-progress> (accessed on 22 July 2013).
- Lukes, S., 2005. *Power: a radical view*. Basingstoke: Palgrave Macmillan

- Mae Tao Clinic, 2013. "Mission Statement," *Mae Tao Clinic Website*. Available at: <http://maetaoclinic.org/about-us/mission-statement/> (accessed on 22 July 2013).
- Marx, C., 1887. *Capital: A Critique of Political Economy*. Translated from German by S. Moore & E. Aveling. London: Allen and Unwin.
- Ransome, P., 1992. *Antonio Gramsci: A New Introduction*. London: Harvester Wheatsheaf.
- Raybould, A., 2012. "UPDATE 3-Myanmar government abolishes direct media censorship," *Reuters Website*. Available at: <http://in.reuters.com/article/2012/08/20/myanmar-censorship-idINL4E8JK35920120820> (accessed on 23 July 2013).
- Reddy, T., 2000. *Hegemony and Resistance: Contesting Identities in South Africa*. Farnham: Ashgate Publishing
- The Guardian, 2012. "US to ease economic sanctions on Burma in response to reforms," *The Guardian Online*. 27 September 2012, Available at: <http://www.guardian.co.uk/world/2012/sep/27/us-eases-burma-sanctions-clinton-sein> (accessed on 22 July 2013).
- The Karen Human Rights Group, 2008. "Village Agency: Rural Rights and Abuse in Rural Karen State," *KHRG Website*. Available at: <http://www.khrg.org/khrg2008/khrg0803.html> (accessed on 15 August 2013).
- The Karen Human Rights Group, 2011. "Toungoo Interview: Saw F---, October 2011," *KHRG Website*. Available at: <http://www.khrg.org/khrg2011/khrg11b47.html> (accessed on 24 July 2013).
- The Karen Human Rights Group, 2011b. "Tenasserim Interview: Saw K---, August 2011," *KHRG Website*. Available at: <http://www.khrg.org/khrg2011/khrg11b30.pdf> (accessed on 24 July 2013).



**RECONSTRUCTING
LABOUR & BUSINESS
THROUGH THE HUMAN
RIGHTS LENS**

LABOUR FLEXIBILITY IN THE PHILIPPINES AND THE CHALLENGES TO CSR COMPLIANCE

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This article describes the emerging labour flexibility devices practiced in the Philippines, commonly in the form of casualisation or informalisation of workers, and how these adversely impact on the realisation of workers' rights and in turn challenge the Protect, Respect, and Remedy Framework on business and human rights. It features the case of Nouvelle Industries, with an articulated corporate social responsibility system, to illustrate the point. It contextualizes the problem as underpinned by the global movement of capital that drives the atomization of labour relations and the commodification of labour.

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1. Introduction

Labour protection in the Philippines, which has been dismal to begin with, is further hampered by the continued and increasing flexibility of labour. This practice is likewise becoming widespread in Southeast Asia where most suppliers are located. In Indonesia while Regulation 19 (2012) clarified that only non-core or supplemental work can be subcontracted¹, unions claim that almost 16 million Indonesians or 40 percent of the country's formal workforce are outsourced workers.² In Thailand, a labour law amendment in 1998 allowed the hiring of contract workers. In Malaysia, the 2011 amendment to the Employment Act expressly recognizes labour contracting and, less expressly, allows labour contractors to be the employers on record, thereby diluting any possible employment relationship between a facility and the workers that are producing its products. It is important to note that labour outsourcing is the preferred employment arrangement for migrant workers to Malaysia creating layers of vulnerability since migrant workers' rights remain stubbornly vague. In the Philippines, there are no available statistics on what percent of the workforce are employed in flexible work arrangement because the government only registers whether a person is employed or not but it does not indicate the workers' employment status. In March 2012, the Philippine Association of Labour Service Contractors claimed that at least 1 million workers are employed in subcontracting arrangement but the DOLE Secretary said that the number is around 200,000.³ However, the data does not say how many workers are working for labour-only contractors.

This demand for flexibility in the production process is said to have increased global competitiveness where companies compete on the basis of price, quality and on-time delivery. Invariably, "this competitiveness has led to the fragmentation and relocation of production processes, through outsourcing and subcontracting, the deregulation of the labour markets, and the informalisation of economic activities."⁴ Dae-Oup Chang relates the informalisation of labour to the growing mobility of transnational capital and describes how informality becomes the essence of restructuring Asian labour in order to support the spatial movement of capital, resulting in the lack of legal, institutional and union protection for *informalised* workers.⁵

- 1 The law likewise clarifies that labour may be outsourced only to a limited type of work, namely, cleaning, catering, security, support services in mining and oil and transportation services.
- 2 Emmerson, R and Yuriutomo, I., 2013. Controversy over Outsourcing Regulations in Indonesia: Third-Party Contracting Arrangements. *SSEK*, [online] May. Available at: <http://blog.ssek.com/index.php/2013/05/controversy-over-indonesias-outsourcing-regulation-third-party-contracting-arrangements/> (accessed on 9 June 2013).
- 3 Torres, E., 2012. PHL no 'global sweatshop,' DOLE's Baldoz says. *Business Mirror*, [online] 29 March. Available at: <http://businessmirror.com.ph/home/economy/25215-phl-no-global-sweatshop-doles-baldoz-says> (accessed on 30 April 2012).
- 4 Tomei, M. undated. *Freedom of Association, Collective Bargaining and Informalization of Employment: Some Issues*. Geneva: International Labour Office. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.35.2856&rep=rep1&type=pdf> (accessed on 10 March 2011).
- 5 Chang, D., 2009, Informalising Labour in Asia's Global Factory. *Journal of Contemporary Asia*, vol. 39, no. 2, pp. 161-179.

Labour flexibility has brought forth new employment arrangements that are not contemplated under the antiquated Philippine Labour Code and, at least in the Philippines, this is turning out to be the biggest threat to labour rights protection. The International Labour Organization (ILO) identifies four workplace rights as core labour rights – freedom of association and right to collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour, and elimination of discrimination in respect to employment and occupation.⁶ The ILO declared that all members, regardless of the ratification status vis-à-vis relevant Conventions, have an obligation by the very fact of membership to respect, promote and realize these rights in good faith and in accordance with the ILO Constitution. These core rights, including the right to security of tenure, are what the outsourcing arrangement subverts. I aim to (a) describe the different labour flexibility devices that Philippine manufacturers currently practice using the case study of Nouvelle Industries as concrete example, (b) identify the key labour rights adversely affected by labour flexibility manifesting in the form of casualization or informalization of workers, and (c) show how this new labour configuration that decouples workers from the workplace poses a challenge to the Protect, Respect and Remedy Framework on business and human rights.

In this paper, I used the term *labour flexibility* to refer to the employer's strategies with regard to the form in which labour is contracted, where the emphasis is on the attempts of employers to vary labour inputs according to fluctuations in the state of external demand.⁷ In practice, it involves classifying the workforce into core regular staff and a periphery of casualized labour. One strategy to keep labour flexible is to outsource work and labour, which is taken up in this paper.⁸ The terms *flexibilization* and *casualization* of labour are used interchangeably.

An export-oriented garments factory in the Philippines was chosen as the topic of study as it has an articulated corporate social responsibility system and it features labour conditions that this paper sought to describe. Data gathering was done through a two-day factory audit⁹ that involved management and worker interviews, ocular inspection and documents

6 *International Labour Organization Declaration/ILO 18 June 1998 on the Fundamental Principles and Rights at Work and its Follow up.*

7 Kugler, A., 2004. *The Effect of Job Security Regulations on Labour Market Flexibility: Evidence from the Colombian Labour Market Reform.* Available at: <http://www.nber.org/chapters/c10070.pdf> (accessed on 30 May 2012). See also Brodsky, M., 1994. Labour market flexibility: a changing international perspective. *Monthly Labour Review*, November 1994; Wilthagen, T. and Tros, F., 2004. The concept of 'flexicurity': a new approach to regulating employment and labour markets. *Transfer* 2/04. For an illuminating discussion on how global capital drives the creation of informal labour in formal economies, see Chang, D (note 5).

8 One other strategy is to feminize labour. See, e.g., Villamin W and J. Hernandez (undated). *Globalization, Labour Markets and Human Capital in the Philippines.* Available at: http://www.dlsu.edu.ph/research/centers/aki/_pdf/_concludedProjects/_volumeII/VillamilandHernandez.pdf (accessed on 30 May 2012).

9 The audit was covered by a non-disclosure agreement so it was necessary to change the names of the factory, the multinational brand to which the latter was supplying and the workers' cooperatives that are supplying manpower to the factory.

review. The UN Protect, Respect and Remedy (PRR) Framework for Business and Human Rights was used as lens to analyse the issue of labour flexibility in terms of (1) the state duty to protect against human rights abuses by third parties, including corporate actors, (2) the corporate responsibility to respect human rights, and (3) the need for greater access by victims to effective remedy, both judicial and non-judicial.

2. Manifestations of Labour Flexibilisation

The earlier model of casualization or flexibilization of labour saw the practice of assigning core production work to seasonal, contractual, casual, part-time and home-workers, who the facilities hire or contract with directly. While Philippine law clearly defines these terms, these are being used interchangeably to refer to casualized workers. *Seasonal workers* are those that have been previously employed under short-term contracts by the factory. These workers are hired by factories to work for a maximum of 5 months per contract and many have been intermittently employed for over 5 seasonal cycles, with a few months' gap in between cycles, but without any guarantee that they will be hired for more permanent positions or be absorbed into regular employment. As seasonal employees, the workers perform the same tasks as regular workers and they are subject to the same targets and quotas. They also receive all legally mandated benefits, except that they cannot be members of the union and they are not entitled to separation pay.

Subsequently, instead of directly hiring workers for a short-term period, Philippine garments factories started to source workers from labour outsourcing agencies. This arrangement is known as trilateral labour employment—with the principal company that places the order for workers and pays based on a service contract fee, the labour outsourcing agent who serves as the direct employers, and the workers who have no formal relationship with the principal company and who have minimum protection under the law. This leads to a “de-coupling” of workers from the formal site of production.¹⁰

Most export-oriented garments factories in the Philippines maintain a core regular staff of at most 40 percent and at least 60 percent of non-regular workers who move fluidly from one employment type to another. In audits of 8 garments export-oriented facilities, conducted between October 2011 and March 2012, the following numbers are indicative:

10 Barrientos, S., 2011. *Labour chains: analysing the role of labour contractors in global production networks*. Brooks World Poverty Institute: University of Manchester. Available at: <http://www.capturingthegains.org/pdf/bwpi-wp-15311.pdf> (accessed on 30 April 2012).

Company	Reported as Regular Workers	Subcontracting Agency Workers/ Coop Workers	Casual	Probationary	Juvenile
A	2017			387	
B	59				
C	2160				540
D	18	844			
E	191	260			
F	300		256		
G	22			400	
H	110	1000	160		
Total	4877	2104	416	787	540

Out of the total number of workers, it appears that around 80 percent of workers directly involved in producing goods for the factories are not regular workers.

Philippine labour law is founded on a bilateral employment relationship in which an employer is charged with the obligation to protect the rights of his/her workers, with the government ensuring the enforcement of laws. In regular employment, the employer is directly responsible for the promotion, protection and realization of workers' rights during the whole employment cycle, i.e. selection, recruitment and hiring, on-site management (e.g. provision of work premises, supervision, payment of regular and overtime pay, observance of legal requirements concerning labour standards and labour relations, etc.), discipline and termination of employment. Although all kinds of workers have a right to minimum conditions of employment, it is only those who are regularized and therefore enjoy security of tenure who earn all the benefits accruing to regular workers (hours of work, holidays, leaves, benefits, right to associate and collectively bargain and to be terminated only for just causes,¹¹ among others).

Article 280 of the Philippine Labour Code states that:

11 Just causes include installation of labour-saving devices, redundancy and retrenchment to prevent losses or the closing or cessation of operation of the establishment or undertaking. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.

The provisions of the written agreement to the contrary notwithstanding and regardless of the oral agreements of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer except when the employment has been fixed for a specific project or undertaking, the completion or termination of which has been determined at the time of the engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season.

A worker engaged to perform tasks necessary to the business automatically becomes regular after 6 months' probationary period. To be sure, the factory has the right to regularize workers or not on the basis of their capacity to perform the work. The fact that the workers are not regularized prior to the lapse of the probationary period is still within the right of management. But when same workers are referred to a subcontracting agency or workers' cooperative after the cessation of contract and they are then deployed to the factory to perform the same, exact work that they were doing as contractual workers in the facility, it stands to reason that these workers are doing work that is necessary or desirable in the usual business or trade of the employer. The issue is obviously not about the workers' abilities to do the job. They are, in fact, capable of doing the job and should have been regularized to perform duties necessary and desirable to the business after the probationary period. It has long been settled in case law¹² that the primary standard of determining regular employment is the reasonable connection between the particular activity performed by the employee and its relation to the usual trade or business of the employer.

It needs to be emphasized that the law creates legal fiction to ultimately protect the rights of workers. The courts would not hesitate to declare the existence of an employer-employee relationship if that would eventually benefit the workers. When work rendered by non-regular workers are proved to be critical, necessary and desirable to the usual business of the employer, the practice of hiring them as contractual workers—only to hire them again but only on a different employment status and arrangement—clearly circumvents the regularization requirement under the law.

In the last three decades, the flexibility of the Philippine labour force has been observed as employers become hard-pressed to find creative ways to keep the business afloat even if it meant contracting out manpower needs to labour contractors. Although independent job and service contracting (i.e., most commonly, janitorial services for maintenance and upkeep or engaging a security agency to secure the premises of the company) is allowed under the law, labour-only contracting is not.

Labour-only contracting, as defined, is an arrangement with third-party agencies where only workers—as opposed to jobs or services, which would comprise legitimate contracting—are provided to the company, and where the subcontracted work is critical to the company's

12 *De Leon v NLRC*, G.R. No 70705, 21 August 1989; *Chavez vs. NLRC* (2005).

operations. It essentially means providing warm bodies to a company to do work essential to the company's business and this is what the law absolutely prohibits. Unfortunately, we are increasingly finding more workers employed under this precarious situation.

Article 106 of the Labour Code and Department Order 18-A (2011) (*herein* DO 18-A) allows job contracting or subcontracting, where a company sources out part of or the entire job or work to a contractor. Under DO 18-A, there is legitimate contracting or subcontracting if **all** the following circumstances concur:¹³ (a) the contractor is duly registered, (b) there is substantial capitalization, in stocks and/or tools and equipment equivalent to 3 million pesos, and (c) the service agreement ensures compliance with all the rights and benefits under labour law, which includes among others, safe and healthful working conditions; labour standards such as service incentive leave, rest days, overtime pay, holiday pay, 13-th month pay and separation pay; social security and welfare benefits; self-organization, collective bargaining and peaceful concerted activities; and security of tenure. These three standards should be present in policy and practice and absent one the arrangement becomes vulnerable to a charge of labour-only contracting. As consequence, where 'labour-only' contracting exists, the law establishes an employer-employee relationship between the employer and the employees of the 'labour-only' contractor, and the contractor is considered merely an agent of the principal employer with whom s/he will be jointly liable.¹⁴

DO 18-A also clarified some concepts and labour standards for subcontracted workers sourced from manpower agencies or cooperatives. In an effort to address the current changes in employment arrangement and the legislative gap, in section 5 it is stated that in legitimate contracting or subcontracting arrangement, there exists an employer-employee relationship between the contractor and the employees it engaged to perform the specific job, work or service being contracted; and in the event of any violation of any provision of the Labour Code, including the failure to pay wages, there exists a solidary liability on the part of the principal and the contractor for purposes of enforcing the provisions of the Labour Code and other social legislation, to the extent of the work performed under the employment contract. In addition, the principal shall be deemed the direct employer

13 Consistent with a long line of jurisprudence on this matter, the Supreme Court reiterated the doctrine in the case of *Job M. Aliviado, et al. vs. Procter and Gamble Phils., Inc., et al.*, [G.R. No. 160506, 6 June 2011]:
The law allows contracting arrangements for the performance of specific jobs, works or services, regardless of whether such activity is peripheral or core in nature. However, in order for such outsourcing to be valid, it must be made to an independent contractor because the current labour rules expressly prohibit labour-only contracting. There is labour-only contracting when the contractor or sub-contractor merely recruits, supplies or places workers to perform a job, work or service for a principal and any of the following elements are present: (i) The contractor or subcontractor does not have substantial capital or investment which relates to the job, work or service to be performed and the employees recruited, supplied or placed by such contractor or subcontractor are performing activities which are directly related to the main business of the principal; or (ii) The contractor does not exercise the right of control on the performance of the work of the contractual employee.”

14 As the Philippine Supreme Court ruled in the case of *Job M. Aliviado, et al. vs. Procter and Gamble Phils., Inc., et al.*, [G.R. No. 160506, 6 June 2011].

of the contractor's employees in cases where there is a finding by a competent authority of labour-only contracting. Further, in section 8, it mandates that all the contractors' employees shall be entitled to all the rights and privileges provided for in the Labour Code, to include the following:

- Safe and healthful working conditions
- Labour standards, such as but not limited to service incentive leaves, rest days, overtime pay, holiday pay, 13th month pay and separation pay, as may be provided in the Service Agreement or under the Labour Code
- Retirement benefits under the SSS or retirement plans of the contractor, if there is any
- Social security and welfare benefits
- Self-organization, collective bargaining and peaceful concerted activities; and,
- Security of tenure

There is a separate provision on security of tenure in section 11, in which it is stated that: "It is understood that all contractor's employees enjoy security of tenure regardless of whether the contract of employment is co-terminus with the service agreement or for a specific job, work or service, or phase thereof."

From 2010, the prevalence of outsourcing production to cooperatives rather than to subcontracting agencies has been observed and through this, cooperatives introduce a new labour flexibility device. A workers' cooperative is described as one organized by workers, including the self-employed, who are at the same time members and owners of the enterprise. Its principal purpose is to provide employment and business opportunities to its members and manage it in accordance with cooperative principles. One of the ways by which they generate business for the coop is by entering into subcontracting arrangements with the factories. The following case study describes this arrangement in detail.

3. Case Study: Nouvelle Industries, Inc.

The company was founded in the 1970s as a steam laundry enterprise and under the name Steaming Laundry.¹⁵ Two years after, it ventured into the washing of denim garments with a top denim brand as one of its first customers. In 1989, Steaming Laundry expanded its washing operations to include dry finishing and as a result of this expansion, Nouvelle Industries, Incorporated (*herein* Nouvelle) was established. In 1991, sandblasting was introduced and in 1996, it established its cut-and-sew operations to become a fully integrated garments company, with services that included warehousing, cutting, sewing, washing, finishing and packing. From 1989 to 2000, the company was servicing top multinational garments brands like Levi's, Jones Apparel and American Eagle Outfitters, among others.

15 Not the real name of the enterprise. In this paper, all the proper names are changed as the facts were gathered during audits. The conduct of the audit was covered by a non-disclosure agreement.

In 2000, the company decided to focus on cutting, laundry and quality assurance, and it contracted out the manufacturing end to another company. In 2007, the company decided to subcontract part of its core production processes to two in-house workers' cooperatives – Handsewing Cooperative to do the sewing and Fancy Pants Cooperative for detailing. By 2011, Nouvelle is getting the orders from customers, supplying all the raw materials, cut goods and accessories pertaining to specific job orders, outsourcing production to the cooperatives, and finally delivering the finished and labelled goods to the customers.

The cooperatives are required to follow the manufacturing specifications as indicated in the instruction sheet that Nouvelle issues. Prior to mass production, two counter samples by the cooperatives are submitted for the written evaluation of Nouvelle's quality assurance department. Once the counter-samples are approved, two sets of final samples would then be submitted. Once the samples are finalized, work is turned over to Handsewing Coop. After passing inspection, sewn materials are then endorsed to Fancy Pants Coop for detailing, which includes handsewing, scraping, lining and pocketing, grinding, pigmenting, PP spraying and finally staging. The materials are then endorsed back to Nouvelle for washing, curing, finishing and final quality check before delivery. Every endorsement is covered by an invoice.

Handsewing Multi-Purpose Cooperative (*herein* Handsewing Coop) and Fancy Pants Multi-Purpose Cooperative (*herein* Fancy Pants Coop) are worker cooperatives set up by some of the former workers of Nouvelle. During the audit, unverified reports were received that around the time Nouvelle's sewing and dry processes were dissolved, Nouvelle suggested to the employees and workers who were about to lose their jobs to set up the coops to which Nouvelle can subcontractor some of the work. The coops were established in 2007 and, by 2011, Nouvelle is subcontracting sewing to Handsewing Coop, while Fancy Pants Coop does the dry processing or detailing processes. Embroidery works is subcontracted by Nouvelle to an independent contractor. On paper, these three entities appear to conduct business independently and autonomously from each other.

Both coops entered into an exclusive subcontractor-ship agreement with Nouvelle, the terms of which are identical. The agreement is valid for one year and renewed every year thereafter, subject to the decision of Nouvelle. It binds Nouvelle to pay for service rendered by the coops, but the contract price is not indicated in the agreement. With regard to the liability to coop employees/workers, the agreement stated that the subcontractors are solely answerable and responsible for the payment of wages, benefits, and allowances among others. It likewise included a non-liability clause that practically exempts Nouvelle from any labour-related claim or indemnification for damages. The sub-contractor coops are required to post a performance bond in the amount of PHP50,000 (USD1,150), either in cash or surety, to ensure their faithful compliance with the agreement's terms, although it was not clear whether the coops have actually posted this bond.

Further, both coops entered into a lease agreement for the consideration of PHP 30,000 (around USD700) per year and the lease agreement covers “space at the factory, equipped with necessary machineries and tools,” which they cannot assign or transfer. When asked, the management of both coops admitted that they actually do not pay rent and are instead responsible for the payment of utilities and the expense of the repairs and maintenance of the premises, machines, and tools. The coops do not have their own plant facilities or equipment. While both coops seem to be validly registered with the Cooperative Development Authority (CDA), their subcontractor licenses from the Department of Labour and Employment (DOLE) have expired at the time of the audit.

At the time of the research, Nouvelle maintains a workforce of about 230 employees. About 160 workers are directly involved in production and the rest are composed of management, supervisors and office staff. About 25 percent of production workers are probationary. Handsewing Coop has a total workforce of about 180 workers and about 160 of them are directly involved in production, from sewing, trimming, marking, packing, finishing, packing and quality control. 20 percent of the workers are identified as probationary workers. Although it does more varied work for Nouvelle, Fancy Pants only has about 80 workers, with around 60 operators.

Most workers in Nouvelle receive daily and monthly wages, but around 30 are piece-rate workers¹⁶ mostly in the finishing and trimming sections. During the first quarter of last year, Nouvelle was granted a wage order deferment for three months, which allowed it to delay the minimum wage rate adjustment. While most coop workers are identified as regular, most of them receive wages on a piece-rate basis. Out of 80 workers in Fancy Pants, 56 are regular piece-rate workers. In Handsewing, almost 80 percent of its production workers are paid by piece. Under the Barangay Micro-Business Enterprise (BMBE) Program¹⁷, a waiver from the local government was granted to both coops and Nouvelle, exempting them from paying the legal minimum wage. The minimum wage rate in the factory’s location is PHP280 (USD6.5) per day but with the BMBE grant, workers are getting a gross income of PHP263 (USD6) per day.

Its workers are either regular or probationary and they are further divided on the basis of how their wages are computed – monthly, daily or piece-rate. The management of the coops said that workers are on single shift (8 AM to 5 PM) during the regular season and on two shifts (6 AM to 2 PM; 2 PM to 10 PM) during peak season. Similarly, Nouvelle workers are on 8AM to 5PM shift, with 2 hours overtime per day. Workers interviewed said that they are regularized after the legally-mandated probationary period of 6 months. All workers in these three organizations enjoy legally-mandated benefits (social security, Phil-health, housing fund) including 13th month pay, service incentive leaves of 7 days per year, holiday pay, legally-mandated leaves and entitlement to separation pay.

16 Piece rate workers are paid based on the number of pieces they finish on a given day.

17 The Barangay Micro- Business Enterprise (BMBE) certificate grants small businesses tax incentive and an exemption from payment of legal minimum wage. The facility and coops complies with the BMBE-allowed basic rate.

In Handsewing Coop, the work for piece-rate worker is classified as *multi-tasking*, which means workers are expected to be moved to sections, lines or departments where s/he is needed. Work is from Monday to Saturday at 8 hours per day, with ½ hour of lunch-break, which will be scheduled by the supervisor. Workers are expected to render 2 hours of overtime everyday “if necessary or if the Coop mandated it.”¹⁸ Workers are required to obey the Coop Workers’ Manual. Termination of workers is based on grounds provided under the Philippine Labour Code. In Fancy Pants, the conditions of employment are almost identical, except that workers enjoy a 1-hour lunch break and the contract contains a provision on a possible mandatory medical examination when the management deems it necessary. Grounds for termination from service are based on the Philippine Labour Code and performance evaluation.

The *cooperative workers* are under the full control and management of the cooperative. These workers are not considered as the factory’s employees, not entitled to the company benefits, but are required by the cooperative to adhere to the client-factory’s policies, rules and regulations. These are all skilled and experienced workers, integrated well into the production processes in Nouvelle, and are subjected to the same, if not more stringent, performance evaluation standards.

The Cooperative Code of 2008¹⁹ is not instructive about the labour standards applicable to coop owner-members-workers and it is not clear what labour rights they enjoy. The Philippine Supreme Court had occasion to rule on the question of whether or not an employment relationship can exist between a cooperative and its members. It said: “a cooperative through registration acquires juridical personality separate and distinct from its owners, akin to a corporation. Consequently, an owner-member of a cooperative can be an employee of the latter and an employer-employee relationship can exist between them.”²⁰ However, the decision in this case was promulgated before the enactment of the 2008 Cooperative Code and it remains to be seen whether the doctrine would hold. While

18 The employment contract is in Filipino, as translated by the author.

19 The Cooperative Code was enacted in 2008 (Republic Act 9520) and it defines a cooperative as “an autonomous and duly registered association of persons, with a common bond of interest, who have voluntarily joined together to achieve their social, economic and cultural needs and aspirations by making equitable contributions to the capital required, patronizing their products and services and accepting a fair share of the risks and benefits of the undertaking in accordance with universally accepted cooperative principles (Art. 3, Republic Act 9520).” The Cooperative Development Authority (CDA) is the government agency in charge of the registration and regulation of cooperatives. As of December 2011, there are 14,406 multi-purpose cooperatives and 21 workers cooperatives registered with the CDA. Cooperatives are classified into different types: credit, consumers, producers, marketing, service, multi-purpose, advocacy, agrarian reform, cooperative bank, daily, education, electric, financial service, fishermen, health services, housing, insurance, transport, water service and workers’ coop. What concerns us here are the multi-purpose cooperatives, which are required to combine 2 or more of the business activities of these different types and it may include provision of labour, and the workers’ cooperatives.

20 Republic of the Philippines, represented by the Social Security Commission (SSC) and Social Security System (SSS) v Asiapro Cooperative (GR 172101, 23 November 2007).

the Cooperative Code is silent, I argue that once a cooperative engages in subcontracting work, the non-member workers of the coop should enjoy the same rights and protection as any other subcontracted worker and the subcontracting arrangement should be subject to standards of legitimate subcontracting as any other entity. If it were deemed engaged in labour-only contracting, it should suffer the same penalty as any other labour-only contractor.

4. Key Issues Impacting Labour Rights

The key labour issues involved in labour flexibilization have to do with (a) the circumvention of the regularization requirement, (b) precariousness of employment status, (c) threat to Constitutionally guaranteed rights to security of tenure, freedom of association and right to collectively bargain, (d) subminimum wages and benefits scheme that reflects discriminatory practice against non-regular workers, and (e) the absence of clear labour rights of cooperative owners-members. Currently, in general workers are classified in the following categories and the extent or limitation of legal protection can be illustrated as follows:²¹

Categories of Workers	Description	Employment Relationship	Legal Protection under the Philippine Labour Code
Regular	Rigid	Bilateral	Full protection in terms of labour standards and labour relations
Project			Adequate legal protection in the duration of the project or the season
Seasonal			
Labour contracting	Flexible	Trilateral: principal, labour contractor, worker	Generally, precarious employment status, with no security of tenure; subminimum wages and benefits scheme; restricted right to associate and collectively bargain
Jobs and service contracting			
Commission-paid		Bilateral	Most inadequately protected under the law
Contractual			
Boundary-based			
Home workers			
Casual			
Cooperative		Bilateral but workers are considered member-owners of the cooperative	

21 Adapted and updated from Macaraya, Bach M (undated). *The Philippines: Workers' Protection in a New Employment Relationship*. Available at: <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/wpnr/philippines.pdf>. (accessed on 16 August 2010).

Outsourcing work to subcontractors, including cooperatives, allows factories to abscond from their obligations to workers who are actually producing the goods for them. They do not have to keep them as regular workers or pay for social security and insurance since they are not the employers on paper. This way, factories can keep labour costs down and still meet buyers' orders on time. By subcontracting work, factories are also able to outsource their human resource functions. They only need to pay the subcontractors a fixed service fee and it will be up to the subcontractors to pay his/her workers based on time and work rendered, without regard to whether the fee is enough to meet the minimum wage. They can easily demand to have a worker replaced without having to go through the termination process, which in the Philippines requires notice and hearing. Factories get all the benefits of having the work done without being involved in any stage of the employment cycle.

What complicates the issue is how the scheme is abused so that most arrangements are labour-only contracting, which is absolutely prohibited. Since the coops and subcontractors are duly registered and licensed by the Department of Labour and Employment, this arrangement enjoys a presumption of legality and workers are left to suffer under subminimum labour conditions. The amended law on subcontracting that identified the applicable labour standards only took effect in December 2011 and how it will lend more protection to workers in this situation still remains to be tested. In the law, subcontracted workers from manpower agencies should be entitled to most of the legally mandated benefits—like minimum wage, hours of work, benefits, payment of overtime work and service incentive leaves, among others. Although the law says that they enjoy security of tenure, the provision is too vaguely phrased to determine if they have security in the duration of their employment with the subcontractor or if their situation is similar to that of fixed-term workers who are secure only during the term.

The position of coop workers in subcontracting scheme is more untenable. The cooperative workers are under the full control and management of the cooperative. These workers are not considered as the factory's employees and not entitled to the company benefits, but are required by the cooperative to adhere to the client-factory's policies, rules and regulations. It can be argued that for non-members who are workers of the coop, labour protection under DO 18-A applies to them. But coop members are considered owner-members of the business and they straddle the roles of being both the subcontractors and workers. Their situation is akin to the self-employed. If the work conditions are subminimum, who can they claim against? If this happens, they will essentially be claiming against themselves.

By subcontracting work, factories skirts around the issue of freedom of association and collective bargaining outside their regular workers, whose numbers are kept to a minimum? Even if the factory is unionized, the subcontracted workers are not qualified to join it. The law grants them the right to form their own union and enter into a collective bargaining agreement but the bargaining agent will be the subcontractor and not the factory. The subcontractor, who is more often a labour-only contractor, usually has nothing worth bargaining over. For coop owners-members, while they have freedom to associate—and it

can be pedantically argued that a cooperative is one of the higher forms of association—they will not be able to exercise the right to collectively bargain as they cannot bargain with themselves.

The most pressing problem is that in these subcontracted labour arrangement everything is kept to a minimum because the agencies have no interest or incentive to give more. For workers, there is no upward mobility and there is no opportunity to develop more skills. Length of service does not translate to higher pay. Also, there are government incentives that are used to exempt the subcontractors from paying the minimum wage rate. Most casualized workers earn on piece-rate basis and while the law orders that the daily quota should enable workers to earn the daily minimum wage rate, most factories do not bother to ensure this.

5. Interrogating CSR Compliance in the Nouvelle Supply Chain

In 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights that serves to implement the Protect, Respect and Remedy (PRR) Framework. In summary, the Framework rests on three pillars: (a) the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication; (b) the corporate responsibility to respect human rights, which means avoiding infringing on the human rights of others and addressing adverse human rights impacts with which they are involved; and (c) the responsibility of both State and corporations to ensure that those affected have access to effective remedy, through judicial, administrative, legislative or other appropriate means, including operational-level grievance mechanisms. In the sections below I examine how this Framework plays out in the Nouvelle CSR system and point out the gaps and challenges that labour flexibility poses to the PRR Framework.

5.1 Corporate Responsibility to Respect Rights and Ensure Access to Remedy

As described by Barrientos,²² “global production is expanding through outsourcing to developing countries, via interlinked networks of producers and agents coordinated by large global and regional buyers.” This requires instituting a quasi-legal regime of compliance across its supply chain, one that exists in parallel to country efforts, to ensure observance of laws and protection of workers’ rights, and the applied corporate standards are more often higher than what is required under national laws.

Referring back to the case study, Nouvelle Industries contracts with multiple multinational garments companies and some domestic brands and one buyer, Executive Company²³, has a Code of Conduct for Vendors and Contractors that it expects its suppliers to comply

²² See note 9.

²³ While the name of the international customer is changed in respect of the non-disclosure agreement signed by the author, the Code of Conduct quoted here is as originally written.

with.²⁴ Executive Company's articulated social responsibility has to do with ensuring that its products are produced under legal, humane, safe and sustainable working conditions and it seeks to guarantee that workers' rights are respected. The buyer company does this by instituting an audit mechanism throughout its supply chain across the globe. This corresponds with the minimum expectations of corporations under the UN Protect, Respect and Remedy (PRR) Framework to respect laws and workers' rights both in policy and practice with due diligence. However, given that the most critical problem in Nouvelle is the condition of the subcontracted workers and the precarious situation of the coop workers, it is notable that the customer's code of conduct does not have a specific standard on precarious employment or the use of temporary, contingent or contract workers. Assumedly, this will be covered by the general requirement to comply with applicable local laws and regulations, but it will be problematic if the applicable laws do not provide sufficient protection.

In this supply chain, it is easy enough to evade responsibility. Since the buyer's concern is on the condition of workers producing its goods, Nouvelle can declare that all the production for Executive Company is done in-house and that none is outsourced. Even if the buyer insisted on auditing the whole production process, if it is not sufficiently informed on or not attuned to the vagaries of the domestic labour market, it is easy to miss out on the implications of work subcontracting or outsourcing to workers' cooperatives. Most buyers are happy enough to see legal permits and they do not inquire too deeply into the nature and consequence of this arrangement. Further, if for instance, part of production of Executive Company's goods is indeed outsourced to Handsewing or Fancy Pants, the customer may still choose to not do anything about the situation if its leverage over Nouvelle is not considerable, for example, if the sourcing makes up a small portion of Nouvelle's business. Following up on what Executive Company did to respond to the findings in Nouvelle I was informed that its sourcing has decided to stop working with Nouvelle so whatever leverage the buyer has over it disappeared, leaving the situation of workers unchanged.

24 The following are the code of conduct standards:

- a. Child labour as defined by local law
- b. Forced or involuntary labour, which includes prisoner, bonded or indentured labour
- c. Disciplinary actions and harassment, including physical, psychological or sexual harassment or abuse
- d. Non-discrimination on the basis of race, religion, age, nationality, social or ethnic origin, sexual orientation, gender or political opinion, in hiring or employment practices
- e. Freedom of association, which gives emphasis on the absence of unlawful interference
- f. Compensation and benefits according to local law
- g. Safe and healthy work environment compliant to applicable laws and regulations, which includes access to potable water and sanitary facilities.
- h. Applicable environmental laws and regulations

5.2 State Duty to Protect and Ensure Access to Remedy

While the protective legislation is in place, the gaps have to do with uncovering labour flexibility devices at the plant-level and enforcing the law against those who do not meet the standards. As mentioned, duly licensed subcontracting arrangements enjoy the presumption of regularity and unless someone complains or the government inspectors themselves discover it, labour-only contracting can subsist year in and year out. Licenses are issued once the subcontractor proves that it has substantial capitalization and that it is a duly registered company. However, two of the standards mentioned above are about company practices with regard to labour standards compliance and gaps will not be discovered unless inquired into or complained about. Once a complaint is filed, it triggers a mechanism that will ultimately decide whether the arrangement is labour-only and whether the subcontractor is merely an agent of the principal. While the procedural mechanisms are in place, it then becomes an issue of substantive access. For workers who are in precarious employment situation, they would have to achieve a high level of awareness of rights before they become brave enough to put a complaint in motion. Once they do, they should be prepared to lose their jobs while the case is pending, or else bear other forms of reprisal like withholding of privileges or benefits.

On CSR in particular, the Philippine Labour Department launched the Incentivizing Compliance Program (ICP) in 2011, indicating a major policy change in the government's labour monitoring framework. The program aims to raise compliance by enterprises to core labour laws and other social and labour standards. The regulatory/inspection track remains the primary strategy in ensuring compliance with labour laws, but it does strongly indicate within the government a strong receptiveness to other approaches to labour inspection that include effectiveness and performance enhancement and not simply regulation. One standard that will be checked is whether the factory has a workplace grievance mechanism that has worker representative in the committee and one that affords confidentiality and assures against reprisal. Hopefully, this will augment the existing protective mechanisms at the national level.

Global corporate social responsibility (CSR) trends have changed in recent years. From asking how a company uses its profits, where the focus is on philanthropy, community relations, environment etc., the question now is on how a company makes its profits. Stakeholders—consumers, media NGOs, trade unions, students, investors and international organizations, among others—are now looking at a company's internal business practices and ethical business relationships. In addition to price, quality and on-time delivery, new requirements on labour standards, health and safety, ethical conduct and environmental sustainability are developed. The preferred method of checking compliance to these performance indicators is auditing, during which information on potential non-compliance issues is gathered. After which, violations to legal requirement and what buyers' have identified as zero tolerance standards are likely to be remediated.

As observed, CSR in the Philippines is customer driven and remains inorganic. When the customer leaves, companies tend to drop the ball. While the PRR Framework talks about the responsibility to exercise leverage over affiliates, this only works if the brands or international customers have adequate leverage or a special interest to make things right. If the supplier is too important the gravitas of the brands will waver like what we saw in the Apple-Foxconn partnership, or if the business of the buyer is not that big then it will not have enough leverage on the factory-supplier to improve its practices. Hence, as corporate social responsibility is fickle and contingent, State monitoring and enforcement of laws remains necessary. It means ensuring that laws and effective enforcement mechanisms are in place. It requires uncovering illegal labour flexibility schemes at the plant level. It also means guaranteeing effective access to remedy, which includes **access** to the process—in terms of physical, geographical, financial, linguistic and formal access—and **effectiveness** of the process that underlines timeliness, responsiveness and legitimacy of results.

For CSR to achieve its noble purpose—and what the PRR critically misses out on—it requires an informed and rights-literate workforce. Workers have to understand what their rights are and what can be demanded of corporations and governments. At the factory level, workers need to be oriented on their rights under national laws, their responsibilities and what can be expected from the companies based on their codes of conduct. It includes informing them of how to engage the companies on minimum work conditions and the State when these minimum conditions are not met. No matter the laws and mechanisms that are implemented, if workers are not and do not feel empowered then a sophisticated CSR framework will be useless.

In articulating CSR standards, more intense focus would have to be on who is producing their products. Corporations have done well in checking and screening out child labour, which is straightforward enough. More dynamism is needed to look at the body of standards as a whole and see how a particular labour configuration affects compliance to forced labour or freedom of association, to name but a few. Further, companies have an obligation to mitigate the vulnerabilities of workers who produce for them. They can insist on a remediation program and as part of that, they can demand that labour standards be extended to all workers in the facility, their employment status notwithstanding. It can require their direct suppliers to conduct due diligence on the latter's suppliers and subcontractors to ensure that all parties are complying with the buyer's code, enhanced by the suppliers' own codes, throughout the supply chain. Likewise, both have a responsibility to warrant that all workers, regardless of who their employer is on paper, have effective access to grievance procedure and remedy both at the national and factory levels that entails (a) informing workers what their rights are and how they can demand respect for them, (b) setting the system in place, which at the minimum should ensure confidentiality, responsiveness and that workers are protected against possible reprisals, and (c) guaranteeing that there is no interference to the exercise of this right. Finally, and for multinational companies involved in global production in particular, they should warrant that their global buying practices are not driving illegal and unfair labour practices in sourcing countries or that

their practices are not weakening government enforcement of labour rights. It requires closely examining their sourcing policies and protocols and ensuring that compliance to laws and standards are fully embedded in their processes.

6. Conclusion

Currently, labour flexibilization or casualization poses the biggest threat to labour rights' realization and protection as workers are decoupled from their worksites through a separation of productive and contractual engagement between the principal and the workers, resulting to workers' inability to access and exercise most of their rights that are traditionally linked with a regular employment arrangement. A more negative result is that it commodifies labour to the extent that it is not about employment relations any longer, but all about feeding the machine with contingent and provisional workforce. The casualization of labour makes the worker invisible within the regulatory framework that is rendered outmoded by globalization. Within this atomized labour relations, only regular workers, and they are becoming fewer, can access employment protection and benefit. Irregular workers, those who are in casual, contractual and flexible labour arrangement, are unable to access employer-based protection, and because of their precarious employment situation, their ability to participate in workplace-based association, like unions or management-worker committees, that can potentially advocate for improving conditions in the workplace is effectively erased. The challenge lies on how we can wrest control back so that workers in irregular employment relationships are better protected. Should we aim to go back to the classic bilateral rigid employment relationship or should we begin looking at alternative arrangements like perhaps considering the portability of labour rights in order to realize worker protection? More research will have to be done to reveal more labour flexibility devices in other countries and a focused deliberation will have to be made if States were to meet their obligation to protect workers' rights in a less reactive manner.

This paper has shown how easy it is for corporations to evade its social responsibilities to workers who are producing their products, even for a company like Nouvelle that has its corporate social responsibility mechanism down pat. When placed in a larger context of how globalization drives the casualization or informalization of workers, the PRR Framework is shown to have a superficial understanding of this process. It merely allows corporations to skim the surface of the issue and to tinker with the problem lending an illusion of action, without ensuring the necessary agents to enable lasting change.

References

- Barrientos, S., 2011. *Labour chains: analysing the role of labour contractors in global production networks*. Brooks World Poverty Institute: University of Manchester. Available at: <http://www.capturingthegains.org/pdf/bwpi-wp-15311.pdf> (accessed on 30 April 2012).
- Brodsky, M., 1994. Labour market flexibility: a changing international perspective. *Monthly Labour Review*, November 1994.
- Chang, D., 2009, Informalising Labour in Asia's Global Factory. *Journal of Contemporary Asia*, vol. 39, no. 2, pp. 161-179.
- Emmerson, R and Yuriutomo, I., 2013. Controversy over Outsourcing Regulations in Indonesia: Third-Party Contracting Arrangements. *SSEK*, May. Available at: <http://blog.ssek.com/index.php/2013/05/controversy-over-indonesias-outsourcing-regulation-third-party-contracting-arrangements/> (accessed on 9 July 2013).
- International Labour Organization Declaration/ILO 18 June 1998 on the Fundamental Principles and Rights at Work and its Follow up.*
- Kugler, A., 2004. *The Effect of Job Security Regulations on Labour Market Flexibility: Evidence from the Colombian Labour Market Reform*. Available at: <http://www.nber.org/chapters/c10070.pdf> (accessed on 30 April 2012).
- Macaraya, Bach M. (undated). *The Philippines: Workers' Protection in a New Employment Relationship*. Available at: <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/wpnr/philippines.pdf>. (accessed on 16 August, 2010)
- Ruggie, J.G., 2013. *Just Business: Multinational Corporations and Human Rights*. New York: W.W Norton & Company.
- Tomei, M. (undated). *Freedom of Association, Collective Bargaining and Informalization of Employment: Some Issues*. Geneva: International Labour Office. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.35.2856&rep=rep1&type=pdf>. (accessed on 10 March 2011).
- Torres, E., 2012. PHL no 'global sweatshop,' DOLE's Baldoz says. *Business Mirror*. Available at: <http://businessmirror.com.ph/home/economy/25215-phl-no-global-sweatshop-doles-baldoz-says> (accessed on 30 April 2012)

Villamin W and J. Hernandez (undated). *Globalization, Labour Markets and Human Capital in the Philippines*. Available at: http://www.dlsu.edu.ph/research/centers/aki/_pdf/_concludedProjects/_volumeII/VillamilandHernandez.pdf (accessed on 30 May 2012).

Wilthagen, T. and Tros, F., 2004. The concept of 'flexicurity': a new approach to regulating employment and labour markets. *Transfer* 2/04.

LABOUR PROTECTION IN THAILAND A CASE STUDY OF TRIUMPH INTERNATIONAL AND LABOUR UNION

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The case of Triumph International and Labour Union explores Triumph's policy on Corporate Social Responsibility (CSR) and two notable events with regard to the treatment of Triumph workers: the termination of the union leader's employment contract, and the massive layoffs of thousands of Thai workers consequently. The conflicts involved actors other than the employers and employees, and encompassed a complicated situation concerning the *lèse majeste* law.

Although the union leader's job termination was justified under the local legal mechanism, the paper points to failures by the Triumph parent company in Switzerland and local subsidiaries to implement the company's CSR policy with commitment, as well as to failures by state agencies to protect workers' fundamental rights. The failures by both the company and state agencies to act appropriately implied complicity and showed that corporate social responsibility requires business enterprises and state agencies to play their parts.

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1. Introduction

ILO believes that Corporate Social Responsibility (CSR) initiatives, including codes of conduct, can contribute to sustainable development in the workplace and a decent work strategy. The initiatives also help to promote respect for freedom of association provided that employers develop them in parallel with independent worker representatives, and mechanisms for ensuring adherence to them. Strong and independent worker organisations can facilitate consultation between employers and workers with different interests and help to bring “a more equitable distribution of income” through collective bargaining. This also empowers workers and individuals to protect their interests to ensure that their other rights at work, such as fair wages, no excessive working hours, and health and safety become matters of reality (ILO, 2011: 3-4; ILO 2008: 37-38).

But the task of representation in a Thai workplace perhaps brings more pain than joy. As of 2012, only 1,329 labour unions were registered, accounting for less than one per cent of a total of 400,000 private companies nation-wide (Labour Relations Bureau, 2011; Social Security Office, 2012). Moreover, these established workers’ organisations submitted merely 423 demands resulting from 221 conflicts and four walkouts that saw no proper follow-up through normal legal dispute procedures (Department of Labour Protection and Welfare, 2011). These statistics are indicators of the grim reality associated with the rights and empowerment of workers in forming organisations of their free choice without fear, reprisal, or interference, and in negotiating for the improvement of working conditions.

In addition, disputes in labour relations are perhaps more complicated and painful than has been reported. This study examines one of the most complicated labour disputes in Thailand in the context of Triumph International AG’s CSR initiatives with a focus on how Triumph and workers interacted. Part 2 looks at Triumph’s CSR policy, and part 3 concentrates on the peaks of tension during 2008 and 2010 when the company fired the labour union leader, Jitra Kotchadet, followed this through with massive layoffs of thousands of Thai workers in the following year, and other related measures. The conflicts involved a number of actors other than the employers and employees. Part 4 analyses three main actors; Triumph Thailand, Triumph Switzerland, and state agencies with regard to their responsibilities and duties in the Protect, Respect, Remedy Framework introduced by Professor John Ruggie, the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (henceforth SRSG Framework). The study found significance in the use of Section 112 of the Criminal Code to override the labour protection laws in this specific case, affecting workers’ basic rights to the greatest extent. The rights violation combined with the failure of Triumph’s parent and affiliate companies to bear responsibility for their workers, and of relevant state agencies to perform their duties to protect human rights.

2. Triumph and CSR policy: Commitment and progress in development

Triumph International AG (henceforth Triumph), is a multinational manufacturer of lingerie and sleepwear for both women and men. Founded in 1886 by a German family, Triumph has its head office in Zuzach, Switzerland and fields branches in as many as 125 countries world-wide (Triumph, n.d.) Its affiliates include those in Thailand, Vietnam, Malaysia, Philippines, and Singapore in the ASEAN sub-region (Triumph- Asia, n.d).

With regard to the Social Responsibility policy, Triumph adopted its Code of Conduct in 2001. The Code states:

“As an internationally operating company, Triumph International employs staff all over the world. That’s why we are aware of the exceptional responsibility borne by employers in the age of globalisation. We’ve anchored this social responsibility in our Triumph Code of Conduct” (Triumph, 2001).

In the four-page long Code of Conduct, Triumph lays down seven minimum standards which range from avoidance of any kind of forced labour to prohibition of discrimination and a safe and hygienic working environment for workers. In the “union and freedom of wage negotiations” principle, the company “acknowledges” the right of every employee to establish and join unions and the right to enter into wage negotiations. Worker representatives are also “not to be discriminated against” and “have access to all necessary work places so that they are able to look after their representation function.” It is not clear why Triumph simply “acknowledges” the rights to form unions and enter into wage negotiations rather than uses a stronger word to demonstrate commitment, although it affirms blanket adherence to the ILO’s Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No 87) and Convention on the Right to Organise and Collective Bargaining (No 98). Triumph further assures that these rights are to be extended to all employees who make its products, regardless whether they are staff of the company or not, and commits contractors, sub-contractors, suppliers as well as licensees to abide by the Code (Triumph, 2001). This means the company’s Social Responsibility Policy is binding throughout its supply chains including the Thai subsidiaries.

The Code standards draw on international laws and relevant ILO conventions, as do those brandished by many multinational companies with ethical brands. The difference lies in the transparency of their reports. Some core companies explicitly provide public information on how often they revise the standards, what their priorities are, and how they implement initiatives to improve worker-management relations. For instance, the *Performance Count* Sustainability Report issued by the Adidas Group in 2010 reported on how it reached out to the Cambodian government on wages and freedom of association in the country; attempted to improve worker-management forums in Chinese factories; and monitored non-compliance through the worker-hotline initiatives, a mechanism that

ensures non-retaliation from management (Adidas Group, 2010; 11, 45, 50). Triumph, on the contrary, is silent about this. The company's public domains carry nothing but the Code it adopted a decade ago. This makes it difficult to examine how its standards have been implemented continuously and improved over time.

3. Working with the Union at Triumph

When Triumph first came to Thailand in 1947, it set up a trading company under the name of Triumph International (Thailand) Ltd. Located in Samut Prakarn province, the company in 1991 expanded from trading to manufacturing and distributing various types of Triumph products. Five years later Triumph set up a separate entity, called Body Fashion (Thailand) Ltd, for a new manufacturing plant in Nakorn Sawan Province. This new company's name was also used to replace that of the Samut Prakarn plant in 2010 (Triumph, n.d.). Therefore, Body Fashion became a manufacturing base in the two provinces, while Triumph Thailand is responsible for trading and placing orders at Body Fashion. Reorganizing the business' internal structure in this manner indicated Triumph's attempt to survive economically, and, by distinguishing the nature of businesses among subsidiaries, the company took a path different from other multinationals which subcontracted local suppliers instead of absorbing production costs with them.

On the workers' front, the Triumph International Labour Union was formed in 1980, 20 years before the Code was applied across the board. The functioning of a worker representation system at Triumph in practice flourished as the Triumph Union was strong, active, and able to collectively negotiate for wage increases and improvements in the conditions of employment. For example, in 2008, the company had to agree with the Union's demands to raise workers' wages from 203 baht a day, a legal minimum wage base in Bangkok and its vicinity including Samut Prakarn province, to 399 baht per day, or almost double. The company also provided workers with a cost of living allowance of 1,100 baht per month, medical allowance of 3,000 baht per year, all the above legal requirements, plus transportation and free uniforms. The wage negotiation in 2011 resulted in the company's decision to raise wages by six per cent over the 399-baht base, the funeral allowance from 35,000 to 50,000 baht per person, and the cost of living allowance for those who had been working for more than 10 years (Union members, 19 Jan 2012). These results showed the worker organisation's strength and unity in striving for the protection of workers' interests and their well-being.

The Union however, often had to struggle and confront the factory management. Back in 1999, for example, the workers went on strike to pressure management for a wage increase at a time when the old collective bargaining agreement expired and for an extra amount of compensation for the workers in case the company decided to relocate the production plant elsewhere. The management countered this pressure by proposing to freeze the workers' wage increase in the next three years and to log out the operation (Sourcwatch, n.d.). On another occasion, when Body Fashion (Thailand) Ltd. was established, the

management wanted the workers to resign from Triumph International (Thailand) Ltd, implicitly requiring workers to reapply and start again in the status of “newcomers” at the newly set-up company. The Union however, preferred measures to ensure that the workers would just be transferred from the old to the new business entity without losing their entitlement to the old benefits and welfare schemes. (Union members, interviewed 12 and 19 Jan 2012).

The last straw came in 2008 when the factory instituted a new production standard time system. Under the system, a standard time was set up to measure the production output in what seemed to be an attempt to increase productivity and to pay the workers more. In fact, the management team was trying to save costs by reducing the standard production time which pushed the workers to produce more while they were paid less. Reports affirmed that the daily production target came with restrictive conditions, for example making it difficult for the workers to take either sick leave or personal leave. (Union members, interviewed 12 Jan 2012). To protest the factory’s standard time system, which they found intolerable and excessively demanding, the Union leaders and workers opted for a go-slow of the production process.

“The less we do, the more we are overloaded and the less we are paid,” one of the workers said.

“We just sat idly at our sewing machines and went to the bathroom quite often to produce smaller outputs,” another worker added, elaborating on how they fought the system. The company eventually yielded to the pressure and agreed to increase rewards to those who exceeded normal outputs, thus providing for workers to earn fair pay for hard work.

Although the workers won the battle over the factory management, the episode in 2008 led to deteriorating circumstances for them, as the next section relates.

3.1 Contract termination of the Union leader and *Lèse Majesté* Law

Jitra Kotchadet had been working at Triumph as a production operator since 1993. She was a member of the Triumph International Labour Union in the early days before assuming the Union’s presidency between 2006 and 2008. During this period, the Union was at its peak, gaining as many as 3,700 members from a total of 5,300 people in the work force. Jitra strongly contributed to building solidarity between the Union and the workers and to forging powerful leverage for the Union with the management.

“We led the organisation under the collective decision of all workers. Each production line of 50 workers would have one representative,” she said, implying an effective communication channel between the production line workers and their representatives as well as actual and well-grounded information from the factory floor.

“We were rational in working with the management, [based on] our information... what we produced and how much we could produce,” she added.

During the protest of the management's controversial standard time system in early 2008, Jitra, then also a Swimwear Section operator, led the Union to demand, among other things, a six per cent wage rise and an increase in the annual bonus. Before the Union decided to go on strike after a month-long negotiation, the management surprisingly agreed to all demands, scoring another triumph in the Union's history.

But the victory lasted only shortly. Soon after the success of the wage and annual bonus negotiation, the Provincial Labour Court of Samut Prakarn issued a ruling that Jitra's job in the company could be terminated without her receiving severance pay. The notice was made upon the company's request based on an allegation that Jitra had caused damage to the company. According to Section 31 of the 1975 Labour Relations Act, employers are prohibited from terminating the employment of workers, Union members, and committee members involved in making demands for labour or in the negotiating process. But a company can seek approval from the labour court to terminate the employment of an employee who intentionally causes damage to it.

The allegation of defamation stemmed from Jitra's appearance on a television programme a few months earlier wearing a T-shirt carrying the message: "Those who do not stand are not criminals. Thinking differently is not a crime." The statement referred to the right to not stand when the national or royal anthem is played. Jitra was invited to a TV talk show to share her views on issues of rights to abortion, together with two other intellectuals. She admitted that she wore that T-shirt in order to lend support to a fellow social activist, Chotisak Onsoong, who at the time faced a public lawsuit related to Section 112 of the Criminal Code, known as the *lèse majesté* law, for not standing up for the royal anthem in a Bangkok cinema in 2007. Under section 112, anyone found to be insulting the King, Queen, heir or Regent faces up to 15 years in jail on each count. Jitra regarded her gesture as simply an expression of support.

"Buying and wearing a t-shirt displaying a campaign message is very normal. In my opinion, the statement [on the T-shirt] is not too harsh. No matter how one reads it, it does not demean [the monarchy]," she said (interviewed 12 Jan 2012).

A conservative local newspaper thought differently and played up the point about the T-shirt. In the daily's online version, a well-known columnist wrote an article contending that the thoughts in the statement were deemed critical of the monarchy and threatening to the democratic system with the king as head of state. It was also improper, the article claimed, for the National Broadcasting Television (NBT) Channel to allow such a politically-driven campaign to be aired, (ASTV Manager Online, 2008). The article stirred up anger from pro-royalist groups who later called on the public at large to stop buying Triumph products. The movement was fanned by the People's Alliance for Democracy (PAD) who at that time heavily campaigned against ousted former Prime Minister Thaksin Shinawatra and his supporters for their administration of governments, and attacked them for failure to respect the monarchy. Body Fashion Thailand, as a result, sought the court's ruling to terminate Jitra's employment for "damaging" the company's reputation.

The Labour Court issued the ruling on July 8, 2008, but it was not until July 29 that the company informed Jitra about it. Jitra had been unable to testify before the Court from the start. When the Court was compelled to reconsider the case later in the year, it only reiterated the earlier ruling in its final verdict. The Court's ruling stated in part:

“The defendant wearing that black T-shirt [should have been] fully aware that officials were prosecuting Mr. Chotisak Onsoong... Taking the national spirit into consideration, a spirit is unique and different from other nations in that it is accepted or publicly acknowledged that the Thai people highly respect the king so much that nobody can defame or demean [him].

...The claimant [*Body Fashion*] has made well-known products, but the defendant committed an act that led the public to boycott the products, [and] would certainly cause damage to its sales or reputation...” (article 112, 2011; YouTube, 2008)

Jitra's contract was terminated, although years later the public prosecutor decided to drop the *lèse majesté* case against Chotisak Onsoong and his friend, saying that standing up for the royal anthem ‘is not required by law’ and did not constitute insult or defamation (Prachatai, 20 July 2012).

The workers believed the employment termination of Jitra was rather aimed at “destroying the Union” by getting rid of its leader (interview, 19 Jan 2012). This belief moved about 2,000 workers, mainly from the Swimwear Section, to assemble and stop working for 46 days to demand the reinstatement of Jitra, but their efforts were to no avail. Jitra herself made an appeal as well as filed a grievance to the Provincial Labour Court to receive her appeal, but she was denied twice. The main reason for Jitra's being denied access to the upper court was a legal provision that disallowed appeal unless the defendant has a legal argument.¹ Since Jitra's case was about the “fact” of her “improper action towards the [royal] institution,” which is related to her “ethics and consciousness,” there was no room for her to cite legal provisions to make an appeal, explained a legal expert who closely monitored the case (telephone interview, 20 April 2012).

Jitra's case drew a lot of attention from labour rights groups regarding the plight of workers in time of economic crisis. One study approached Jitra's employment termination as a political issue that affected the Triumph Union's leadership, and another described the event as a “successful” strategy by Body Fashion that used the public's boycott of its products to justify the job termination, (Thai Labour Solidarity Committee, 2011; Thanachaisethawut, 2009). Neither study looked further into the complications of the case at the bottom line.

1 The Establishment of the Labour Court Act, B.E.2522 (1979), section 54 says: One can submit an appeal to the Labour Court against its ruling or resolution only when legal matters are relevant. Available at: <http://www.kodmhai.com/m4/m4-4/H10/H-10.html> (accessed on 25 April 2012).

3.2 Massive layoff and related situations

Almost a year after terminating Jitra's job contract, Body Fashion (Thailand) Ltd. laid off almost half of the total workforce of 4,200 people at the Samut Prakarn plant. In its official announcement, the company said the layoff was to "cope with [the] global economic downturn." The firm needed to "restructure the long-term investment in every unit of Triumph" and to "ensure the company can survive amid severe circumstances" (Body Fashion (Thailand), 2009). The production capacity was therefore reduced by as much as 37 per cent at the Samut Prakarn plant, causing 1,959 workers to be dismissed. This group included the sick, the disabled, and pregnant workers, most of whom had been working at the company for more than 20 years. Similarly, in the Philippines, 1,663 people were laid off under Triumph International's retrenchment policy in the same year.

3.2.1 Business' difficulties or growing-up?

The majority of the laid off workers, around 1,600 in number, were Union members from the Swimwear Section who collectively stood up against the company in the alleged anti-Monarchy defamation case in the previous year. Moreover, the layoff decision coincided with Body Fashion (Thailand) Ltd's plan to expand its business to Nakorn Sawan Province after the company received an incentive scheme worth 75.5 million baht from the Board of Investment (BoI) a year before (TNA, 2009). The cheaper labour cost due to differing levels of minimum wages between big cities and the provinces was a key driving force. In 2008, the official minimum wage for Nakorn Sawan was 155 baht a day by comparison with 203 baht a day for Bangkok and Samut Prakarn.²

Thanachaisethawut (2009) reported that the downsizing of the Samut Prakarn plant contradicted the company's previous statements to the effect that the global financial crisis at that time "was an opportunity for business growth" and that "the potential was good for sales growth in the following year." As a result, "many parties" were of the view that the move was part of the company's concerted effort "to overthrow the Union that had long been playing a strong role in negotiating with the employer," he said. The Triumph workers emphasised "that the massive layoff was the result of BoI's extension of investment privileges to the company to build a new plant" and that "the ongoing economic crisis was an excuse to dismiss its older employees, mostly the Union members" (TNA, 2009).

3.2.2 Complaint mechanisms in place?

The workers used both formal and non-formal mechanisms, wherever available, to appeal for help against their dismissals. They went to the Provincial Labour Court to seek an interpretation of the worker-management Collective Bargaining Agreement (CBA) made

2 The official minimum wages were increased to 300 Baht per day nation-wide effectively from 2013 onwards—the author.

in 1999 which required prior consultation of at least 60 days before a planned massive employment termination. The management was reported to argue in Court that it was “compelled” to enter into the said CBA. The Court finally declared the CBA null and void, and not officially valid to be enforced. (Kotchadet, interviewed 12 Jan 2012). The workers also engaged in many activities and rallied against state agencies and countries concerned with Triumph to seek help. This included a demonstration in front of Government House and Parliament, and the submission of grievances to the Swiss Embassy and the European Commission Office in Bangkok. On the international front, the workers submitted a letter to Triumph head office in Switzerland, but they were denied access to meet with the company’s executives. Rather, the company told them to return to Thailand for negotiations (Prachatai, 27 Dec 2009).

The labour unions in Thailand and the Philippines also filed complaints against Triumph, saying it had acted in breach of the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, which recommends that 43 member governments, among them the Swiss government, encourage their enterprises to observe the guidelines wherever they operate. Under the OECD Guidelines, the National Contact Points (NCPs) are part of an implementation mechanism to “assist enterprises and their stakeholders to take appropriate measures,” and “provide mediation and conciliation platform for resolving practical issues that may arise.” (OECD, 2011). But the Swiss National Contact Point failed to resolve the dispute raised by Triumph workers and “unexpectedly” terminated the effort when Triumph, the target of the complaint, refused to enter into the mediation meetings. (Clean Cloth Campaign, 2011). The Union later received an official reply from the OECD saying their complaints were invalid because of the late submission, which was set at six months after the occurrence of the dispute (interview, 12 January, 2012). Therefore the workers were not entitled to receive any remedy from the OECD.

3.2.3 The workers today

Life goes on as usual. The Samut Prakarn plant continues to produce lingerie with a workforce of 2,200 people. The swimwear production, to which Jitra and other union members used to belong, was relocated to a Triumph factory in Sri Lanka, according to Jitra. The Nakorn Sawan plant has about 1,000 workers with no union established.

On the workers’ front, the company paid as much as 262 million baht of severance pay to the laid-off workers as required by law. The amount included legal benefits based on years of service, a compensation fund equivalent to one-month’s salary, a sum of money to cover unemployment plus the remainder of unused paid annual leave. Pregnant workers were also provided with advanced paid maternity leaves for their birth delivery. In total, each worker received compensation of around 100,000 baht (Thanachaisethawut, 2009; workers interviews). Jitra herself became an officer of Triumph Union, responsible for administrative work and providing advice to union committees. Apart from that, Jitra runs

a small fair trade business called “Try Arm” which produces underwear and made-to-order products in local markets. Currently there are about 20 workers who proudly make their products through this “Try Arm” brand.

But workers’ lives outside the factory’s premises are harder. Since a number of laid off workers were in their mid-30s and 40s, or had been working at Triumph no less than 20 years, they found it hard to find new jobs. Even worse, they were banned from getting new jobs because they had been Triumph Union members.

“Some of my friends applied for new jobs, but they couldn’t get any because they had been union members. They were blacklisted,” a former worker said.

Although the Try Arm workers could survive economically, they noticed a remarkable change in life. In terms of welfare benefit, the Try Arm business could not replace Triumph that takes care of its workers in many respects regarded as meaningful considering the rising cost of living.

“Before I was laid off, I got a cost of living allowance, medical fees, and (other) allowances. But now I feel insecure without savings. Our income is reduced, but household expenditures remain high,” said a mother of two children who live with her parents in a rented apartment.

“Without a labour union, we cannot demand anything, and no company would be willing to offer [a welfare programme],” another former Triumph worker said.

But those who were still working at Body Fashion at the Samut Prakarn plant claimed that their working lives had become even tougher and more insecure. With a demanding time management system imposed by the factory management, it became their routine work to scrutinise each product style in response to incentives.

“Our job is more restrictive, tight and strenuous. They reduce manpower but increase the work process, so we are overloaded,” one said, adding that some of them have to work during lunch, while others have occupational deceases, such as Hemorrhoids.

Jitra, with her concrete experience in fighting for her own rights and other Triumph workers’ rights concluded;

“No, we have no freedom of association. What we have [to do] is to maintain what we have already achieved. The company will do whatever it can, taking both the hard and soft approach [to counter workers]. It is more difficult for a newly established union. When you form a union, your work contract will be terminated.”

“The most important thing is we have to keep our jobs. Once you are unemployed, you’ll be in an extremely difficult position. No work means no house [to rent], no food to eat and no savings, right? ... Therefore, to keep our jobs means [we must] live passively,” she said.

4. Does Corporate Social Responsibility work at Triumph?

This paper explores the case of Triumph and its workers in the context of corporate social responsibility. It studies the case of the employment termination of Jitra Kotchadet, former Triumph labour union leader, and the massive dismissal of union members and other workers. The analysis covers two levels: one between Triumph, both Triumph Thailand and International, and its employees, and the other between the state and workers.

4.1. Triumph Thailand and workers

Triumph exercised its social responsibility’s policy by applying the Code of Conduct through its subsidiaries in Thailand. The local company, Body Fashion (Thailand) Ltd, applied the Code through the intermediary of independent worker representatives. Although Triumph’s Code of Conduct and relevant internal mechanisms were in place, a series of events that took place showed that implementation is far from real for the workers. Many labour specialists understand that the company was unhappy with Jitra’s ways in leading and protecting workers’ interest when the needs arose. But Body Fashion couldn’t do anything until the time was ripe. That was when Jitra’s appearance in a television programme was politicised, fanned and escalated into an intractable situation that enabled the company to cite the rising political climate as a reason to terminate her employment. The company was smart enough to use a legal mechanism as an effective tool to fulfil its wish, in both Jitra’s job termination and the dismissal of workers.

First and foremost, the company’s action severely affected workers’ fundamental *rights to freedom of association and wage negotiations* contained in the policy paper. The management committed an extreme violation of rights by removing the workers’ leader to weaken the representation function. This is against the spirit of rights to freedom of association usually linked to the right to collective bargaining, which allows workers to negotiate with their employers on terms of employments and to improve decent working conditions. The principle of freedom of association is enshrined in the Universal Declaration of Human rights, 1948 (No 23) as a basic human right, and the ILO’s Conventions as mentioned earlier. They are recognised as fundamental rights in the ILO’s 1998 Declaration on the Fundamental Principles and Rights at Work. The termination of Jitra and other workers’ employment indicates not only that the management lacked genuine commitment and sincerity to grant these rights. The study also found no concrete evidence that the management tried an alternative option, such as social dialogue, to overcome difficulties in their relations with workers.

The harsh action against Jitra also deprived her of the *right to freedom of expression*, the principle of which is enshrined in the Universal Declaration of Human Rights, 1948 (No 19). It was clear that Jitra was affected by, and became a victim of the *lèse majesté* law for her support of a person who faced a public lawsuit of the said law at that time. Wearing a T-shirt with a problematic political statement underlined her fundamental right to freely think of what she believes in. And the workers' rally in support of her for the unfair termination of her employment also reflected their right to express, that should have been free from harassment and intimidation. But the act eventually resulted in the massive lay-off.

Academics and intellectuals defined the political climate at that time that probably continues today, as one of “fear” towards the *lèse majesté* law. The fear was cultivated that Thai society as well as a well-respected institution was under an invisible threat, thus securing the institution was the most valuable thing to do. Among other things, the actions against threat included those where loyalty toward the royal monarchy was measured and scrutinised, and the state perhaps tried to heighten the severity of the relevant legal provisions, such as those in the *lèse majesté* law (Eammayura, ed., 2010: 145-148). Therefore, those who expressed their opinion or allegedly participated in the process deemed insulting and threatening the monarchy would be subjected to being scrutinised by such fear.

Jitra and several others therefore, became some of the most vulnerable for sacrificing their destiny to unemployment, affecting their *rights to work* to the greatest extent. The 1966-International Covenant on Economic, Social and Cultural Rights recognises the right to work of all people “to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right,” and “to full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.” (Art.7). The termination of employment and dismissal immediately affects the enjoyment of their rights to work, as well as an opportunity to participate and improve their quality of life. Last but not least, the company's arbitrary dismissals also barred union members from the enjoyment of *the rights not to be discriminated*, as the company failed to define in concrete terms the criteria under which workers are to be laid off. The dismissals apparently aimed at removing union members in the swimwear section which included pregnant and middle-aged workers. This is also against Triumph's Code itself, which affirms acknowledgement of the rights of workers to join unions and “not to be discriminated against.”

4.2 Triumph Switzerland and workers

The headquarters of Triumph International in Switzerland acted passively towards the workers. They refused to meet with Triumph workers when they were there but told them to go back to Thailand for negotiations. Triumph also refused to enter the mediation meetings arranged by the OECD's NCP when the latter received complaints from the Thai and Philippines workers. This clearly shows that Triumph placed the entire responsibility on the shoulders of their affiliates in Thailand and the Philippines and shrugged off the criticisms.

With such passiveness, the parent company acted against the SRSG's Framework on corporate responsibility, which expects business enterprises to act with respect for human rights due diligence, to avoid infringing on the rights of other stakeholders, and to address adverse impacts which affect them. The responsibility of business enterprises to respect human rights, the Framework prescribes, "applies to all enterprises regardless of their sizes, sectors, operational context, ownership and structures," although the means through which a business enterprise meets such responsibility "may vary depending on whether, the extent to which it conducts business through a corporate group or individually" (UN Doc A/HRC 17/31: 4, 14).

Mares (2010) points out that the Framework is problematic when it comes to the reality of parent-affiliate relations, particularly when affiliates infringe rights in the absence of the parent company's decision. The bottom line is the Framework lacks an adequate "foundation" on which the parent company can base its act of responsibility, argued Mares (2010). In his view, the Framework lets the responsibility evolve according to emerging social norms, soft laws and notions of non-legal complicity, which makes "the responsibility become questionable, its legitimacy debatable, and the due diligence less consequential in practice." Mares (2010), therefore, proposes a "more carefully grounded" responsibility that is applicable by the parent company.

Mares' arguments make sense. Triumph International in Switzerland, as a parent company, would definitely have leverage on its local affiliate to exercise human rights due diligence, and any of its decisions could contribute to direct or indirect impacts on the affiliate's harmful act toward workers. But it chose to remain passive, limiting its jurisdiction to the local judicial mechanism, where the Thai labour court ruled that Body Fashion deemed it unnecessary to consult with workers prior to dismissals. The local Triumph affiliate was placed in front to deal directly with workers, while the parent company pushed at the back and kept silent. Both took advantage of the local judicial institution that acted in favour of the companies. Triumph also made it understood that it had already met its responsibilities by delivering severance pay according to or above the legal provisions. But the workers faced harsher consequences after dismissals that no one paid attention to.

The SRSG Framework sets guidelines in a broader sense that these enterprises cannot show respect of human rights unless they make certain policy commitments and have processes of human rights due diligence and remediation in place. The Framework does not distinguish business enterprises, address the gaps between those entities, and define risks when a particular party fails to act on its responsibility. Furthermore, the Framework does not address the extent to which business enterprises should act on responsibility beyond the local legal mechanisms and jurisdiction.

4.3 State agencies' roles with CSR implementation at Triumph.

Triumph could not fail to comply with its Code of Conduct unless concerned state agencies acted, either intentionally or unintentionally, in favour of the company. This includes the labour court's ruling giving the company the green light to terminate Jitra's employment, declaring the CBA null and void, and non-enforceable, and the BoI's provision of an investment incentive scheme encouraging Body Fashion to relocate the production plant.

According to the SRSG's Framework, the first pillar is the state duty of protection against human rights abuses by business enterprises through requiring them to apply appropriate policies, regulation and adjudication. In principle, the state should enforce laws that directly or indirectly aim to regulate businesses to respect human rights. Furthermore, the state should "take additional steps to protect against human rights abuses by business enterprises that receive substantial support and services from state agencies." And the core of the guidance shows the state inevitably has a duty to play its part in corporate social responsibility, particularly in the context of the human rights regime. Failure to do so would allow business enterprises to be "complicit" as they benefit from an abuse committed by another party (UN Doc A/HRC 17/31: 4, 8, 9, 17).

Thailand is not a party to the ILO's Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No 87) and Convention on the Right to Organise and Collective Bargaining (No 98), which would oblige the Thai government to improve local laws to deeply and effectively protect workers' rights. But Thailand basically adheres to the UDHR's rights provisions that are, by convention, binding on all states. In particular, Thailand has been a party to the International Covenant on Economic, Social and Cultural Rights since 1999. To perform its duty under this international human rights instrument, state agencies are expected to ensure workers' rights to work as well as the right of trade unions to function freely and to strike provided they do so in accordance with relevant laws. At the national level, the 2007 Thai Constitution, Section 4, 26 and 27 require state authorities to enact and apply the laws in the protection of human dignity, rights, and liberties of people.

In reality however, the labour court in Samut Prakarn did not uphold and enforce the Thai Constitution and relevant laws, such as the Labour Protection Act and Labour Relations Act, which require Triumph to respect workers' fundamental rights and freedom. The labour court rather enforced the Criminal Code, Section 112 to supersede the Constitution and the labour laws, which subsequently had the adverse effect of stifling workers' freedom of expression and other rights. As for the BoI, it should have upheld the value of human rights and conducted human rights' due diligence by Triumph. But the BoI's public domains indicate no human rights-related policy and relevant conditions in place for business enterprises to obtain investment incentive support.

Two consequences emerged from the state failure to perform its duties. Firstly, Triumph was complicit in the absence of the acts that should have been performed by the labour court and the BoI. Secondly, violations of human rights by Triumph implicitly entail a violation of the Thai government's own obligations to international law. Triumph workers therefore became victims not only of business' failure to take responsibility with respect to human rights, but also of the state's failure to protect them against human rights violations by business. As a result, workers could not have greater access to effective remedy.

5. Conclusion and recommendations

Triumph International, both the Thailand affiliate and the parent company in Switzerland, failed to comply with its social responsibility policy effectively in the protection of labour rights. The violation, in which the union leader's job employment was terminated and subsequently affected union members, was aggravated by the political climate where the *Lèse Majesté Law* was tactically applied to dismiss workers. It should be well noted that the use of the *Lèse Majesté Law*, part of the Criminal Code, to override basic labour rights applied specifically to the Triumph context, and could not be extended generally to other cases. The Triumph case, however, risked setting a precedent for the labour court to arbitrarily stop applying labour laws and turn a labour dispute into a criminal case. As the case study revealed, the legal mechanism and regional complaint channel did not function in a way it should have done, thus failing to protect basic labour rights. This emphasised that the powers of employers and employees have never been equal, with corporates having complicated business and human rights agendas. Hence the company's CSR policy, particularly the rights to freedom of association, was far from actually implemented in Thailand.

The SRSF Framework was unable to address the politics and interests of parent-affiliate relations. The case study demonstrated the Framework's gap, particularly when an affiliate transgresses rights in the absence of the parent company's decision or when an affiliate receives consent from the core company in violation of rights. But in line with Framework's description is the complexity of business complicity in shirking responsibility when the state lapses from performing its duty. This indicates that the business responsibility to respect human rights and the state duty to promote and protect the rights of all people must go hand in hand in the context of corporate social responsibility.

All in all, should there be any room for improvement in labour relations in Thailand in future, the focus should be on local and regional levels. The Thai government may consider requiring state agencies that deal with businesses to incorporate respect for and implementation of human rights into a policy associated with assistance or service provided to businesses. The government should also review the Establishment of the Labour Court Act, B.E.2522 (1979), by allowing workers to appeal at a higher level on grounds of either the fact or legal provisions that can maximise the protection of their rights. At the regional level, the Association of Southeast Asian Nations (ASEAN) should

develop a public policy on Corporate Social Responsibility that ensures respect for human rights and accountability by both local businesses and multinational companies wherever they operate and cause human rights abuses or violations. The most important thing is a regional human rights protection mechanism should be established so that Thai and other ASEAN nationals can file grievances and seek justice against multinational companies and affiliates operating in the region that violate human rights.

References

- Adidas GROUP., 2010. *Performance Count: Sustainability Report 2010*. Available at: <http://www.adidas-group.com/en/SER2010/> (accessed on 15 March 2012).
- Article 112 Awareness Campaign, 2011. *Examples of those affected by the lese majeste law*. Available at: <http://article112.blogspot.com> (accessed on 12 March 2012).
- Body Fashion (Thailand). Public Relations News (Updated 29 June 2009) Available at: <http://www.thaipr.net/general/237290> (accessed on 16 April 2012).
- Clean Cloth Campaign, 2011. *Swiss OECD contact point fails to resolve labour dispute over Triumph's mass dismissals in Asia*. Available at: <http://www.cleanclothes.org/media-inquiries/press-releases/swiss-oecd-contact-point-fails-to-resolve-labour-dispute-over-triumphs-mass-dismissals-in-asia> (accessed on 16 April 2012).
- Department of Labour Protection and Welfare, 2011. Number of labour organization in the whole Kingdom. (Updated Dec 2011) Available at: http://relation.labour.go.th/attachments/article/272/number%20of%20labour%20organization%2012_2011.pdf (accessed on 3 March 2012).
- Department of Labour Protection and Welfare, 2010. Submission of Demands, and Conflicts and Walkouts. Available at: <http://portal.labour.go.th/labour/th/index.php/relation/2011-06-02-07-45-47> (accessed on 3 March 2012).
- Eammayura, C. ed., 2010. *The Diversity of Dimension of Lèse Majesté Law*. Bangkok: Faculty of Law, Thammasat University; Faculty of Law, Chiang Mai University; Office of Human Rights Study and Social Development, Mahidol University and Faculty of Political Science, Chulalongkorn University.
- Human Rights Council, 2011. *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises--Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 17th session, Agenda Item 3, UN Doc A/HRC 17/31 (21 March 2011). Available at: http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (accessed on 15 May 2012).
- International Labour Organization, 2011. *Freedom of Association and Development*. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_160208.pdf (accessed on 2 March 2012).
- International Labour Organization, 2008. *Freedom of association in practice: Lessons Learned*. Available at: http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_096122.pdf (accessed on 2 March 2012).

- International Labour Organization, n.d. *Freedom of association and the effective recognition of the right to collective bargaining*. Available at: <http://www.ilo.org/declaration/principles/freedomofassociation/lang--en/index.htm> (accessed on 2 March 2012).
- Lektic, 2010. *Court's verdict on Jitra Kotchadet's case*. Available at: http://www.youtube.com/watch?v=9fyC96XHDCI&feature=player_embedded (accessed on 12 March 2012).
- Manager Online, 2008. *A coincidence at NBT! A guest speaker wore a campaigning t-shirt "No standing-No Criminal."* Available at: <http://www.manager.co.th/Daily/ViewNews.aspx?NewsID=9510000049467>(accessed on 19 March 2012).
- Mares, R., 2010. *A Gap in the Corporate Responsibility to Respect Human Rights*. Monash University Law Review, vol. 36.3, pp. 33-83. Available at: <http://rwi.lu.se/wp-content/uploads/2012/08/A-Gap-in-the-Corporate-Responsibility.pdf> (accessed on 28 June 2012).
- Ministry of Labour, 2012. Minimum wage. Available at: http://www.mol.go.th/employee/interesting_information/4131 (accessed on 10 April 2012).
- Organization for Economic Cooperation and Development, n.d. *Guidelines for Multinational Enterprises*. Available at: <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (accessed on 20 April 2012).
- Prachatai, 2012. *Prosecutor drops case against couple not standing for royal anthem in cinema*. Available at: <http://www.prachatai.com/english/node/3299> (accessed on 25 July 2012).
- Prachatai, 2009. *Former Triumph workers celebrating New Year at Ministry of Labour*. Available at: <http://www.prachatai.com/english/node/1554> (accessed on 16 April 2012).
- Senate of Thailand, n.d. Constitution of the Kingdom of Thailand, 2550 (2007). Available at: <http://www.senate.go.th/index-of-parliament/Infoes/ThailandConstitution2007.pdf> (accessed on 15 May 2012).
- Social Security Office, 2012. Workplace Statistics. Available at: <http://www.sso.go.th/wpr/content.jsp?lang=th&cat=103&id=535> (accessed on 3 March 2012).
- Sourcewatch, n.d. Triumph International AG. Available at: http://www.sourcewatch.org/index.php?title=Triumph_International_AG#Corporate_Accountability (accessed on 10 March 2012).
- Thai Labour Solidarity Committee, 2008. Lesson learned of the Triumph International Labour Union. In: *Lessons of the Workers' Plight in Economic Crisis*. Bangkok: Asia Foundation.

- Thai News Agency, 2009. *Triumph workers dispersed from BoI Office*. Available at: <http://enews.mcot.net/view.php?id=10763> (accessed on 16 April 2012).
- Thanachaisethawut, B., 2009. Dismissals of Employees of Body Fashion (Thailand) Co., Ltd. In: *Taking the Pulse of Labour Movement*. Bangkok: Arom Pongpangan Foundation [not available to public].
- Triumph International, n.d. Asia. Available at: <http://www.triumph.com/global/#/48.html> (accessed on 5 March 2012).
- Triumph International, n.d. Job Offers National. Available at: <http://www.triumph.com/th/th/193.html> (accessed on 6 March 2012).
- Triumph International, n.d. *Social Responsibility and Code of Conduct*. (Published 12 Dec 2001) Available at: <http://www.triumph.com/hk/en/155.html> (accessed on 5 March 2012).



**EMBRACING RIGHTS:
WOMEN AND CHILDREN**

JUVENILE JUSTICE IN MALAYSIA

Tess van der Rijt & Joti Kohli for Voice of the Children

Malaysia has seen a considerable rise in children's encounters with the law, as offenders, witnesses or victims of crime. Handling children in the daunting route of legal procedures and processes with utmost sensitivity is paramount to their well-being, as well as ensuring a greater chance of their rehabilitation, restitution or recovery.

The aim of this paper is to provide a broad overview of the Juvenile Justice System in Malaysia and touch upon some issues within it. Bearing International Law in mind, the analysis will focus on how Malaysia is faring with these standards to then proceed and explore areas of the Malaysian law and court procedures that are commendable and those that need further strengthening. The Malaysia Child Act 2001 clearly states that any order made must be in the best interest of the child,¹ yet fails to provide adequate guidance with respect to the principles or criteria upon which best interest determinations are to be made. Using various international instruments as a guideline, the principles of detention as a last resort and prevention of secondary abuse and their application in the Malaysian Juvenile Justice System with the best interest of the child will be examined.

1 Child Act 2001, Act 611, Available at: <http://www.agc.gov.my/Akta/Vol.%2013/Act%20611.pdf> (accessed on 30 August 2013).

1. Introduction

The origins of the Malaysian Juvenile Justice can be traced back to colonial Malaya with the passing of the Juvenile Courts Act in 1947. The Japanese occupation of Malaysia, 1942-1945, and the social upheaval due to the Second World War resulting in the “breakup of homes, school closures and removal of parental control,” necessitated the establishment of a separate court for juvenile crime.² The 1947 Children and Young Persons Act was enacted to protect and prevent child abuse and neglect. Later in the 1950s, the Juvenile Court Ordinance 1950, the Adoption Ordinance 1952 and the 1953 Registration of Adoption further safeguarded the rights and status of children.”³

The Malaysian legal system followed its colonial legacy until much of the last century and the above-mentioned legislation from the colonial era dictated the handling of children in conflict with the law. After signing the United Nations Convention on the Rights of the Child (CRC) in 1995, Malaysia introduced the Child Act in 2001, repealing and incorporating the Juvenile Court Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991 into one statute. The Child Act 2001⁴ included the four main principles of the CRC: non-discrimination, the best interest of the child, the right to life, survival, and development and participation.

The Child Act 2001 (Act 611) provided holistic approaches on matters related to the child and while it remains a strong statute, many sections need further strengthening. The current enormous gap between the law and implementation on the ground has to be addressed to prevent the suffering of children due to unnecessarily long detention periods, which deprives them of their liberty, parental care and love, and exposes them to the risk of secondary abuse. These matters, if left unchecked, will result in the violation of children’s rights, intentionally or unintentionally, by the same instruments that are meant to protect children from abuse and harm.

It is well-established that in all actions concerning children—whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—of paramount importance is the best interest of the child. The Child Act 2001 (Act 611) also states that any order made must be based on the best interest of the child. However, it provides limited guidance with respect to the principle and criteria upon which best interest determinations are to be made.

The Child Act 2001 (Act 611) does not stipulate the principle of institutionalization to be a last resort, so most often what happens is that child protectors and magistrates recommend institutionalization as a first resort. To finalize such decisions children can also be held on remand for long periods of time, because The Child Act 2001 (Act 611) does not clearly stipulate the period of remand. Moreover, it does not stipulate diversion and restorative

2 Dusuki 2011, p.303.

3 Teh Guan Bee 2000, p. 1.

4 See n.1.

justice, and is grounded in formal police and court-based interventions and institution-based rehabilitation. This heavy focus on institutionalization leaves children feeling rejected by their families and results in complicating efforts made for family reunification.

One positive initiative in the juvenile justice system in Malaysia has been the establishment of D-11⁵ to curb the possibility of secondary abuse of child victims and witnesses.⁶ What follows below is a consideration of the best interest of the child as stipulated in the Child Act 2001 and the CRC, and its application in the Malaysian Juvenile Justice System with regards to detention as a last resort and the prevention of secondary abuse.

2. Principle of Detention as a Last Resort

The CRC states that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.⁷ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”) emphasize that deprivation of liberty shall be imposed only after careful consideration of all other options, and must be used only in cases where the child has committed a serious act involving violence against another person, or if the child persists in committing other serious offences and there is no other appropriate response.⁸

It is needless to reiterate that “deprivation of liberty” does not just apply to the placement of children in prisons. It has a broad definition under international standards and includes all orders placing a child in any facility that s/he may not leave at will.⁹ Therefore the principle of “detention as last resort”¹⁰ refers to all forms of institutionalisation. The underlying reason for the international community’s emphasis on reducing the use of deprivation of liberty as punishment lies in the fact that, despite the best intentions of authorities, removing children from their community and confining them in rehabilitation establishments has proven to be singularly ineffective in reducing...[recidivism], and in fact may increase the chances of a child...[re-offending].¹¹ Thus, legal professionals have to be mindful of the fact that placing children in educational or rehabilitative institutions such as, approved schools, hostels and Henry Gurney,¹² deprives children of their liberty and should also be considered as a measure of last resort for only those children who commit serious crimes.

5 This is the Sexual and Child Abuse Division of the Criminal Investigation Division of the Malaysian Royal Police, established to work with women and child victims of assault and abuse.

6 Interview with Superintendent Ong Chin Lan, March 21, 2012.

7 CRC, Art. 37(b).

8 The Beijing Rules 1985.

9 The UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (The JDLs).

10 This principle is highlighted in Article 37(b) of the CRC.

11 *Ibid.* p. 61.

12 Henry Gurney schools were established in 1949 in Malaysia to cater for juvenile criminals, with a rehabilitative focus, thus the name school and not prison. It is named after Sir Henry Lovell Goldsworthy Gurney because the first school in Malacca was opened by him.

Malaysia has a commendable legal and policy framework for a successful child protection system, yet there are some limits to its implementation. Furthermore, gaps in the laws persist. For example, there is no statutory expression of the principle of institutionalization as a last resort. The Child Act 2001 makes provisions for out-of-home care for both children in conflict with the law and children needing protection through the law. The Act outlines five types of out-of-home care for children in need of protection and/or rehabilitation:

1. Placement in the custody of a “fit and proper person”: applicable to children in need of protection and child victims of exploitation through prostitution;¹³
2. Foster care: applicable only to children who have been abandoned or whose parents cannot be located;¹⁴
3. Adoption: applicable to children who have been subject to a foster care order and whose parent or guardian have not claimed the child or made an appearance before the order expires;¹⁵
4. Placement in a place of safety: for children in need of care and protection;¹⁶ and
5. Detention in a place of refuge: for children who have been trafficked or exploited through prostitution.¹⁷

The Child Act also makes provisions for out-of-home care for children who have committed an offence, including probation hostels (chapter 3), approved schools (chapter 4) and Henry Gurney (chapter 5). Although not formally referred to as prisons, they are nonetheless institutions where children should only be sent to as a last resort. Since police officers, probation and welfare officers, parents, lawyers and magistrates all have a role to play in determining whether or not a child is institutionalized, there are certain areas of interest and practice outlined below that ultimately determine whether or not a child is institutionalised.

3. Remand

Remand concerns children in conflict with the law. Criminal proceedings take place in three stages: pre-trial, trial and post-trial. Within the pre-trial stage, children suspected of a criminal offence can be arrested and detained immediately under the custody of the police. Of all phases of the juvenile justice process, it is upon arrest and immediately thereafter while in police custody that an accused juvenile is most likely to become a victim of torture and other forms of cruel treatment.¹⁸

13 The Child Act 2001, Part XI.

14 *Ibid.* s. 30.

15 *Ibid.* s. 30.

16 *Ibid.* s. 54.

17 *Ibid.* s. 39.

18 Dusuki 2009, p. 148.

The Child Act 2001 stipulates that a child arrested must be brought before a Court for Children (or a Magistrate) within 24 hours and the Court must release the child upon bail.¹⁹ Exceptions to this are for children charged with a “grave offence,”²⁰ (or if the release of the child would “defeat the ends of justice”) who will generally be prohibited from bail. Bail refers to a bond executed by the child’s parents or relative (with or without requiring a cash deposit). In most cases, a cash deposit must be given to the Court, but the amount of the bond varies depending on the seriousness of the crime and the adult’s ability to pay. Although in general the law favours bail for less serious crimes, in practice, children embroiled in criminal proceedings often remain within the custody of the institution. This is generally because parents or relatives do not meet the requirements of bail or are unable to attend bail hearings.²¹ An overwhelming majority of children in conflict with the law being from poor families, the parent/guardian cannot afford bail. This means that in effect, whether a child is released or not is largely dependent on his/her parents, rather than what is in the best interest of the child, or the requirements of the justice system. This is a classic example of a provision being of no use for the very people it is trying to protect, i.e., the underprivileged. Both the Royal Commission Report and SUHAKAM have highlighted shortcomings in bail proceedings including: police requesting remand in cases where it is not necessary; bail hearings being heard in chambers without the accused present; the tendency of Magistrates to grant remand orders as a matter of course; and the lack of legal representation during remand procedures.²²

The other reason children remain in custody is due to police officers requesting remand of the child pending trial. As the maximum period of remand is not stipulated in the Child Act, the Court of Appeal decided in *Public Prosecutor v N (A Child)*²³ that section 117 on remand under the Criminal Procedure Code is applicable. The Criminal Procedure Code stipulates that the period of remand is up to 15 days, however, according to academician and child specialist Dr. Farah Nini Dusuki, the situation has improved and generally for less grave offences, the period of remand is limited to 7 days.²⁴

Even though the period of remand is limited by law, there are reports of children being held on remand for lengthy periods of time. Another serious problem with the long period of remand is that children are often times subjected to torture and abuse. “Although fortunately we have not heard of (at least officially) extreme torturous incidents taking place within police custody in Malaysia, there exist some concerns in respect to treatment of children during these stages.”²⁵

19 The Child Act 2001, s. 84.

20 *Ibid.* s. 83(3).

21 Jabatan Polis Diraja Malaysia 2005 & SUHAKAM 2005.

22 Jabatan Polis Diraja Malaysia 2005.

23 2004 2 MLJ 299.

24 Interview with Dusuki 2012.

25 Dusuki 2009, p. 148.

“For instance, Malaysian Human Rights Commission or SUHAKAM noted that they had received complaints of a 14 year old boy who was allegedly beaten in police custody, detained with adult detainees and his parents were not informed of the date of hearing; a 17 year old boy who was allegedly remanded for 60 days with no family visitations allowed and without being informed of grounds of arrest despite repeated requests and also been denied legal representation. It is to be noted that the right for children to be treated with dignity, the right to life, the right to be presumed innocent, prohibition of torture and ill-treatment of children, the avoidance of the use of harsh language and physical violence should be respected at all times.”²⁶

The JDLs reinforce that children detained under arrest or awaiting trial are presumed innocent and must be treated as such.²⁷ In its Concluding Observations, paragraph 103, the UN Committee on the Rights of the Child expressed concern regarding the long pre-trial detention period and delays in dealing with cases involving children in Malaysia and recommends that the State Party takes efficient legislative and administrative measures to abolish the delays in disposal of cases involving children.

4. Sentencing and Proportionality

The CRC requires State Parties to ensure that all children in conflict with the law are dealt with in a manner that is appropriate to their well-being and proportionate both to their circumstances and to the offence.²⁸ As such, the response to child offenders must be based on a full consideration of not just the gravity of the crime, but also of the child’s individual background and personal circumstances. The proportionality principle also means that measures imposed on children should not be more severe than the offence warrants.

Serious issues of proportionality exist in Malaysia when sentencing children. Child protectors and magistrates admit to erring on the side of caution when making their decisions, recommending institutionalization as the “first resort” rather than the “last resort.” Magistrates and other respondents raised concern about the frequency of sending children and young people into institutional care. It was explained that both Protectors and Magistrates – in the absence of risk assessment training and guidance – feel more reassured when a child is physically away from potential harm in the family.²⁹

26 See SUHAKAM, Report of the Forum on Malaysia’s reservations to the Convention on the Rights of the Child, 2008. p. 56, quoted in *ibid.*, p.149. This report is also available at: Available at: <http://www.suhakam.org.my>. (accessed on 10 June 2012).

27 The JDLs, art. 17.

28 CRC, art. 40(2).

29 UNICEF & Child Frontiers, January 2010, p. 78.

Children can be subjected to lengthy custodial orders for petty crimes, such as theft. Between 2003–2009, 52% of children convicted by the Court for Children³⁰ were convicted for theft,³¹ yet many of these children were sentenced for lengthy periods. Children have also been convicted for three years to Henry Gurney for not possessing their identification card.³² This shortcoming is further exacerbated when children with minor behavioural problems are detained together with child offenders. This is contrary to international best practices regarding criminal contamination, and may actually increase the chances that the child will go on to a life of crime. Fahri Azzat, representing a child who had been convicted of possessing drugs, asked the child how he obtained the drugs and discovered that he met his drug dealer while detained in Henry Gurney.³³

One of the main reasons the above issue persists is because many of these children are unrepresented due to a shortcoming in The Child Act 2001. Section 87 of The Act mentions informing the parents and probation officer once a child is arrested, but there is no mention of legal counsel. This occurs despite the fact that the Criminal Procedure Code Section 28A (2&3) does stipulate the right to legal counsel. It should be evident that if an adult has the right to legal counsel, so does the child. But this omission has meant that:

“In 2008, there were 84,376 Malaysians unrepresented in 108,528 criminal trials in magistrate’s courts, while 4, 726 juveniles were unrepresented in their criminal trials... [my emphasis]”³⁴

To address this issue, a new scheme, The National Legal Aid Foundation (NLAF), focused on criminal legal aid was introduced, whereby the Government pays for access to legal representation even at the pre-trial stage. Trained legal aid lawyers were to be stationed at police stations in order to interview and represent the accused. The Attorney General’s Department put this programme on hold³⁵ but then the NLAF was established in early 2012.³⁶ Unfortunately, this provision does not reach all children as it is for children whose parents or guardians are of a certain income bracket and is not applicable for those charged with the death penalty.³⁷

30 The Court for Children was established after the Child Act 2001 came to force, replacing the previous Juvenile Court. All cases involving minors are heard in this court. The hierarchy of courts in Malaysia begins from the Magistrates’ Court, where the Court for Children is also placed, followed by the Sessions Court, High Court, Court of Appeal and finally the Federal Court.

31 UNICEF & Child Frontiers, July 2012, p. 16.

32 Interview with Dr. Farah Nini Dusuki, March 13, 2012.

33 *Ibid.*

34 Sayagam, Andrew (2012, March 14), Revamped Legal Aid by End Month, The Malay Mail quoted in, Available at: http://www.malaysianbar.org.my/legal/general_news/revamped_legal_aid_by_month_end.html (accessed on 10 September 2012).

35 Interview with Mr. Fahri Azzat, March 12, 2012.

36 For more information see The Malaysian Bar Council (2012), “2012-2013 National Legal Aid Committee Interim Report,” Available at: http://www.malaysianbar.org.my/national_legal_aid/2012/2013_national_legal_aid_committee_interim_report.html (accessed on 10 August 2012).

37 For more information see The National Legal Aid Foundation Brochure, Available at: <http://www.ybgk.org.my/pdf/YBGK%20Risalah-English.pdf> (accessed on 10 August 2012).

The issue of proportionality is exemplified in the circumstance where children over 14 years of age commit serious offences, such as rape or murder. Adult terms of imprisonment are imposed, including life imprisonment and indefinite detention, without sufficient regard to the child's age, background and personal circumstances. The UN Committee on the CRC has been critical of countries that allow children to either be tried or sentenced as adults for serious offences, highlighting that special juvenile justice principles should apply equally to all children in conflict with the law regardless of the seriousness of their actions.³⁸ This is in recognition both of the child's limited culpability for his/her actions and greater rehabilitative potential. In recognition of these considerations, most countries now set a much lower maximum term of imprisonment for children, including those who commit the most heinous crimes such as murder.³⁹

In the Malaysian system, the problem is further exacerbated by lack of review of a sentence. If a child is found guilty or is institutionalized, the Child Act stipulates out-of-home care orders, which are for a defined period of time. There is no requirement for regular, periodic review of placements, or for measures that promote family reunification. Removal from parental custody is presented as a long-term care solution, rather than a temporary measure. Interim care options, such as temporary shelter or fostering, would provide an opportunity for welfare workers from a range of agencies to work to make the home environment safe, or to find alternative longer-term care solutions for the child.⁴⁰ Magistrates have also expressed a concern that they may make important decisions regarding the placement of a child into the care of another beside the parents, but these cases are rarely brought back to the court for review.⁴¹ It is apparent there are insufficient resources to monitor and review children's cases on a continuous basis.

5. Focus on the Child

The last resort principle means that any form of deprivation of liberty, including placement in a Sekolah Tunas Bakti (approved schools), probation hostel, Henry Gurney School, or juvenile rehabilitation centre should be used only in cases where the child has committed a serious crime involving violence or persists in committing other serious offences and there is no other appropriate alternative. Research conducted by Child Frontiers has shown that "last resort" was generally understood by stakeholders as permitting custodial sentences whenever a parent was unwilling or perceived as unable to provide an appropriate level of supervision over the child.⁴² Sentencing decisions seem to centre mainly on the capacity of parents, the child's physical living environment and the willingness of parents to sign a bond or take the child back, rather than the nature and seriousness of the offence or character of the child. As a result, a significant number of children are being subjected to

38 UNICEF & Child Frontiers, July 2010, p. 75.

39 *Ibid.* p. 75.

40 UNICEF & Child Frontiers, January 2010, p. 61.

41 *Ibid.* p. 80.

42 UNICEF & Child Frontier, July 2010, p. 75.

deprivation of liberty for minor, non-violent crimes. Statistics from the Department of Social Welfare [Jabatan Kebajikan Masyarakat 2012] show that the majority of children in its custodial facilities have committed very minor crimes, the most common being theft. Furthermore, the magistrates predominantly obtain information about the child's family from the probation reports. Due to lack of resources and time, these probation reports often focus little on the child, their mental state and chance of reoffending, and more on the factual situation concerning the parents and the family's financial situation and living conditions.

As a result, it is not uncommon for magistrates to find themselves “forced” to sentence a child to an institution due to the fact that the child lacks any family support—financially or emotionally—and therefore they feel the child would be better supported in an institution. Parents often consider their child unruly and naughty and therefore “beyond control.” They believe the child should be detained for discipline, or they explain that they simply cannot afford to care for their child. For example, Fahri Azzat represented a 12 year old boy who had stolen a mobile phone.⁴³ Even though it was the boy's first offence, he was sentenced to three years at Henry Gurney, which Mr. Azzat appealed. Speaking to the boy's mother, Mr. Azzat found out that she has eleven children and does not have the money to support her son—she can neither control nor afford him. Therefore, she desired that her son be institutionalised. In the absence of parental supervision and support, the magistrate deemed it appropriate to decline the appeal, since the child would likely return to the same friends and possibly re-offend.

Parents or guardians of children can request the Court for Children to detain a child in an approved school, place of refuge, probation hostel or centre on the ground that the parent or guardian is unable to exercise proper control over the child.⁴⁴ In practice, this provision is generally used for status offences, such as running away, being disobedient or more frequently, for being a pregnant unmarried daughter. “Parents may request the court to take their daughters into care, although it has been reported that many parents use the court to threaten or punish the girls While Department of Social Welfare officers recognize that these girls are not in need of protection per se, the Protectors prefer to act with caution lest the parents do eventually banish the girl from the family home In Kuala Lumpur, the magistrate, on the advice of the Protectors, will usually refer the girl to the special home for pregnant teenagers.”⁴⁵ Thus we witness children being punished for no fault of their own but due to parental issues, in particular weak parental skills.

Asrama and *Sekolah Tunas Bakti* (approved schools) staff members who participated in a Child Frontiers survey stated that many children who have been detained due to being beyond control, “end up feeling rejected and unloved by their family and become even more rebellious, which can cause family reunification and reintegration to become even

43 Interview with Mr. Fahri Azzat, March 12, 2012.

44 The Child Act 2001, s. 46.

45 UNICEF & Child Frontiers, January 2010, p. 77.

more difficult.”⁴⁶ Some suggested that parents and children should be required to undergo one or two months of counseling before considering sending the child to an institution, or that the parents should be required to visit the facility first, to dispel misperceptions that it is like a boarding school. The UN Committee on the Rights of the Child in paragraph 51 has emphasized that children should not be sanctioned for behaviour that would not be considered criminal if committed by an adult. While technically children who are “beyond control” are not considered “offenders,” they are nonetheless subject to the same conditions of detention as child offenders, which they themselves perceive as punishment. Dr. Farah Nini Dusuki argues that the concept of children being “beyond control” is outdated and should be abolished.⁴⁷

6. Diversion and Restorative Justice

The most effective way to avoid the issues surrounding children in the legal system is to not have them in the system in the first place. The CRC stipulates that State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.⁴⁸ In order to achieve this, the Beijing Rules outline that police, prosecutors or other agencies dealing with children’s cases must be empowered to dispose of cases at their discretion without initiating formal proceedings, in accordance with the criteria laid down for that purpose.⁴⁹

“There are two main justifications for taking this different approach to sentencing children in conflict with the law. Firstly, children lack the maturity and judgment of adults and have diminished guilt or responsibility for their actions. Secondly, as they are still young and developing their personalities, children tend to have greater rehabilitative potential than adults and can be more easily influenced to change their behaviour Rigorous evaluations undertaken in the US, UK, Canada, and New Zealand have shown that institution-based reform models are less effective than community-based programmes and that the percentage of children who go on to commit further violations after their release from reform schools is consistently higher.”⁵⁰

The amendments to the Child Act in 2001 did not include new international global strategies, such as diversion and restorative justice. As such, the State’s fundamental approach to children in conflict with the law has remained fundamentally the same since the law was first introduced in 1947. “Malaysia’s approach to juvenile justice is grounded in formal police and Court-based interventions and institution-based rehabilitation. However, this approach has been demonstrated to be the most costly and least effective way of

46 UNICEF & Child Frontiers, July 2010, p. 24.

47 Interview with Dr. Farah Nini Dusuki, March 13, 2012.

48 CRC, s. 40 (3)(b).

49 Beijing Rules, Rule 11.2.

50 UNICEF & Child Frontiers, July 2010, pp. 61-62.

dealing with child offending.⁵¹ Furthermore, although there is no proof as such, anecdotal evidence suggests that some children are forced by police officers to confess, which, is all the more reason to push for restorative justice so children do not have to deal with the police or court system.⁵²

The Child Act currently does not include any specific provisions with respect to pre-trial diversion of children. However, pursuant to the Federal Constitution, the Attorney General's office has the power, exercisable at his/her discretion, to institute or discontinue criminal proceedings,⁵³ which could be used as the basis for diversion. Malaysia does not currently have any formal diversion programmes or processes for resolving minor offences through mediation or some other restorative approaches. However, the Ministry of Women, Family and Community Development is currently conducting consultations and negotiations regarding a possible restorative justice system in Malaysia.⁵⁴ Furthermore, it is reported that the police exercise some discretion for minor crimes such as traffic violations, minor shoplifting and fights between children.⁵⁵ Although some of these crimes are mediated by the police, rather than formally going through the court system, in the majority of cases the police conduct a full investigation and submit investigation papers to Deputy Public Prosecutor for a determination of whether the charges are appropriate.

Many countries offer alternatives to the formal court system. This includes a restorative justice process, which involves a mediated settlement between the child, his/her family members and the victim. Otherwise, courts, police or prosecutors can refer children to a diversion programme, such as completing a specific number of hours in community service rehabilitation or vocation training, counselling, or participation in programmes such as conflict resolution, anger management, peer influence resistance and drug and alcohol resistance. Some programmes require the participation of the child's parents also. If the programme is completed successfully, the charges are withdrawn.⁵⁶ In this sense, restoration and rehabilitation can be achieved, while avoiding the court system. In the 2007 UN Committee on the Rights of the Child's Concluding Observations paragraph 103(b), it was recommended that Malaysia develop and implement a comprehensive system of alternative measures to deprivation of liberty, such as probation, community service orders and suspended sentences, in order to ensure that deprivation of liberty is used only as a measure of last resort. The recommendation has yet to be implemented.

51 *Ibid.* p. 110.

52 Interview with Dr. Farah Nini Dusuki, March 13, 2012.

53 Federal Constitution Malaysia, s. 145(3).

54 Interview with Dr. Farah Nini Dusuki, March 13, 2012.

55 UNICEF & Child Frontiers, July 2010, p. 45.

56 United Nations Office of Drugs and Crime (UNODC), 2006. *Handbook on Restorative Justice Programmes*. Available at: http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf (accessed on 10 August 2012).

7. Preventing Secondary Abuse

Secondary abuse occurs when the victim, having suffered from abuse or neglect, is further victimized while liaising with authorities, be it the police, courts or other institutions. The CRC highlights that all measures have to be in place to ensure the child is not further abused within the system and in Article 39 outlines that all

“State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment that fosters the health, self-respect and dignity of the child.”

Social workers and other functionaries play a very important role in the lives of child victims and witnesses of abuse, particularly child sexual abuse. The success of rehabilitation of these victims is dependent on the degree of sensitivity and level of understanding with which the social workers deal with them.

The D-11 at the Malaysian Royal Police was established to work with women and child victims of assault and abuse. It is an example of a positive initiative in Malaysia working to ensure that child victims are not further abused and that children have the best possibility of recovery and restitution. D-11 was established 15 May 2007; however D-9(b)⁵⁷ had been carrying out a similar role since 1986, albeit with narrower functions.⁵⁸ “The division operates under MS ISO⁵⁹ standards and is formally audited and monitored annually to ensure compliance with international obligations. There are 33 D-11 officers in Bukit Aman (all of whom are females except two) and there are 700 D-11 officers nationwide. The main functions of the police officers are to: rescue victims and support them to access a place of safety; investigate all reported cases of child abuse and neglect; and take statements and prepare evidence for the Deputy Public Prosecutor (DPP).⁶⁰ At headquarters level, the division is divided into three specialized units:

1. Children’s Unit
2. Domestic Violence Unit
3. Sexual Crimes Unit⁶¹

57 The unit that handles cases on abused women, i.e., domestic violence, rape, etc.

58 Interview with Superintendent Ong Chin Lan, March 21, 2012.

59 MS ISO or Malaysian Standards are developed by Standards Development Committees (SDCs) within the Malaysian Standards Development System and approved in accordance with the Standards of Malaysia Act 1996 (Act 549). The ISO/IEC Guide 59 – Code of good practice for standardization and Annex 3 to the WTO/TBT Agreement act as guiding principles in the development of Malaysian Standards.

60 UNICEF & Child Frontier January 2010, pp. 38-39.

61 *Ibid.* p. 38.

The Child's Unit deals with abandoned babies, abuse (physical, sexual and psychological), trafficked babies and missing children. Every police officer working at D-11 completes two weeks of in-service training, which is conducted 2-3 times per year.⁶² At these trainings, officers are taught the core elements of abuse and sexual violence and recognizing the symptoms of each. Various sectors of society and organizations are involved in the training, including the Attorney General's Chambers, academicians, and representatives from non-governmental organizations.⁶³

Victims are able to approach D-11's Victim Care Centres (VCC) directly. There is at least one VCC in each of the 14 states in Malaysia. The VCCs have a very home-environment feel, with comfortable couches and flowers on display. There is a playroom with soft toys and books to make the children feel comfortable and at ease, a private enclosed interview room, and a room with a bed for those who need to rest if they have travelled far. All of these features aim to reduce the fear in victims and prevent secondary abuse by making them feel comfortable and relaxed.⁶⁴

An ex-Training and Education Manager at Protect and Save the Children, a Malaysian NGO that works against child sexual abuse, recalled that only 3 VCCs were in operation during her time from 2007-2011. She had dealt with children who had come from other states to be interviewed at the VCC in Kuala Lumpur. Ms. Wong was pleased to know that now there are 14 VCCs. She added,

“Although the idea and intention behind VCC is commendable, the implementation of these ideas and practice needs considerable attention. The VCC is used to make the child feel better but it doesn't necessarily manage to reduce his/her fear. The manner in which staff talk to the child is very important. The aim is to get a disclosure from the child in the child's own time rather than rushing him/her to talk. Very often the child is not prepared for the court as well. It is not uncommon to find the abuser in the same space as the child. Confidentiality, a very important factor, is also not respected. Overall the general attitude is that of pity to the children and often the tendency to dictate or dominate them so as to get a swift disclosure.”⁶⁵

This clearly shows there are some weaknesses in implementation, which can easily be overcome with better training in child-friendly principles and monitoring and evaluation measures. But overall D-11 being victim-focused, officers ensure that a victim is not interrogated for the purposes of the investigations and giving evidence and then suddenly left alone, and that the victim is supported legally, medically and emotionally.⁶⁶ If the victim is required as a witness in a trial, a D-11 social welfare officer will become their witness supporter. They will be taken to court before the date so that they are aware

62 Interview with Superintendent Ong Chin Lan, March 21, 2012.

63 *Ibid.*

64 *Ibid.*

65 Interview with Ms. Wong Lai Cheng, July 14, 2012.

66 Interview with Superintendent Ong Chin Lan, March 21, 2012.

of the court environment and are as comfortable as possible in an otherwise daunting situation. D-11 officers contend that this not only results in a more confident witness, but they also give better quality evidence.⁶⁷ D-11 officers explain that the greatest issue with the process is that in order to make a decision about the case, the DPP requires medical reports of the victim. These medical reports can take months for the hospital to produce.⁶⁸ As perpetrators can only be detained for fourteen days, they are often released and subsequently sometimes disappear. This is a particularly distressing situation for the victim.

Ms. Wong pointed out that not only delays in the issuance of the medical reports occur but also the overall case is a cause for concern. It is not uncommon to find a case commencing when the child is 9, only to be completed by the time the child is 12 or 13. This delay results in a lot being lost or forgotten and the chances of conviction are considerably reduced. She further added that,

“The victims of abuse are sent to the Hospital KL, a government hospital. The SCAN Team (Suspected Child Abuse and Neglect Team) then works on getting the medical report for the child. An area of strength of the SCAN Team is that they run parents support groups. These groups are very helpful for the parents since they have the opportunity to meet other parents in the same situation. Though attempt is made to have these sessions on a monthly basis, they are not very regular and they need to be run by expert staff. This is a very good programme that can be further strengthened with the injection of resources and more expert personnel.”⁶⁹

Besides the VCC, D-11 also has Child Interview Centres (CIC), where children’s evidence-in-chief is pre-recorded. There are six interview centres in Malaysia: Bukit Aman (Kuala Lumpur), Penang, Johor, Melaka, Terengganu and Kelantan. The first centre in Kuala Lumpur was initiated by the British High Commission, which included not only providing the recording machines and funds for the building, but also technical expertise. The Kuala Lumpur centre performs two to three interviews a day, four days a week. The fifth day of the week is reserved for interview transcript writing. Any officer working at the centre completes a Violence Investigation Course, which is organized by D-11 and includes speakers from Protect and Save the Children, Tenaganita, UNICEF and SUHAKAM.⁷⁰ International experts are also invited, who teach the officers specific interview techniques for children.

CIC officers explained that it can be very difficult to interview child witnesses, as some are as young as four years old. Therefore when the child is brought to the CIC, they initially spend time playing with the child in a large and open playroom. The room is painted in bright colours and is filled with natural light and numerous toys. The interviewer spends

67 *Ibid.*

68 *Ibid.*

69 Interview with Ms. Wong Lai Cheng, July 14, 2012.

70 Interview with Superintendent Ong Chin Lan, March 21, 2012.

time conducting ‘play therapy’ with the child in order to build rapport with him/her and try to make him/her feel relaxed in the foreign environment. Once the child is comfortable the same officer takes the child to the technical room for establishing the facts of the case with the child. The room is set up with hidden microphones and cameras, which are controlled by another officer in a separate room. As such the recording can be adjusted and monitored without a third stranger being present in the room. The officer explains to the child the various ways the child can describe the facts: they can talk, they can draw what happened, or they can choose to use anatomical dolls. There is an adult male, adult female, male child and female child doll available, all of which are anatomically correct, which the child can use to demonstrate what occurred. After the interview recording, the child is referred to a psychiatrist. Through the establishment of D-11, a specialized police unit, and comprehensive hospital-based services (OSCC – One Stop Crisis Centre and SCAN teams), child victims of the most serious forms of violence, sexual abuse, and trafficking now have access to medical care, psycho-social support, legal advice, and child-sensitive investigative procedures.⁷¹

The specialized police units and the OSCC and SCAN teams are a positive and commendable development in the Malaysian Juvenile Justice System. The operation of these establishments remains weak or non-existent in smaller cities and towns. Given their success in Kuala Lumpur government should make a concerted effort to see that these services are available to child victims and witnesses throughout Malaysia.

8. Conclusion

Children who become involved in crime do not and should not lose their right to be treated as children.⁷² Children who are victims of a crime should be treated with the utmost care in order to ensure they are not further victimized within the legal system. Although Malaysia has a laudable legal and policy framework with fair practices, there are some areas of the law where a review or reform is required. In particular, implementation of the law together with strong monitoring and evaluation measures need serious attention. This paper applied the international principles of detention as a last resort and the prevention of secondary abuse to the Malaysian context. By strengthening the current legislation and bringing it up to par with International Law, the Malaysian Juvenile Justice System can be based on a solid legal foundation. To ensure proper implementation, proper training of the police, legal professionals and social workers would carry the principles of child justice to the ground. Finally, more awareness amongst all the legal institutions and the community at large on the causes of the increase in child crime and the need for restorative justice will modernize the Malaysian Juvenile Justice System to the standards of a progressive nation in the 21st century.

71 UNICEF & Child Frontiers January 2010, p. 88.

72 Dusuki 2009, p. 141.

References

- Bee, Teh Guan, 2000. Institutional Treatment and Management of Organizations for Juvenile Offenders in Malaysia UNAFEI Resource Material Series no. 59. Available at: http://www.unafei.or.jp/english/pdf/RS_No59/No59_20PA_Bee.pdf, (accessed on 10 June 2012).
- Dusuki, F. N., 2009. 'The UN Convention on the Rights of the Child and The Administration of Juvenile Justice: An Examination of the Legal Framework in Malaysia.' *Asia Law Quarterly: Human Rights Laws of Asian Countries*. Vol. 1, No 1 April, Korea Legislation Research Institute.
- Dusuki, F. N., 2011. "Criminal Law and the Rights of the Children in Malaysia," in Nisrine Adiad & Farkhanda Zia Mansoor (eds.), *Criminal Law and the Rights of the Child in Muslim States: A Comparative Analysis*, London, British Institute for International and Comparative Law.
- The Human Rights Commission of Malaysia (SUHAKAM), 2005. *Report Forum on the Right to a Fair and Expeditions Trial*, 7-8 April. Available at: http://www.suhakam.org.my/c/document_library/get_file?p_l_id=30217&folderId=26478&name=D LFE-650.pdf (accessed on 4 March 2012).
- UNICEF & Child Frontiers, January 2010. *Child Protection System in Malaysia: An Analysis of the System for Prevention and Response to Abuse, Violence & Exploitation against Children*, Kuala Lumpur. (to be published in Autumn 2013).
- UNICEF & Child Frontiers, July 2010. *The Malaysian Juvenile Justice System: A Study of Mechanisms for Handling Children in Conflict with the Law*, Kuala Lumpur. (to be published in Autumn 2013).

Interviews

- Interview with Mr. Fahri Azzat, Solicitor and Legal Aid lawyer, 12 March 2012.
- Interview with Dr. Farah Nini Dusuki, Senior Lecturer, Faculty of Law, University of Malaya, 13 March 2012.
- Interview with Superintendent Ong Chin Lan, Royal Malaysian Police, 21 March 2012.
- Interview with Ms. Wong Lai Cheng, ex-Training and Education Manager at Protect and Save The Children, 14 July 2012.

International instruments

Committee on the Rights of the Child forty-fourth session, Consideration of Reports Submitted by State Parties Under Article 44 of the Convention: Concluding Observations: Malaysia, CRC/C/MYS/CO/1, 2 February 2007.

Convention on the Rights of the Child, opened for signature 20 November 1989, (entered into force 2 September 1990).

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The JDLs), Adopted by General Assembly resolution 45/133 of 14 December 1990.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), Adopted by General Assembly resolution 40/33 of 29 November 1985.

Malaysian laws, regulations and cases.

Child Act 2001, Act 611, 15 February 2001. *Preamble, Part XI, s. 30, s. 39, s. 46, s. 54, s. 83(3), s. 84.*

Criminal Procedure Code 2006, Act 593. *s. 352.*

Federal Constitution Malaysia, 1963. *s. 145(3).*

Public Prosecutor v N (A Child) [2004] 2 MLJ 299.

Government Documents

Jabatan Kebajikan Masyarakat (Department of Social Welfare) 2011, Available at: http://www.jkm.gov.my/index.php?option=com_jdownloads&Itemid=314&task=viewcategory&catid=41&lang=ms (accessed on 20 January 2012).

Jabatan Polis Diraja Malaysia, Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police, 2005.

NEGOTIATING AGENCY, EXCLUSION AND POWER: RURAL-URBAN MIGRANT WOMEN IN PHNOM PENH'S INFORMAL SETTLEMENTS

Kristy Ward

Dominant neoclassical migration theory makes various assumptions about women's roles in the household and community and in doing so suggests linear and one-dimensional migration processes and outcomes for women which provide no allowances for context, or the diversity of women's lives. The argument that migration significantly benefits women who move from rural villages to urban city centres may be correct in certain cases, however for those who migrate to informal urban settlements this is often not the case. This paper discusses the lives of migrant women in Phnom Penh's informal settlements to explore how poverty, migration and gender intersect to shape social exclusion and power relations for women. Based on in-depth interviews and focus group discussions with rural-urban migrant women this paper identifies that whilst mobility has the opportunity to increase choice and economic security for women, the denial of various human rights as experienced by women in informal settlements often mitigates these benefits. This paper also discusses the dynamic nature of both the causes and consequences of migration for women in heterogeneous urban populations along with the need to consider how intra-urban inequities and gender can significantly impact migration outcomes for women.

1. Introduction

It is often claimed that migration empowers women by offering new opportunities in labour markets, thereby increasing personal financial contributions to the household and thus improving women's individual and collective bargaining power. Patriarchal values are also thought to be broken down in the city as people develop new ways of thinking and living (Ghosh 2009; Skeldon 1999). This paper aims to explore these generalised claims for rural-urban migrant women in Phnom Penh's informal settlements to determine whether there are specific aspects of both the processes and outcomes of migration which are either beneficial or detrimental to women in the context of social exclusion, marginalisation and human rights violations including the right to an adequate standard of living (including the right to adequate housing and water), the right to life, liberty and personal safety, the right not to be subjected to cruel, inhumane or degrading treatment or punishment, the right to fair and decent work, the right to health, and the right to non-discrimination on the basis of gender (Universal Declaration of Human Rights 1948; International Covenant on Economic, Social and Cultural Rights 1966; Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment 1984; UN Committee on the Elimination of Discrimination Against Women 1992). In doing so this paper also highlights the dynamic nature of both the causes and consequences of migration for women in heterogeneous urban populations, and the need to consider how intra-urban inequities and gender can significantly impact migration outcomes for women.

Migration is a dynamic and complex phenomenon which impacts women and men in different ways. Dominant neoclassical migration theory makes various assumptions about women's roles in the household and community and in doing so suggests linear and one-dimensional migration processes and outcomes for women (Ghosh 2009; de Haas 2007; Skeldon 2009). These assumptions provide no allowances for context or the diversity of women's lives, therefore leading to positive perspectives of migration which fail to enquire whether such approaches reflect the experience of women across a range of ages, classes and locations.

Migration has been considered extensively in the literature. Historically the phenomenon has been portrayed in both positive and negative contexts with these trends mirroring societal values of modern (city) and traditional (rural) at given points in time (Wratten 1995; Jarvis et al 2009; Erman 1998). As with the outcomes of migration, the process and its drivers have also been contested and are linked with ideologies of neoclassicism and structuralism. Grounded in economic theory, and closely resembling the push-pull framework¹, migration is considered a linear process for neo-classicists with workers moving from areas with low wages and a surplus of labour to destinations offering higher wages and a broader range of income earning opportunities (de Haas 2007). Within

1 The often-cited 'push' and 'pull' factors of migration in the Global South include rural poverty, increased waged labour opportunities in cities as a result of globalization and demographic growth (Portes 2008).

this process migrants are considered to act as individual and rational decision makers in assessing the economic costs and benefits of mobility. They are presumed to have complete information on migration options at their disposal and move to locations where they are able to attract the highest wages, and where there is a high probability of employment (International Organisation for Migration 2010; Chappel et al 2010). The primary critique of the economic rationality theory is its failure to account for structural inequalities, including inequitable resource distribution, which are fundamental to understanding the migration process given that 'migration does not take place in a social, cultural, political and institutional void' (de Haas 2007, pp.6-7). In her study of young Cambodian women who migrate to the city in search of modernity, independence and autonomy, Derks (2008) challenges neoclassical migration theory by arguing that a series of individual decisions do not adequately explain the complexity of the migration process, or the direction of migration flows.

To counter the economic rationality approach feminist and Marxist theories suggest that individuals are constrained by structural forces which result in the unequal distribution of power and resources. As such, individual migration decisions must be analysed in the context of global capitalism, proliferation of the manufacturing sector (largely in the Global South to benefit the Global North), the loss of traditional livelihoods as a result of uneven development, environmental degradation and land grabbing (de Haas 2007). Mediating between the neoclassic and structuralist approaches to migration is the household strategy theory which, as the name suggests, positions the household, or family, as the key unit of analysis. Developed primarily by Stark (1978) it is suggested that families share risks and develop strategies in response to external livelihood risks which in turn determines which household members will migrate. Remittances are argued to be the key motivator for migration in this context, which is a primary distinction from neoclassical migration theory.

Authors such as Chant (1991; 1998) have brought a gender perspective to migration theory by arguing that migration occurs not only as a result of labour opportunities (productive tasks), but also to ensure that housing and welfare needs of the family are met (reproductive tasks). Chant also suggests that the neoclassical perspective of migration views women as independent in terms of their mobility without adequate consideration of the gendered division of labour and intra-household decision making structures. Importantly, household organisation is central to the negotiation of resources and decisions as to who migrates, and when. Unlike other migration theories, the household strategy theory is able to account for human agency in the migration process. As such the rural poor are not 'passive victims' of global macro-economic forces, but are continuously seeking to improve their living conditions, albeit within structural constraints, and therefore migration is a conscious decision made as part of a broader household strategy to improve livelihoods (de Haas 2007). Despite its success in negotiating between neoclassical and Marxist migration theories, there are notable limitations. In particular, critics highlight that conflict, dissent and unequal power relations within the household are overlooked. The assumption that household resources are distributed equally amongst all members by a '*benevolent dictator*'

(Argarwal 1997), and that each household member participates equally in decision making, ignores the way in which women's voices are subordinated within the household, and how decision making power is used, usually by men, to determine who migrates where and when (Silvey 2004; Argarwal 1997). Hew (2003) proposes that household strategies instead mediate between the decision of an individual and the broader structural and economic forces at work; and in her study of female labour migration in Java Wolf (1992) explains that use of the term 'strategy' is misleading. Rather than a premeditated longer term plan, which the word 'strategy' implies, migration is better explained as a short term coping mechanism whereby individuals migrate in response to external shocks and vulnerabilities such as failed annual crops and emergency medical care.

2. Is migration beneficial for women?

Enmeshed in the ideological debate on migration is the question of whether the phenomenon results in positive or negative outcomes for migrants and their families, and in particular women, in both origin and destination locations. Over the last decade there has been a shift to a more favourable perspectives of migration flows and their relationship with development (Chappel et al 2010; Portes 2008; Deshingkar 2006; International Organisation for Migration 2010; Ghosh 2009; Wise et al 2013). The increasingly cited mantra of 'migration and development' has captured the attention of governments and multilateral organisations largely due to the purported positive effects of remittances² on rural poverty reduction. Supporting the economic rationality argument is the claim that migration empowers women by breaking down patriarchal relations in receiving destinations thereby increasing decision making power within the household. Within an international context mobility is promoted as a process of empowerment for women who immigrate to high income countries given the increased opportunity for employment and greater negotiating power within the household (International Organisation for Migration 2010; Skeldon 1999). Deshingkar (2006) suggests that internal migration has a positive effect on poverty through higher incomes and remittances however also highlights that poor migrants throughout the Global South remain socially and economically excluded and are particularly vulnerable given their insecure tenure status in the city. What is often lacking from the debate, however, are the personal motivations and aspirations of rural-urban migrants themselves. Do their experiences, both individual and collective, fit neatly into one or more of the theories defined in the academic debate? Or are personal experiences so inherently dynamic they are unable to be categorised and instead reflect a spectrum of theories either defined, or yet to be enunciated?

Several feminist authors have brought the voice of migrant women to the forefront of the mobility. Derks' (2008) ethnographic study of migrant women workers in Cambodia; Wolf's (1992) exploration of factory workers in Java; Thorbek's (1987) gender analysis of slum culture in Bangkok; Chant's (1991) study of female migration in Costa Rica; Erman's

2 Funds sent from migrants to family members remaining in the location of origin.

(2001, 1998) analysis of migrant women in Turkey's *geckendous*³ and Hew's (2003) study of female labour migrants in Sarawak each unpack the stratum of migration theory within the context of women's lives, predominantly in the context of labour migration. These studies demonstrate that each migration experience is unique and, whilst there are similarities which can be neatly categorised (such as rural landlessness and income earning opportunities in the city), there are also complex social, cultural and political differentials which shape the process of migration and its impacts.

It is the diverse and gendered experience of migration which is omitted from studies claiming the transformational effects of remittances on household well-being and national Gross Domestic Product (GDP), and the positive impacts of mobility on gender equity and women's empowerment. Whilst remittances may provide an important source of income for rural families, this is often at a cost to migrants themselves; and although women may gain control over their material lives, patriarchal structures and values remain deeply entrenched (Arya & Roy 2006; Jolly & Reeves 2005). Relationships of power are also critical in analysing the consequences of migration for women, however are frequently omitted from analyses of migration processes and outcomes. Migration itself shapes social orders and inequalities and many women who migrate, whilst benefiting on one hand from increased earning capacity, experience social exclusion and marginalisation in the household, community and workplace through labour exploitation, inadequate housing conditions, marginalisation in the community on the basis of residential status, lack of access to health services and unequal distribution of resources within the household (Kabeer 1997; Erman 2001; Thorbek 1987). The denial of human rights protections for rural-urban migrant women, both in origin and destination locations, indicates that human rights violations 'multiply along migration paths' (Wise et al 2013, p.437) with migrants frequently moving from one situation of deprivation to another.

3. Migration and urban poverty in Cambodia

Since 1960 As a result of several decades of civil conflict Cambodia has experienced various periods of population movement, predominantly under forced conditions. The first wave of migration occurred in the early 1970s when those from rural areas fled to Phnom Penh or Thailand for protection from armed warfare between US backed government forces and the Viet Cong. It was in 1975 that Democratic Kampuchea (Khmer Rouge) took power with a specific agenda of agrarian reform. During this period private land ownership was abolished and the entire population of Phnom Penh, which had grown to 2 million people, were forcibly sent to the countryside to be re-educated as farmers (Chandler 2008; Fallavier 2009).

3 Geckendou is a Turkish word for an informal settlement.

Following the fall of the regime four years later, in 1979, many who had survived returned to Phnom Penh and occupied abandoned buildings and land on a first-come first-served basis (Beng & Payne 2004). The 1991 Paris Peace Agreements marked the beginning of the end of the civil war and saw the return of almost 750,000 refugees to Cambodia (ref). Most were unable to return to their rural homes due to heavily bombed agricultural land and damaged infrastructure. Instead, many chose to migrate to Phnom Penh. The genesis of informal, low-income settlements in occurred during this time and continued throughout the 1980s as settlements were established on vacant land - usually the least desirable plots of land beside railways or on river banks - and in close proximity to labour opportunities (Fallavier 2009).

In response to a growing urban population the Municipality of Phnom Penh (MPP) formally recognised many older settlements in 1985 by granting occupation rights which gave residents secure tenure, without land title, and access to compensation in the case of eviction. During this period the MPP also issued family books to those with occupation rights which provided access to government utility connections for a limited number of households. Families who arrived after this period settled on state public land and were tolerated by local authorities, however given no benefits (Fallavier 2009). In line with increased resistance to the formation of informal settlements the MPP established an blurred delineation between 'squatters' and 'urban poor' with the former defined as those who illegally occupy public or private land and the latter referring to households with some form of secure tenure, but not ownership. Fallavier (2009:75) highlights that in Cambodia the term squatter has meaning beyond tenure and translates to 'people living in anarchy'. The perception of 'squatters' as being a threat to the social order results in discrimination which is played out in the broader community and results in local authorities refusing to engage in dialogue with residents on issues such as infrastructure upgrading and land titling.

Today Cambodia has one of the highest urban growth rates in South East Asia (6 per cent annually) which sits in sharp contrast to the projected national growth rate of 1.7 per cent (National Institute of Statistics 2008; UN-HABITAT 2010). In 2009 there were 410 informal urban settlements and 40,548 urban poor families (almost a quarter of Phnom Penh's population) residing within Phnom Penh's eight districts (Sahmakum Teang Tnaut 2009). These settlements are located near railways, river banks, water reservoirs, rooftops, alleys and middle-occupancy buildings. Over the past ten years there has been a geographical shift of the urban poor to Phnom Penh's outer districts as increasing land value and government intervention pushes, often forcibly, settlements to the periphery of the city (Sahmakum Teang Tnaut 2009). Residents of low-income settlements continue to face significant social discrimination in the city. Discrimination also exists *within* low-income communities, mainly towards renters and seasonal migrants, given their perceived lack of stability and inability to contribute to savings groups and other NGO projects which promote collective organisation. Such social exclusion significantly limits the resource and support networks of individuals and households, which further compounds economic vulnerability (Fallavier 2009).

4. Methodology

This paper is based on the findings of a study conducted with rural-urban migrant women in Phnom Penh's informal settlements and explores not only the commonality of their experience, but the diversity of their lives. Fieldwork for this research was conducted over a six month period during 2010 and 2011 and included focus groups and in-depth interviews with 49 women. Six informal urban settlements were selected for inclusion in the study. The size and socio-economic conditions of each community varied significantly. Poor, yet slightly better off settlements had high rates of home ownership, active participation in NGO-initiated community groups and housing constructed from higher quality building materials such as concrete and tiles. Women in these communities had generally worked in garment factories at some stage, with many now remaining at home to manage the household and care for children. Husbands were often *motodop*⁴ drivers. Structures in poorer settlements were made from recycled materials including bamboo, tin, or wood, and most families rented their homes. Infrastructure, including drainage and road access, was inadequate with solid waste often blocking access routes and accumulating under and next to houses. Women in these settlements earned income through the informal sector⁵ often as waste pickers, street vendors or sex workers.

Participants were diverse in terms of their age (20 to 62 years of age), province of origin, length of residency, work type, family structure, education and marital status. Half had lived in Phnom Penh for five years or less including five women who migrated in the last 12 months. In addition to a broad spread of ages women had also migrated from numerous provinces (ten in total) with Prey Veng being the most common place of origin. None of the women interviewed had completed secondary school and 13 had not completed any schooling at all. The highest level of education attained was Grade 8. Just under half of the women participated in NGO-initiated community groups to varying degrees – some were active members and others were ‘notional’ members, however had not attended meetings or contributed to savings schemes. Several women were specifically excluded from community groups on the basis that they were renters.

5. From rural to urban: Why are women moving?

Rural-urban migrant women moved to Phnom Penh for a range of reasons and in each case exercised varying degrees of agency in the decision to move ranging from complete control to limited, if any, voice. The primary driver for migration was poverty and limited economic opportunities in their ancestral province. Women migrated in search of a better life for themselves, their families who migrate with them, and immediate kin who remain in the province. In some cases women migrated simply as a means of survival.

4 A ‘*motodop*’ is motorbike taxi.

5 There is no official definition of the informal sector in Cambodia however it is generally accepted to be unregistered and unregulated economic activity (ILO 2006).

Land plays a critical role in rural livelihoods and those with insufficient landholdings are unable to access the primary means of livelihood in the province – rice farming. Whilst some landless women worked in rice fields owned by other families, the income generated was irregular and insufficient to support a household even where husbands and children assist in agricultural work. The absence of alternate rural livelihoods forces families to seek employment in the city. Almost all of the women interviewed were landless and cited this as a critical factor in their decision to migrate to the city. They had either sold land to pay off debts (usually high interest loans from money lenders to pay for medical emergencies) had very small landholdings, or had not owned land previously. Several women moved to Phnom Penh to escape abusive family situations. Eight young single women migrated in search of garment factory work as a means of supporting their parental families in the province. This migration was usually initiated by parents, and undertaken despite the tensions surrounding the independent mobility of young women (Brickell 2012; Jacobsen 2008; Derks 2008). On one hand young women are expected to earn income to support their parental families, with the garment and manufacturing export sector providing one of the few opportunities to do so. However women's physical distance from their ancestral province, far from the surveillance of parents and relatives, often leads to assumptions and accusations regarding their sexual behaviour and moral conduct (Derks 2008; Jacobsen 2008). Women also spoke of their desire for modernity in regard to their living conditions (electricity), personal appearance (clothes and jewellery) and employment (machines as opposed to back-breaking outdoor manual labour in the rice fields) as a key factor which influenced their decision to migrate to Phnom Penh.

The initial drivers for migration are only one side of the story. In our conversations I explored with women the discussions and negotiations that took place within the household, and sometimes the community, which resulted in the decision to move to Phnom Penh. The initial suggestion to migrate was made by either women, their husbands, or in several cases a mother or sibling with the final decision usually made jointly with husbands after a period of negotiation, or solely by the women themselves. A small number of participants explained it was their husbands or parents who made the final decision, however only often after a period of consultation, demonstrating that women are proactive in the migration process. The initial impetus to move to Phnom Penh came not only from the household itself, but also from community and kin. Neighbours and relatives, either resident in Phnom Penh or migrant returnees to the village, were important conduits of information regarding city life and work prospects. In many cases they were highly influential, actively encouraging women and their husbands to seek work in Phnom Penh to relieve financial pressure. For others, particularly young women migrating in search of work in garment factories, the influence from peers who returned to the province with money and consumer goods purchased with garment factory wages was more subtle. Channak⁶ explained this to me:

6 Pseudonyms have been used for all participant names.

There are a lot of women from my province who moved to work in the city. After they come to work here they have something new and modern so others want to come and earn money like them (Channak, Age 31, Interview 11).

For those living in extreme situations of rural poverty, the question of whether there was in fact a decision to be made must also be considered. For Sina and her family there was no choice *'if we continued to live there we would die because we had nothing to eat'*. Theary also explained that she exercised limited choice in her decision to migrate:

At that time my father died and my three sisters were small. My family situation was difficult so I had to force myself to move and work in the city. I followed my friend who was my neighbour in the province. My mother did not want me to come but I had to because I had no choice (Theary, Age 30, Interview 14).

The examination of women's motivations to migrate, and their agency in the process, demonstrates the complexity of each individual experience. Both men and women are key decision makers in regard to household mobility, usually following a period of negotiation with their spouse. Young women often migrate in search of work to support their parental families and identify as having made this decision themselves; however this decision is framed within strong cultural expectations of dutiful daughters and mothers (Brickell 2012; Derks 2008; Jacobsen 2008; Gorman et al 1999). The impetus for both Sina and Theary's migration demonstrates that the distinction between forced and voluntary is not always clear.

6. Multiple dimensions of exclusion and vulnerability in the city

6.1 Economic vulnerability

High levels of economic and social vulnerability characterise the lives of women in Phnom Penh's informal urban communities. Each of the participants directly linked the many issues and struggles of their daily lives in the city to financial pressure in the household. The average daily income for households⁷ ranged from 4800 riel (USD1.20) to 20,000 riel (USD5.00) per day. The fluctuation of daily income and high cost of living in the city were of particular concern and impacted women and their families in various ways. Firstly women were often unable to support their children's education with just under a third of women separated from their young children who remained in the province with relatives. In some cases this was not only to facilitate schooling, but the challenge of financially supporting extended families in Phnom Penh. One woman, Sunla, explained to me that because her uncle's family were considered 'rich' they could take better care of her son. Phearun had also chosen to live separately from her daughter in order to provide a more stable environment:

7 The average household size is 4.7 people (NIS 2009).

I miss my daughter, but if she stays here I am a renter and I move a lot, so she has to move schools all the time. I left her in the province since she was five years old (Phearun, Age 41, Interview 02).

Phearun's daughter is now thirteen. The emotional impact to women was evident as they explained the emotional strain and heartache of leaving young children behind.

Women also cited significantly higher costs in the city, particularly for food and rent, which absorb much of the additional income earned in the city. Poorer households are unable to access official state connections to water and electricity, instead paying up to 70 per cent more for services purchased from private vendors. Economic vulnerability also limits the ability of women and their families to absorb external shocks, most commonly health problems. Due to the high cost of health care women and their families had rarely visited a health facility, or obtained loans from money lenders at high interest rates for emergency medical care. These conditions also reflect the denial of multiple human rights including the right to an adequate standard of living, which encompasses the right to adequate housing and the right to water, and the right to health (Universal Declaration of Human Rights Article 25; International Covenant on Economic Social and Cultural Rights Article 11 and Article 12). Consequently, women felt there was minimal change in their living standards following migration. The perceived benefits of city life were the ability to earn a regular and more stable income when compared to seasonal agricultural production in the province.

6.2 Work in the informal sector

Women were largely employed in low skilled and poorly paid work, predominantly in the informal sector which lacks 'formal contracts, rights, regulations and bargaining power' (Davis 2006, p.181). Labour exploitation including long work hours, low pay and limited work options reflects women's limited access to labour and the violation of the right to fair work, pay and reasonable hours as outlined in international human rights law (Universal Declaration of Human Rights Article 23; International Covenant on Economic Social and Cultural Rights Article 7). Those without formal education, and those lacking the connections necessary to secure work in garment factories, migrated with the intention of finding work as a street trader, waste picker or beer promoter. Several studies have outlined links between the Cambodia's demographic imbalance, lack of job opportunities in the labour market and resulting reliance on the informal sector, particularly for women (Lee 2006; International Labour Organisation 2006). This has resulted in a disproportionate number of women in the informal sector, many of whom are rural-urban migrants earning less than their male counterparts. Waitress and waste pickers earned the lowest daily income at just over USD1 per day. Several participants were employed in garment factories at some stage prior to their current paid or unpaid work to support their parental families in the province. However many women had shifted from garment factory work to waste collection or other informal sector work, explaining that they preferred informal sector work when compared to the rigidity and regulation of garment factory jobs. The move to informal sector work was also driven by the need to earn daily, rather than monthly, income.

The capacity to earn higher and more regular income was one of the key motivators for women in their decision to migrate. Whilst balancing higher income with the higher cost of living in the city, the increased choice that women gained over their work options offered a subtle form of agency exercised within social and cultural boundaries. Although a significant source of marginalisation on one hand, work in the informal sector provides *opportunities* for women to break new ground in their urban lives when compared with the province. What remains unclear, and therefore requires further investigation, is the disconnect between women's often substantial economic contributions to the household and bargaining power within this domain, as will be discussed further in this paper.

6.3 Remittances

Globally remittances represent the second most important external funding source for developing countries (Lopez-Ekka et al 2011) and governments are now embracing the potential that such flows can have on GDP and economic growth. Studies to date have focused largely on the impact to the recipient household and communities in the context of international migration, rather than remitting individuals and households. Portes (2008) suggests that the benefits of remittances are overstated from the perspective of the recipient family within an international context. Based on discussions with women in Phnom Penh it appears that in the context of rural-urban migration the benefits may also be overstated for those in the sending destination given the vulnerability (poor housing, neglected health and nutrition and exploitative work) which women encounter in order to remit funds.

Most women had sent remittances to their families in the province at some point following their migration to Phnom Penh, and just over half were currently remitting funds. Women further compromised their own health, security and living conditions in order to maximise the amount of money sent to their families. Women would skip meals, work two or three jobs, or walk two hours each way to their place of work to save additional money to remit to their families in the province. Those who were unable to send money regularly saved what they could for special occasions to remit. Although this research did not focus specifically on remittances it was apparent that the payment of money to rural kin often operated as an additional impediment to women in informal urban settlements as they struggle to support their own lives in the city, and also those of their families in the province. Whilst remittances may go some way to combating economic poverty in rural areas there has been limited analysis of the way in which remittances compound urban poverty for migrants. Further research is required to fully analyse the impact of remittances for women, and their families, who are disbursing funds.

6.4 Sexual and gender based violence

The work which women undertake in the city as a means of survival, and to support their families in the province, exposes them to a high risk of sexual and gender based violence which has been reported specifically in relation to garment factory workers, beer promoters and sex workers (Taylor 2011; Makin & Sakada 2006; Amnesty International 2011). Many participants spoke of the harassment and violence which they and others women had experienced since migrating to the city including domestic violence and rape. Whilst no research has been conducted on domestic violence in informal urban settlements in Cambodia⁸ several studies highlight the link between financial pressure, alcohol abuse and domestic violence in both urban and rural households (Gender and Development for Cambodia 2010; Brickell 2008). Women who participated in this study often cited men's consumption of alcohol as one of the main problems in their community, and highlighted the relationship between alcohol consumption, domestic violence and intra-community conflict. The experience of sexual and gender based violence for women in informal settlements is a violation of multiple human rights (Universal Declaration of Human Rights Article 3 and Article 5; Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment 1984; UN Committee on the Elimination of Discrimination Against Women 1992) and impacts women's sense of security and safety both in the household and the wider community.

6.5 Social networks, isolation and exclusion

Urban informal settlements are heterogeneous and are sites of both conflict and cooperation with notable intra-community disparities in terms of wealth and power (de Wit and Berner 2009). Migrants are located on the periphery of informal settlements in Phnom Penh both geographically and socially. Social exclusion operates in various dimensions and at differing levels and is, fundamentally, the inability of individuals, for reasons beyond their control, to access opportunities, resources and rights which others in society are able to access (Burchardt 2000; Pearce 2001). For migrant women in informal settlements social exclusion is experienced primarily through the inability to participate in formal institutions (education, health and finance) and social structures (political and community participation) as a direct result of discrimination and lack of resources.

At the individual level rural-urban migrant women are severely excluded from community activities, including projects initiated by NGOs, and rarely engage socially outside of the community. Often networks within the community were also limited however patron client connections, which are necessary for survival, were present for the majority of women. Social exclusion impacts significantly on the confidence of women and many new migrants

8 Whilst no studies have focused specifically on domestic violence in informal urban settlements in Cambodia, the high rate of domestic violence in Cambodia has been discussed extensively in the literature (See Ministry of Women's Affairs 2009; Bricknell 2008 & 2011; Surtees 2009; Santry 2005; Gender and Development for Cambodia 2010).

feel nervous or ashamed to request assistance from their neighbours on arrival. Sreyya knew no one in the Phnom Penh when she migrated with her husband and grandson. She pitched a tarpaulin on a spare piece of land and observed how other waste pickers worked:

It was difficult. I was afraid because I didn't know people and I didn't know what to do. So I followed other waste pickers and when I saw others collect and then they put into their bag, I did the same thing (Sreyya, Age 52, Interview 26).

I asked Sreyya whether there were people in the community that she could talk to about her problems, including domestic violence:

I don't talk to my neighbours often, I have no time. I just say a few words and then come back to do my work (Sreyya, Age 52, Interview 26).

Lack of time and confidence is compounded by intra-community dynamics which operate to exclude renters. Poorer communities are characterised by a highly transient population who rent properties on both a short and long-term basis. Of the women interviewed eighteen were renters and six were under an unusual arrangement whereby they owned the physical structure (mainly recycled building materials including bamboo and plastic sheeting) but paid half of the negotiated rent for the land with the remainder being subsidised by an NGO. The discrimination which renters encounter takes various forms. Renters explained that they were not permitted to participate in NGO supported community groups as they were perceived to be unreliable, transient and lacking the financial capacity to participate. One afternoon I was discussing these problems with Srey Momm who explained that migrants were normally not permitted to join community groups. Another woman who had overheard this part of our conversation was quick to confirm this, explaining that the group was only for villagers who owned a house. Those who didn't could leave at any time and had no right to join the group. Srey Momm had been renting in the community for two years and had a well-established food stall at the front of her house. Yet despite her active and long-term presence in the community she was not permitted to participate in community groups given her status as a renter. Other women also commented that even though they were interested in the group, participation was difficult as meetings were held during the day when they were working.

Post-migration networks were critical in securing housing and finding work, with a high degree of reliance on relatives or neighbours. Of the women interviewed only three had migrated to Phnom Penh without the assistance of neighbours or urban relatives. The strong reliance on such networks reflects the social structure of Cambodian society which is based on relationships of reciprocity with kin and patrons (Ledgerwood 2002; Kim 2011). Individuals and households without these networks experience an added degree of difficulty in their lives as they negotiate access to various resource and support networks.

Within informal settlements women interact with neighbours as well as kin, mainly to share information or borrow small amounts of rice or money. When I asked women who they spoke to when they had a problem the most common responses were either a community leader or sister. Women frequently commented that they had no one to speak to about their problems. Although several participants continued contact with friends they had met whilst working in garment factories, women commonly described their social isolation both within and outside of the community in terms of friendships, but also engagement with formal institutions and structures including banking, health and police services, and local government authorities. Those most isolated, even within their immediate community, were the poorest women. By comparison, women who had worked in either waged labour or as small traders in the market in Phnom Penh were better connected, perhaps due to the networking skills and confidence they had developed through their employment.

7. Negotiating small gains

The majority of participants stated that whilst Phnom Penh offered a greater range of income earning opportunities which paid more money, and more regularly, their expenditure in the city was much higher. Food and vegetables, which were previously grown and harvested for free in the province, now cost money. The cost of rent and utilities were significantly higher and transport (usually *motodop*) was an additional cost to be factored into the weekly budget. The fluctuation of daily income results in families borrowing small amounts of money from neighbours, usually for food, which are then repaid when household cash flow improves. In more serious circumstances families return to the province for short periods as a safety net, yet inevitably migrate back to the city. Given these challenges, several women expressed a desire to return to the province. Sros came to the city with her husband and first child many years ago but wished to return to the province:

Now I am always hard on myself because I have made a decision that was wrong already. I sold the house to come to Phnom Penh and now we don't have anything in the province so we cannot go back. When we first arrived it seemed like the people here they looked down on us and don't talk to us. This makes me very sad so my feeling is that I just want to go back but I don't know how to do it (Sros, Age 53, Interview 30).

Unlike Sros, the majority of women indicated that they would not consider returning citing numerous reasons including the lack of income earning opportunities, the relative ease of work in Phnom Penh when compared to the rice fields, access to electricity, better education for their children, and the shame of returning to the province unsuccessful.

It's not good for me to go back with nothing because my family moved here for four or five years, but we have nothing left. So if I go to live back in the province with nothing I will feel embarrassed (Rathana, Age 24, Int25).

Despite the difficulties they encountered in their daily lives, the benefits of city life outweighed those in the province even though net improvements were marginal in terms of living conditions and livelihoods.

Normally people dream something big, but sometimes we cannot reach that dream. At least my family can live in a better situation even though it's not so good like what I thought, but at least it is better (Channak, Age 31, Interview 11).

If we move beyond an economic analysis, many of the subtle changes in social relations and household dynamics for women become apparent. When women were asked why they decided to move to the city the most common response was *'there was nothing to do in the province'*. By this women meant that there were limited, if any, livelihood opportunities other than rice farming. Women explained that although the city had not provided its promised benefits, work was easier and more flexible when compared with the province. In comparison to hard manual labour in the rice fields, women felt working in a garment factory or picking waste offered more flexibility, and was physically easier. Women also perceived they had more livelihood opportunities in Phnom Penh when compared with the province and it was not uncommon for women to move between different jobs. Greater choice and flexibility of work translated to slight improvements in economic security for women and their families, which was previously absent in the province. However this does not circumvent the fact that women's work was largely unskilled and poorly paid, nor does it suggest that women's increased financial value translated to greater bargaining power in the household.

Although women may have made small gains within the public sphere this was not necessarily the case within the household. An often cited benefit of migration for women is their ability to challenge gender norms and patriarchy given exposure to new ideas and ways of living (Ghosh 2009; Skeldon 1999; International Organisation for Migration 2010). However participants in this study identified that both they and their husbands continued to subscribe to socially constructed gender roles in the household. It is important to contextualise Cambodia's migratory movements within a post-conflict setting. The role of women as custodians of culture is particularly important given the return to strong traditional norms following the period of civil conflict which, amongst many detrimental impacts, restricts the mobility of young women (Jacobsen 2008; Derks 2008). There remain strong cultural norms in contemporary Cambodian society regarding women's conduct, behaviour and roles (Brickell 2012). Men are responsible for external relations whilst women are confined to those activities which are centred on the domestic sphere. Young women must remain physically close to their mothers to maintain the family honour and their own marriage prospects. Later in life women are predominantly responsible for household affairs, including finances and child rearing, in both urban and rural settings. However it is also suggested, in other patriarchal contexts, that husbands generally exert *control* over financial resources, in making key policy decisions regarding allocation, leaving women responsible for the *management* of those resources which involves implementing

policy decisions into practice (Kabeer 1997). This was certainly the case for the majority of women I interviewed. When talking with women about the process of decision making in their household I found that men were primarily deferred to as the key decision makers and household head. Women could often voice their opinions however the final decision would rest with men given they were perceived to be household head, even where women contributed significantly, and in some cases solely, to household income. Whilst there was a degree of joint decision making, major decisions were predominantly made by men particularly in the area of health, children's schooling and purchase of assets. In addition, men rarely assisted with domestic chores or childrearing even where women spent a significant proportion of their time engaged in productive work. In several cases women were instructed by their husbands not to work so that they could properly attend to their domestic responsibilities. Despite family situations adapting as a result of migration, decision-making and power within the household changed only in subtle forms, and in limited circumstances, even where women contributed significantly to household income. Women with increased agency were those with higher levels of education, or those who had been employed in waged-labour. Erman (2001) identified similar outcomes for women in Ankara's squatter settlements where husbands devalued their wives financial contributions and often instructed them to quit work in order to attend to their gendered duties in the household. Erman (2001:125) argues that whilst women may take pride in their achievements and contributions to the family post-migration, this does not necessarily challenge existing household power structures resulting in 'traditional patriarchy attempt[ing] to reproduce itself under urban conditions.'

However agency and influence operate at multiple levels and women with extended families often commented that younger siblings, particularly sisters, would seek their advice which gave some women a personal sense of control and authority. Sunla transitioned between rural and city life, often at the request of her parents, and in response to her familial obligations as the eldest daughter. Now settled in Phnom Penh with her husband and several siblings who also moved from the province her decision-making capacity in the household operates at differing levels and in nebulous forms. In relation to her siblings she identifies herself as the head of the household given that she is the eldest sister and has the power to 'control'. With her husband the relationship is markedly different: *'he is the one who makes the final decision after our contribution'*. Yet Sunla also describes the way in which household members come together to jointly discuss significant decisions, often deferring to their parents for advice. For Sunla her varying levels of agency in the household are inextricably linked with multiple and gendered roles – as an older sister, as a wife and as a daughter.

In considering whether migrant women are able to exercise choice and agency in the spheres of household and community post-migration the outcome is varied. For some the process of migration has provided waged labour opportunities, which, when combined with other pre-existing factors such as completion of primary education, results in a higher degree of bargaining power in the household. However for the majority of women power

dynamics in the household are reproduced post-migration even in circumstances where women contribute significant financial resources to the household, which was the case for most respondents working in the informal sector.

8. Conclusion

The argument that migration significantly benefits women who move from rural villages to urban city centres may be correct in certain cases, however for those who migrate to informal settlements this is often not the case. Through multiple social exclusions women experience economic vulnerability and social isolation, which is often exacerbated by the payment of remittances. Women's migration is often undertaken in response to the violation of human rights in rural areas, however life in the city often entrenches women's lack of access to human rights protections including labour exploitation, sexual and gender based violence, and lack of access to health, safe housing, water and sanitation, and education. Despite these challenges, women gain an increased level of control within their lives even where gendered norms are reproduced in the household, and where economic contributions to the household fail to result in increased bargaining power. Many women are able to exercise choice over work options, even where the only options available are poorly paid and low skilled jobs. For others, regular income and the ability to plan for the future outweighs the higher costs of city living and social isolation. However it should not be assumed that migration automatically improves the position of women in the household. As I found in Cambodia, and as Kabeer (1997) demonstrated in Bangladesh, and small gains are made within cultural and gendered boundaries. Whilst migration offers the *opportunity* for a better life, structural inequities, power and social exclusion must be better understood in the context of heterogeneous communities, including the way in which migrant women negotiate or participate in these structures, to maximise gains at the individual and community level. Reconceptualization of the development and migration paradigm requires a radical shift from the current discourse which is grounded in neoliberal ideology. In short, we need to move beyond a crude economic assessment of the benefits for individuals (in both the receiving and sending destination) to a more dynamic consideration of the way in which power and exclusion shapes the diversity of women's experiences and identities, particularly as rapid urbanisation and globalization drive rural populations to informal settlements in urban areas where existing and new forms of marginalisation are produced and reproduced.

References

- Agarwal, B., 1997. "Bargaining" and Gender Relations: Within and Beyond the Household,' *Feminist Economics*, Vol. 3, No. 1, pp. 1-51.
- Amnesty International, 2010, *Breaking the Silence: Sexual Violence in Cambodia*, Amnesty International Publications, London.
- Arya, S. & Roy, A., 2006, *Poverty, Gender and Migration*, Sage Publications, New Delhi.
- Beng, H. & Payne, G., 2004. "Improving Tenure Security for the urban poor in Phnom Penh, Cambodia: an analytical case study," *Habitat International*, Vol. 28, pp. 181–201.
- Brickell, K., 2008. "'Fire in the House': Gendered experiences of drunkenness and violence in Siem Reap, Cambodia," *Geoforum*, Vol. 39, No. 5.
- Brickell, K., 2012. "'We don't forget the old rice pot when we get the new one': Discourses on Ideals and Practices of Women in Contemporary Cambodia," *Signs*, Vol. 36, No. 2, pp. 437-462.
- Burchardt, T., 2000. "Social exclusion: concepts and evidence," in Gordon, D. & Townsend, P., (eds) *Breadline Europe: The measurement of poverty*, The Policy Press, Bristol.
- Chandler, D., 2008, *A History of Cambodia*, 4th Ed, Silkworm Books, Thailand.
- Chant, S., 1991. "Gender, Migration and Urban Development in Costa-Rica: The Case of Guanacaste," *Geoforum*, Vol. 22, No. 3, pp. 237-253.
- Chant, S., 1998. "Households, gender and rural-urban migration: reflections on linkages and considerations for policy," *Environment and Urbanization*, Vol. 10, No. 1, pp. 5-21.
- Chappel, L., Angelescu-Naqvi, R., Mavrotas, G., & Sriskandarajah, D., 2010. *Development on the Move: Measuring and Optimising Migrations Economic and Social Impacts*, Institute for Public Policy Research and Global Development Network, London.
- Davis, M., 2006, *Planet of Slums*, Verso, London.
- de Haas, H., 2007. *Migration and Development: a Theoretical Perspective*, Conference Paper, Transnationalisation and Development: Towards a North South Perspective, Bielefeld University, May 31 and June 1, 2007.
- Derks, A., 2008, *Khmer Women on the Move*, University of Hawaii Press, United States.

- Deshingkar, P., 2006. *Internal Migration, Poverty and Development in Asia*, Asia 2015: Promoting Growth, Ending Poverty Conference Paper, Session 3: Realising the Potential for Poverty Reduction Parallel Group 3A, Topic Paper 2.
- Erman, T., 2001. "Rural Migrants and Patriarchy in Turkish Cities," *International Journal of Urban and Regional Research*, Vol. 25, No. 1, pp118 -133.
- Erman, T., 1998. "Becoming "Urban" or Remaining "Rural": The Views of Rural-To-Urban Migrants on the Integration Question," *International Journal of Middle Eastern Studies*, Vol. 30, pp.541-561.
- Fallavier, P 2009, *Participation as an End Versus a Means: A Recurring Dilemma in Urban Upgrading*, VDM Verlag.
- Gender and Development for Cambodia, 2010, *A Preliminary Analysis Report on Deoum Troung Pram Hath and Modern Cambodia: a Qualitative Exploration of Gender Norms, Masculinity, and Domestic Violence*, Phnom Penh.
- Ghosh, J., 2009. *Migration and gender empowerment: Recent trends and emerging issues*, Human Development Research Paper 2009/04, United Nations Development Program.
- Hew, C., 2003, *Women Workers, Migration and Family in Sarawak*, Routledge Curzon, London.
- International Labour Organisation, 2006, *Decent work for men and women in the informal economy: profile and good practices in Cambodia*, Bangkok and Phnom Penh.
- International Organisation for Migration, *World Migration Report 2010, The Future of Migration: Building Capacities for Change*, Geneva, Switzerland.
- Islam, M., Montgomery, M., & Taneja, S., 2006. *Urban Health and Care Seeking Behaviour: A Study of Slums in India and the Philippines*, Project Report, USAID, Maryland.
- Jacobsen, T., 2008. *Lost Goddesses: Denial of Female Power in Cambodian History*, NIAS Press, Copenhagen.
- Jarvis, H., & Kantor, P., & Cloke, J., 2009, *Cities and Gender*, Routledge, London.
- Jolly, S., & Reeves, H., 2005, *Gender and Migration: Overview Report*, BRIDGE, Institute of Development Studies, United Kingdom.
- Kabeer, N., 1997. "Women, Wages and Intra-household Power Relations in Urban Bangladesh," *Development and Change*, Vol. 28, pp. 261-302.

- Kim, S., 2011. "Reciprocity: Informal Patterns of Social Interaction in a Cambodian Village," in Marston, A., John, (ed). *Anthropology and community in Cambodia: reflections of the work of May Ebihara*, Monash University Press, Caulfield, Victoria.
- Ledgerwood, J., 2002. *Cambodia Emerges From The Past: Eight Essays*, Northern Illinois University Monograph Series, No. 3, South East Asia Publications, Northern Illinois University, Canada.
- Lee, C.C., 2006. *Cambodian Women Migrant Workers: Finding from a Mapping Study*, UNICEF, Phnom Penh.
- Lopez-Ekra, S., Aghazarm, C., Kotter, H., & Mollard, B., 2011. 'The impact of remittances on gender roles and opportunities for children in recipient families: research from the International Organisation for Migration', *Gender and Development*, Vol. 19, No. 1, pp.69-80.
- Makin, J., & Sakda, P., 2006. *Cambodia: Women and Work in the Garment Industry*, ILO Better Factories Cambodia and the World Bank, Phnom Penh.
- Ministry of Women's Affairs, 2009, *Violence Against Women: 2009 Follow-up Survey*, Final Study Report, Cambodia.
- National Institute of Statistics, Ministry of Planning, *General Population Census of Cambodia 2008*, Phnom Penh.
- Ovansen, J., Trankell, I., & Ojendal, J., 1996. *When Every Household is an Island: Social Organisation and Power Structures in Rural Cambodia*, Uppsala Research Reports in Cultural Anthropology No. 15, Department of Cultural Anthropology, Uppsala University.
- Pearce, R., 2001. "Social exclusion: a concept in need of definition," *Social Policy Journal of New Zealand*, Issue 16, July 2001.
- Portes, A., 2008. "Migration and Development: A conceptual review of the evidence," in Castles, S. & Delgado Wise, R., (eds), *Migration and Development: perspectives from the South*, International Organisation for Migration, Geneva.
- Sahmakum Teang Tnaut, 2009, *The 8 Khan Survey: Urban Poor Settlements in Phnom Penh*, Cambodia.
- Silvey, R., 2004. "Power, difference and mobility: feminist advances in migration studies," *Progress in Human Geography*, Vol. 28, No. 4, pp. 490-506.

- Skeldon, R., 1999. *Migration of Women in the Context of Globalization in the Asian and Pacific Region*, Economic and Social Commission for Asia and the Pacific, Women in Development Paper Series No. 2.
- Skeldon, R., 2004. *More Than Remittances: Other Aspects of the Relationship between Migration and Development*, Third Coordination Meeting on International Migration, Population Division, Department of Economic and Social Affairs, United Nations Secretariat, New York, October, 2004.
- Stark, O., 1978, *Economic-Demographic Interactions in Agricultural Development: The Case of Rural-to-Urban Migration*, Food and Agriculture Organisation, Rome.
- Taylor, A., 2011. *Women and the City: Examining the Gender Impact of Violence and Urbanization: A comparative Study of Brazil, Cambodia, Ethiopia, Liberia and Nepal*, ActionAid, Johannesburg.
- Thorbek, S., 1987, *Voices from the City: Women of Bangkok*, ZedBooks, United Kingdom.
- UN-HABITAT, *Urban Indicators*, Available at: <http://www.unhabitat.org/stats/default.aspx> (accessed on 10 June 2012).
- Wise, R.D., Covarrubias, H.M., Puentes, R., 2013. "Reframing the Debate on Migration, Development and Human Rights," *Population, Space and Place*, Vol. 19, pp. 430-443.
- Wratten, E., 1995, "Conceptualizing urban poverty," *Environment and Urbanization*, Vol. 7, pp.11-38.
- Wolf, D., 1992, *Factory daughters: gender, household dynamics and rural industrialization in Java*, University of California Press, Berkeley.

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Sam Moody was Capacity Building Manager at the Karen Human Rights Group (KHRG), a leading local organisation that supports villagers in Eastern Burma to protect themselves from human rights abuse. At KHRG he has assisted the Programme Management Team to create new systems for project cycle management, donor management and financial management. Before taking the position at KHRG, he lived and worked in Gambella, a remote region of western Ethiopia, where he served as Director of the Anglican Church in Ethiopia's community projects. During his term, he assembled a team of members of the local community to plan and implement grassroots projects in health, education and peace-building. Sam's experiences have led him to seek to develop his ideas regarding how the capacity building relationship between non-local and local actors can rehearse both the positive and negative aspects of international social justice work. He currently works for an international development organisation and is based in London.

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Tess van der Rijt is an Australian lawyer, with particular experience in international human rights law. Her areas of interest include human rights, public health policy, global governance and child rights. Tess' interest in child rights in Malaysia originated through her work as a Consultant at Voice of the Children. She also has experience working at the World Health Organisation (WHO), the Australian High Commission to Malaysia and the Lee Kuan Yew School of Public Policy in Singapore.

Kristy Ward is a PhD candidate in the Faculty of Arts and Social Sciences at the University of New South Wales (UNSW) and a Research Associate at the Centre for Refugee Research, UNSW. She has worked in community and international development for over ten years in project development, project management and research roles. Her current research explores urban poor women's experience of self-help groups and development discourse in post-conflict Cambodia. Ms. Ward can be contacted at kristy.ward@unsw.edu.au.

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 and peace. 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 and peace in the Region.

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 and peace in Southeast Asia through faculty and course development;
- To develop deeper understanding and enhancement of human rights and peace knowledge through collaborative research;
- To achieve excellent regional academic and civil society cooperation in realizing human rights and peace 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 20 academic institutions/centres. Moreover, it has successfully organized two international conferences on Human Rights and Peace & Conflict in Southeast Asia (Bangkok, 2010 & Jakarta, 2012). It has also done training for both seasoned and emerging scholars in human rights- and peace-based research and instruction. In terms of resource material development, SEAHRN has already published *Human Rights in Southeast Asia Series I: Breaking the Silence* (October 2011) and *Human Rights and Peace in Southeast Asia Series 2: Defying the Impasse* (September 2013). It is currently developing a human rights and peace textbook which features various themes written for and by Southeast Asian academics and scholars.

SEAHRN Members are committed to support, develop, enhance and strengthen the following areas in human rights and peace studies, research and advocacy:

- Faculty Development
- Pedagogical Training
- Curriculum and Course Development
- Research and Publication
- Human rights and Peace Conferences/Symposia

- Faculty and Student Exchange Programmes
- Outreach Programmes for ASEAN officials and Civil society groups
- Development of Human Rights and Peace Studies Database
- Development of Online-based Human Rights Resources

SEAHRN membership is open to academic institutions/centres focusing on human rights and peace studies and research in Southeast Asia. To know more about recent and upcoming activities of the Network, visit www.seahrn.org. Institutions/centres who wish to join SEAHRN are encouraged to send a letter of interest (signed by the Director/Chair/Dean) together with most recent profiles of faculty and academic study and research programmes relevant to human rights and peace to seahrn@gmail.com.

SEAHRN MEMBERS

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- Center for Human Rights Studies, Islamic University of Indonesia
- Center for Human Rights Studies, State University of Medan
- Center for Peace and Conflict Resolution Studies (CPCRS), Syiah Kuala University
- Human Rights Center, Faculty of Law, Universitas Indonesia
- Center for Southeast Asia Social Studies, University of Gadjah Mada
- Center for Human Rights, University of Surabaya

Lao PDR

Human Rights Research Center (HRRC), Lao Academy of Social Sciences (LASS)

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- Human Rights Centre, Faculty of Law, Universiti Malaya
- Gender Studies Programme, Universiti Malaya
- Research and Education for Peace, Universiti Sains Malaysia
- Southeast Asian Conflict Studies Network (SEACSN), Universiti Sains Malaysia

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- Ateneo Human Rights Center, School of Law, Ateneo de Manila University
- Institute of Human Rights, University of the Philippines

Thailand

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- Center for the Study of Human Rights and Non Violence, College of Politics and Governance, Mahasarakham University,
- Individuals for Chulalongkorn University (Faculty of Political Science)

Vietnam

- Center for Study of Human and Citizen Rights, Ho Chi Minh City University of Law
- Research Center for Human and Citizen's Rights (CRIGHTS) Law Department, Vietnam National University-Hanoi

“Amplifying the Voices” attempts to capture relevant issues that mirror certain aspects in the lives of Southeast Asians. Papers featured in this Series aim to provide fresh ways of (re)defining the Region and of analysing degrees by which human rights, freedoms, and peace are being enjoyed by those who consider Southeast Asia as home.



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