

# An Introduction to Human Rights in Southeast Asia

2

**Volume**

Revised Second Edition



# An Introduction to Human Rights in Southeast Asia : Volume 2

Revised Second Edition, 2024

By

ASEAN University Network - Human Rights Education (AUN-HRE)  
and Institute of Human Rights and Peace Studies (IHRP), Mahidol  
University

With support of Norwegian Centre for Human Rights (NCHR),  
University of Oslo

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# **An Introduction to Human Rights in Southeast Asia: Volume 2**

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# Introduction

At the time the ASEAN University Network - Human Rights Education (AUN-HRE) was formed in 2009, one of its overarching objectives was to develop textbooks to facilitate human rights learning in Southeast Asia. In parallel with the formation of AUN-HRE, the Southeast Asian Human Rights and Peace Studies Network (SEAHRN), an independent network, was established. At that time, there were not many human rights textbooks available that were written with a focus on the Southeast Asian context. Responding to lecturers' frustrations of not having appropriate materials for their human rights courses, in 2011, the SEAHRN took an initiative to prepare human rights textbooks for students and lecturers in the region. This is one of the first initiatives made by the SEAHRN with the financial support of the Raoul Wallenberg Institute (RWI), Lund University. After having published *An Introduction to Human Rights in Southeast Asia: Volume 1 and 2*, SEAHRN decided to transfer this project to AUN-HRE in order to reach a wider audience and to ensure that the textbooks prepared received a formal recognition from ASEAN and ASEAN relevant bodies. With funding from the Norwegian Centre for Human Rights (NCHR) at the University of Oslo, AUN-HRE has continued the textbook project until now.

The publication of the first two volumes of *An Introduction to Human Rights in Southeast Asia* was enthusiastically welcomed by lecturers and the volumes have since been translated into Burmese, Khmer and Thai languages. While the primary target of the textbooks were undergraduate students, the two volumes have been used as reference materials for graduate and even post-graduate students in universities across the region. In 2019, AUN-HRE and SHAPE-SEA (Strengthening Human Rights and Peace Research and Education in ASEAN/Southeast Asia Program) jointly published Volume 3 of the introductory textbook along with a *Teaching Manual on Human Rights* to guide and facilitate the effective use of the textbooks themselves.

In October 2018, at the 13th ASEAN Senior Officials Meeting on Education held in Nay Pyi Taw, Myanmar, updating existing teaching materials on the fundamentals of human rights and peace was endorsed as a priority action. Following this, AUN-HRE conducted a survey amongst lecturers in Southeast Asia on the usage of the first two volumes of the textbooks. Feedback was also taken from participants of the AUN-HRE regional lecturer training workshops. The textbooks have been reportedly used both as mandatory reading material and recommended reference readings for students. The respondents also indicated that they found specific chapters from both volumes of the textbooks useful including: Fundamentals of Human Rights, International Human Rights Standards, International Human Rights Treaties, Protecting Human Rights in Southeast Asia, Women's Human Rights and Children's Human Rights. In order to improve the textbooks further, the respondents suggested that more case studies from Southeast Asia can be added along with discussion on human rights issues with respect to Covid-19 pandemic; discussion on recent developments in human rights theory and practice; as well as more illustrative case studies to facilitate discussions and debates in class.

It should be noted that since their publications, all the textbooks including the translated versions and the teaching manual have been made available through the SHAPE-SEA website which could be freely downloaded. The process of reviewing and updating the textbooks *An Introduction to Human Rights in Southeast Asia: Volume 1 and 2* themselves began in earnest in 2021. Scholars and academics had been invited to review and contribute to the updating of the textbooks with new information, knowledge and case studies. The editorial team has tried to ensure that each chapter is consistent and contains as up-to-date information as possible. The original order of the chapters in the first edition has also been reorganised in the revised second edition to reflect a progression from core concepts, standards and mechanisms to cross cutting issues of gender and children's rights; to human rights of specific groups; to human rights in relation to specific themes of development, business and human rights, environment and democracy; ending with an overview of human rights in the history of southeast Asia. The revised and updated second edition of the textbooks contain 15 chapters and are divided in two volumes.

Volume 1 contains seven chapters covering fundamental concepts of human rights; the two core covenants; key human rights mechanisms at different levels; and the two main cross-cutting themes of women's and children's human rights that also set out an understanding of important human rights principles.

- Chapter 1 provides a critical understanding of the meaning of human rights. It further discusses the evolution of human rights standards, the Universal Declaration of Human Rights; the different categories of rights and the fundamental concepts underlying human rights.
- Chapter 2 introduces international human rights law, its different sources and the process of making it. It also briefly discusses the mechanisms for protection and promotion of human rights that exist at the international level and the reasons why States agree to ratify treaties and accept human rights obligations.
- Chapter 3 introduces the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Using examples of human rights issues in the Southeast Asian region and beyond, it discusses the rights guaranteed under the two instruments and the corresponding State obligations. While discussing the scope of rights and obligations, it refers to the General Comments issued by the two treaty bodies, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.
- Chapter 4 examines existing human rights mechanisms at the international level. It examines the functions and scope of powers of the charter-based mechanisms and the human rights treaty bodies. The purpose of the chapter is to provide the readers with an understanding about the dynamics through which human rights compliance can be strengthened at the national level.
- Chapter 5 provides an understanding of the mechanisms that exist at the national and regional levels to strengthen protection and promotion of human rights. In doing so, it outlines the main elements of strong human rights protection and promotion systems at the national level and discusses human rights elements in Constitutions, human rights specific legislations and the powers of judiciary and national human rights institutions. Further, it discusses existing mandates of the regional human rights systems in Europe, the Americas, Africa and ASEAN.
- Chapter 6 discusses women's human rights. Every human rights treaty underlines the principle of non-discrimination on the grounds of sex (and gender), while the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) specifically focuses on elimination of discrimination in different spheres so that women can realise their civil, political, economic, social and cultural rights. This chapter discusses the root causes of discrimination against women and the concept of equality strengthened under CEDAW. It also discusses the protection mechanism for women's rights existing at the international and regional level. And lastly, it discusses some contemporary concerns in relation to women's human rights. It is hoped that the chapter would provide a framework for analysis of gender dimensions of different human rights issues and concerns.
- Chapter 7 provides an understanding of the UN Convention on the Rights of the Child (CRC), the fundamental principles underlying it and its optional protocols. Specific thematic areas of violence against children, right to education, juvenile justice, child labour, children in armed conflict and the right of adolescents to reproductive health are also discussed.

Volume 2 of the revised second edition focuses on human rights of specific groups; the interconnecting issues of development, business and human rights and environment; the linkages between democracy and human rights; and ends with discussion on human rights in Southeast Asian history.

- Chapter 8 discusses the rights of two categories of non-citizens: migrant workers and victims of human trafficking. In doing so, using case studies, it first discusses the nature of migration and its various forms to highlight the issues faced by migrants in the countries of origin, transit and destination that make them vulnerable to rights violations. Next, it discusses the human rights frameworks that exist at international and regional level to protect and promote rights of migrant workers and victims of human trafficking.

- Chapter 9 focuses on the rights of two other categories of non-citizens: refugees and stateless persons.
- Chapter 10 discusses the rights of LGBTI (lesbian, gay, bisexual, transgender and intersex) communities. It first discusses the nature of discrimination faced by them, the causes underlying such discrimination, and human rights standards that have been adopted to strengthen protection and promotion of their rights. Lastly, it discusses the distinct rights issues faced by transgender and intersexual people.
- Chapter 11 focuses on human rights and development. It provides an overview of the different development approaches adopted since the end of World War II; post-war reconstruction; modernisation theory; basic needs approach to development; neoliberalism; and integration of human rights and development. The latter theme also explores gender and development, the right to development, concept of sustainable development, the human security approach and the human development and capabilities approach. Lastly, the chapter discusses the human rights-based approach to development and its basic principles.
- Chapter 12 discusses the principles of business and human rights and the different frameworks that exist to protect rights from being violated by business actors. These different frameworks include the labour rights protection framework, self-regulation by businesses and the framework provided under the United Nations Guiding Principles on Business and Human Rights (UNGPs). It also provides a critical perspective by examining the ten years review of the adoption and implementation of the UNGPs. Lastly, the chapter examines some different strategies that have been adopted in Southeast Asia to secure accountability from business actors.
- Chapter 13 focusing on environment and human rights, provides a critical overview of the evolution of the human rights to a clean, healthy and sustainable environment. It discusses the normative content of the human right to a clean, healthy and sustainable environment, and the corresponding obligations on States. Lastly, the chapter discusses the challenges of climate change.
- Chapter 14 explores the links between democracy and human rights. It begins by building an understanding of the concept of democracy before examining the ways in which civil and political rights lay the foundations of a strong democratic system. Finally, it examines the nature of democracies existing in Southeast Asia.
- Chapter 15 examines historical development of human rights and democracy in Southeast Asia and reflects on how the history of human rights in the region can be open to critical interpretation.

References to human rights documents such as General Comments, reports of UN Special Rapporteurs and other UN mechanisms, reports of non-governmental organisations, news reports, and other reliable sources as well as illustrative case studies have been used throughout the revised second edition. They have been used not only to highlight the human rights problems existing in the Southeast Asian region and beyond, but also to illustrate the ways in which different actors contribute to the strengthening of human rights protection and promotion at different levels. It is hoped that through analysis of diverse information, readers are able to critically assess the dynamics of human rights work and practice.

## Features of the Textbooks, Revised Second Edition

- **Case Studies** are provided in some chapters and are accompanied by questions for further reflection and analysis by the readers.
- **Chapter Summary and Key Points** are given at the end of each chapter.
- **Figures** that include statistical information and diagrams are presented where appropriate.
- **Further Readings** containing a list of readings and references are provided at the end of each chapter.
- **Key Terms** in each chapter highlight important concepts and clarify their meanings.
- **Reader's Guide** is provided at the beginning of every chapter to introduce key themes and contents.
- **Reflection and Discussion** include excerpts from news clippings, statements by stakeholders, human rights reports, news items, etc., along with questions to facilitate reflection on the issues concerned.
- **Spotlight** presents in-depth information on particular issues.
- **Tables** present information in a systematic and succinct form.
- **Typical Exam or Essay Questions** are given as examples at the end of each chapter.

## Use of the Textbooks, Revised Second Edition

The revised second edition of the textbook Volume 1 & 2 have creative commons copyright. Adaptations of the revised second edition of the textbooks must attribute AUN-HRE and IHRP as original authors in addition to SEAHN and SHAPE-SEA. Readers can make copies of the textbooks with suitable acknowledgement. The textbooks cannot be sold for profit.

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# Chapter 8

## The Rights of Non-Citizens: Migrant Workers and Trafficked Persons \*

### Reader's Guide

This chapter focuses on two categories of non-citizens: migrant workers and victims of trafficking in persons. It first gives an introduction to the phenomenon of migration and its various forms by providing case studies to highlight the issues faced by migrants in their countries of origin, transit, and destination which make them vulnerable to both rights violations and trafficking in persons. Next, it discusses the different frameworks used to strengthen the promotion and protection of migrant worker rights, all of which aim to establish safe and fair migration processes. These inter-related frameworks are: the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICMRW), 1990; the ILO Framework and its tripartite working approach; the Global Compact for Safe, Orderly and Regular Migration, 2018; and the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, 2018. In addition, this chapter will discuss the human rights approach

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\* The chapter for the first edition was prepared by Matthew Mullen and Michael (Mike Hayes), Institute of Human Rights and Peace Studies (IHRP), Mahidol University. It has been updated by Kalpalata Dutta, ASEAN University Network - Human Rights Education (AUN-HRE) with inputs from: Bandana Pattanaik, Global Alliance Against Traffic in Women (GAATW); Pau Supanuntaroek, Research Associate, AUN-HRE; and Vachararutai Boontinand, AUN-HRE and IHRP.

to trafficking in persons. Finally, it ends with a discussion on the impact of the COVID-19 pandemic on migrant workers and victims of trafficking in persons. In particular, the chapter will highlight programs and the initiatives of actors such as the International Labour Organisation (ILO) and the International Organisation for Migration (IOM) to illustrate the types of measures that can be taken to strengthen migration governance..

### Spotlight: Snapshot of International Migration in ASEAN<sup>1</sup>

Migrant stock refers to the total number of international migrants present in a given country at a particular point in time who have ever changed their country of usual residence.<sup>2</sup>

In ASEAN, Brunei Darussalam, Malaysia, Singapore, and Thailand are destination countries having large migrant stocks. In 2019, Thailand and Malaysia were considered to have the 17<sup>th</sup> and 18<sup>th</sup> largest stocks of international migrants in the world, respectively, placing them second and third in Asia behind only India.

Among other net origin countries, the Philippines has the ninth-largest diaspora population in the world and the fourth-largest in Asia – behind India, China, and Bangladesh. Not far behind, Indonesia has the 11<sup>th</sup> largest diaspora population in the world and the fifth-largest in Asia. The next largest diaspora populations among ASEAN origin countries are Myanmar, Vietnam, the Lao People’s Democratic Republic, and Cambodia.

Table 8-1: International Migrant Stock

| Destination Countries in ASEAN | Total migrant stock (000) | International migrant stock as a percentage of total population | Share of women in total migrant stock | Working age migrant stock (000) | Share of women in working age migrant stock |
|--------------------------------|---------------------------|-----------------------------------------------------------------|---------------------------------------|---------------------------------|---------------------------------------------|
| Brunei                         | 111                       | 25.5                                                            | 43.4%                                 | 105                             | 43.1%                                       |
| Malaysia                       | 3430                      | 10.7                                                            | 38.9%                                 | 3111                            | 37.9%                                       |
| Singapore                      | 2156                      | 37.1                                                            | 55.9%                                 | 1980                            | 56.1%                                       |
| Thailand                       | 3635                      | 5.2                                                             | 49.8%                                 | 3234                            | 49.4%                                       |

## 8.1 Who are migrants?

While the term is not defined under international law, the International Organization for Migration or IOM, the leading UN agency focusing on migration, has defined a migrant as a person who moves away from his or her place of residence, whether within a country or across an international border, temporarily or permanently for a variety of reasons. This umbrella term is inclusive of migrant workers, international students, and smuggled migrants, etc. However, such categorisation of migrants is a complex process as it involves different considerations. There is also a fluidity between these different categories as a migrant worker may become a victim of trafficking or smuggling with change in circumstances. Chapter 8 and Chapter 9 focuses on four categories of migrants: migrant workers, victims of trafficking, refugees and stateless persons.

<sup>1</sup> Excerpt adapted from ,International Labour Organisation. (2022). *Measuring Labour Migration in ASEAN: Analysis from the ILO’s International Labour Migration Statistics (ILMS) database*.

<sup>2</sup> United Nations. (2012). *Toolkit on International Migration*. <https://www.migrationdataportal.org/resource/toolkit-international-migration> accessed on 30 September 2023

### 8.1.1 Type of migration

Some common types of migration are labour, forced, and irregular migration.

*Labour migration:* As per estimates of the ILO (2018), the Asia-Pacific region hosted 25 million migrant workers in 2017, or 15% of all such groups worldwide, labour migration in this region also declined sharply during the COVID-19 pandemic when lockdowns were imposed in destination countries.<sup>3</sup>

#### Spotlight: Labour Migration Patterns in Thailand

Thailand is an important regional migration hub within the GMS and in Southeast Asia more generally. As of December 2019, the number of registered migrant workers in Thailand stood at 3 million, mainly coming from Myanmar, Cambodia, Lao People's Democratic Republic, and Vietnam – however, the number of undocumented migrant workers is unknown. By December 2020, registered migrant workers in the country had declined to 2.4 million, i.e. by 18%. This reduction can be explained by the increase in the number of migrant workers returning to their home countries due to the COVID-19 outbreak. Migrants in Thailand are employed in a range of sectors including construction, manufacturing, fisheries, agriculture, hospitality, food preparation services, and domestic work.

*Forced migration:* Forced migration refers to migratory movements involving force, compulsion, or coercion. The term has also been used to describe the movement of persons who are forced to leave because of crisis situations such as disaster, climate change, armed conflict, and persecution. Forced migration can occur across international borders or within countries in which case it is known as internal displacement.

*Irregular migration:* The IOM defines this as “movement that takes place outside the regulatory norms of the sending, transit, and receiving country.” Some examples are:

- a migrant *entering* a country irregularly, such as with false documents, or not entering the country through official border crossing points;
- A migrant *residing* in a country irregularly by violating the terms of his/her visa and residence permits; and
- A migrant *employed* in a country irregularly, such as when a migrant does not have a permit to take up paid employment in the country.

It is important to note that such irregularity refers to the status of a person at a certain point in time or during specific periods. For example, migrants escaping a conflict and entering another State to seek protection may be deemed irregular migrants at the time they cross the borders, but their status may become regular once they have applied for asylum.

### 8.1.2 Trafficking in persons

Trafficking in persons refers to the recruitment, transportation, transfer, harbouring, or receipt of persons, by force, coercion, fraud, or some other form of deception, for the purpose of exploitation (a more technical definition under international law is discussed later in the chapter). Trafficking and migration are often connected and can be seen in the same continuum. People may be pushed to migrate for various reasons such as poverty, oppression, a lack of social or economic opportunities, the risks associated with conflict and instability, natural disasters, and similar conditions. With

<sup>3</sup> Excerpt adapted from: International Organisation for Migration. (2021). *Asia-Pacific Migration Data Report 2020*. p. 43.

limited information and limited channels for safe migration, people rely on agents who recruit and arrange for their travel and become their traffickers. Traffickers also ‘pull’ people towards migration by harbouring dreams of better employment and educational opportunities and an improved quality of life, whilst also touting freedom from persecution, family reunification, etc.

Another point to note is that trafficking is different from human smuggling. Human smuggling refers to the facilitation of irregular entry into a country where the migrant is not a national or resident for financial or other material gain. It differs from human trafficking as it is believed that smuggled people are aware that they are breaking immigration laws and entering a country illegally. In other words, people subject themselves to being smuggled voluntarily. Trafficking differs as victims are often deceived, coerced, and are not free to make the choice (that is, they are usually forced into some sort of bondage). In practice the distinction between smuggling and trafficking is very thin.

## **Case Studies: Labour Migration, Forced Migration, Trafficking in Persons in Southeast Asia**

### **Case Study 1: *How do Special Economic Zones impact migrant workers in Thailand?*<sup>4</sup>**

In the greater Mekong sub-region, the proliferation of Special Economic Zones (SEZs) has served to promote the growth of economic corridors, generate jobs, and attract foreign direct investment. However, migrant workers in these zones are vulnerable to abuse and exploitation. For example, these zones are strategically located close to the border areas. The Royal Thai

In Thailand, with close to 2.5 million documented migrant workers (and an unknown number of foreign workers lacking documentation), the potential for exploitation is compounded as SEZs are often strategically located near border areas.

In year 2021 - 2023, the Labour Protection Network Foundation (LPN) in partnership with ASEAN Australia Counter Trafficking (ASEAN-ACT) conducted a study of migrant workers in SEZs in three provinces in Thailand (Sra Kaew, Trat, and Rayong) to assess the vulnerability of workers to abuse and exploitation. Interviews were conducted with 180 migrant workers. The findings revealed that the wages of the workers ranged from 200 to 300 baht per day. The workers also stated that they incurred expenses during their journey – many arrived at their work locations with significant debts incurred that were then deducted from their salaries. And several workers reported that their employers had withheld their personal documents – a potential indicator of forced labour. Others shared experiences of strenuous working hours and conditions conducive to work-related injuries. Almost all earned below the minimum wage of 328 baht per day.

The study found that the migrant workers interviewed in these provinces experienced abuse and harsh conditions in their workplaces relating to extreme working hours and conditions, costly work and border permits, limited access to medical services, and work suspensions or reduced income due to the pandemic.

Migrant workers who often come to Thailand with their families and dependents, mostly minors, are also vulnerable to abuse and exploitation. Children are particularly vulnerable to being exploited as beggars or workers in the informal economy. In this regard, the LPN’s study called for extending social protection especially child protection services and access to education to families of migrant workers.

<sup>4</sup> Excerpt adapted from: ASEAN-Australia Counter Trafficking. (2023, June 2) *How do Special Economic Zones impact migrant workers in Thailand?* <https://www.aseanact.org/story/lpn-research/>, accessed on 29 September 2023.

### ***Case Study 2: Labour Migrants Vulnerability to Human Trafficking and Labour Exploitation in Southeast Asia: An Analysis of Vietnam<sup>5</sup>***

Vietnam is estimated to have 560,000 migrant workers in 43 countries, although the actual number, including irregular migration, is probably far higher. The primary corridors for labour migration are from Vietnam to Japan, Korea, and Taiwan. Destinations in the ASEAN region include Thailand and Myanmar, Indonesia, Singapore, and Malaysia. Vietnamese migrant workers also go to the Middle East, and to countries in Eastern and Western Europe.

While migrating for work is a choice, several factors influence that choice, and affect migrants' ability to exercise agency. At each stage—from experiences in pre-departure, the journey, destination countries, and the migrant's return to Vietnam—such workers are vulnerable. Prior to their departure, many factors influence their vulnerability, but a major challenge arises from a lack of knowledge and an inability to access reliable information, as well as the fees charged by recruiters. These factors also influence the journey of migrant workers. Debt results in migrants taking risks in destination countries in order to earn more. Competition among migrant workers also increases vulnerability in the destination country, as other migrant workers are equally vulnerable and trying to negotiate better conditions. On their return, exploited workers face significant barriers in being recognised as victims or receiving compensation, support, and redress.

Vietnamese migrant workers are extremely vulnerable to exploitation and abuse. They assume the risk of migrating for work and tend to deal with the exploitation themselves rather than reporting it to the authorities. This arises from vulnerabilities they experience directly, such as the high fees charged by recruitment agencies, indebtedness, a lack of information, and their irregular status (in some cases). Vulnerability is also a result of the lack of support services, the difficulties in investigating cases, and a lack of incentive to report them.

The primary obstacle to addressing vulnerability to labour trafficking is that most stakeholders, particularly the most powerful, have an interest in maintaining the status quo. Governments want workers to migrate, since it may be a central element of the country's development strategy. Recruitment agencies and brokers generate a profit by identifying workers and placing them with employers abroad. Employers gain access to cheaper labour which increases their profit margins. Accordingly, there are few incentives to address vulnerabilities and change the dynamics of labour migration.

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<sup>5</sup> Excerpt adapted from: Jespersen, S., Ngo, T. M., & Vu, C. G. (2023). *Labour migrant's vulnerability to human trafficking and labour exploitation in Southeast Asia: An analysis of Vietnam*. ODI.; International Organization for Migration. (2021). *Thailand Social Protection Diagnostic Review: Social Protection for Migrant Workers and Their Families in Thailand*.

### Case Study 3: Public Attitudes Towards Migrant Workers in Japan, Malaysia, Singapore and Thailand<sup>6</sup>

Migrant workers in the Southeast Asia and Pacific sub-region make crucial contributions to the economies and societies of both origin and destination countries. Of the migrant workers in the region in 2017, 5.2 million were women. Women migrant workers compose the majority of workers in several sectors: domestic work, entertainment, seafood processing, electronics manufacturing, and garment manufacturing, amongst others. They frequently experience gender-based inequalities, exploitation, and sometimes violence during the migration process, which compound the prejudice and discrimination they experience as migrant workers.

Among the countries of destination (Japan, Malaysia, Singapore and Thailand), there is a demand for low-skilled workers in mainly low wage sectors (that is, care work including domestic work, entertainment, construction, agriculture, and manufacturing). Yet, significant proportions of the public in all four countries have negative perceptions of migrant workers.

Some such perceptions are:

| Public Attitudes                                                                                    | Thailand (%)<br>n=1,034 | Malaysia (%)<br>n=1,009 | Singapore (%)<br>n=1,005 | Japan (%)<br>n=1,051 |
|-----------------------------------------------------------------------------------------------------|-------------------------|-------------------------|--------------------------|----------------------|
| Migrant workers threaten their country's culture and heritage                                       | 58                      | 68                      | 53                       | 41                   |
| Migrant workers have poor work ethics and cannot be trusted                                         | 60                      | 44                      | 32                       | 34                   |
| Migrant workers who end up being exploited only have themselves to blame                            | 57                      | 59                      | 40                       | 23                   |
| Migrants with irregular status who have broken the laws should not expect to have any right to work | 76                      | 86                      | 75                       | 56                   |
| Migrant workers should not be able to join a union                                                  | 41                      | 65                      | 36                       | 22                   |
| Migrant workers should not receive the same work conditions as local workers                        | 38                      | 73                      | 36                       | 29                   |
| Migrant workers should not receive the same pay and benefits as local workers                       | 52                      | 58                      | 60                       | 35                   |

<sup>6</sup> Excerpt adapted from, ILO. (2019). *Public attitudes towards migrant workers in Japan, Malaysia, Singapore, and Thailand*. [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_732443.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_732443.pdf), accessed on 29 September 2023.

Unfortunately, negative attitudes can condone discrimination, exploitation, and even violence against migrant workers. They can also detrimentally affect policies on labour migration, including those most affecting women migrant workers, such as policies on domestic work. Public attitudes and perceptions vary based on the multiple and intersecting identities of the migrant workers they encounter. As a result, the public in countries of destination may hold biases based on many factors including nationality, gender, sex, ethnicity, marital status, language, race, documentation status, age, or education.

Understanding the nuances and complexity of public attitudes (and the relationship between attitudes and behaviour) is essential to any measures aiming to ensure positive migration outcomes, non-discrimination, protection of rights at work and in service provision, and freedom from exploitation and violence in labour migration throughout the region.

#### **Case Study 4: Human Traffickers Prey on Rohingya Refugees<sup>7</sup>**

Rubina returns from the market in the Rohingya refugee camp near Teknaf in southeast Bangladesh and flops down on the floor of her small shack. “I hope I can reunite with my husband someday,” the 38-year-old says in a tired voice.<sup>7</sup>

She has tried. Her husband, Roshidullah, left their original home in Myanmar’s Rakhine state some years ago to work illegally in Malaysia. In 2017, Rubina and her son fled a violent military crackdown in Myanmar and moved to Bangladesh along with around a million Rohingya refugees.

Roshidullah then paid human traffickers so that Rubina and their seven-year-old son, Enamullah, could join him. “I did not know where I was going,” Rubina tells The Third Pole. “My husband told me that the Bengali agent is a trusted man and had prepared all the paperwork so that my son and I can reach him in Malaysia. I do not know how much he had to pay.”

They were two of the 396 survivors among the refugees who set sail in a fishing trawler to Malaysia from Rohingya camps in south-eastern Bangladesh in mid-February 2020. Newly alert to the COVID-19 pandemic, Malaysian authorities blocked the trawler at sea, and the would-be illegal immigrants spent 55 days adrift, not allowed to land anywhere.

Thirty of them died before Bangladesh sent a vessel to bring back the rest. They were so starved and dehydrated when they disembarked that “most just flopped down on the beach like dying fish,” said an observer.

Would she have gone if she had known the risks? “I would never risk my son’s life.” It’s not a straight answer, but it is the only one she gives.

On her return to the refugee camp near Teknaf in the Cox’s Bazar district of Bangladesh, Rubina lost touch with her husband. She has not heard from him since April 2020.

Rubina is one of thousands of Rohingya who have attempted to make the dangerous journey across the Bay of Bengal to Malaysia, lured by a sophisticated and ever evolving international network of human traffickers profiting from the misery of others. From March 2019 to March 2020 alone, there were 15,000 recorded trafficking incidents with actual numbers likely to be much higher. The humanitarian crisis peaks in the winter when the sea is calmer. But many people still lose their lives.

<sup>7</sup> Excerpt from: Shishir, N. N. (2021, February 2). *Human traffickers prey on Rohingya refugees. The Third Pole*. <https://www.thethirdpole.net/en/livelihoods/human-traffickers-prey-on-rohingya-refugees/>, accessed on 29 September 2023

### **Case Study 5: UN Warns of Trafficking, Sexual Abuse in the Shadow of the Rohingya Refugee Crisis<sup>8</sup>**

Human trafficking and exploitation are rife among Rohingya refugees who have fled Myanmar to seek safety in Cox's Bazar, Bangladesh, the United Nations migration agency has found.

According to interviews and community focus groups conducted in the district's makeshift IOM settlements, desperate men, women, and children are being recruited with false offers of paid work in various industries including fishing, small commerce, begging and, in the case of girls, domestic work. With almost no alternative sources of income, the refugees are willing to take whatever opportunities they are presented with, even ones that are risky, dangerous and that involve their children.

Once they start the job, they usually find that they are not paid what was promised. They are often deprived of sleep, made to work more hours than was agreed, are not allowed to leave their work premises, and are not allowed to contact their family. Women and girls are often physically or sexually abused. Some report being forced into jobs they never agreed to do.

Many of the recruiters are Bangladeshi, while some are Rohingya themselves. The number of criminals and trafficking rings operating in the district has expanded with the population. The abuse mainly occurs in neighbourhoods surrounding the settlements, but recruiters are also taking people to places as far away as Cox's Bazar city, Chittagong, and Dhaka. The IOM has also been made aware of cases where Rohingya have been trafficked to areas outside of Bangladesh, and is assisting the victims.

Forced and early marriages are also taking place among the Rohingya population. For many families, it is a coping mechanism that offers protection and economic advancement for young Rohingya women and girls.

### **Reflection and Discussion: Labour Migration, Forced Migration, Trafficking in Persons**

Review the case studies presented above and reflect and discuss on:

- (a) Usually, who are the actors involved in the migration process?
- (b) In general, what are the issues faced by people wanting to migrate in their countries of origin prior to migration?
- (c) What issues are faced by migrant workers and their families upon reaching their countries of destination or employment?
- (d) What particular issues are faced by women migrant workers?
- (e) Is yours a country of destination for migrant workers? What are the attitudes of people towards migrant workers?
- (f) What are some of the conditions that make people vulnerable to trafficking in persons?

<sup>8</sup> Excerpt adapted from: UN News. (2017, November 14). *UN warns of trafficking, sexual abuse in shadow of Rohingya refugee crisis* UN News. <https://news.un.org/en/story/2017/11/636002-un-warns-trafficking-sexual-abuse-shadow-rohingya-refugee-crisis#:~:text=UN%20warns%20of%20trafficking%2C%20sexual%20abuse%20in%20shadow%20of%20Rohingya%20refugee%20crisis,-14%20November%202017&text=Human%20trafficking%20and%20exploitation%20are,Nations%20migration%20agency%20has%20found>, accessed on 29 September 2023

## 8.2 Promoting and Protecting the Rights of Migrant Workers and Members of Their Families

Migrant workers are a subset of migrants and can be defined as persons who are engaged in paid work in a State of which the person is not a national.

There are several frameworks for the protection and promotion of their rights involving different actors and using a diverse range of approaches and tools. However, these frameworks do not operate in silos. Rather, they complement each other to strengthen the rights of migrant workers and their families. They are: the human rights treaty framework, the core instrument being the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families or ICMRW (1990); the ILO Framework and its tripartite working approach; the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2018); and the Global Compact for Safe, Orderly and Regular Migration (2018).

In most cases during the migration process, migrant workers face challenges and rights violations, both in their States of origin and in destination or employment countries. The case studies above highlight some of these issues. Thus, a perusal of the various frameworks is essential to fully understand the ways migrant workers and their families are protected.

### 8.2.1 *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, 1990*

The International Convention on the Protection of the Rights of all Migrant Workers and Members of their families (ICMRW), 1990 is the culmination of many years of discussions, reports, and recommendations on the subject of migrant rights. This section highlights some of its main aspects.

#### 8.2.1.1 *Definition of a migrant worker*

The term ‘migrant worker’ refers to a person who is

*to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national (Art 2(1)).*

The Convention also defines the term “*migrant workers in an irregular situation.*” Article 5 states that migrant workers and members of their families are considered to be undocumented or in an irregular situation if they have entered the State of employment in an unauthorised manner and are not authorised to stay, reside, or work in the State, or because they have overstayed in the State, or have violated the conditions of their authorised stay.

The Committee on the Protection of All Migrant Workers and Members of their Families (CMW) in its General Comment 2 has stated that usage of the term, ‘illegal,’ to describe migrant workers in an irregular situation is inappropriate as an association with criminality tends to stigmatise the workers. The CMW has also emphasised that even workers in an irregular situation cannot be deprived of their rights under Part III of the Convention.

#### 8.2.1.2 *Rights of migrant workers under the ICMRW*

The rights enumerated in the ICMRW can be viewed in light of: (1) The principle of non-discrimination; (2) The human rights of all migrants; and (3) The rights of migrant workers and members of their families who are documented or in a regular situation.

*Principle of non-discrimination:* Article 1 of the ICMRW states that the Convention applies to all migrant workers and members of their families without distinction of any kind. This principle is

reiterated in Art 7, Part II which provides that States Parties should respect and ensure the rights contained in the Convention without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth, or other status.

*Human rights of all migrants:* Part III recognises a range of rights held by migrant workers and members of their families. The CMW in General Comment 2 has clarified that even workers in irregular situations cannot be deprived of their rights under Part III of the Convention. While most rights in Part III elaborate upon the application of rights enumerated in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to migrant workers and their families, there are some that address their specific needs as can be seen in the text box below.

### **Spotlight: Human Rights of all Migrants as Guaranteed in ICMRW**

#### ***Human rights of migrant workers***

- Freedom to leave any country and to enter their country of origin (Art 8)
- Right to life (Art 9)
- Freedom from torture and ill-treatment (Art 10)
- Freedom from slavery or forced labour (Art 11)
- Freedom of thought, conscience, and religion (Art 12)
- Freedom of opinion and expression (Art 13)
- Freedom from arbitrary or unlawful interference with privacy, family, home, correspondence, and other communications (Art 14)
- Property rights (Art 15)
- Right to liberty and security of person (Art 16)
- Right to be treated with humanity under lawful arrest and detention (Art 17)
- Right to a fair and public hearing by a competent, independent, and impartial tribunal (Art 18)
- Prohibits retroactive application of criminal laws (Art 19)
- Prohibits imprisonment for failure to fulfil a contract (Art 20)

### ***Rights addressing a migrant worker's specific needs***

- Prohibits destruction of travel or identity documents (Art 21)
- Prohibits expulsion on a collective basis or without fair procedures (Art 22)
- Right to diplomatic assistance (Art 23)
- Right to recognition as a person before the law (Art 24)
- Equality of treatment between nationals and migrant workers for some work conditions and pay (Art 25)
- Right to participate in trade unions (Art 26)
- Equal access to social security (Art 27)
- Right to emergency medical care (Art 28)
- Right of a child to a name, birth registration, and nationality (Art 29)
- Equality of access to public education (Art 30)
- Right to cultural identity (Art 31)
- Right to transfer earnings and savings (Art 32)
- Right to be informed by the State of origin, State of employment, and State of transit regarding conditions of admission in country of employment and rights and obligations under the law and practice of the State, and other such administrative regulations.

*Rights specific to migrant workers and members of their families who are documented or in a regular situation:* The case studies presented earlier highlight some specific needs of migrant workers before starting their migration journeys and during their stay and employment in their countries of destination. Fulfilment of these needs helps to protect migrant workers from the risks associated with all stages of the process. Part IV guarantees rights to migrant workers and their families who are in a regular situation and include:

- Rights to be informed fully by the States of origin and States of employment about conditions applicable to their admission, concerning their stay, and the remunerated activities they may engage in (Art 37);
- The right to freely move in the territory of the State of employment and freely choose their residence (Art 39);
- The right to form associations and trade unions (Art 40);
- The right to participate in the public affairs of their State of origin, including voting and elections (Art 41);
- The right to enjoy the same opportunities and treatment as nationals in relation to economic and social services (Arts 43 and 45), in the exercise of their remunerated activity (Art 55), in the choice of their remunerated activity (Art 52) and in respect of protection against dismissal and the enjoyment of unemployment benefits (Art 54);
- The guarantee to receive from the State of employment, an authorisation of residence for the same period as the authorisation to engage in remunerated activity when separate authorizations to reside and to engage in employment are required by national legislation (Art 49);
- The guarantee that migrant workers who are terminated from their employment prior to the expiration of their work permit shall neither lose their authorisation of residence nor shall they be considered to be in an irregular situation (Art 51); and
- The right to transfer their earnings and savings from the State of employment to their State of origin or any other State (Art 47).

### **Key Term: Remittances**

Remittances are the money and goods which migrant workers and other people living outside send home. Remittances have an important impact on communities, and in some cases, on the national economy. For example, remittances form a large part of the Philippine's economy and improve the conditions of many communities in Myanmar. Migrants can be a source of economic empowerment and the driving force behind new opportunities, despite being in another State or another region. Remittances are a significant pull factor (something appealing which motivates people to migrate) in Southeast Asian migration. The protection of remittances and the ability to send remittances home is vital to such workers and amounts to a human right.

#### **8.2.1.3 Critical analysis of the ICMRW framework**

The Convention has several gaps. Specifically, only 58 States have ratified it to date. Brunei, Malaysia, Singapore, and Thailand, the major destination countries in Southeast Asia, have not ratified the Convention as yet. Thus, migrant workers in these countries cannot avail of the protection provided under its framework.

Another weakness of the Convention is that it contains no specific provision for women migrant workers, thus making the treaty gender blind. With the globalization of work and changing work practices, women are increasingly migrating for work. Many of the violations women could face, for example, sexual discrimination in the workplace or unequal pay, are not directly addressed by the ICMRW. This weakness is particularly apparent for domestic workers who are almost exclusively women. Because domestic work is often unregulated and the women work in private homes, it is much more difficult for them to raise complaints, organize themselves, claim overtime, and seek adherence to other work standards.

Another group which is excluded from the ICMRW are youth workers (people under 18 seeking work) who may need special protection. The Minimum Age Convention (ILO 138) stipulates that the minimum age of work should not be less than 15, and in some cases 14 years of age. It further states that the minimum age of work in hazardous employment should not be less than 18. Thus, the ICMRW does not cover working children aged 15-18 years who may need special protection.

Despite its shortcomings, the ICMRW does provide standards for the protection and promotion of migrant workers which may be used as guidance for both law reform and policy-making.

### Spotlight: The Flor Contemplacion Case<sup>9</sup>

Flor Contemplacion was a Philippine maid working in Singapore who was charged and found guilty of murder. She was executed on 17 March 1995. However, many argue the facts of the case are still open to debate. A maid was found strangled, and the four-year-old boy she looked after was discovered drowned in a bath. Flor Contemplacion became a suspect after police read the murdered maid's diary and Flor confessed to the crime. Claims of mental instability on Flor's part and also that the boy's father had strangled the maid after he discovered she had drowned his son, were ignored.

This case became a rallying point for many organizations advocating for recognition of the rights of migrant workers, particularly domestic workers in Singapore. People were especially concerned that Flor's guilt was established too quickly, and that the police did not pursue other avenues of investigation. The Philippines government offered little, if any, consular advice or protection to Flor; although belatedly sensing that people in the Philippines were very upset, they did protest her death sentence and later withdrew their ambassador from Singapore and abandoned some bilateral treaties.

Following this, Singapore gradually improved the legal protection of domestic workers, by introducing a "Maid Abuse" law (s 73 of the Penal Code) in 1998. Further, Singapore's Manpower Ministry in 2012 announced a weekly day of rest for foreign domestic workers. However, this obligation only applies to new contracts made after January 2013. This is not the only case of a domestic worker being given the death penalty. More recently, Sri Lankan and Indonesian maids received the death penalty in Saudi Arabia which led sending countries to adopt laws increasing the protection of domestic workers. For example, Indonesia banned domestic workers from migrating to Saudi Arabia in 2011, but recently signed an agreement with the Saudi government allowing travel under certain protective conditions (for example, minimum monthly wages, limited work hours, and provisions prohibiting the confiscation of passports).

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<sup>9</sup> Excerpt adapted from: Valmonte, K. (2022, March 18). *27 years since Flor Contemplacion, OFWs still at risk of abuse and maltreatment*. Philstar Global. <https://www.philstar.com/headlines/2022/03/18/2168201/27-years-flor-contemplacion-ofws-still-risk-abuse-and-maltreatment>, accessed on 29 September 2023

## **Reflection and Discussion: Assessing the Domestic Legal Framework Protecting Rights of Migrant Workers**

Review the laws in your country or any country of your choosing. Do they protect the rights of migrant workers? Specifically:

- (a) Does the guarantee of non-discrimination cover migrant workers?
- (b) Can migrant workers access rights to a fair trial? Do barriers prevent them from accessing these rights?
- (c) Do the labour laws extend protection to migrant workers, especially with regard to minimum wages and overtime allowance, just and fair conditions at work, the organisation of trade unions, and accident injury and compensation?
- (d) Can migrant workers and members of their families access and enjoy rights to culture, public education, and healthcare?
- (e) Are they guaranteed rights to diplomatic assistance and to transfer earnings and savings?
- (f) Are all the rights guarantees discussed above applicable to migrant workers in irregular situations?

### **8.2.2 The ILO Framework and its tripartite working approach**

The ILO was created in 1919 as part of the Treaty of Versailles at the end of World War I. It was founded on the understanding that conditions of labour involving injustice, hardship, and privation to large numbers of people could jeopardise peace and harmony in the world. Accordingly, its main function is to promote just conditions of work through the development of international and national standards whilst strengthening their compliance. The ILO has a unique structure of government, employer, and worker representatives. It has three main bodies: the International Labour Conference that sets international labour standards and broad policies of the ILO; the Governing Body or the executive council of the ILO; and the International Labour Office or the permanent secretariat of the ILO. The ILO has established many standards in labour rights, including maternity leave, limitations on child labour, workplace safety standards, and minimum wage standards. In addition, the ILO has reporting procedures much like the UN, complete with complaints mechanisms.

## Spotlight: ILO Standards on Labour Rights Including Rights of Migrant Workers

### Fundamental ILO Conventions

- Forced Labour Convention, 1930 (No 29) and its 2014 Protocol
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No 98)
- Equal Remuneration Convention, 1951 (No 100)
- Abolition of Forced Labour Convention, 1957 (No 105)
- Discrimination (Employment and Occupation) Convention, 1958 (No 111)
- Minimum Age Convention, 1973 (No 138)
- Occupational Safety and Health Convention, 1981 (No 155)
- Worst Forms of Child Labour Convention, 1999 (No 182)
- Promotional Framework for Occupational Safety and Health Convention, 2006 (No 187)

### The ILO Conventions and Recommendations Related to Migrant Workers

- Forced Labour Convention, 1930 (No 29) and its 2014 Protocol
- Migration for Employment Convention, 1949 (No 97)
- Recommendation concerning Migration for Employment, 1949 (No 86)
- Abolition of Forced Labour Convention, 1957 (No 105)
- Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 (No 143)
- Recommendation concerning Migrant Workers, 1975 (No 151)
- Domestic Workers Convention, 2011 (No 189)

Apart from using ILO Conventions for standard-setting at the national level, the ILO bases its work on the **Sustainable Development Targets** related to labour migration such as to:

- Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, particularly women migrants, and those in precarious employment (Target 8.8), and
- Facilitate the orderly, safe, regular, and responsible migration and mobility of people by implementing, for example, planned and well-managed migration policies.

The ILO brings together governments, employers, and workers to set labour standards, develop policies, and devise programs. Two of its initiatives which establish fair migration processes reduce the risks of human trafficking and which strengthen migrant worker rights are the Fair Recruitment Initiative and the Ship to Shore Rights, South East Asia.

## Spotlight: ILO Initiatives to Establish Fair Migration Processes

### ***Fair Recruitment Initiative<sup>10</sup>***

The Fair Recruitment Initiative (FRI) was launched in 2014 as part of the ILO Director General's call for a Fair Migration Agenda. The FRI's vision is to ensure that recruitment practices nationally and across borders are: grounded in labour standards; developed through social dialogue; and ensure gender equality. During the first phase of the initiative (2014-2019), the ILO and its partners developed tools and guidance on fair recruitment procedures and established dialogue at international levels on the subject. The second phase of the Strategy (2021-2025) is grounded in relevant international standards, global guidance, and social dialogue between governance institutions and actors within the labour market. The four pillars of the second phase of the strategy are: enhancing, exchanging, and disseminating global knowledge on national and international recruitment processes; improving laws, policies, and enforcement to promote fair recruitment; promoting fair business practices; and empowering and protecting workers.

As part of this initiative, the ILO developed the General Principles and Operational Guidelines (GPOG) for fair recruitment. In June 2019, the Association of Hong Kong Manpower Agencies (AHKMA), and the Society for HK-Accredited Recruiters of the Philippines (SHARP) signed the first ever Code of Conduct on the fair recruitment of domestic workers from the Philippines to Hong Kong. Both associations have committed to enforce the Code. Accordingly, an online worker feedback system has been created which monitors the agencies' compliance to the Code principles and the commitments of the AKHMA and SHARP.

### ***Ship to Shore Rights South East Asia<sup>11</sup>***

Ship to Shore Rights South East Asia is a multi-country, multi-annual initiative of the European Union (EU) and the UN, implemented by the ILO in collaboration with the IOM and the United Nations Development Programme (UNDP). Its overriding objective is to promote regular and safe labour migration and decent work for all migrant workers in the fishing and seafood processing sectors of Southeast Asia.

Countries in Southeast Asia are among the world's top producers and exporters of fish and seafood products, and migrant workers contribute significantly to the fishing and seafood processing sectors. The program aims to address the characteristics of working in the fishing and seafood processing sectors as well as the barriers and risks present in the migration system, which can lead to unsafe migration, decent work deficits, abuse, and trafficking for forced labour.

#### *Programme Objectives*

- Strengthen the legal, policy, and regulatory frameworks related to labour migration and labour standards, focusing on the fishing and seafood processing sectors of Southeast Asia.
- Protect labour rights and promote safe and secure working environments for all migrant workers, from recruitment to the end of contract.

<sup>10</sup> Information about the Fair Recruitment Initiative is available at its webpage: <https://www.ilo.org/global/topics/fair-recruitment/fri/lang--en/index.htm>

<sup>11</sup> Information about the Ship to Shore Rights South East Asia initiative is available at its website: <https://www.shipto-shorerights.org>

- Empower migrant workers, their families, organisations, and communities to promote and exercise their rights.

Under the Ship to Shore Rights project, the ILO has been working with the Thai seafood industry since 2016. As such, the Seafood Good Labour Practices (GLP) program was developed to work with companies to set workplace standards based on Thai labour laws and international standards, and to build capacity on applying such labour standards to their businesses. Through these activities, the Seafood GLP has helped the industry to make progress on the protection of fundamental labour rights including on the issues of child labour, forced labour, freedom of association, collective bargaining, discrimination, and occupational safety and health.

Another initiative under the Ship to Shore project in 2023 occurred with the support of the EU and Stella Marris and can be seen in the development of a comprehensive pre-departure orientation in the Philippines, as upon their return home, many Filipino migrants wanted to share their experiences about their time spent on fishing vessels at sea. Accordingly, the ILO and Stella Maris are now spearheading efforts to capture this knowledge for the benefit of other potential migrants.

Further, the Gender Equality and Women's Empowerment Strategy has also been developed to provide a robust gender analysis of the fishing and seafood processing sectors. It also highlights how the issues of labour migration, informality, and gender intersect to entrench inequalities and exacerbate decent work deficits. The strategy calls for an ambitious and transformative approach, integrating gender mainstreaming across all types of program activity, while simultaneously implementing specific activities focused on the empowerment of women and LGBTQI+ persons.

### **Reflection and Discussion: Reviewing Fair Migration Initiatives**

Review the Fair Recruitment Initiative and the Ship to Shore Rights program. Reflect on:

- (a) What are the specific objectives of these initiatives?
- (b) What problems in the migration cycle is the ILO attempting to address through these initiatives?
- (c) What have been some of its successes as described?

#### **8.2.3 ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, 2018**

While not all countries in ASEAN have ratified the ICMRW, they have come together to adopt other instruments and mechanisms for the protection and promotion of the rights of migrant workers in ASEAN.

As such, ASEAN adopted the Declaration on the Protection and Promotion of the Rights of Migrant Workers in 2007 – however, it does not enumerate rights. Rather, it outlines the obligations of receiving and sending States in the areas of: (1) protection from exploitation, discrimination, and violence; (2) labour migration governance; and (3) the fight against trafficking in persons.

Following adoption of the Declaration, a Committee on the Implementation of the Declaration was established leading to the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers in 2018. The Consensus lists the rights of migrant workers as well as the

obligations of sending and receiving States. One significant aspect in which it is different from the ICMRW is that while rights granted in Part III of the ICMRW are applicable to migrant workers in irregular situations, the Consensus clearly states in Art 3 that its applicability is subject to the laws, regulations, and policies of respective ASEAN Member States. Nevertheless, while the Consensus does not explicitly guarantee rights to migrant workers in irregular situations, for humanitarian reasons, it does urge Member States to closely co-operate to resolve cases of migrant workers who, through no fault of their own, have subsequently become undocumented and to take measures to prevent and curb the flow of undocumented migrant workers (Arts 56 and 57). Significantly though, the ASEAN Consensus is non-binding in nature.<sup>12</sup>

### **Spotlight: Regional MPs – ASEAN Consensus on Migrant Workers Does Not Provide Adequate Protections<sup>12</sup>**

JAKARTA – The adoption at last week’s ASEAN Summit of a new regional Consensus covering the rights of migrant workers fails to provide adequate protections for them region-wide, ASEAN Parliamentarians for Human Rights (APHR) said today.

While commending ASEAN leaders for coming to an agreement on the importance of safeguarding migrant workers’ rights, the collective of regional lawmakers said that the final document—the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers—was not enough. MPs argued that more robust protections are needed, including through a legally-binding regional treaty.

“This Consensus fails to meet the basic criteria that we, along with many civil society organizations, have been calling for: a legally-binding document that would provide genuine protections in accordance with international human rights law,” said APHR Board Member Teddy Baguilat, a member of the House of Representatives of the Philippines.

The Consensus adopted last week came a decade after the approval of the 2007 Cebu Declaration, which called for the development of an instrument to protect migrant workers’ rights. Although ASEAN leaders claimed that the Consensus marked the culmination of this effort, regional MPs said that language in the document—particularly repeated clauses qualifying commitments as being “subject to national laws, regulations, and policies”—undermined its potential impact and reflected the problematic approach of previous ASEAN documents, including the ASEAN Human Rights Declaration.

“The Consensus affords wide latitude to States to limit protections in accordance with domestic laws and policies, essentially allowing them to selectively opt out of adherence to critical provisions. We have seen this sort of qualifying language in ASEAN documents before, and those have been implemented in ways that have allowed for the continued violation of the rights of millions of ASEAN citizens,” Baguilat said.

“It is extremely disappointing that ASEAN leaders decided to limit the scope of migrant workers’ rights in this way. Human rights are universal and should supersede domestic law, not be curtailed by it.”

<sup>12</sup> *Regional MPs: ASEAN Consensus on Migrant Workers does not provide adequate protections.* (2020, November 9) ASEAN Parliamentarians for Human Rights. <https://aseanmp.org/2020/11/09/regional-mps-asean-consensus-on-migrant-workers-does-not-provide-adequate-protections/>, accessed on 29 September 2023.

The comments from regional legislators come several months after the conclusion of an APHR-led fact-finding mission to Malaysia in August, during which a delegation of current and former parliamentarians from four ASEAN Member States looked into conditions for migrant workers and the ways in which their situation could be improved. The findings from the mission, as well as policy recommendations based on them, were published in a summary report released in September.

“What we found in Malaysia is applicable to all countries in the region. There is a widespread lack of political will to truly address and bring to an end rights violations against migrant workers,” said Baguilat, who took part in the August mission.

“ASEAN has time and again shown that it can say the right things. But when it comes time for action, critical commitments are conveniently ignored by member governments. We are concerned, based on our findings, that enforcement of the Consensus at the domestic level will be insufficient,” Baguilat added.

Parliamentarians said that more needed to be done on the part of ASEAN Member States to prove that they had the political will to implement the Consensus and to address the lack of protections for migrant workers at the domestic level.

“Migrant workers are essential to the development of the ASEAN Community. In order to demonstrate a genuine commitment to safeguarding their rights, ASEAN should pursue the development and implementation of a region-wide action plan, including a handbook on common standards,” said APHR Board Member, Kasit Piromya, a former Thai MP who also joined the mission to Malaysia in August.

Lawmakers also reiterated their call for a legally-binding treaty, echoing calls from civil society.

“The Consensus demonstrates that ASEAN can be progressive in its pronouncements. It recognizes that workers can become undocumented through no fault of their own and extends protections to them, at least rhetorically. But this and other positives are rendered almost meaningless since the document is not legally-binding,” said Eva Kusuma Sundari, an APHR Board Member and parliamentarian from Indonesia.

“ASEAN was able to agree on a legally-binding treaty on human trafficking, so they should be able to do the same for migrant workers. Renewing discussions on a legally-binding instrument, along with fast-tracking the development of action plans to implement this Consensus, would be a good way to prove that the political will to address the situation does exist,” Sundari concluded.

## **Reflection and Discussion: Assessing the ASEAN Consensus on Migrant Workers**

Review the press statement released by the ASEAN Parliamentarians on Human Rights (as seen above):

- (a) What are the gap(s) in the ASEAN Consensus on migrant workers as identified by ASEAN parliamentarians?
- (b) What are the recommendations of the ASEAN parliamentarians?

#### 8.2.4 Global Compact for Safe, Orderly and Regular Migration, 2018

The Global Compact for Safe, Orderly and Regular Migration was adopted at an intergovernmental conference in Morocco in 2018. It is notable as it is the first intergovernmental agreement to cover all dimensions of international migration in a comprehensive manner. The Global Compact rests on the Universal Declaration of Human Rights, the other core international human rights treaties, the United Nations Convention against Transnational Organised Crime and its Protocol on Trafficking in Persons, and other related instruments. Although not legally binding, it is an important framework for migration governance as it puts migrants and their human rights at its centre. The Global Compact outlines 23 objectives. Each contains a commitment, followed by a range of possible governmental actions to achieve safe, orderly, and regular migration across the cycle. It also contains an implementation framework and a commitment to achieve the objectives at the national, regional and international levels. The IOM serves as the secretariat of the network. Further, it stipulates that UN Member States discuss and share their progress every four years beginning in 2022 through the International Migration Review Forum.

### 8.3 A Human Rights Approach to Anti-trafficking Debate

In 2000, the United Nations Office on Drugs and Crime or UNODC adopted the Trafficking Protocol, one of three protocols to the United Nations Convention Against Transnational Organized Crime (2000), and in so doing, for the first time defined the act of trafficking in international law. It also criminalised the act of trafficking and provided for the protection of the rights of trafficked persons.

#### Spotlight: Definition of Trafficking

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children or the Palermo Protocol states:

*Trafficking in persons shall mean the [actions of] recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*

For a situation to be trafficking, three key elements must exist (although for children, only the ‘act’ and ‘exploitation’ elements are necessary).

*The ‘act’ element:* Refers to the recruitment, transportation, transfer, harbouring, or receipt of persons. This list covers the full spectrum of the migration movement, from initial recruitment to the person being received at the other end and is significant as it criminalizes the entire process. Trafficking is therefore not merely the exploitation of a person, but also the selling or recruiting of someone into a trafficked situation.

*The ‘means’ element:* Refers to the method used to accomplish the act including threats or the use of force, deception, coercion, abduction, fraud, abuse of power or a position of vulnerability, or the giving of payments or benefits.

*The ‘purpose’ element:* Refers to the exploitation of people and includes a list of exploitative practices such as sexual exploitation, **forced labour**, slavery and slavery-like practices, and the

removal of organs. According to the ILO Convention of Forced Labour No 29 (1930), forced labour refers to

*All work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*

The definition of forced labour has three elements. First, “work or service” which refers to all types of work occurring in any industry and sector including in the informal economy. The second element is “menace of any penalty” which refers to a wide range of penalties or measures used to force someone to work. The last element is involuntariness. The exceptions to forced labour as mentioned in ILO Convention No 29 are: compulsory military service, normal civic obligations, prison labour, work in emergency situations such as war, flood, earthquake, etc, and minor communal services for the community.

However, the above definition of trafficking in persons applies to adults only. An exploited child only needs to prove the action and purpose elements for trafficking to occur. Moreover, the Trafficking Protocol does not specify a gender or age – anyone can be trafficked. It does not specify that borders must be crossed, so people can be trafficked even within their own country. The Protocol also clearly states that the consent of the victim is irrelevant if any of the above means were used.

### **8.3.1 Victim-centred approach to trafficking**

A victim-centred or human rights approach to trafficking focuses on the rights of the victim and the corresponding obligations of States. In addition to the Palermo Protocol for Human Trafficking, some instruments which provide the international normative framework for the human rights approach to trafficking include the ICCPR, the ICESCR, the Convention on the Rights of the Child, and its Optional Protocols, the Convention on the Elimination of All Forms of Discrimination Against Women, the ICMRW, the Recommended Principles and Guidelines on Human Rights and Human Trafficking issued by the Office of the High Commissioner of Human Rights, 2002, and the UNHCR’s Guidelines on International Protection for Trafficking, 2006.

At the Southeast Asian regional level, the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP), a binding instrument, was adopted in 2015.<sup>13</sup> An ASEAN Plan of Action complementing the ACTIP<sup>14</sup> was also adopted to provide specific action plans to effectively address regional challenges in relation to: (1) the prevention of trafficking in persons; (2) the protection of victims; (3) law enforcement and prosecuting the crime of trafficking in persons; and (4) regional and international cooperation and coordination.

### **8.3.2 Analysing rights of victims of trafficking and state obligations**

Some rights vital for a victim of trafficking to seek remedies and corresponding State obligations are:

**Rights to life, liberty and security:** Every human has the right to life, and the rights to liberty and security. Trafficking causes harm to the enjoyment of these rights. In this regard, States have an obligation to adopt appropriate legislative and other measures necessary to establish trafficking as a criminal offence. States also have an obligation to effectively investigate, prosecute, and

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<sup>13</sup> The full text of which is available at <https://asean.org/asean2020/wp-content/uploads/2021/01/ACTIP.pdf>, accessed on 3 October 2023.

<sup>14</sup> The full text of which is available at <https://asean.org/wp-content/uploads/2021/01/ASEAN-Convention-Against-Trafficking-in-Persons-Especially-Women-and-Children-Plan.pdf>, accessed on 3 October 2023.

adjudicate trafficking and related conduct, whether committed by governmental or non-State actors.

***Rights non to be discriminated against:*** Every victim of trafficking in persons has the right to seek protection and remedies against such violations. States cannot deny them access to protection based on their age, sex, gender, nationality, or other status. In particular, a State cannot deny protection on the grounds of citizenship or irregular migration status. The principle of non-discrimination is at the heart of the international human rights framework and is recognised in the international bill of rights.

***Rights to access remedies and justice:*** The right to access remedies and justice includes several elements:

First, it entails a guarantee that trafficked persons will not be detained, charged, or prosecuted for the illegality of their entry or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent such involvement was directly related to their situation as a trafficked person. This guarantee is crucial to empower victims of trafficking to seek help. If victims fear punishment because of their irregular status or their involvement in illegal activities in countries of transit or destination, they may lack incentive to seek remedy.

Further, once rescued from situations of trafficking, States have a responsibility to provide access to physical and psychological care to the victims. States have the obligation to provide access to such care and services even if the trafficked person is unwilling to cooperate in legal proceedings.

Another important component of the right to seek remedy is legal aid and assistance. States have a duty to provide legal aid to trafficked persons for the duration of any criminal, civil, or other action against suspected traffickers. And last but not least, States have an obligation to provide temporary residence permits to victims during legal proceedings as well as to guarantee witness protection programs in cases where powerful actors are suspected to be involved in the human trafficking operations.

***Obligation to respect the best interests of the child:*** In cases where children are identified to be victims of trafficking, the State has to consider the best interests of the child in all their actions. In particular, the actions of the authorities must be respectful of the special vulnerabilities and needs of children and their rights.

***Guarantee of a safe and voluntary return:*** Upon rescue, a question that often arises is whether victims of trafficking can stay in the country of destination rather than return to their country of origin. Both States have an obligation to guarantee the safe and voluntary return of the victim of trafficking. As such, destination countries should refrain from forcibly repatriating victims of trafficking while countries of origin should take steps to enable victims to reintegrate into their families safely and with human dignity.

***State obligations to strengthen the victim identification process:*** Victim identification is the process by which individuals are identified as victims of trafficking. Identification as a victim of trafficking entitles individuals to rights and protections. In cases of human trafficking, law enforcement may find the victims in situations of sexual exploitation, forced labour, or irregular migration, etc. If law enforcement is unable to identify elements of the offence of trafficking in the situation, they may treat the case as a violation of labour laws, immigration laws, or criminal codes. Victims may feel unable to volunteer information about their exploitation due to trauma, an inability to understand the language used by law enforcement, or fear of the traffickers. In such contexts, States have a responsibility to develop tools and resources to identify and assist victims of trafficking. For example, the Council for Anti-Trafficking in Persons and Anti-Smuggling

of Migrants in Malaysia (MAPO) and the Ministry of Human Resources (MOHR) in collaboration with the ILO developed a training manual entitled, 'Forced labour and trafficking in persons.'<sup>15</sup> This online learning module comprises a practical guide for the police and officials from the immigration, customs, and Maritime Enforcement Agency to better understand the issues around trafficking and forced labour.

### **8.3.3 New trafficking trend: Online investment scam operations**

Since early 2021, the rise of online scam operations has raised concern especially with regard to its links to human trafficking criminal networks in Southeast Asia. Lured by lucrative job postings in social media, victims from across the region, as well as beyond, have found themselves imprisoned in scamming centres across Cambodia, Lao PDR, and Myanmar where they have been forced to carry out online scam operations.<sup>16</sup> Many of these centres were former casinos that closed down as a result of the travel restrictions put in place to curb the spread of COVID-19. As a result, the owners sought to generate new income streams by shifting towards the less regulated online sphere including gambling or scam operations. Hence, the internet became a means for new types of recruitment, deception, and exploitation.

The economic impact of COVID-19 led to mass unemployment and created a large pool of potential victims. In the past, most trafficking victims in the region were people with limited access to education working in low-income jobs. However, many victims of the new online scam operations are well-educated, multilingual, computer-literate, and may even hold higher education degrees.

Currently, instruments to counter this new trend in trafficking are limited, with the Philippines being the only country in the region having trafficking laws that address violations via internet and digital platforms. Nevertheless, the pervasiveness of the problem has led ASEAN leaders to make their first declaration on the danger of such cyber scams at the summit of the Association of Southeast Asian Nations in Indonesia on 10 May 2023. There, they pledged to crack down on online scams operated by human traffickers preying on vulnerable job seekers, particularly in the region's poorest countries.<sup>17</sup>

## **8.4 Impact of COVID-19 on Migrant Workers and Victims of Trafficking in Persons**

Migrant workers and their families were among the populations most severely affected by the COVID-19 pandemic which exacerbated pre-existing structural inequalities and prejudices relating to migrants and brought to the forefront problems that had long been neglected. When businesses halted operations, migrants were the first to lose their jobs. After border controls tightened, many found themselves stranded in destination countries with no income and no access to social protection. Language barriers meant many migrants were unable to access information about the pandemic, including methods to protect themselves from its effects. Irregular migrants were especially vulnerable since they lacked access to healthcare services and social protection; their irregular status too made them fearful to seek help.<sup>18</sup> Similarly, loss of income made people more

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<sup>15</sup> Cronje, P., & Zaid, A. B. (2021). *Forced Labour and Trafficking in Persons – Training Manual for Law Enforcers, Malaysia*. International Labour Organisation.

<sup>16</sup> OHCHR, Regional Office for South-East Asia (2023) Online scam operations and trafficking into forced criminality in Southeast Asia: recommendations for a human rights response. United Nations.

<sup>17</sup> LK. (2023) 'Southeast Asian leaders pledge crackdown on human traffickers online scams,' Reuters, 11 May. <https://www.reuters.com/world/asia-pacific/southeast-asian-leaders-pledge-crackdown-human-traffickers-online-scams-2023-05-10/>, accessed on 30 September 2023.

<sup>18</sup> United Nations (2020, December 18) *Asia Pacific Migration Report 2020: Assessing Implementation of the Global Compact for Migration*. <https://www.unescap.org/resources/asia-pacific-migration-report-2020>, accessed on 30 September 2023.

desperate for employment opportunities of any kind. Such a situation coupled with stricter border restrictions, pushed many towards pursuing more irregular methods of migration, many of which were dangerous and carried the risk of exploitation and even trafficking.

Meanwhile, victims of trafficking also faced the heightened risk of COVID-19. Lack of identity documents and/or freedom of movement equated to an inability to access health and other social services, including vaccinations. Some victims were simply abandoned on the streets by their traffickers without any means of survival as the pandemic forced business closures. At the same time, victims in confinement faced stricter controls and increased violence at the hands of their traffickers.<sup>19</sup>

COVID-19 also reduced the ability of frontline responders and organizations to identify, refer, and provide support to trafficking victims. The 2022 Global Report on Trafficking in Persons (GloTip) found that for the first time in 20 years, the number of detected victims fell in all regions around the world in 2020, possibly as a result of the pandemic limiting the capability of law enforcement and trafficking being forced ever more underground. Trafficking for sexual exploitation also became less detectable. Since identifiable victims of sexual exploitation worked in public establishments (for example, night clubs, brothels, bars, etc.), the closure of such establishments may have led to a reduction of these forms of exploitation. On the other hand, it could also mean they just became more hidden and less detectable.

### **Spotlight: Singapore's Migrant Dormitories' Outbreak**

One case that best highlights how COVID-19 exposed pre-existing social inequalities is the outbreak that occurred in Singapore's migrant dormitories. At the beginning of the pandemic, Singapore was praised for its effective management of the situation and its ability to maintain low and stable levels of new daily cases. However, this changed in late March 2020 when a case was found in the migrant worker dormitories. From then on, the number of new cases rapidly rose, reaching the thousand mark in April; almost all the new cases involved residents residing in such dormitories. In other words, the poor housing conditions forced workers to live together in cramped spaces, effectively making it impossible for them to socially distance. Yet, they were also forced to quarantine in isolation, having to face not only the stress of potentially falling sick but also the stress from losing their incomes and being unable to send remittances back home.

"Day and night, we are just inside one room ... It's actually torturing our minds. It's like jail."

"Then we can't socially distance because there's no space."

The above quotations are taken from an article by the BBC<sup>20</sup> on how COVID-19 exposed inequality in Singapore. The poor conditions of the dormitories posed a problem even before the pandemic but was left unaddressed until it hit. Discrimination against migrant workers is prevalent in Singapore and the way in which the government dealt with the dormitory outbreak, by separating "cases in the community" from "cases residing in dormitories" only highlighted the deeply entrenched 'Us vs Them' mentality, further exacerbating xenophobic attitudes.

<sup>19</sup> UNODC (2021) The effects of the COVID-19 pandemic on trafficking in persons and the responses to the challenges. <https://reliefweb.int/report/world/effects-covid-19-pandemic-trafficking-persons-and-responses-challenges>, accessed on 30 September 2023.

<sup>20</sup> Tan, Y. (2020) 'COVID-19 Singapore: a 'pandemic of inequality' exposed,' BBC News, 18 September. <https://www.bbc.com/news/world-asia-54082861#>. accessed on 30 September 2023.

## A. Chapter Summary and Key Points

‘Migrant’ is an umbrella term that includes migrant workers, international students, smuggled people, and victims of human trafficking, etc. Common types of migration are: labour migration, forced migration, and irregular migration.

Irregular migration refers to movements occurring outside the regulatory norms of countries of origin, transit, and destination. The irregularity refers to the status of a person at a given point of time. A person escaping from conflict or natural disaster or persecution may enter into a country irregularly, but his/her status may become regular once the person applies for asylum. The correct term to use is ‘irregular’ rather than ‘illegal’ as notions of criminality are attached to the former.

Trafficking in persons refers to the recruitment, transportation, transfer, harbouring, or receipt of persons, by force, coercion, fraud, or some other form of deception, for the purpose of exploitation. Unsafe migration processes make people vulnerable to smuggling and trafficking in persons.

The different frameworks for promoting and protecting the rights of migrant workers are: the human rights treaty framework, the core instrument being the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICMRW), 1990; the ILO Framework and its tripartite working approach; the Global Compact for Safe, Orderly and Regular Migration, 2018; and the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2018). These frameworks are interrelated.

The rights contained in the ICMRW can be viewed with respect to three categories: (1) the principle of non-discrimination, (2) the human rights of all migrants (Part III), and (3) the rights of documented migrant workers and members of their families or those in regular situations (Part IV). The rights contained in Part III while reaffirming the rights enumerated in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), also list rights that address the specific needs of migrant workers. The Committee (CMW) monitoring the ICMRW has clarified that rights in Part III are also applicable to migrant workers in irregular situations.

However, the ICMRW has not been widely ratified. In Southeast Asia, major destination countries such as Brunei, Malaysia, Singapore and Thailand have not ratified the Convention. In addition, the needs of female migrant workers and working migrant children aged 15-18 are also not addressed by it. Despite these gaps, the ICMRW does articulate international standards that may be used as reference points by law and policy makers.

The International Labour Organisation (ILO) has a tripartite working approach. It brings together governments, employers, and workers to set labour standards and develops policies and programs to make migration safe and fair at every stage of the cycle.

The ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers was adopted in 2018. The Consensus lists the rights of migrant workers and the obligations of sending and receiving States. One significant aspect in which the ASEAN Consensus is different from the ICMRW is that while rights granted in Part III of the ICMRW are applicable to migrant workers in irregular situations, the Consensus clearly states in Art 3 that its applicability is subject to the laws, regulations, and policies of respective ASEAN Member States. As such, the ASEAN Consensus is non-binding in nature.

The Global Compact for Safe, Orderly and Regular Migration was adopted at an intergovernmental conference in Morocco in 2018. It is important as it is the first intergovernmental agreement to comprehensively strengthen migration governance. The Compact outlines 23 objectives, each

of which contains a commitment, followed by a range of actions that governments can choose to achieve safe, orderly, and regular migration across the migration cycle. It also contains an implementation framework and a commitment to achieve the objectives at the national, regional and international levels. The International Organisation for Migration (IOM) serves as the secretariat of the network.

A victim-centred or human rights approach to trafficking focuses on the rights of a victim of trafficking in persons and the corresponding obligations of States. In addition to the Palermo Protocol for Human Trafficking, some of the instruments which provide the international normative framework for a human rights-based approach to trafficking include the ICCPR, the ICESCR, the Convention on the Rights of the Child, and its Optional Protocols, the Convention on the Elimination of All Forms of Discrimination Against Women, the ICMRW, the Recommended Principles and Guidelines on Human Rights and Human Trafficking issued by the Office of the High Commissioner of Human Rights, 2002, and the UNHCHR's Guidelines on International Protection for Trafficking, 2006.

The rights and obligations that are at the focus of a human rights approach to trafficking are: the right to life; rights to liberty and security of a person and corresponding State obligations; rights against non-discrimination; rights to access remedies; the obligation to respect the best interests of the child; guarantees of a safe and voluntary return, and State obligations to strengthen victim identification processes.

## B. Typical exam or Essay Questions

- What are some negative things people say about migrant workers in your country and what can be said to counter these views? How do migrant workers contribute to the economy, workforce, and community in your country?
- Discuss the laws regulating migrant labour in your country. Do the laws force people into undocumented situations or do they protect the rights of workers?
- If you live in a sending country, what preparation and protection does your government offer to migrants travelling overseas to work?
- Is the law on trafficking in your country in compliance with the Palermo protocol? Does it have the same definition, and does it provide the same rights as Palermo? Are there any major weaknesses in your domestic laws?
- Find a case of trafficking that occurred in your country. How was the situation identified, and how was the victim protected? Do you consider government initiatives in your country enough to combat trafficking?

## C. Further Reading and References

International Labour Organisation (ILO), '*Locked down and in limbo: The global impact of COVID-19 on migrant worker rights and recruitment*' ILO, 2021, available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_821985.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_821985.pdf), accessed on 30 September 2023.

International Organization for Migration (IOM), '*Asia-Pacific migration data report 2022*' IOM Asia-Pacific Regional Data Hub, 2023, available to download at <https://publications.iom.int/books/asia-pacific-migration-data-report-2022>, accessed on 30 September 2023.

Scholten, P., Pisarevskaya, A., Levy, N. (2022). An Introduction to Migration Studies: The Rise and Coming of Age of a Research Field. In: Scholten, P. (eds) *Introduction to Migration Studies*. IMISCOE Research Series. Springer, Cham. [https://doi.org/10.1007/978-3-030-92377-8\\_1](https://doi.org/10.1007/978-3-030-92377-8_1)

United Nations Office on Drugs and Crime (UNODC), '*Global report on trafficking in persons 2022*' UNODC, 2022, available at [https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP\\_2022\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf), accessed on 1 October 2023.

### **Other Reference Material**

The websites of the ILO, the IOM, the UNODC, ASEAN-Australia Counter Trafficking, and other international organisations provide a rich source of information on standards and practices to strengthen migration governance and the protection of the rights of migrant workers and victims of trafficking in persons.



# Chapter

# 9

## Rights of Refugees and Stateless Persons\*

### Reader's Guide

Chapter 8 discussed migration and the rights of migrant workers and the victims of human trafficking. This chapter discusses the rights of two other categories of non-citizens: refugees and stateless persons. It begins by explaining the terms, 'refugee' and 'stateless person' before examining the vulnerable situation of these non-citizens and presenting the specific international human rights treaties protecting and promoting their rights. Through examples and case studies, this chapter will also provide an overview of the situation of refugees and stateless persons in Southeast Asia.

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## 9.1 Introduction

As discussed in the previous chapter, the dividing line between categories of non-citizens such as refugees, stateless people, migrant workers and victims of human trafficking is very thin and changes in personal circumstances of people can result in different categorizations or people falling within multiple categories. For example, a stateless person may become a refugee overnight when faced with persecution, or a migrant person may become a victim of human trafficking. As a result, the protection of their rights becomes even more challenging. One example in Southeast Asia is that of the Rohingya of Myanmar, who, since becoming stateless there, have been forced to take refuge elsewhere. Accordingly, many Rohingya refugees also became victims of human trafficking. This chapter will provide an overview of the international standards governing the rights of refugees and stateless persons and discusses the challenges that exist in the protection of such rights.

## 9.2 The Refugee Convention

The Universal Declaration of Human Rights (UDHR) was the first international document to recognize the right to seek and enjoy asylum from persecution, although, previously, the League Of Nations did offer legal protection to some groups fleeing persecution (for example, from Russia and Germany). While the UDHR was universal in its protection, and based refugee protection on the individual and not the group, it did so vaguely, stating, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” This assertion did not specifically mention refugees (rather it talks of “those seeking asylum”). At the time of its adoption, this was a significant concern as World War II had resulted in a sizeable number of refugees. Action was needed, so in 1950 the UN High Commissioner for Refugees (UNHCR) was established. Following that, in 1951 the UN Convention Relating to the Status of Refugees (commonly called the Refugee Convention) was adopted. The Refugee Convention defines the term “refugee” and this definition is still commonly used today, most critically to outline the requirements that must be met before a person can claim refugee status.

### 9.2.1 Who is a refugee?

The United Nations Convention relating to the Status of Refugees commonly known as the 1951 Refugee Convention and its 1967 protocols defines the term ‘refugee’ and outlines the rights and international standards of treatment concerning their protection. Accordingly, it defines a refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

**Time clause of 1 January 1951:** At the time the Convention was adopted (1951), States sought to limit their obligations to the refugee situation existing at that time (refugee situation at the end of World War II). However, with time, it became increasingly necessary to make the Refugee Convention applicable to persons at risk after 1951 as well. For this reason, a Protocol relating to the Status of Refugees was adopted in 1967 (entry into force on 4 October 1967). This removed the time clause of 1951 from the definition of refugees.

**Well-founded fear of being persecuted:** A key element of the definition, this involves both subjective and objective components. Referring to the applicant’s state of mind, this element is inherently subjective in nature and is assessed through his/her statements. By contrast, “well-founded” adds

an objective component. Thus, the applicant's frame of mind must be supported by an objective situation existing in his/her country of origin demonstrating a clear risk of persecution. In other words, while assessing this "well-founded fear of being persecuted," authorities must also take into account the personal and family background of the applicant including membership of particular racial, religious, national, social or political groups, his/her interpretation of the situation, and his/her personal experience. Further, in assessing this objective element, authorities are not required to pass judgement on the conditions existing in the applicant's country of origin. Rather, they should only review such context to assess the applicant's credibility. In addition, the situation of each person must be assessed on its own merits as the fear of persecution may vary from one individual to another.

**Persecution:** Although no universally accepted definition of the term exists, Art 33 of the 1951 Convention provides some guidance – here, persecution can be understood to mean a threat to life or freedom on account of one's race, religion, nationality, political opinion or membership of a particular social group. Thus, discrimination in various forms combined with adverse factors in a person's country of origin amounting to serious violations of human rights are generally accepted to fulfil the criteria of "well-founded fear of persecution."

**For reasons of race, religion, nationality, membership of a particular social group or political opinion:** The well-founded fear of persecution must be for reasons of: (1) race, (2) religion, (3) nationality, (4) membership of a particular social group, or (5) political opinion. Fear of persecution can arise from either one or a combination of these factors. Applicants are not expected to identify the factors giving rise to the fear of persecution. It is the task of the authorities to ascertain the reason behind the applicant's fear of persecution, and to determine whether such reasons fall within the ambit of the Convention.

**Is outside the country of his nationality:** This requirement is also known as alienage. Individuals need to be outside their country of origin to claim refugee status. As long as the person is within the territorial jurisdiction of his/her home country, international protection cannot be initiated. However, the concept of alienage does not require an applicant to have left the country *because* of a well-founded fear. Instead, a person can apply for refugee status *after* having been abroad for some time because of circumstances arising in his/her country of origin. In such cases, the applicant would not initially have been a refugee but may become one at a later date, making the person a refugee "sur place."

**and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country:** A refugee is a person who does not enjoy the protection of the government of their country of origin. The phrase "is unable or owing to such fear is unwilling" implies that ability to avail protection is determined by circumstances beyond the will of the person concerned. For example, situations of war, civil violence, fear of targeted violence, or other such circumstances may make it difficult for the person to avail government protection. Protection by a person's home country may also have been denied to the applicant in the past, and such denial will strengthen his/her claim.

**or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it:** The last clause refers to stateless persons. In case of stateless refugees, the phrase, "country of nationality" is replaced by country of "habitual residence," and the phrase, "unwilling to avail himself of protection" is replaced by the phrase, "unwilling to return to it." It is vital to note that while a stateless person living outside his/her country of habitual residence should be unable to return to said country to be recognised as a refugee, a stateless person's inability to return must be due to reasons of fear.

## Case Studies: Well-founded Fear of Persecution

### ***...for reasons of gender***

Rahaf Mohammad al-Qunun, a 18 year old Saudi woman landed at Suvarnabhumi Airport on 5 January 2019. She was flying in from Kuwait to Australia, with a stop over in Thailand. Upon landing in Bangkok, al-Qunun said, an official from the Saudi Embassy met her and seized her passport as her family had reported to the authorities in Bangkok that she was travelling without the permission of her male guardian. She was held at an airport hotel so that she could be returned to Kuwait. al-Qunun barricaded herself in her room at the airport hotel and sent out appeals for asylum on twitter. She said that she was trying to flee her family as she was subjected by them to physical and psychological abuse. She said she had been locked up in a room for six months because she had cut her hair and expressed fear that she would be sent to jail and eventually be killed if she was returned to Kuwait.

Thailand allowed her to stay in Bangkok, and let her case be assessed by the UNHCR, the UN Refugee Agency. UNHCR determined that her claim for asylum was valid and she was granted refugee status by the UNHCR. Eventually, Canada offered her resettlement and a new home.

Human rights organisations such as Human Rights Watch have documented the systemic discrimination faced by women under the male guardianship system in Saudi Arabia. Under this system, a woman's life is controlled by a man from her birth till death - such as the father, husband, brother or even son. This guardianship system prevents women from taking any key decisions about their life.

Reference: BBC News. (2019, January 11). Rahaf al-Qunun: Saudi teen granted asylum in Canada. *BBC News*. <https://www.bbc.com/news/world-asia-46844431>

### ***... for reasons of race***

The Rohingyas are a muslim ethnic minority who have lived over centuries in Myanmar. However, they were deprived of citizenship by Myanmar in 1982, making them stateless. As a stateless population, Rohingyas are denied protection of their basic rights and are made vulnerable to exploitation and abuse. In August 2017, armed attacks forced thousands of Rohingyas to flee their homes in Rakhine State in Myanmar and seek refuge across the Bay of Bengal in Bangladesh. The UNHCR has recognised the Rohingya as the most persecuted minority in the world.

Reference: *Rohingya Refugee Crisis Explained*. (2023, August 23). UNHCR. <https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/>

## Key Terms: Refugee Protection

**Asylum:** Refers to the grant of protection by a State in its territory to persons outside their country of nationality or habitual residence who are fleeing persecution, serious harm, or for other reasons. This includes protection against refoulement, permission to remain on the territory of the asylum country, humane standards of treatment, and access to a durable solution. In the context of refugees, durable solutions may mean voluntary repatriation, local integration, or resettlement.

**Asylum seeker:** A general term for any person seeking international protection. In some countries, it is used as a legal term referring to a person who has applied for refugee status and is awaiting a final decision on their claim. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum seeker. Asylum-seekers cannot be sent back to their country of origin until their claims have been examined. Further, they are entitled to certain minimum standards of treatment while their refugee status is being determined.

**Burden sharing:** Refers to the principle through which the diverse costs of granting asylum assumed by a host country is equitably divided among a greater number of States. The origin of this principle can be found in Paragraph 4 of the 1951 Convention Relating to the Status of Refugees which acknowledges that granting asylum can place an unduly heavy burden on destination countries and that such problems should be addressed through international cooperation.

**Local integration:** An example of a durable solution for refugees involving permanent settlement in a host country. A complex and gradual process involving three dimensions (legal, economic, and socio-cultural), the process concludes with the refugee's naturalisation in the host country.

**Refoulement:** The removal of a person to a territory where he/she would be at risk of persecution. Under both international refugee law and customary international law, refoulement is permitted only in exceptional circumstances.

**Refugee camp:** Refers to a plot of land which is temporarily made available to host refugees where essential services including food, sanitation, health, medicine, and education are provided by the UNHCR, host governments, and other humanitarian organizations. The average length of time spent in such camps varies depending on the crisis. In protracted refugee situations involving mass displacements from a country over many years, entire generations may grow up inside their confines. In such situations, the UNHCR will provide durable semi-permanent shelters and work with communities to offer educational and livelihood opportunities to help refugees rebuild their lives.

**Refugee Status Determination (RSD) procedure:** The legal or administrative process by which governments or the UNHCR determines whether a person seeking international protection is considered a refugee under international, regional, or national law.

**Resettlement:** Refers to the transfer of refugees from an asylum country to another State that has agreed to admit them and ultimately grant them permanent residence. The status of resettled refugees ensures protection against refoulement and provides a resettled refugee and their dependents with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.

**Voluntary repatriation:** Refers to the free and informed return of refugees to their country of origin in safety and dignity. Voluntary repatriation may be organized (i.e. when it takes place under the auspices of the concerned States and/or UNHCR) or spontaneous (i.e. when refugees repatriate by their own means with little or no direct involvement from government authorities or UNHCR).

**Urban refugees:** As the name implies urban refugees live in the community where they have a better chance of finding employment to support their families. However, if the country has not ratified the Refugee Convention, then refugees living in the country do not enjoy full protection to live their lives and earn their livelihoods. In such cases urban refugees are at risk of being arrested and deported to their countries of origin. They are also often denied access to health care and education. Further, since they do not have official documents, they are forced into informal employment increasing their vulnerability to exploitation and abuse.

(UNHCR master glossary of terms, available at: <https://www.unhcr.org/glossary>)

### **9.2.2 Rights of refugees**

The 1951 Refugee Convention enumerates the rights of refugees together with corresponding obligations on States. These can be divided into two groups: rights that should be enjoyed by refugees at the same level as nationals; and rights that can be enjoyed at the same level as other non-citizens. However, the rights guaranteed in the 1951 Convention are not exhaustive as refugees are also entitled to the rights guaranteed in the core human rights treaties.

**Table 9-1: Rights Guaranteed in 1951 Refugee Convention and State Obligations**

| Rights entailing same protection as nationals                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Rights entailing protection as favourable as possible, and not less favourable than that accorded to aliens or non-citizens                                                                                                                                                                                                                                                                                                                                                           |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>* Right to freedom of religion (Art 4)</li> <li>* Rights to inventions, designs or models, trade marks, trade names, and rights in literary, artistic and scientific works (Art 14)</li> <li>* Right to access courts (Art 16),</li> <li>* Right to access rationing system (Art 20)</li> <li>* Right to elementary education (Art 22.1)</li> <li>* Right to public relief and assistance (Art 23)</li> <li>* Rights regarding remuneration, hours of work, overtime arrangements, holidays with pays, restrictions on homework, minimum age of employment, apprenticeship, etc. (Art 24 (1a))</li> <li>* Social security (Art.24 (1b))</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <ul style="list-style-type: none"> <li>* Acquisition of movable and immovable property (Art13)</li> <li>* Right of association (Art 15)</li> <li>* Right to wage-earning employment (Art 17)</li> <li>* Right to self employment (Art 18)</li> <li>* Right to engage in liberal professions (Art 19)</li> <li>* Right to housing (Art 21)</li> <li>* Right to access education other than elementary education (Art 22.2)</li> <li>* Right to freedom of movement (Art 26)</li> </ul> |
| Specific Obligations of States                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| <ul style="list-style-type: none"> <li>* To not discriminate in the enjoyment of rights on grounds of race, religion or country of origin (Art 3)</li> <li>* To provide administrative assistance as needed to exercise rights by a refugee and to deliver documents or certifications as needed by refugees from their countries of origin (Art 25)</li> <li>* To issue identity papers to refugees in their territory who do not possess a valid travel document (Art 27)</li> <li>* To not impose charges, duties or taxes at a rate higher than those levied on nations in similar situations (Art 29)</li> <li>* To permit refugees to transfer assets which they have brought into its territory to another country where they have been resettled (Art 30)</li> <li>* To not impose penalty on account of illegal entry or presence of refugees if they are able to show good cause of their illegal entry or presence. (Art 31)</li> <li>* To not expel a refugee lawful in their territory save on grounds of national security or public order, and in pursuance of a decision reached according to the due process of law (Art 32)</li> <li>* To not expel a refugee in any manner to a territory where life or freedom of the refugee would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion (Art 33)</li> <li>* To facilitate the assimilation and naturalisation of refugees (Art 34)</li> <li>* To co-operate with UNHCR in the exercise of its functions (Art 35)</li> </ul> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

### 9.2.3 Refugee protection in Southeast Asia

According to the United Nations High Commissioner for Refugees or UNHCR, in 2022 there were an estimated 240,000 refugees within the region, with Malaysia hosting the largest number (134,554), followed by Thailand (94,472), Indonesia (9,785), the Philippines (857), and Cambodia (24).<sup>1</sup> Despite these numbers, only three countries in the region (Cambodia, the Philippines, and Timor-Leste) have ratified the Refugee Convention. In Thailand, refugees are treated as illegal immigrants under its Immigration Act of 1979. Consequently, persons such as Rohingya refugees are often placed in immigration detention centres or closed government shelters lacking sufficient access to essential services. Similarly, Malaysia considers unregistered refugees as illegal migrants under its Immigration Act of 1969. However, in 2022, it did adopt the Trafficking Refugee Information System (TRIS), a registration system under which refugees and asylum seekers can get 'MyRC' ID cards. As a result, the Malaysian government promised to provide access to education, healthcare, and job

<sup>1</sup> *Refugee Data Finder*. (2022). UNHCR. <https://www.unhcr.org/refugee-statistics/download/?url=sz2CBD>

opportunities to those so registered. Likewise, Indonesia enacted PR No 125/2016 which provides for the protection of refugees. The law outlines the process of refugee rescue and management, and provides for their basic needs. Notwithstanding, other than these initiatives and a broad commitment to the principle of non-refoulement, governments generally deal with refugees from the perspective of national security and political expediency.

### **Spotlight: Article 33 Prohibition of Expulsion or Return (“Refoulement”)**

- No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
- The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Non-refoulement ensures that a person will not be forcibly returned to their country where they will face persecution regardless of the legal status of refugee protection where they are. Even if a State has not signed the Refugee Convention, or any other human rights treaty, they must still refrain from deporting that person back to his or her country. This does not mean that refoulement does not happen. Within Southeast Asia there have been cases of Hmong being sent back to Laos, Ugiyars to China, and North Koreans to North Korea, even though it is suspected that these people will face persecution.

Given the low level of protection from the State, the work of the United Nations High Commissioner for Refugees (UNHCR) and other civil society organisations focussing on refugees becomes very important. The UNHCR is the main UN organisation aiming to protect refugees. Established in 1950, it provides lifesaving assistance including shelter, food, water and medical care to refugees and asylum seekers. Long term, it also supports resettlement of refugees in third countries. It works in partnership with governments, civil society organisations and in some cases private sector companies to support refugees and the communities hosting them. Civil society organisations, often working in collaboration with the UNHCR, provide legal assistance, education and training and health care to asylum seekers and refugees. Often, they also engage in advocacy at national and international levels to strengthen protection and promotion of rights of refugees.

## **9.3 Stateless Persons**

A stateless person does not hold the nationality of any country. Statelessness is defined in the first article of the 1954 Convention Relating to the Status of Stateless Persons as “A person who is not considered as a national by any State under the operation of its law.”

## Reflection and Discussion: Acquiring Nationality

A person acquires nationality through different means:

1. Descent: nationality comes from one's mother or father
2. Place of birth: nationality is given because you were born in a particular country
3. Marriage: nationality is gained from a husband or wife Naturalization: a person applies to a country to become a national and the country gives them nationality

Nationality laws can be complex. They may be found in the constitution, in citizenship laws, and in laws of marriage. Many countries in Southeast Asia have updated their laws of citizenship in the past decade. Search for these laws which may be found on the website of your Department of Immigration or equivalent government ministry, or in a section of the constitution. After you read through the laws, answer the following questions:

- (a) How did you get your nationality? Was it because you were born in a particular country, or was it due to your parent's nationality? How did your parents get their nationality? What about your grandparents?
- (b) Are you allowed to have dual nationality? If you marry a foreigner, can you give them your nationality? What about your children?
- (c) Are there gaps in the laws? Can you think of situations where someone, say someone married to, or born to, a citizen of your country, can become stateless because the laws in your country do not recognize them?

Statelessness often has a severe impact on the enjoyment of rights. As a consequence, stateless people denied a legal identity in their place of birth are denied such documents as passports, licenses, and even death certificates. They are further excluded from access to basic services (e.g. healthcare, social security, education, job opportunities) and may lack the capacity to participate in processes impacting their lives.

### 9.3.1 Causes of statelessness

The right to citizenship is found in the UDHR, Art 15, which says: "everyone has the right to a nationality" and "no one shall be arbitrarily deprived of his nationality." However, some people may be born stateless, while others may become stateless. What are the causes of statelessness?

**Discrimination:** One of the major causes of statelessness is discrimination on the basis of race, ethnicity, religion, language or gender. Such discrimination can be in the form of: laws that do not allow women to pass their nationality on to their children on an equal basis with men; and changes in nationality laws which exclude whole populations.

## Case Studies: Discrimination Leading to Statelessness

### Brunei

Under the Brunei Nationality Act only fathers can automatically confer nationality on their children. Female citizens cannot confer their nationality to their children on an equal basis with men. A Brunei female citizen married to a male non-citizen can confer her nationality to her child only after completing a registration process. This legal requirement leaves children born to a female citizen married to a non-national vulnerable to statelessness if the parents are not aware of the legal requirement of registration, or if the father denies parentage, or if the father himself is stateless and other such reasons.

Reference: Statelessness Network Asia Pacific, The Brunei Project, Global Campaign for Equal Nationality Rights, & Institute on Statelessness and Inclusion. (2019). *Joint Submission to the Human Rights Council at the 33rd Session of the Universal Periodic Review*.

### Myanmar

After Myanmar gained independence from the British, the Union Citizenship Act, 1948 was enacted. The Union Citizenship Act defined citizenship and identified specific ethnicities that could gain citizenship. These ethnicities recognised as the indigenous races of Burma did not include the Rohingya ethnicity. However, the Union Citizenship Act allowed people whose families had lived for two generations in Myanmar to apply for identity cards. This provision allowed the Rohingya people to apply for citizenship or identity cards. In 1982 Myanmar adopted a new Citizenship Law. The law established a hierarchy of three citizenship classes. Article 3 of the new law recognised people belonging to Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine and Shan ethnic groups, and other ethnic groups settled in Myanmar from a period prior to the year 1823 as Burma Citizens. Apart from this category of full citizens, it created two other categories of “associated” and “naturalised” citizens. Articles 7 and 8 of the new law specify that applicants for “associated” and “naturalised” categories of citizenships need to show their ancestral documents or evidence of family tree for determination of their status as citizens. The Rohingya people, are excluded from the first category of citizenship, and find it difficult to produce the documents required to gain recognition as associated or naturalised citizens. Thus, they are rendered stateless.

Reference: *The Rohingya: The World's Largest Stateless Population*. (n.d.). Medicines Sans Frontières. <https://msf.org.au/rohingya-worlds-largest-stateless-population>

**Gaps in nationality laws:** In some cases, laws determining citizenship are not carefully drafted, leaving some groups excluded. This can cause statelessness. For example, the 2008 Law on Vietnamese Nationality did not afford sufficient protection against those at risk of statelessness, particularly as regards children. As submitted by the UNHCR in 2018 for the 3rd cycle of Vietnam's Universal Periodic Review, the Law on Vietnamese Nationality did not recognise dual nationality and required parents (where either parent is a foreign national) to express their agreement to select Vietnamese nationality in writing at the registration of the child's birth. This requirement made the children of such parents vulnerable to statelessness, such as when parents fail to reach an agreement, or are unaware of the law.

**Emergence of new states and changes in borders:** Another cause of statelessness is political change and the transfer of territory which may alter State borders. In such cases, specific groups may be left without a nationality – even when new countries allow nationality for all, ethnic, racial, and religious minorities may have trouble proving their links to a country.

**Migration of people:** Sometimes, when people migrate from the countries of their birth, and such migration is irregular, they and their children may become stateless. For example, when children are born in destination countries, and that country does not confer nationality based on birth,

and the country of origin does not allow parents to pass their nationality to children born abroad, the child may be at risk of statelessness. Another instance of statelessness caused by migration is when people are absent from their country of origin for long periods of time or have children in foreign lands. For example, Indonesia previously had a law revoking the citizenship of anyone living outside the country for more than 5 years. This was repealed in 2006 allowing over 100,000 Indonesians in Malaysia to reclaim their nationality.

### **Spotlight: Statelessness Amongst Hill Tribes in Thailand<sup>2</sup>**

A significant percentage of the stateless people in Thailand comprise hill tribes in Thailand. The hill tribes have their historic origins in bordering China, Laos or Myanmar. Some of the hill tribes have lived in Thailand for generations, but lost their Thai nationality due to border demarcation in 1904. Subsequently, a 1972 amendment to the Nationality Act made it more difficult to obtain citizenship in Thailand. Hill tribes such as the Akha people came into Thailand from neighbouring Myanmar to flee the civil war that was there much of the 20th century. After many decades of living in Chiang Rai and Chiang Mai, the elderly still have residence permits and not citizenship. In Thailand, in order to obtain citizenship, one has to prove that they were born in Thailand or one of their parents is a Thai national. Hill tribes are not able to prove any of these conditions.

#### **9.3.2 The statelessness conventions**

Specific international conventions that protect and promote the rights of stateless persons are the Convention Relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). The UNHCR has been entrusted by the General Assembly with the mandate to identify, prevent, and reduce statelessness, and to protect stateless persons.

The 1954 Convention provides a definition of stateless persons and enumerates standards of treatment. Further it identifies the rights that stateless persons should be able to enjoy on the same level as citizens and the rights that should be accorded to them as non-nationals.

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<sup>2</sup> Rojo, M., & Rojo, N. (2020, July 9). Tuenjai Deetes: Eliminating Statelessness in Thailand. *USC University of Southern California*. <https://crcc.usc.edu/tuenjai-deetes-eliminating-statelessness-in-thailand/>

**Table 9-2: Rights of Stateless Persons and Corresponding State Obligations**

| Rights that stateless persons should be able to enjoy as citizens                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Rights that can be enjoyed by Stateless persons similar to other non-nationals                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>* Right to freedom to practice religion and access religious education of their children (Art. 4)</li> <li>* Artistic rights and industrial property (Article 14)</li> <li>* Right to access courts (Article 16)</li> <li>* Rights in wage-earning employment, particularly those who are working under labour recruitment and immigration schemes (Article 17.2)</li> <li>* Right to avail general distribution of products when products are in short-supply and a rationing system exists (Article 20)</li> <li>* Right to access elementary education (Article 22.1)</li> <li>* Right to public relief and assistance (Article 23)</li> <li>* Right to entitlements under labour legislation and social security (Article 24)</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <ul style="list-style-type: none"> <li>* The right to acquire movable and immovable property (Art. 13)</li> <li>* Right of association (Article 15)</li> <li>* Right to engage in wage-earning employment (Article 17.1)</li> <li>* Right to self-employment (Article 18)</li> <li>* Right to engage in liberal professions (Article 19)</li> <li>* Right to access housing (Article 21)</li> <li>* Right to access education other than elementary education (Art. 22.2)</li> <li>* Right to freedom of movement (Art. 26)</li> </ul> |
| Specific Obligations of States                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <ul style="list-style-type: none"> <li>* Obligation not to discriminate against stateless persons with regard to applying the provisions of the Convention on grounds of race, religion or country of origin (Article 3)</li> <li>* Obligation to respect the right to marry (Article 12)</li> <li>* Obligation to provide administrative assistance for exercising rights when required (Art. 25.1)</li> <li>* Obligation to provide documents or certificates as required (Art. 25.2)</li> <li>* Obligation to charge moderate fees commensurate with those charged to nations for administrative services and to make exceptions in matters of fees in case of indigent persons when required (Art. 25.3)</li> <li>* Obligation to issue identity papers and travel documents (Art. 27 and Art. 28)</li> <li>* Obligation to refrain from imposing duties, charges or taxes on stateless persons of amounts higher than that which would be levied on nationals in similar situations (Art. 29)</li> <li>* Obligation to permit stateless persons from transferring assets which they have brought into the territory of the State (Art. 30)</li> <li>* Obligation to refrain from expelling a stateless person lawfully in the territory on grounds of national security or public order without due process of law (Article 31)</li> <li>* Obligation to facilitate assimilation and naturalisation of stateless persons as far as possible (Art. 32)</li> </ul> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

The Convention on the Reduction of Statelessness was adopted on 30 August 1961 and entered into force on 13 December 1975. It complements the 1954 Convention relating to the Status of Stateless Persons and aims to prevent statelessness by enumerating the rules for the conferring and withdrawal of citizenship. Further, it designates the Office of the United Nations High Commissioner for Refugees as the body to receive and present claims from stateless individuals to the relevant authorities. Some important State obligations contained in the 1961 Convention are:

- States should grant citizenship to children born on their territory, or born to their nationals residing abroad who would otherwise become stateless upon application.
- States are prohibited from withdrawing citizenship from their nationals if it would result in statelessness.
- States are under an obligation to avoid statelessness in the process of transferring territory.

### 9.3.3 Actions to eliminate statelessness

In October 2013, the UN High Commissioner for Refugees adopted the Global Action Plan to End Statelessness (2014-2024). Developed in consultation with States, civil society, and international organisations, it identified 10 actions that need to be taken to eliminate statelessness in 10 years. Since each State has a unique profile of statelessness, every action may not be necessary for every State. For each, the UNHCR set out the goals to be achieved and milestones or interim targets to reach. Countries are encouraged to implement the Global Action Plan by developing national action plans setting out detailed strategies and actions needed to achieve these country level goals.

#### **Spotlight: The Global Action Plan to End Statelessness (2014 – 2024)**

- Action 1: Resolve existing major situations of statelessness
- Action 2: Ensure that no child is born stateless.
- Action 3: Remove gender discrimination from nationality laws.
- Action 4: Prevent denial, loss or deprivation of nationality on discriminatory grounds.
- Action 5: Prevent statelessness in cases of State succession.
- Action 6: Grant protection status to stateless migrants and facilitate their naturalization.
- Action 7: Ensure birth registration for the prevention of statelessness.
- Action 8: Issue nationality documentation to those with entitlement to it.
- Action 9: Accede to the UN Statelessness Conventions.
- Action 10: Improve quantitative and qualitative data on stateless populations.

#### **Reflection and Discussion: Actions to Eliminate Statelessness**

Identify a country in Southeast Asia that has a problem of statelessness and

1. Identify the groups who are stateless and the causes of such statelessness.
2. Has the country adopted a national action plan to reduce stateless under the Global Action Plan?
3. If yes, study and present the strategies adopted by the country to reduce statelessness and the actions taken by it.
4. If no, identify and analyse the reasons as to why the country has not adopted any national action plan.

## **A. Chapter Summary and Key Points**

### **Refugees**

Refugees are individuals seeking protection from their State who are recognized under the 1951 Refugee Convention. To be a refugee they must fit the definition which includes being persecuted by a State because of their race, religion, political opinion, nationality or member of a social group. The 1951 Refugee Convention and Protocol governs rights of refugees and corresponding State obligations.

### **Statelessness**

To be 'stateless' means that no State considers a person to be a citizen under their laws. Stateless people face violations throughout their lives in many ways, such as lack of access to government services and threats to security. Statelessness may be caused because of discrimination, gaps in

nationality laws, migration across borders or emergence of new states and international borders. The two Conventions governing rights of stateless persons are: Convention Relating to the Status of Stateless Persons (1954) which gives the definition of statelessness, and the Convention on the Reduction of Statelessness (1961) which provides numerous ways States can reduce the occurrence of statelessness. Statelessness is also recognized in other treaties such as the Refugee Convention, CRC, CEDAW, and ICCPR.

## B. Typical Exam or Essay Questions

- In your country research the significant populations (if any) of stateless people and refugees. Why does your country have these populations?
- What vulnerabilities and threats do refugees and asylum seekers face in your country? What is being done to protect their rights?
- If your country has stateless people, what actions have been taken by the State to reduce statelessness?

## C. Further Reading

### Refugees

The following authors have written textbooks on refugee law and rights (and their work can be found through internet searches):

- Guy Goodwin-Gill and Jane McAdam
- BS Chimni
- James Hathaway
- Vitit Muntarbhorn has authored a book called the *Status of refugees in Asia* (1992)

The *Refugee Law Reader* is a free, online textbook on refugee law and it has a section of refugee protection in Asia.

For research on refugee issues and refugee rights, the UNHCR websites is very useful, in particular their *Global Report*, *New Issues in Refugee Research* series, *Refugees Magazine* and their *Handbooks*.

Most documents on refugees and statelessness can be found on their Refworld site.

The *Forced Migration Review* is a very useful magazine which is freely available on the internet

### Statelessness

Other guides and texts include:

- Equal Rights Trust. This organization produces a number of reports, including the recent Unravelling Anomaly
- Refugees International has a program on statelessness with research reports
- Refworld has numerous documents on the international law context to statelessness
- The UNHCR homepage on statelessness has many guides, research and links to the conventions.

# Chapter 10

## Sex and Gender Diversity\*

### Reader's Guide

LGBTI (lesbian, gay, bisexual, transgender, and intersex) communities face stigma, violence, and discrimination in the enjoyment of their rights because society perceives them as deviant, or in the wrong. This perception is based on a binary understanding of gender or the belief that there are only two gender possibilities: male/masculine, and female/feminine. Traditionally strongly connected to religious values, the institution of marriage has for a long time been understood as a union between males and females. Thus, only heterosexual couples are perceived to be at the core of the basic unit of society – the family. Sexual orientation and gender identity going against the dominant perception have therefore been considered abnormal and in need of correction through societal pressure, medicine, and laws. It is these understandings that lead to stigma against LGBTI communities, criminalisation of homosexuality, discrimination on the basis of sexual orientation and gender identity, non-recognition of same-sex partnerships under law, and violence against such groups. Nevertheless, in recent decades, a noticeable shift in perception has occurred leading to decriminalisation and the adoption of gender equality laws. Activism by LGBTI communities and organisations together with measures adopted by the United Nations also helped to bring about this shift.

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\* The chapter for the first edition was prepared by Douglas Sanders, Institute of Human Rights and Peace Studies (IHRP), Mahidol University. It has been updated by Joel Mark Baysa-Barredo, Strengthening Human Rights and Peace Research and Education in ASEAN / Southeast Asia (SHAPE-SEA) and reviewed by Viti Muntarbhorn, Professor Emeritus at the Faculty of Law, Chulalongkorn University.

## 10.1 Introduction

An old anti-homosexual tradition linking Christianity and Islam back to Judaism, and a Buddhist belief in Southeast Asia espouses that being transgender or homosexual reflects misdeeds in a past life. While the contemporary strength of these religious beliefs is often unclear—Christianity has abandoned many Jewish rules, including circumcision and food laws—in recent times, mainstream Protestant denominations have come to support equality and non-discrimination. For example, Pope Francis surprised many by refusing to judge homosexuals who have good will and seek God while also saying that the Church should apologize “to a gay person whom it offended.” Outside of the Islamic heartland in the Middle East, there are even some LGBTI-friendly Muslim congregations, and several prominent gay imams. Likewise, in Thailand, some gay men have been ordained Buddhist monks. Indeed, all major religious traditions are now witnessing internal divisions or debates on the extension of human rights principles to LGBTI.

Religion aside, social attitudes towards homosexuality have often proved equally problematic. In response, individuals were forced to hide same-sex attractions and gender variance even from close family members. Staying hidden, or ‘in the closet,’ was a stressful, but rational, defence strategy. It is probably still the most common strategy used almost everywhere by gays and lesbians. In broad terms, LGBTI found society to be hostile to their existence, but usually blind to their presence. This combination of responses is odd (or distinctive) when we compare the experience of sexual minorities with that of women and racial minorities (two other equality-seeking groups).

In the last fifty years, on the whole, hostile laws have been dropped in the West and Latin America, as well as in other places. However, it has fallen to current human rights thinking to challenge older discriminatory thinking. Accordingly, the mantle has been taken up by modern medicine (which now holds that no illness or pathology is involved) and biology (which points out how common these variations are amongst both humans and animals). This rethinking has been aided in modern societies by: (a) the mobility of individuals and their subsequent independence from their birth families; and (b) the individual rights orientation of modern human rights principles.

This chapter begins by looking at the relevant terms and categories. It next examines key trends on LGBTI issues at the global, regional, and ASEAN levels. Following, it further examines the rights issues faced by such groups including decriminalisation, discrimination and violence, and the public advocacy initiatives adopted by LGBTI groups to bring in reform. Finally, it discusses the distinct rights issues faced by transgendered individuals and intersexuals.

## 10.2 Terms and Categories

### LGBTI+

Initially ‘gay rights’ organizations gradually expanded to cover a range of sexuality identities sharing similar problems of hostility (or at least discomfort) on the part of larger society to sex and gender diversity. This led to the acronym, LGBTI, bringing together as allies lesbians, gay men, bisexuals, transgenders, queer or questioning, intersexuals, and asexuals. A plus (+) sign is normally included to accommodate other identity categories.

### Sex

‘Sex’ refers to one’s physical or biological sex. There are three broad categories: female, male, and intersexual. Traditionally, ‘sex’ and ‘gender’ are often interchangeably used. Part of the reason stems from the fact that the word ‘sex’ in English has two meanings, referring to both one’s physical sex and to sexual acts.

### Sex characteristics

According to the Yogyakarta Principles +10, this pertains to “each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.”

**Gender**

‘Gender’ refers to ‘socially constructed’ patterns of roles, behaviour, and self-presentation that are ‘feminine,’ ‘masculine,’ or ‘androgynous.’

**Gender expression**

Gender expression pertains to how individuals express themselves (in terms of patterns of masculinity, femininity, or both). This is most evident in, but not exclusive to, one’s choice of clothing and accessories.

**Gender identity**

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

**Queer**

Queer is used by many activists and academics to refer to persons not identifying as heterosexual or those who do not conform to one’s assigned sex at birth. It is also an umbrella term for a wide spectrum of gender identities, including ones that are non-normative or non-conforming.

**Cisgender**

Cisgender refers to a person whose gender identity aligns with one’s assigned sex at birth.

**Intersexual**

Intersexuality refers to various conditions in which the body at birth is neither completely male nor completely female. Previously called ‘hermaphrodites,’ this term was eventually rejected due to its demeaning connotations.

**Transgender**

Transgender is an umbrella term that refers to individuals who depart, in whole or in part, from the gendered patterns of dress and behaviour associated with their physical sex. It includes masculinity in women, effeminacy in men, androgyny, transvestism (cross-dressing), and transsexualism. Various transgender ‘identities’ exist in parts of South and Southeast Asia. For example, male bodied individuals living as women, may be identified as Hijra, Metis, Open, Kathoey, Mak Nyah, Waria, or Bakla (in India, Nepal, Myanmar, Thailand, Malaysia, Indonesia, and the Philippines, respectively). In addition, female bodied individuals may identify as ‘toms’ or ‘butches.’ These categories are different from ‘transwomen’ and ‘transmen’ who typically seek recognition as women or men, and who do not adopt the particular transgender identities referred to here.

**Transsexual**

‘Transsexuals’ (note the double ‘ss’) are individuals whose ‘gender identity’ generally rests with the ‘other’ sex. As a result, such individuals will usually ‘cross-dress.’ Moreover, some may seek body modifications to better conform to their personal sense of gender identity. In addition, they may (or may not) seek sex reassignment surgery (sometimes called gender confirmation surgery). A male-to-female transsexual is now often referred to as a ‘transwoman’ while a female-to-male transsexual is a ‘transman.’

**Sexual orientation**

Sexual orientation refers to the sexual attraction felt by one individual to another on the basis of their physical sex. Individuals can be sexually attracted to men, women, or both. There is no necessary relationship between gender expression/gender identity, and sexual orientation. Not all effeminate men are homosexual, and not all homosexual men are effeminate. The following are some categories, which may overlap over a period of time:

- Straight/Heterosexual refers to persons who are emotionally, romantically, and sexually attracted to people of the opposite sex.
- Asexual refers to a person who does not experience sexual attraction to other people.
- Bisexual refers to persons who are emotionally, romantically, and sexually attracted to both men/males and women/females.
- Gay refers to persons who are emotionally, romantically, and sexually attracted to people of the same sex.
- Lesbian refers to women who are emotionally, romantically, and sexually attracted to other women.
- Pansexuals regard themselves as not limited in sexual choice with respect to biological sex, gender, or gender identity.
- Questioning refers to people who are in the process of exploring their sexual orientation or gender identity.

### **Reflection and Discussion: Separate colours or a rainbow spectrum?**

Discussions related to SOGIE-SC (sexual orientation, gender identity, gender expression, and sex characteristics) use a number of distinct terms or categories. The rainbow flag is now an international symbol of sex/gender diversity, particularly of the LGBTI community. While the flag consists of separate bands of colours, in nature, a rainbow is a spectrum or continuum. Nowadays, the rainbow represents the ability to express one's SOGIE, so much so that there is even a rainbow flag emoji on our smartphones. The level of acceptance is such that many more celebrities and influencers feel comfortable identifying as sexually 'fluid.'

#### **Questions**

- (a) Why is it important for LGBTI people to have the rainbow flag as a unifying symbol?
- (b) Do most people (or all people) have elements of masculinity and femininity in their physical bodies, and in their actions and orientations?
- (c) If sex and gender are on a continuum (or scale), why do most people live exclusively as one type?

## **10.3 Key Historical Trends at the Global Level**

In the years since the passage of the Universal Declaration of Human Rights (UDHR), dramatic changes have been seen regarding sexuality issues around the world. In 1948, half the world had criminal laws against male homosexual acts, reflecting the impact of British colonialism. As such, governments and private businesses would seek to avoid hiring homosexuals who they saw as suffering from some kind of illness. Likewise, in 1948, no state extended any legal recognition to same-sex couples. Lesbians could lose custody or access to their biological children if their sexual orientation became known. In the same manner, major religious traditions were seen as hostile or silent on LGBTI issues. Exceptionally, spirit mediums in various traditions were often transgender or homosexual (many examples of which can be found in Southeast Asia).

Today, a striking international divide on SOGIE-SC issues can be seen. In the Global North and Latin America: (a) criminal laws have almost completely been abolished; (b) anti-discrimination laws now usually cover 'sexual orientation' and sometimes 'gender identity' or 'intersex status'; and (c) some or all of the rights and obligations of marriage now apply to couples of diverse

gender identities. Further, civil unions or marriages have been accepted in a number of countries. The Netherlands opened it to any two individuals in 2001, a lead that has now been followed in 31 countries, including all of the European colonial powers that once held colonies in Southeast Asia (France, the Netherlands, Portugal, Spain, the United Kingdom, and the United States). However, Taiwan is the only Asian country, so far, that has legalized same-sex marriage.

By contrast, the treatment of LGBTI people in much of Sub-Saharan Africa, Russia, and its immediate neighbours has regressed. Colonial-era criminal prohibitions have been strengthened in some African states with national leaders often vocally condemning homosexuality. As a result, vigilante actions against suspected homosexuals or homosexual gatherings have occurred in a number of African states and LGBTI human rights defenders have also been assaulted. Some have even been killed. Similarly, Russia and its neighbours have introduced new laws against “propaganda” in favour of homosexuality in an attempt to push gays and lesbians back into the closet, end visibility, ban public activism, and block the work of civil society organizations. The goal of such laws, it is said, is to protect children from exposure to propaganda in favour of homosexuality. Opposition to LGBTI rights remains strong in most of the MENA region (Middle East and North Africa) and in member states of the Organization of Islamic Cooperation (which includes Indonesia, Malaysia, and Brunei).

### **10.3.1 The SOGIE-SC situation in Asia**

Asia, particularly Southeast Asia, is not immune to challenges with regards to SOGIE-SC. Criminal prohibitions survive from colonial times in former British colonies (with the single exception of Hong Kong which decriminalised male-male sexual acts before reversion to China). Nevertheless, no country in South or Southeast Asia actively enforces such laws although police harassment and arrests for vagrancy or public nuisance occurs in some places. Moreover, sporadic vigilantism against gay or transgender events have happened in Java with the police failing to curb actions of the Islamic Defenders Front and similar vigilante groups. In another example, two gay rights activists were murdered in Bangladesh in February 2016, the first such incident in Asia (albeit as part of a series of religiously based extra-judicial killings in the country aimed at atheists and non-Sunni Muslims). Furthermore, laws protecting LGBTI from discrimination in employment are just beginning to appear in the region. Transsexuals can get recognition of post-operative sex through changes in personal documents in only three Southeast Asian states (Indonesia, Singapore, and Vietnam). Unsurprisingly, lack of acceptance by families is widely reported as a major problem, with States and religion giving little or no support. Bullying in schools is also a regional problem.

Policy statements by heads of government and other national political figures vary. In Singapore in 2007, Prime Minister Lee referred to homosexuals as part of both society and many Singaporean families. As such, his government does not discriminate against LGBTI in employment. Yet, he also supported the retention of a colonial-era criminal prohibition of male-male sexual acts (while promising no “proactive enforcement”). Similarly, two prime ministers in Malaysia, including Najib Razak, have frequently condemned homosexuality. Likewise, the Sultan of Brunei proposed religious provisions against homosexual acts, on top of a colonial-era prohibition. In Myanmar, which also inherited a prohibition, no leading politician seems to have formally addressed the issue of enforcement, retention, or repeal. Significantly, beginning in January 2016, a number of cabinet ministers, leading politicians, educators, and clerics in Indonesia, condemned homosexuality, some even calling for a criminal prohibition or compulsory treatment. This broke general patterns of silence in the country by political and other leaders on issues of sexual and gender diversity, ending the sense that Indonesia was fairly tolerant of such diversity. Indeed, a criminal prohibition is currently being considered in constitutional litigation and as part of the ongoing project to enact a new national penal code. All of which means that Cambodia, where the government called for acceptance and criticized stereotypical depictions of LGBTI persons in media reports, is one of the few exceptions in the region.

### 10.3.2 Changes at the United Nations

The United Nations espoused human rights as one of its pillars for global cooperation. The Universal Declaration of Human Rights paved the way for standards and mechanisms ensuring rights and freedoms, particularly of marginalized sectors such as women, migrant workers, and persons with disabilities. While LGBTI people have yet to be formally recognized, issues of sexual orientation and gender identity have, over the years, been taken up by human rights treaty bodies and special rapporteurs (the ‘expert’ parts of the UN system), starting with the 1993 decision of the Human Rights Committee in *Toonen v. Australia* (described in the ‘Criminal Laws’ section).

#### **Spotlight: Queering Human Rights Standards: The Yogyakarta Principles +10**

In 2006, in a period in which progress in the political bodies of the UN seemed to be blocked, a diverse group of experts on human rights and sexuality met at the campus of Gadjah Mada University in Yogyakarta, a historic sultanate in Central Java, Indonesia. Based on existing human rights standards, the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* were formulated. A major goal was to make it clear that SOGIE-SC rights were not ‘new’ rights, as opponents argued, but were simply the application of existing human rights principles to LGBTI individuals. Many of the experts had worked in the UN system as members of treaty bodies or as special rapporteurs. Others were academics, or judges, or from leading human rights NGOs. One co-chair was Professor Vitit Muntarbhorn from Chulalongkorn University in Bangkok, and a former UN Independent Expert on SOGI. Former UN High Commissioner for Human Rights, Mary Robinson, also participated. Twenty-five countries were represented in the gathering. The 29 principles are well drafted, and have been referred to often at the UN and in various legal contexts. In 2017, the document eventually evolved into the Yogyakarta Principles +10, which updated the language and further recognized more rights and freedoms pertaining to LGBTI peoples.

The UN Human Rights Council (the key political body in the UN human rights system), for the first time, supported LGBTI human rights with resolutions in 2011 and 2014. Similarly, the Office of the UN High Commissioner for Human Rights completed two studies and launched an active campaign, ‘Born Free and Equal,’ with publications and videos which UN Secretary General Ban Ki-moon and the UN High Commissioner for Human Rights frequently spoke in support of. This trend continued when in 2012, the UN High Commissioner for Refugees emphasised the importance of “sexuality-rights assurances and state obligations towards LGBTI peoples.” In 2016, the Human Rights Council took the further step of establishing an on-going mechanism in the form of an independent expert to address “violence and discrimination based on sexual orientation and gender identity.” This key resolution was put forward by seven Latin American States, including Argentina, Brazil, Colombia, and Mexico. Asian States supporting the resolution included South Korea and Vietnam. Asian opposition came mainly from Bangladesh, China, Indonesia, Kyrgyzstan, Maldives, and Qatar. India and the Philippines abstained. As a consequence, bitter opposition and prolonged debates raged around each of the three Human Rights Council resolutions. This resulted in the preamble to the 2016 resolution being amended to refer to some of the arguments against LGBTI equality rights (respect for individual state sovereignty, religious values, local cultural particularities), without limiting the substantive sections of the resolution.

In Asia, the UN Development Programme (UNDP) has been particularly active, with an ongoing ‘Being LGBTI in Asia’ programme funded by the United States and Sweden. The UNDP has also

published country reports on LGBTI issues in Cambodia, China, Indonesia, Mongolia, Nepal, the Philippines, Thailand, and Vietnam.

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

Another significant development occurred in 2020 when 36 Member-States proclaimed the need to address the challenges faced by intersexuals. At the 45th session of the Human Rights Council, they called on all States “as a matter of urgency, to protect the autonomy of intersex adults and children and their rights to health, and to physical and mental integrity so that they live free from violence and harmful practices.” Finally, in 2021, at the 47th session of the Human Rights Council, 27 States under the banner of “SOGI Group of Friends,” openly expressed their intention to collaborate on awareness and to raise and provide support to efforts to address the multiple concerns and challenges faced by LGBTI people throughout the world. It is key to note that none of these States were from Southeast Asia.

### **10.3.3 The SOGIE-SC situation at the ASEAN level**

The Association of Southeast Asian Nations (ASEAN) prides itself on promoting “unity in diversity.” However, despite social, economic, and political gains, the recognition of diverse gender identities and sexualities still remains a challenge for the ten-member state association, which embraces the values of consensus, non-interference, and national sovereignty. In particular, a few Member-States still view this matter as culturally sensitive.

While civil society organizations and LGBTI groups campaigned for the inclusion of rights pertaining to SOGIE in the ASEAN Declaration on Human Rights, no expressed inclusion was eventually made. On the formal signing of the Declaration at the 21st ASEAN summit in Kuala Lumpur in 2012, Malaysian Prime Minister, Najib Razak, specifically said that Malaysia rejected lesbian, gay, bisexual, and transgender rights, adding that other ASEAN leaders knew the position of Malaysia and had accepted its stance. To date, regional human rights bodies such as the ASEAN Intergovernmental Commission on Human Rights and the ASEAN Commission on the Rights of Women and Children (ACWC) have yet to formally address LGBTI issues.

## **10.4 Rights Issues Faced by the LGBTI Community**

### **10.4.1 Criminal laws against homosexuality**

Passages in the book of Leviticus (18:22 and 20:13) impose the death penalty on a man who “lies with a male as with a woman ...” This Jewish prohibition, one of hundreds of rules in early Judaism, continued in Christianity and Islam (supplemented by a particular interpretation of the story of Lot/Lut and the destruction of Sodom). Through Christianity, the prohibition became part of Roman law, then part of Roman Catholic religious law, and was enforced throughout Europe. With the Protestant Reformation, church courts were abolished in half of Europe, and the offence moved from religious to secular criminal law. In Britain, it took the form of the ‘Buggery’ Act of 1534

which prohibited anal intercourse – its wording clearly marking its religious origins. Many similar criminal laws were also faithful to Leviticus which condemned the act as “abominable.” Such laws applied to males only and imposed the death penalty. Britain’s law continued until 1860.

In France, the *Napoleonic Penal Code of 1810* totally reformed its criminal law, setting out all criminal offences in one comprehensive, well-organized code. Without explanation or any public debate, the prohibition against homosexual acts was dropped. As a result of French conquests, the ‘decriminalisation’ of homosexuality spread to half of Europe. This also happened as a result of governments voluntarily adopting or copying the French code. Consequently, major colonial powers (the Netherlands, France, Spain, and Portugal) had no such prohibition. Thus, there was no prohibition on homosexuality in the criminal laws of their colonies (Cambodia, Indonesia, Laos, the Philippines, or Vietnam). Thailand, which was never directly colonized, adopted a prohibition, but later repealed it after a history of non-enforcement.

By contrast, Britain enacted a penal code for India in 1860 which included a reformulation of the British ‘buggery’ law, but without the religious language and the death penalty.

Article 377 reads:

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

It is important to note that Art 377 shifted the basis for the prohibition away from morality or religion, eliminating such words as “vice” and “abominable.” Instead, the acts involved are described as “against the order of nature,” a more secular, biological assertion. It became common to describe homosexuality as some kind of illness, disorder, or pathology. Often people would express a fear that this pathology would spread and so argued it must be kept under control to avoid contagion.

However, post-World War II studies on homosexuality have established that:

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

As a result of these studies, homosexuality was removed from the listing of pathological conditions by medical associations in the United States and the United Kingdom in 1973, and by the World Health Organization in 1983. Most countries have followed this change, including China in 2001. The American Psychiatric Association now condemns any treatments designed to change or ‘cure’ homosexuals as unscientific and harmful. Similarly, a court in China in 2014 ruled against a ‘conversion’ therapy clinic as practicing consumer fraud. However, the wording of Art 377 continues in the legal systems of former British colonies or protectorates in most of Asia. In Southeast Asia today, it is part of the law in Brunei, Malaysia, and Myanmar and continues to be in force in Bangladesh, Pakistan, Sri Lanka, and in former British colonies in Oceania, the Caribbean, and Africa.

#### **10.4.1.1 The movement for decriminalisation**

History's first homosexual rights organization, led by elite gay males (doctors and lawyers), began in the late 19th century in Europe in the context of a campaign for decriminalisation. The movement was centred at an institute in Berlin, led by Dr Magnus Hirschfeld, who travelled widely on speaking tours in Europe, America, and Asia. Branches and affiliates sprang up in various parts of Europe. The institute in Berlin was destroyed by the Nazis in 1939, and books and documents in its library were publicly burned. No gay rights organizations survived that setback other than a few exceptions. It was only after World War II that new gay rights organizations began to emerge in Europe and North America. They were confronted with the daunting fact that half the world had criminal laws prohibiting male-male sexual acts, and all such laws were linked to the religious-based laws of Europe. Thus, decriminalisation became the primary goal of the organizations formed after World War II.

Reforms in the period following began slowly with decriminalisation occurring first in Illinois in 1960, Britain and Wales in 1967, and Canada in 1969. In the famous case of *Dudgeon vs United Kingdom* in 1981, the criminal prohibition in Northern Ireland was held to violate the European Convention of Human Rights despite relying on arguments pertaining to personal privacy. Similar decisions were reached for the criminal laws of Cyprus and Ireland. In Tasmania too, criminal prohibition was held to be in breach of the International Covenant on Civil and Political Rights in *Toonen v. Australia* in 1994 on grounds of privacy and equality. Indeed, the *Toonen* decision was a key breakthrough in the UN human rights system. However, it was only in 2003 that the United States Supreme Court also found such laws to be unconstitutional.

Decriminalisation occurred in Hong Kong before its reversion to China.

In 2009, the Delhi High Court ruled against Art 377 on grounds of equality and privacy, adding that the prohibition of discrimination on the basis of 'sex' in the Indian Constitution included 'sexual orientation.' However, the Indian Supreme Court reversed that decision in 2013, but in January 2016, ordered a rehearing of the issue by a panel of five judges. Over the ongoing life of the Indian litigation: (a) the Congress Party came out in favour of decriminalisation; (b) one or more cultural celebrities were publicly identified as gay; (c) decriminalisation gained support in liberal public opinion; and (d) annual colourful pride parades flourished in perhaps half a dozen cities. Thus, the flip-flops and delays in these judicial challenges proved very useful in the process of gaining visibility for LGBTI issues. But it was not until 2018 that the Indian Supreme Court finally struck down parts of Section 377 of the Indian Penal Code that criminalised consensual gay sex.

Lastly, Singapore dropped Art 377 in 2007, but retained a separate colonial-era criminal provision condemning acts of "gross indecency" between males.

#### 10.4.1.2 Existing criminal laws in Southeast Asia

### Reflection and Discussion: Criminal Laws in Southeast Asia Relevant to Homosexuality

*Criminal laws in Southeast Asia relevant to sexuality include:*

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

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

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

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

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

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

#### Questions

- (a) What SOGIE-SC related issues are normally prohibited and/or criminalised in these countries?
- (b) What are the factors that influence such prohibitions?

In Southeast Asia, the four former British colonies of Brunei, Malaysia, Myanmar, and Singapore each retain colonial-era prohibitions. However, such laws tend not to reflect local decisions or arise out of domestic, religious, or social considerations. For example, Catholic majority Philippines has no prohibition although the Church continues to condemn homosexual acts. While Buddhist majority Myanmar has a prohibition, Buddhist majority Thailand does not. Likewise, although Muslim majority Malaysia has a prohibition, the national criminal law in Muslim majority Indonesia does not. By the same token, Singapore has a prohibition but China does not. Despite the existence of such laws, it has to be pointed out that no country in Asia has tried actively to enforce them. The few cases reported in Brunei media of prosecutions all involved acts with underage males.

Having said that, in March 2015, the leading body of Islamic leaders in Indonesia or the Council of Indonesian Ulama (MUI), issued a fatwa, or religious ruling, calling for the criminalisation of homosexual acts. As such, in 2016 the Indonesian Constitutional Court gave serious attention to a case urging criminalisation. Indeed, the on-going project of drafting a new comprehensive criminal code could well result in criminalisation despite the fact that no State in Asia since the end of the colonial period has criminalised homosexual acts (with the exception of Sri Lanka which extended its prohibition to include acts between women). Only in Africa have two countries (previously French colonies) formerly having no prohibition enacted criminal prohibitions in the years since independence.

Despite this, police may lay charges for public nuisance, soliciting, vagrancy, or other similar minor offences and it is usually easy either to get convictions for such charges, or just to use the threat of prosecution to intimidate or harass individuals, move them away from visible public areas, or extort bribes.

### **Spotlight: The Two Prosecutions of Anwar Ibrahim in Malaysia**

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

At a point in time when Mahathir had retired and Abdullah Badawi, somewhat of a reformer, was Prime Minister, Anwar was finally released. He then founded a new political party and was successful in building an alliance with two other opposition parties. In the 2008 general election, this opposition alliance made significant gains against the national coalition which had ruled Malaysia since independence. Four months later, Anwar was again charged with sodomy. Again, it was said to involve an aide, again without violence or physical coercion. Again, Anwar said the charges were fabricated for political reasons. He was acquitted at trial. Then Prime Minister, Najib Razak, authorized an appeal. The ruling was reversed and a five-year sentence imposed. The decision was then upheld by the Federal Court in February 2015 despite extensive national and international coverage of the two prosecutions and the condemnation of such groups as Amnesty International.

### **Spotlight: Police Action in Mandalay**

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

For the first time, an organized campaign around such police actions arose. The LGBT Rights Network held a press conference and released statements. Several national and international news sources reported on the story. Three individuals filed complaints with the Myanmar National Human Rights Commission, the Ministry of Home Affairs, the Head of the Police, and two committees of the national legislature. Videos of interviews with the victims and activists were posted on YouTube. The UN Special Rapporteur on Human Rights in Myanmar met with the victims and included information on the incident in a report to the UN General Assembly. However, a lawsuit against the police was dismissed by the courts. This did not prevent the Human Rights Commission from asking the Home Ministry to respond to the allegations. The request was ignored, and at the time, the Commission had no authority to compel it to respond. Nonetheless, the incident became a significant national and international story. It is hoped the publicity and controversy will deter police from further abuse.

### 10.4.1.3 Sharia Laws

Sharia, or the Muslim way of living, has become a basis for legal frameworks in some countries where Islam is the dominant religion. A number of interpretations of these scriptures relate to homosexuality, mainly alluding to sodomy. However, some scholars have also recognised sexual identities. Despite this, LGBTI issues have, in most cases, been treated negatively by countries subscribing to Sharia law where many prohibitions on same-sex relationships and sexual activities have been implemented. In fact, ten predominantly Muslim states have imposed the death penalty for consensual same-sex relationships including Iran, Saudi Arabia, Yemen, Nigeria, Somalia, Mauritania, Qatar, United Arab Emirates, Pakistan, and Afghanistan.

In Southeast Asia, criminal laws based on Sharia are present in regions where Islamic values and practices are greatly observed with members of LGBTI communities witnessing actions leaning towards discrimination, and to a certain extent, persecution.

### **Spotlight: Sharia Criminal Laws on Sexuality in Southeast Asia (and Islamic State Areas)**

#### **Indonesia**

In 2009, the legislature in Aceh, an autonomous province at the northern tip of the island of Sumatra, enacted a local criminal law which decreed death by stoning for adultery, and 100 lashes for homosexual acts. These offences were part of what are referred to as Islamic Sharia (Shariah, Syariah) laws, that Aceh (uniquely in Indonesia) was authorized to impose. Although the Governor did not sign the new Sharia law and it never came into force, in 2014, the legislature in Aceh enacted a new law against homosexual acts both between men and between women. The penalty was caning (up to 100 lashes), or a payment in gold, or imprisonment. The law applied to both Muslims and non-Muslims, the only Sharia law in Southeast Asia to apply to non-Muslims. Showing affection in public between the sexes was also forbidden.

#### **Malaysia**

The State of Kelantan in north-eastern Malaysia, governed by the Parti Islam se Malaysia (PAS), enacted Sharia laws in 1993 and 2015 with punishments of stoning to death for adultery, crucifixion for armed robbery when accompanied by a killing, amputation of the right hand for theft, and death for apostasy (converting away from Islam). The State of Terengganu, when it had a one-term PAS government, enacted an equivalent law in 2002. However, the imposition of these penalties by state governments is blocked by national legislation. In 2015, Kelantan, not for the first time, sought to reform national legislation to allow it to impose “enhanced punishment” for Sharia offences. Accordingly, in May 2016, the national government submitted a bill to parliament on behalf of PAS, which sits in the ranks of the opposition. The bill added caning to the punishments that Kelantan could impose for particular moral offences committed by Muslims. While debate on the bill was deferred and media accounts were unclear as to whether homosexual acts were covered, in 2021, the government under Prime Minister Ismail Sabri Yaaob stated his intention to intensify its efforts to draft the Syariah Courts (Criminal Jurisdiction) (Amendment) Act to increase the criminal jurisdiction powers of Sharia courts.

### **Brunei**

In 2013, the Sultan of Brunei introduced what was to be the first of three stages to implement a comprehensive code of Sharia law, with stoning to death for homosexual acts to be introduced in phase three. As a result, there were many internal and international protests. Although phase two was delayed for several years, the Sultan confirmed his intention to proceed with the additional stages and on 3 April 2019, the Sharia Penal Code Order 2013 came fully into force.

### **Islamic State (ISIS, ISIL)**

So-called “Islamic State” which in 2015 and 2016 controlled significant parts of Syria and Iraq, has executed at least 25 males, alleged to be homosexual, by throwing them from rooftops. Large crowds witnessed these events, often stoning the body after its fall. The campaigns of Islamic State against minority Christians and homosexuals have since been discussed in separate special sessions of the UN Security Council in 2015. Although its influence has been much diminished, individuals from Southeast Asia did travel to the Middle East to join Islamic State, and some may return to their home countries, raising possible cause for concern.

## **10.4.2 Violence**

The types of violence meted out against LGBTI persons is vast and its perpetrators are many and varied. While violence of an extreme nature is not widespread and/or reported commonly, it is still present in some Asian countries. The situation becomes severe and grave when no legal protection exists and the violence is institutionalized. Further, the socio-cultural impact faced in informal settings and day-to-day living can deepen violent experiences. Thus, perpetrators of violence can include non-official personnel.

A 2014 study published by OutRight International<sup>1</sup> described situations of violence against lesbian, bisexual women, and trans people in five Asian countries (Malaysia, the Philippines, Japan, Sri Lanka, and Pakistan). The report highlighted that families are often the primary perpetrators of violence. In other words, it is often and mostly within the family setting that emotional, verbal, physical, and sexual violence against LBT people occurs. In addition, issues pertaining to LBT were not included or avoided in reports and programs on violence against women.

It also pointed out that LGBTI reports usually place their focus on State perpetrators of violence, leaving others outside the scope of analysis and recognition. Accordingly, it reflected the normalization of violence occurring in private settings or by perpetrators other than State officials such as family members, intimate partners, and employers who may often be side-lined. Even when attention was given to LGBTI, it typically centred on gay men and transwomen, ignoring violence in the private realm. The report also documented the deaths of over a dozen Thai lesbians in a detailed letter to top government officials in March 2012. In this case, most of the victims seem to have been “tomboys,” but importantly, the killings were not executed by police or security officials.

In 2020, the UN Independent Expert on SOGI released a report on conversion therapy – the practice of forcibly “changing non-heteronormative sexual orientations and non-cisnormative gender identities.” It was reported that in some Southeast Asian countries, LGBTI persons are subject to such methods. For example, LGBTI can be sent to traditional healers for curing or treatment in

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<sup>1</sup> The International Gay and Lesbian Human Rights Commission. (2014). *Violence: Through the Lens of Lesbians, Bisexual Women and Trans People in Asia*. <https://outrightinternational.org/our-work/human-rights-research/violence-through-lens-lesbians-bisexual-women-and-trans-people-asia>, accessed on 25 November 2022.

Cambodia and Vietnam. This has also been the case for transgender persons in Malaysia whilst in the Philippines, Christian LGBTI members have on occasion been instructed not to engage in sexual activities.

### **Spotlight: SOGIE-SC-based Violence Amid the COVID-19 Pandemic**

The massive spread of the Novel Coronavirus of 2019 (COVID-19) not only posed serious threats to public health throughout the world, but also exposed marginalized groups, including LGBTI people, to multiple forms of inequality and violence. Economic shock forced many into poverty. Moreover, lack of employment and access to basic services, particularly SOGIE-SC specific healthcare and treatment, led to a breakdown of both physical and mental health. Protracted lockdowns resulted in the rise of SOGIE-SC-based domestic violence against transgendered people, as reported in Indonesia and Malaysia. Hateful sentiments and actions too increased tremendously. In the Philippines, it was reported that village authorities bullied queer “offenders” of curfew regulations. Cyberbullying also became rampant, at a time when technology became the dominant medium for communication, recreation, education, and work.

#### ***10.4.3 The struggle against discrimination***

Equal rights are constitutionally guaranteed in most Southeast Asian countries with many including lists of prohibited grounds of discrimination. For example, the constitution of Cambodia states in Art 31 that citizens are equal before the law, regardless of “race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status.” However, no constitution in Southeast Asia expressly includes sexual orientation, gender expression, or intersex status in such lists. These grounds may come under “other status” but no court in the region has yet ruled on this issue. Nevertheless, constitutional provisions usually only apply to government actions and laws and not issues related to employment, accommodation, and/or to services provided by private businesses. Specific non-discrimination laws are required to counter such acts.

Express discrimination exists in some countries in the context of military service. For example, the Philippines bars gay males from service in the armed forces. Similarly, while same-sex sexual acts are not against the law in South Korea, such laws do apply if the individual is a member of the armed forces. In Singapore, conscripts who are known to be gay are given an alternative form of service. Thailand exempts transgender individuals from military service on the basis of the medical classification of “gender identity disorder.”

One success story can be seen in the Philippines where activists lobbied for a decade for a national anti-discrimination law covering employment. Quezon City, home to the main campus of the University of the Philippines, enacted the first such law in the country. Accordingly, at the beginning of 2016, local ordinances protecting LGBTI from discrimination were in place in the Philippines in two provinces, nine cities, one municipality and three barangays (small administrative units) within Quezon City. Taiwan too enacted a national law against sexual orientation discrimination in employment in 2002, and education in 2004.

## Reflection and Discussion: Gender Equality Laws

### The Thai Gender Equality Act

The 1997 Thai Constitution prohibited discrimination on grounds of ‘phet,’ a Thai word usually translated as ‘sex’ or ‘gender.’ Like some other languages, Thai does not draw a distinction between the two English language terms. In 2007, a constitutional drafting convention debated whether to add words to include what Thais often call ‘sexual diversity.’ No wording was added but an official statement was issued over the decision saying the word ‘phet’ already included “sexual identity or gender or sexual diversity, which may be different from the phet in which the person was born.”

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

The Act was especially beneficial to LGBTI students seeking to wear uniforms or graduation outfits of their own choosing and queer employees in some provincial government agencies. While the law seemed particularly promising for LGBTI people living in Thailand, interpretation and enforcement are still lacking. Many find the language vague, ambiguous, and even exclusionary. Article 17, for example, pertains to prohibiting gender-based discrimination. It also, however, contains an exemption to the rule if it involves “protecting the welfare and safety of a person or for following religious rules, or for the security of the nation.” A case of a transgender woman barred from using a female restroom was dropped due to the assumption that the defendant was likely to disturb peace and order, or even commit crimes.

### Questions

- (a) Why is it important to have policies and/or legislation on Gender Equality?
- (b) What features in the Act still require further strengthening or improvement?

To what extent should individuals be able to claim an exemption from anti-discrimination laws on the basis of personally held religious views or personal conscience? For example, laws opening marriage to non-gender conforming couples have a vital exemption in that they do not require religious authorities to conduct these ceremonies. Disputes arose in France, the United States, and Canada as to whether civil servants involved in issuing marriage licences or actually performing marriages could refuse same-sex couples on the basis of their personal beliefs. Such exemptions for government employees are usually rejected although the controversy continues.

In **Ladele, McFarlane v. UK** (2013), the European Court of Human Rights upheld the firing of a government clerk who refused, on grounds of personal belief, to register a same-sex partnership. Additional disputes surfaced as to whether private businesses could refuse services such as wedding planning or the provision of wedding cakes or flowers for same-sex events. Some individual states in the US have enacted ‘religious liberty’ laws allowing such personal exemptions although their constitutional validity has not yet been tested. In **Boy Scouts v. Dale** (2000), the US Supreme Court allowed the Boy Scouts organization to exclude homosexuals from its programs, holding that the

organization had a right of free association. After years of controversy, the organization finally dropped the ban. The same sequence of events occurred with the banning of gay and lesbian organizations from St Patrick's Day parades (big public non-religious events associated with Irish heritage). The US Supreme Court upheld the discrimination in the name of freedom of expression, but after much controversy, the discrimination was ended by the parade organizers themselves.

#### **10.4.4 Recognition of same-sex relationships/partnerships**

Legal recognition of relationships is needed to give couples security in relation to children, property, and finances. For example, when a partner dies, the other person should be able to take ownership of their house, access bank accounts, and maintain guardianship of their children. These securities are not regularly available to gay and lesbian couples. A surviving partner may be evicted from their house or lose access to joint finances which will then be transferred to the dead partner's family.

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

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

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

In 2013, the government of Vietnam proposed the legal recognition of unmarried couples, heterosexual or homosexual, to resolve child custody or division of property disputes. Despite significant national debate on the set of reforms, in the end, the legislature rejected the recognition of same-sex couples.

In a similar vein, a committee of the Thai parliament held five seminars or hearings in different parts of the country with the last one in April 2013 to consider establishing a registration system for same-sex couples that would provide various legal rights and obligations. Separately, a number of activists worked with the Law Reform Commission of Thailand to produce an alternative registration law that would be available to all couples and which would be more comprehensive in dealing with issues of property, social programs, and children. One prominent activist held out for the opening of marriage, rejecting the idea of a separate registration system. Support for the issue was widespread as demonstrated in 2017, when during an International Day Against Homophobia, Transphobia, and Biphobia (IDAHOT) event, a petition, signed by 60,000 people in support of the civil union bill, was presented to Thailand's Justice Ministry. Finally, in 2022, the Thai Cabinet approved the civil partnership bill, which will potentially allow LGBTI couples to register their marriages. Serendipitously, the announcement came around the time of Bangkok's Pride Parade. Upon approval, the law, which will be a first in Southeast Asia, will also cover matters related to inheritance, assets, and child adoption.

With respect to international law, in *Joslin v. New Zealand* (2002), while the UN Human Rights Committee rejected a claim by same-sex couples for equal access to legal marriage, it was on the basis of the specifically gendered language in Art 23(2) of the *International Covenant on Civil and Political Rights*. However, the Committee in *Young v. Australia* (2003) later found the denial of a spousal pension to a surviving same-sex partner violated equality rights.

Whilst rejecting a claim for full marriage rights, the European Court of Human Rights in *Schalk and Kopf v. Austria* (2010) held that a new registration law remedied many of the inequalities in Austrian law between heterosexual couples and same-sex couples. Likewise, in *Oliari v. Italy* (2015), the court ruled that Italy was required to have some system of recognition of same-sex couples, either by registration or marriage. The court noted that the movement towards legal recognition of same-sex couples continued to develop rapidly in Europe and other parts of the world. In so doing, it cited a US Supreme Court decision in 2015 requiring all states to grant same-sex marriages and to recognize same-sex marriages granted in other states. Italy subsequently enacted a registration law which would otherwise have been blocked by opposition in the Senate. Notably, Italy was the last jurisdiction in Western Europe to introduce either marriage or a registration system.

As regards other countries in Asia, in 2015, a small number of local governments, first in Japan and then in Taiwan, allowed same-sex couples to register their relationships. The benefits of registration were largely linked to: (a) medical situations where a partner sought hospital visitation rights or the ability to authorize medical procedures in emergency cases; and (b) in relation to the joint rental of apartments. Suddenly, there was a procedure that involved some official recognition, albeit with very limited consequences. It was only with the passing of the bill on same-sex marriage in 2019 that Taiwan became the first country in Asia to legalize same-sex marriage.

During its third UPR in 2019, Cambodia accepted the recommendation to explore the possibility of a same sex marriage law, together with anti-discrimination and gender identity laws. This, together with recent developments in Thailand, indicate the need to be socially and politically savvy in order to mobilize support for laws, thus enabling greater equality in society.

## **10.5 SOGIE-SC Visibility and Activism**

### **10.5.1 Civil society organizations for and by LGBTI people**

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

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

Health and advocacy organizations now exist in most major Southeast Asian countries. Founded in 1983, Indonesia's Gaya Nusantara can claim to be the oldest gay rights organization in Asia. Founded in 1989, the lesbian organization, Anjaree, was the first such organization in Thailand. However, most remain unregistered. Those that do register tend to rely on muted or ambiguous names, often using the now universal LGBTI symbolism of the rainbow, for example, the Rainbow Sky Association of Thailand, Rainbow Stream (Arus Pelangi) in Indonesia, and Colors Rainbow in Myanmar. Two main LGBTI organizations in Vietnam are both registered and active, but their names give no indication of any such focus. In addition, Vietnam seems to have the only Southeast Asian branch of PFLAG (Parents and Friends of Lesbians and Gays).

In 2011, LGBTI issues finally moved into the spotlight in ASEAN's human rights advocacy space. This began with the active participation of local and national activists from Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam in the ASEAN Civil Society Conference/ASEAN People's Forum. A few years later, in 2015, the ASEAN SOGIE Caucus (ASC) was established as a network of and a platform for activists working on LGBTI issues. Its work focuses on building collaborations, capacity, knowledge, and advocacy spaces.

### **Spotlight: Forging Alliances with the SOGIE-SC Community**

LGBTI peoples are typically at the forefront of the struggle against discrimination and advocacy for SOGIE-SC rights. However, in order to further advance an agenda of acceptance and equality, it is crucial that allies, or champions outside of the community, support movements and causes. Apart from political figures pushing for progressive legislation, several voices have stood up for LGBTI communities including religious leaders, some of whom have professed an openness to respecting diversity and enabling tolerance. For example, in Indonesia, progressive Muslim scholars such as Abdul Muiz Ghazali and Musdah Mulia promote the values of humanity and justice. Likewise, Shine Waradhammo, a Thai Buddhist monk, expressed his support for the passage of a civil partnership bill in his country. In the medical world, the American Psychiatric Association de-pathologized homosexuality in 1973. This was significant because it meant being LGBTI would no longer be considered a medical illness. More recently, an increasing number of doctors now provide specialized care and treatment to LGBTI persons.

#### **10.5.2 Public action and advocacy**

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

When the COVID-19 pandemic heavily restricted mass gatherings, including pride marches, LGBTI groups resorted to e-meetings on various online platforms such as Zoom, which allowed young and emerging activists to participate in celebrations and discussions. This, however, raised serious

concerns regarding internet accessibility and digital security, particularly for activists living in fragile areas such as Myanmar.

## **Reflection and Discussion: Public Action and Advocacy on SOGIE-SC Issues**

### *Pink Dot in Singapore*

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

In 2015, 28,000 Singaporeans participated in Pink Dot events. In 2016, it even attracted 18 corporate sponsors, including Google, Barclays, JP Morgan, Goldman Sachs, Bloomberg, BP, Facebook, Apple, General Electric, and Visa. In response, the government issued a statement:

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

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

### Questions

- (a) How important are public gatherings such as Pink Dot to SOGIE-SC issues?
- (b) How is your government treating freedom of assembly, particularly of LGBTI persons?

To facilitate the political participation of marginalized groups, the Philippines introduced a system of special party-list parties to represent dispersed economic or social groupings that were unrepresented in the legislative branch as a result of the constituency system. An LGBTI political party applied to be so recognized, but was denied on moral grounds. In 2010, the Supreme Court upheld the registration of Ang Ladlad as a party-list party, based on the rights of LGBTI people to political participation, freedom of expression, and equal treatment. Ang Ladlad ran in two national elections, but failed to win seats. In the most recent national elections, no LGBTIQA group ran for a seat in congress.

### 10.5.3 Public media and government censorship

Freedom of expression has been a constant struggle for queer people living in Southeast Asia. Despite using creative means to convey their messages, some States still adamantly regulate or restrict SOGIE-based content. For example, the government of Singapore explicitly prohibits positive images of homosexuals which led to a ban on gay Christian singers, Jason and DiMarco in 2005. Similarly, in 2008, a cable television channel was fined when a home decorating program featured a nursery in the home of a lesbian couple who had adopted a baby. The Media Development Authority said the program “normalizes and promotes a gay lifestyle.” In February 2009, Singapore also censored the annual Academy Awards broadcast from Los Angeles, cutting parts of speeches on the film, *Harvey Milk*, which portrayed the life of a gay politician. Similarly, a quick same-sex kiss was cut from the stage production of *Les Misérables* in June 2016. A similar blockage of ‘positive images’ occurs in Malaysia, Brunei, and Laos. Foreign gay magazines are not available in these countries, and wire service stories on LGBTIQ topics worldwide do not get reprinted.

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

In addition, Thailand has released a surprising number of movies with gay characters, although most are low-budget comedies with mocking depictions of gay men and transgender women. But there are a few stand-out productions such as *Iron Ladies*, *Beautiful Boxer*, *Love of Siam*, *Bangkok Love Story*, *Yes or No*, *Yes or No 2*, and the charming 2015 film, *Winning at Checkers (Every Time)*. Indeed, *Winning at Checkers* was submitted as the country’s foreign language entry to the Oscars. Moreover, these films are shown in regular cineplexes throughout the country. Similarly, there have been numerous gay and lesbian films in the Philippines. Other parts of Southeast Asia can claim one or two titles: *Lost in Paradise* in Vietnam, *Arisan*, *Arisan 2* and *Beautiful Man* in Indonesia, *In a Bottle* in Malaysia, and some comedies in Myanmar. As a result, there have been LGBTIQ film festivals in Indonesia, Thailand, and Myanmar, and showings in other places.

To conclude, amid State-sanctioned restrictions, LGBTI creatives have found an ally in technology and the internet. SOGIE-based content has become more widely available and accessible through online media platforms such as YouTube and Netflix. LGBTI movies and series can be viewed anytime by audiences in different parts of the world. Further, the availability of closed captions or subtitles has made content even more accessible to viewers.

## Reflection and Discussion: Capitalizing on Gay Romance

The COVID-19 pandemic saw the meteoric rise of gay-themed shows, which are accessed mainly on mainstream media and internet streaming platforms. These “boy love” series, mainly from Thailand (e.g. *Tharntype*, *Bad Buddy*, *Together, the Series*) and the Philippines (e.g. *Gameboys*, *Gaya sa Pelikula*) feature stories of mainly romantically involved male characters dealing with diverse issues ranging from safe sex to social acceptance. A number of young actors such as Vachirawit Chiva-aree became overnight celebrities garnering a cult following from different parts of the world. While these shows were a pleasant distraction from the pandemic, they also served to raise awareness on the existence of queer relationships.

### Questions

- (a) What changes have these shows made to your society’s view of LGBTI identities and relationships?
- (b) Do these gay-themed shows directly or indirectly promote any stereotypes?
- (c) What other kinds of LGBTI issues and relationships do you wish to see presented in media platforms?

## 10.6 Transgender

‘Transgender’ is a term that came about in the 1990s to describe individuals who reject the gendered patterns of dress and behaviour associated with their assigned sex at birth. The stereotypical association of transgender with homosexuality is still a problem because the categories ‘transgender’ and ‘homosexuality’ are different. While most cross-dressers are heterosexual, most transsexuals, after body change, seek heterosexual relationships.

### 10.6.1 Transsexuals

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

Genital surgery became widely available in the West only in the 1960s. Consequently, a set of medical rules for undergoing genital surgery was developed requiring:

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

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

For transsexuals, the right to health found in Art 12 of the *International Covenant on Economic, Social and Cultural Rights* includes a proper diagnosis and appropriate treatment. The European Court of Human Rights in *L v. Lithuania* (2007) held that the state medical system could not refuse surgery

in a case where the individual had been diagnosed as a transsexual and a course of treatment had already begun. The *Diagnostic and Statistical Manual of Mental Disorders, DSM-IV* of the American Psychiatric Association and the *ICD-10* of the World Health Organization represent an international consensus on diagnosis and treatment.

Individuals in Indonesia, Singapore, and Vietnam on completing genital surgery can acquire personal documents, such as national identity cards, driver's licences and passports, altered to reflect their post-operative 'gender identity.' Document change is also possible in China, Japan, South Korea, Hong Kong, and Taiwan. After changing the documents, the individual can marry in their newly recognized sex. For instance, a male to female transsexual will be able to legally marry a male. Nevertheless, in 2007, the Supreme Court in the Philippines rejected document change. Tellingly, the pronouncement of its judgement began with a quotation from the book of Genesis in the Bible. Despite being the regional centre for sex reassignment surgery, Thailand does not allow the altering of one's personal documents after surgery or sex-change.

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

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

The old requirements (diagnosis, waiting periods, divorce, genital surgery, sterility) now seem to reflect nothing more than the neurotic fears surrounding any loosening of the sex/gender system. International media first reported on a 'pregnant man' a decade ago – the sensational story of an individual in Oregon who had given birth to a child after document change identified him as male. It is a testament to how times have changed that this story has since faded from media coverage and would no longer constitute news.

In a 2016 report, the UN Special Rapporteur on Torture noted that the refusal of transgender people's legal recognition in their appropriate gender "leads to grave consequences for the enjoyment of their human rights, including obstacles to accessing education, employment, healthcare and other essential services." The report also noted that "in states that permit the modification of gender markers on identity documents, abusive requirements can be imposed upon transsexuals such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures." It is now frequently asserted that the requirement of genital surgery and sterility for legal recognition of gender identity amounts to a form of torture.

In recent years, strong transsexual identification of some pre-puberty children has even come to be recognized and respected. Medical treatment may involve the blocking of puberty and delaying bodily changes until the individual is mature enough to make a clear decision.

### **10.6.2 *Discrimination against transgenders***

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

In the US, a recurring issue on this subject relates to sexually segregated toilets. In October 2006, the New York Metropolitan Transportation Authority resolved a long-standing dispute by ruling that individuals throughout their extensive subway and railroad system could access whichever restroom was “consistent with their gender expression.” As a direct challenge to the federal government which makes grants to schools dependent upon toilet access based on gender expression or gender identity, in 2016, some individual states enacted laws requiring individuals to use toilets in accordance with the ‘sex’ indicated on their birth certificates. Indeed, a coalition of state governments has sued the national government over the issue. This led to a 2021 landmark ruling of the US Supreme Court which ended the long battle for trans rights in school bathrooms when it allowed a transgender student to use the bathroom that corresponded to their gender identity.

## Reflection and Discussion: Barriers Faced by Transgenders in Exercising Rights

### ***Discrimination against Transgenders***

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

Three transgender women in Negeri Sembilan, who had been arrested and prosecuted for wearing women's clothing under a state-level Sharia law, challenged the law as in conflict with human rights provisions in the Malaysian Constitution. State level governments have authority to legislate on matters related to Islam, and all 13 states prohibit Muslim men from dressing as women. Three states also criminalise women "posing as men." Cases are heard in Sharia courts. In a carefully prepared challenge, backed by the NGO, Justice for Sisters, a trial court heard evidence about the classification of Gender Identity Disorder (GID) in the **DSM-IV** of the American Psychiatric Association. The three individuals had been diagnosed as having GID and evidence established that the condition was neither a matter of personal choice nor amenable to treatment. A sociologist gave evidence and described the Mak Nyah community in the country (a long recognized transgender grouping) as thus. However, a religious authority testified that cross-dressing was forbidden in Islam. After losing at trial, the petitioners were successful on appeal. In 2014, the Court of Appeal ruled that the state-level Sharia law was in conflict with the constitutional rights to life and personal liberty, equality, freedom from gender discrimination, freedom of movement, and freedom of speech, assembly, and association. The judgment cited a decision of the Supreme Court in India which held that the prohibition of discrimination on grounds of 'sex' covered 'gender identity' as well. It quoted from a Malaysian government report to the UN General Assembly Special Session on HIV/AIDS in 2010 which said that the social shunning of transgenders in the country resulted in the majority of Mak Nyah being "unable to obtain employment and thus end up doing sex work." The judgment criticized the trial court which had equated transgender with homosexuals, saying the case had "absolutely nothing to do with homosexuality." The implications for any future challenges to Art 377, however, were made clear. In 2015, the Federal Court, the highest court in the Malaysian system, on purely procedural grounds, ruled that the decision could not stand. It said that a constitutional challenge could only proceed with an authorization from the Federal Court. The authorization of a high court judge, which had been obtained, was insufficient. As in the *Seksualiti Merdeka* case, judicial review was rejected on grounds that avoided any discussion of human rights. The ruling suggests that the Federal Court could block any attempt to revive the challenge.

### Questions

- (a) What challenges do transgender people face in your country?
- (b) What has been the response of the government and civil society organizations on these issues?

### ***Political Representation of Southeast Asian transgenders***

A few LGBTI people, mainly from Europe and South America, have successfully occupied seats of power at the national and local levels. The first openly LGBTI- elected head of government was Johanna Siguroardottir who was Prime Minister of Iceland from 2009 to 2013.

While there are no laws or policies prohibiting LGBTI persons from running for political office, provisions promoting their political participation are nowhere to be seen. Generally, governments throughout Southeast Asia still lack a substantial number of queer people in elected positions at the local and national levels. The region has yet to witness an openly LGBTI person becoming head of state or government. Despite this, transgender politicians have successfully made their way into public office.

Geraldine Roman (Philippines): Elected as the first-ever transgender person into the lower house of congress in 2016, Geraldine hails from a political family in Bataan. In 2019, she was re-elected for a second term of office as representative of the first district in her home province and has since been championing the passage of an anti-discrimination bill on the basis of sexual orientation and gender identity (SOGIE Equality Bill).

Tanwarin Sukkhapisit (Thailand): A film director by trade, Tanwarin was elected as member of parliament in the Future Forward Party in 2019. The party, known for promoting democratic reforms, was dissolved in February. She was later removed from office, after having been found by the court to have breached the electoral law for being a “stockholder of a media company.”

#### Questions

- (a) Why is it important for LGBTI persons to enjoy their right to political participation?
- (b) Does your country have any LGBTI persons in politically-elected positions? If so, what factors in your country allow and/or prohibit them from entering public office?

### **10.6.3 Distinct transgender identities**

In the Southeast Asian region, there are gender non-binary groupings, pertaining mainly to transgender people. The best known are the Bakla and Transpinay in the Philippines, the Mak Nyah in Malaysia, the Waria in Indonesia, and the Kathoey in Thailand. Internationally, the best known (and largest) of the ‘third sex’ groupings are the Hijra and related groups in India, Pakistan, and Bangladesh. It has to be noted that these terms can be exclusionary, given the fluidity of gender, or even derogatory, particularly when used to refer to persons of non-conforming genders.

These groupings have no equivalents in the contemporary West or in Confucian influenced societies in East Asia. Some find a place in entertainment, as in the transvestite cabaret shows in Thailand, or as entertainers at political rallies in Indonesia. Some run small businesses, such as beauty parlours, or work selling cosmetics in department stores. In the Philippines, they are often called “parloristas.” In South Asia and Southeast Asia, they frequently engage in sex work, being barred from most other jobs.

The plight of these groups has led to two types of reform. A small handful of government agencies have recognized these groups as socially and economically marginalized and introduced several training programs by social welfare departments in Malaysia and Indonesia. Finally, while governmental recognition of a ‘third sex’ category has occurred in some South Asian countries such as Nepal, the same cannot be said for Southeast Asia.

## 10.7 Intersexuals

Intersexuality refers to various conditions in which the body at birth is neither completely male nor female. Some forms of intersexuality do not become apparent until the onset of puberty. When an intersex child is born, confusion and embarrassment usually overwhelms the parents. Doctors, at least in the past, routinely recommended ‘normalizing’ surgery, to bring the child’s physical appearance into line with a male or female standard. The fact of an intersex history was regularly kept from the child, who may come to realize on maturity that critical information has been suppressed.

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

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

Little information exists in Southeast Asia as to whether the new international standards are being followed by doctors and medical institutions. Nonetheless, intersex individuals have been able to get their personal documents corrected, even in countries that will not change documents for post-operative transsexuals. In Indonesia, the case of Alter(ina) Hofan garnered much publicity when despite being classified as female at birth, his designation was changed to male after surgery. Difficulties arose when he married a woman, only to be accused by the woman’s mother of not being a man. After sensational coverage in the Indonesian media, Alter was imprisoned for several weeks before the charges were finally dropped.

In 2008, the Philippine Supreme Court in the *Cagandahan* case granted an intersex applicant’s petition to be recognized as male. The petitioner was classified as female at birth, but male characteristics developed as the body matured. The judgment reflected on the rigidity of having only two sexual categories, male and female, when the petitioner’s body did not conform to either model. Since the petitioner identified as male, and sought that classification, the court so ordered.

## 10.8 Conclusion

In the second decade of the 21st century, we are finally witnessing significant changes to the treatment of LGBTI people and the enjoyment of LGBTI rights throughout the world with an obvious shift away from near universal rejection or condemnation sixty years ago. At the global level, many more countries, albeit mainly in Europe and Latin America, are expressing support

for action to urgently address the challenges faced by LGBTI peoples. However, ASEAN and its Member-States still have a long way to go as regards accepting SOGIE as an agenda point. This is unfortunate because the COVID-19 pandemic exposed inequalities and multiple forms of violence against queer people which is hindering the ability of the community to garner social respect and recognition for their lived SOGIE experiences.

## **A. Chapter Summary and Key Points**

### **Trends at the Global Level**

Since the UDHR was adopted, dramatic changes in the world on sexuality issues have occurred. These include: repeal of criminal laws against homosexuality in most countries around the world; adoption of anti-discrimination laws that cover sexual orientation; and acceptance of civil unions or marriages by a number of countries. The United Nations has adopted measures to strengthen protection of the rights of the LGBTI community. However, opposition to LGBTI rights remains strong in most of the MENA region (Middle East and North African region) and in Member States of the Organisation of Islamic Cooperation (OIC).

### **Rights Issues Faced by the LGBTI Community**

Penal laws adopted by colonial powers decriminalised sexuality but while they repealed these laws at home, such laws remained in place in the colonies. After World War II, decriminalisation of homosexuality gradually started with States such as the USA, Britain, and Canada. However British colonies in Southeast Asia have continued to retain such criminal laws. Sharia laws in Southeast Asia also contain prohibitions against homosexuality. LGBTI continue to face direct and institutionalised violence. Often the family, intimate partners, and employers are the primary perpetrators of such violence. In most Southeast Asian countries, constitutions guarantee equal rights and prohibit discrimination. However, sexual orientation, gender expression, or intersex status are not expressly recognised as prohibited grounds of discrimination. While LGBTI communities do need protection against discrimination, they also need legal recognition of same-sex relationships/partnerships so they can exercise their rights and manage their lives and affairs effectively.

### **SOGIE Visibility and Activism**

The first active LGBTI civil society organizations in Southeast Asia focused on health and concerned themselves with education and the prevention of HIV/AIDS. These have evolved to become active members of the regional human rights advocacy movement. Rights to assemble and associate are tested with 'pride parades' held in various city centres. Governments have tried to prevent such parades in Malaysia and Singapore. Also, technology has become a tool for queer creatives to publish content to a wider audience.

### **Transgender**

'Transgender' is an umbrella term to describe individuals who reject the gendered patterns of dress and behaviour associated with their physical sex. In Southeast Asia, there are a number of 'third sex' transgender groupings such as the Bakla in the Philippines, the Mak Nyah in Malaysia, the Waria in Indonesia, the Kathoey in Thailand, and the Hijra in India, Pakistan, and Bangladesh. The stereotypical association of transgender with homosexuality is still a problem. Most cross-dressers are heterosexual. Individuals in Indonesia, Singapore, and Vietnam, on completing genital surgery or sex-reassignment surgery, can have their personal documents altered to reflect their post-operative gender identity. Anti-discrimination laws that cover gender identity are increasingly common in the world. Reforms are taking place in South Asia with Southeast Asia lagging behind. Reform has been in the areas of services for socially and economically marginalized LGBTI; training programs for social welfare departments; and recognition of a 'third sex' category (but only in some countries). A recurring issue is sexually segregated toilets.

## **Intersexuals**

Intersexuality refers to various conditions in which the body at birth is neither completely male nor female. Some forms of intersexuality do not become apparent until the onset of puberty. In recent years, the transsexual identification of some pre-pubescent children has been recognized and respected.

Previously, when an intersex child was born, doctors would routinely recommend surgery to bring the child's physical appearance into line with a male or female standard. Intersex activists argue that almost all these surgeries are cosmetic and not medically necessary. They also involve guesswork, for doctors cannot know how the individual will identify on maturity in terms of sex or gender identity. The preferred practice now is to recognize the patient's/person's rights and acquire informed consent before surgery.

## **B. Typical Exam or Essay Questions**

- What are the similarities and differences between International Human Rights Standards and the Yogyakarta Principles +10?
- What social and/or political factors hinder or facilitate the enjoyment of SOGIE-SC rights in your country?
- What are the laws, government policies, and general social attitudes in your country on the issues raised in this chapter? What positions has your country taken on sexuality issues at the United Nations and/or ASEAN?
- Do SOGIE-SC rights advocacy groups function freely and visibly in your country?
- What countries or jurisdictions currently uphold: (a) criminal laws against same-sex sexual acts between consenting adults; (b) laws against cross-dressing; (c) laws against individuals hanging out at night in places that gays or cross-dressers frequent; (d) laws or policies that prohibit gay or lesbian or transgender bars; or (e) restrictions on media that feature images of LGBTI? Are they regularly enforced?
- Why do countries retain anti-SOGIE-SC criminal laws when these are not actively enforced?
- Is the bullying of LGBTI people present in your country? How does your government address such issues?
- If someone changes their sex through an operation, should their birth certificate also be changed to reflect their new gender? Why, or why not?

## **C. Further Reading**

### **Sexuality and Rights**

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

### **Research Organizations**

The United Nations Development Programme (UNDP) has many useful publications on sexuality in the Asia Pacific and produces country reports under the 'Being LGBT in Asia and the Pacific' program including reports for Cambodia, Indonesia, Philippines, Thailand, and Vietnam. For more information, see:

UNDP, 'Being LGBT in Asia and the Pacific' UNDP, available at <https://www.undp.org/asia-pacific/projects/being-lgbti-asia-and-pacific#:~:text=Being%20LGBTI%20in%20Asia%20and%20the%20Pacific%20is%20a%20regional,to%20health%20and%20social%20services>, accessed on 18 November 2022.

UNDP and the Asia Pacific Forum, *Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions*, 2016, available to download at <https://www.undp.org/asia-pacific/publications/promoting-and-protecting-human-rights-relation-sexual-orientation-gender-identity-and-sex-characteristics-manual-national>, accessed on 18 November 2022.

Other UNDP reports include:

*Leave No One Behind: Advancing Social, Cultural and Political Inclusion of LGBTI People in Asia and the Pacific* (2015). Available at [https://www.undp.org/sites/g/files/zskgke326/files/migration/asia\\_pacific\\_rbp/rbp-hhd-2015-leave-no-one-behind.pdf](https://www.undp.org/sites/g/files/zskgke326/files/migration/asia_pacific_rbp/rbp-hhd-2015-leave-no-one-behind.pdf), accessed on 18 November 2022.

Discussion Paper: *Transgender Health and Human Rights* (2013). Available at <https://www.undp.org/sites/g/files/zskgke326/files/publications/Trans%20Health%20&%20Human%20Rights.pdf>, accessed on 18 November 2022.

### Other Resources

Council of Europe, *Protecting Human Rights of Transgender Persons: A Short Guide to Legal Gender Recognition* (2015). Available to download at <https://edoc.coe.int/en/lgbt/6963-protecting-human-rights-of-transgender-persons.html>, accessed on 18 November 2022.

Human Rights Watch (HRW) and Amnesty International have programs on LGBTI rights and their websites contain a useful array of advocacy notes and research reports. Some relevant HRW reports include:

*I'm Scared to be a Woman: Human Rights Abuses against Transgender People in Malaysia* (2014). Available at <https://www.hrw.org/report/2014/09/24/im-scared-be-woman/human-rights-abuses-against-transgender-people-malaysia>, accessed on 18 November 2022.

*"These Political Games Ruin Our Lives": Indonesia's LGBT Community Under Threat* (2016). Available at [https://www.hrw.org/sites/default/files/report\\_pdf/indonesia0816\\_web\\_2.pdf](https://www.hrw.org/sites/default/files/report_pdf/indonesia0816_web_2.pdf), accessed on 18 November 2022.

The International Council on Human Rights Policy has a study on *Sexuality and Human Rights*, 2009 (available to download at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551221](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551221), accessed on 18 November 2022).

The International Court of Justice (ICJ) has a *SOGI Case Book* of court cases (available at <https://www.icj.org/sogi-casebook-introduction/>, accessed on 18 November 2022) and a *SOGI UN Database* of reports, resolutions, and findings from treaty bodies (available at <https://www.icj.org/sogi-un-database/#:~:text=The%20SOGI%20UN%20Database%20contains,first%20UN%20compilation%20in%202005>, accessed on 18 November 2022).

The Office of the High Commissioner for Human Rights (OHCHR) also has some useful publications including a *Fact Sheet on Intersex* (available at <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>, accessed on 18 November 2022) and *Born Free and Equal: SOGI in International Human Rights Law* (available at <https://www.ohchr.org/sites/default/files/Documents/Publications/BornFreeAndEqualLowRes.pdf>, accessed on 18 November 2022).

The UN Independent Expert on SOGI (IESOGI) produces annual reports on critical themes related to LGBTI rights and issues including:

IESOGI, 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' A/HRC/35/36, 2017, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/095/53/PDF/G1709553.pdf?OpenElement>, accessed on 18 November 2022.

IESOGI, 'Practices of so-called "conversion therapy"' A/HRC/44/53, 2020, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/108/68/PDF/G2010868.pdf?OpenElement>, accessed on 18 November 2022.

IESOGI, 'The law of inclusion' A/HRC/47/27, 2021, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/123/16/PDF/G2112316.pdf?OpenElement>, accessed on 18 November 2022.

IESOGI, 'The right to the enjoyment of the highest attainable standard of physical and mental health of persons, communities and populations affected by discrimination and violence based on sexual orientation and gender identity in relation to the Sustainable Development Goals' A/HRC/50/27, 2022, advance unedited version available to download at <https://www.ohchr.org/en/calls-for-input/2022/call-inputs-report-un-human-rights-council-realisation-right-persons-affected>, accessed on 18 November 2022.

OutRight International is an NGO which publishes research and reports including: 'Letter to Thai officials: Killings of lesbian women and transgender people in Thailand' (22 March 2012) and *Violence: Through the Lens of Lesbians, Bisexual Women and Trans People in Asia*, 2014 (available at [https://outrightinternational.org/sites/default/files/2022-10/LBT\\_report.pdf](https://outrightinternational.org/sites/default/files/2022-10/LBT_report.pdf), accessed on 18 November 2022).

Other useful organizations include the Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), the Sexual Rights Initiative (SRI), and the World Health Organization's programs on sexuality, gender, and human rights.

# Chapter

# 11

## Human Rights and Development\*

### Reader's Guide

The term 'development' usually refers to advancement or growth that can be both static and dynamic. As a static concept, it is understood to be a condition of well-being. However, it can also be seen as a process of change from one state or condition to another and hence, dynamic in nature. Another dimension of development is that it exists at different spatial scales, meaning it can refer to the above at the individual, community, national, regional, and international levels. Development at one level does not necessarily lead to the same change at other levels. Finally, there is almost always a political aspect to notions of development. To summarise, development can have multiple meanings depending upon the actors defining it which may include the individual, community, government, non-government organisations, private companies, and multilateral organisations. This chapter seeks to unpack the different dimensions of development, first by examining the ideas underpinning development and tracing their emergence in history, then by discussing the relationship between human rights, the environment, and development, and finally by elaborating on a human rights approach to development.

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## 11.1 Introduction

### Reflection and Discussion: How difficult is it to plan development?

Consider a rural community. There is no primary school in the village meaning children have to travel 30 km to reach the closest one in a neighbouring village. The community needs a primary school. How can this need become a reality?

Different approaches can be adopted to make the change happen.

The community could come together, identify a location, pool their financial and human resources, and establish a school itself. In such a case, the processes of change take place at a community level and are driven by it.

However, not all groups have the resources to establish a school in which case, they may need government support. But such support will be dependent on government policy and budget. In other words, does the government have an education policy that mandates it establish primary schools in every village and has it allocated adequate finances in its annual budget to do so? Thus, the decision will depend on the government's social and economic policies which may in turn be influenced by its obligations under different bilateral and multilateral agreements.

This example shows that the fulfilment of basic human needs to improve the quality of life as regards education, health, livelihood, and housing are dependent on the structural environment or the legal, social, economic, political, and cultural norms binding local communities and society at large. This structural environment and its operational dynamics (at both the local and national levels) reflects a State's development approach. In addition, it is useful to remember here that States are part of a global community of nations, and as such, international level policies will often impact a State's decision-making and consequently people at the local, regional, and national levels.

This chapter focusses on development approaches adopted since the end of World War II. However, it should also be pointed out that at the war's end, much of Asia, Africa, and Latin America were still under European colonial rule, the economies of which were based on the extraction of resources and the exploitation of labour to boost international trade. The imperial powers drew raw materials such as cotton, timber, sugar, indigo, tobacco, rubber, and spices from the colonies, encouraged manufacturers in their own countries to process the raw material, imposed high tariffs on the import of goods produced outside the country, before finally selling the finished products to those self-same colonies. In order to ensure they had the purchasing power to buy the finished products, the imperial powers invested in education so locals could be employed in administrative positions while simultaneously creating infrastructure, such as roads, railways, and ports to facilitate the trade. In other words, enhancing the welfare of the people was never the primary goal of such nations.

It is also important to note that development approaches adopted after World War II had their roots in the economic, political, and sociological philosophies emerging in 18th century Europe. For example, at that time, Adam Smith (often regarded as the father of modern economics) wrote *Inquiry into the Nature and Causes of the Wealth of Nations* (1776) wherein he introduced ideas of classical economics, and advocated for free trade and State non-interference in private business and enterprises. As such, he emphasised increasing production, division of labour, and regulation of the system via the “invisible hand of the market.” He believed individuals would act out of self-interest to protect and promote their own well-being and therefore would refuse to buy too costly products and move to other jobs if wages were too low. This market-centered approach to

economic development is also known as “*laissez-faire economics*.” Its prevalence led to the 1929 Wall Street Crash and the Great Depression of the 1930s thereby highlighting the failures of such a free market approach.

These failures led to a drastic rethinking of the fundamentals of economic theories and policies. In 1936, economist John Maynard Keynes published *The General Theory of Employment, Interest, and Money* wherein he proposed that investment in new infrastructure projects was the key to economic growth. Such investments, he claimed, would lead to job creation and wealth generation through the multiplier effect. He also argued that, instead of allowing markets to operate independently, governments could propel economic growth through monetary policy and by government expenditure. This approach was adopted in many post-war reconstruction initiatives.

### **Key Terms: Development Categorizations, Economic and Political Systems**

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

**First, Second, Third, Fourth Worlds:** The definitions of ‘First World’ (the capitalist West), ‘Second World’ (communist and socialist countries), ‘Third World’ (poor countries seeking independence from the first and second worlds), and ‘Fourth World’ (indigenous and marginalized groups) are obviously political in nature and are seen as out-dated today. As such, they have rarely been used since the end of the Cold War.

**Developed and Developing Countries:** Instead, the United Nations now uses the terms, ‘developed’ (rich countries) and ‘developing’ (poorer countries). However, specific categorizations depend on individual organizations, with some using wealth, GDP, or human development as indicators. Further sub-categories, such as ‘least developed countries’ (LDCs), were also introduced to cover the poorest nations (including Cambodia, Laos, and Myanmar).

**Global North and Global South:** The terms, ‘Global North’ (rich and affluent countries/regions) and ‘Global South’ (poorer countries/regions) has been used since the 1990s and is based on a political and developmental categorization of countries and regions which assumes exploitation of the South by the North. These categories also imply that rich (North) and poor (South) regions or populations can co-exist in a given country.

**Capitalism:** Capitalism refers to an economic and political system in which private actors own and control property in accordance with their own interests, and the dynamics of demand and supply are set by market prices. Capitalism is founded on the pillars of capital labour, private property, self-interest (through which people act in pursuit of their own goals), competition, market mechanisms, and the freedom to choose with respect to consumption, production, and investment, with a limited role for governments or the State. By contrast, Marxism highlights the conflict between capital and labour which is based on the “mode of production” of any given society or country. During the Cold War, nations officially allied with the United States were known as the “Capitalist Bloc.”

**Socialism:** Socialism refers to an economic and political system based on public ownership of the means of production. In such a system, decisions regarding production and distribution are made by the State (government) based on the belief that public or shared ownership of resources and central planning will facilitate an equal distribution of goods and services and help to create a more equitable society. During the Cold War, countries allied with the Soviet Union were known as the “Socialist Bloc.”

## 11.2 Post-war Reconstruction

After World War II, Western nations, especially in Europe, sought to establish economic systems that would help to create the conditions for sustainable peace. One of the measures taken was to set up key international institutions aimed at promoting sustainable economic growth, namely the International Monetary Fund (IMF), the World Bank, and the General Agreement on Tariff and Trade (GATT). Similarly, in 1948, the USA launched the 'Marshall Plan' or the European Recovery Plan to provide financial assistance to European countries to rebuild their war-torn infrastructure and economies. However, the Soviet Union withdrew its participation as it believed economic integration with the West would reduce its influence over Eastern European countries. Instead, it announced its own 'Molotov Plan' to provide aid to rebuild the countries in Eastern Europe.

In his second inaugural address in January 1949, US President Truman extended the Marshall Plan to other countries in the world as well. He stated:

*... we must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas.*

*More than half the people of the world are living in conditions approaching misery. Their food is inadequate. They are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas.*

*For the first time in history, humanity possesses the knowledge and the skill to relieve the suffering of these people ...*

The program, commonly known as the "Point Four Program," provided technical assistance and economic aid to underdeveloped countries, largely in the fields of agriculture, public health, and education. While some assistance was channelled through United Nations agencies, most were managed directly by the United States. As the economies in Europe recovered, attention turned to countries in Africa, Asia, and Latin America, which, having recently gained independence, required support to strengthen their economies and raise standards of living. This led to the use of international developmental assistance as a means by which the capitalist bloc (USA, Canada, Europe, and Australia) and the socialist bloc (Soviet Union, Eastern Europe, and China) sought to attract and keep countries within their spheres of influence and trade. As a result, development aid and assistance became politicised. Different streams of development theory emerged over the course of time mostly influenced by government policies in developed and developing countries, the Bretton Woods Institutions, the United Nations, and other multilateral development agencies.

### Spotlight: The Bretton Woods Institutions

The IMF, the World Bank, the GATT, and the WTO are also known as “Bretton Woods Institutions” as they were established based on the agreement between industrialised nations at the Bretton Woods Conference in the USA in 1944. Based on the ideas of three experts (US Treasury Secretary, Henry Morgenthau; his chief economic advisor, Harry Dexter White; and British economist, John Maynard Keynes), these institutions form part of the United Nations System, but in practice they function autonomously.

**The World Bank (WB):** Not a single bank, but at least five interconnected banks and institutions whose purpose it is to assist developing countries by lending money, running development projects, and giving technical assistance to governments.

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

**The General Agreement on Tariffs and Trade (GATT):** Its role is to promote free trade between its members. Originally, it consisted of 23 members. However, it was replaced by the World Trade Organisation in 1995.

**The World Trade Organization (WTO):** The Bretton Woods agreement included plans for the creation of an international trade organisation. However, this plan was only realised in the early 1990s with the setting up of the WTO. The WTO deals with the rules of trade between nations and acts as the forum for negotiating trade agreements by its member governments. It also settles trade disputes between its members and supports the needs of developing countries.

### 11.3 Modernisation Theory (Dominant in the 1950s and 1960s)

Post-war reconstruction efforts were largely based on this theory. It accepted that the ideal State was a modern society marked by high production and high consumption. The strategy involved channelling aid from developed countries into productive investments in traditional societies (where economies were dominated by subsistence activities such as agriculture, production was labour intensive, and the use of technology low) thereby facilitating a shift towards industrialisation. The theory assumed that as societies reached this modern state, priority would be given to social welfare which would increase standards of living. Nonetheless, the modernisation theory was criticised by development thinkers from the Global South who questioned the assumption that Western nations’ own experience of evolution from traditional to modern societies could be replicated in post-colonial contexts.

One particular strain of criticism emerged in Latin America in the 1960s and 1970s. The ‘dependency theory’<sup>1</sup> argued that, far from being a natural state, poverty in underdeveloped countries was actually a direct result of power relations between developed and poor nations which placed the economic discrepancies between the first and third worlds firmly at the door of the former. Thus, they argued that underdeveloped countries had been coerced and/or persuaded to offer cheap labour and raw materials to advanced economies (which had the means to transform them into finished products), only to buy these finished goods back at higher prices, vastly reducing their ability to expand their own productive capacities. It was the inequities of this system that created

<sup>1</sup> For further understanding see: Namkoong, Y. (1999). Dependency Theory: Concepts, Classifications, and Criticisms. *International Area Review*, 2(1), 121-150. <https://doi.org/10.1177/223386599900200106>

a core of rich countries at its centre (First World), leaving poorer countries (Third World) to languish at its periphery. Moreover, dependency theorists also contended that the power relations existing between these two groups were duplicated within Third World countries, enabling those with access to power and world markets (usually the military, government officials, financial leaders, and businesses) to exploit the poor in their own countries. To increase their leverage with the First World, this group called for greater interaction between Third World countries. At the same time, improving the situation within countries would reduce the gap between rich and poor.

### 11.4 Basic Needs Approach to Development (1970s)

The basic needs approach to development grew out of the ILO World Employment Program in the 1970s. The idea originated from Abraham Maslow's concept of the "*hierarchy of needs*" (1943). Maslow believed there were five different levels of needs: at the base were physiological needs such as food and water which were vital for survival; next were safety needs encompassing, for example, personal security, employment, and health; following were social needs such as friendships and family ties; further up the scale were esteem needs such as the need for appreciation and respect; and at the top of the pyramid was self-actualisation or the desire to be the most one can be. Maslow believed that satisfying one's needs at the lower levels of the hierarchy would eventually lead to self-actualisation. However, research in the 1970s by the ILO showed that a significant component of the world's population was unable to satisfy even their most basic needs. Accordingly, development strategies were identified putting employment and basic needs front and centre. The ILO report for the World Employment Conference in 1976 defined basic needs as food, clothing, housing, education, and public transportation. In particular, employment was recognised as a means to fulfil one's basic needs. Therefore, this development strategy aimed to combine economic growth with employment creation.

### 11.5 Neo-liberalism

In the late 1980s, the neo-liberal economic theory gained prominence. Neo-liberalism calls for increased privatisation, economic deregulation, and lower taxation to enable markets to function freely. The argument was that if markets could operate freely, capitalism would generate wealth which would trickle down to everyone. Neo-liberalism called for greater individual freedoms and respect for private property, allowing the initiatives of dynamic individuals to drive development forward unrestricted. As such, proponents of neo-liberalism called for the removal of administrative rules and regulations, lower taxation, reduced worker protection, and less environmental protection to oil the wheels of business. General agreement by the World Bank, the IMF, and world leaders led to the adoption of neo-liberal policies as the best approach to development – also known as the "*Washington Consensus*." Consequently, conditionalities based on these ideas or "structural adjustment programs" were imposed by the Bretton Woods institutions on developing countries wishing to receive loans. Global free markets or globalization was considered the means as well as the end of development, and so development policies were targeted towards making local markets fit to participate in a global market society.

In Southeast Asia, the neo-liberal approach brought many benefits, so much so that in a 1993 report, the World Bank called it the "*East Asian Miracle*."<sup>2</sup> The 'miracle' centred on the growing economies of countries like Singapore, Thailand, Indonesia, and Malaysia (although the report also included Japan, Taiwan, South Korea, and Hong Kong) which saw massive increases in wealth, health, and education. Quality of life had improved dramatically for many people in the region with almost universal access to primary schools and a wide availability of high paying jobs and consumer goods. While benefits increased for people during the East Asian Miracle, some

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<sup>2</sup> *The East Asian miracle : economic growth and public policy : Main report (English)*. (1993). The World Bank. <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/975081468244550798/main-report>

governments in the region avoided human rights obligations by arguing that “*trading off rights*” was necessary for economic growth. For example, political rights and freedom of expression were seen as unnecessary because they slowed economic development. This also forms part of the “*Asian Values*” debate.

### **Key Term: Trading of Rights**

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

However, the miracle awakened underlying tensions as well. Growing inequality was emerging at the regional level, with countries like Laos, Cambodia, and Myanmar being left behind. As a result, large numbers of workers began leaving these countries to work for higher pay in wealthier Southeast Asian countries like Malaysia, Singapore, and Thailand. However, even within wealthier countries, the influx of money was not always invested wisely and economic problems soon surfaced. This led to the “*1997 Asian Financial Crisis*” which started in Thailand in May, but by the end<sup>3</sup> of the year had caused financial instability in Indonesia, Singapore, and Malaysia, and ripple effects across the world. The crisis was a direct result of globalization and the increasing integration of national economies into the global market. Subsequently, the vast amounts of money from the global economy that had poured into these countries in the years before 1997 was rapidly withdrawn, causing instability in currencies, stock markets, and the import/export industries. The Asian financial crisis raised many questions about the fundamentals of globalization and the market economy. In particular, people complained that agreements between States and the IMF had allowed transnational corporations (TNCs) to enter local economies and seize markets from smaller local businesses. Concerns were raised that States were being forced to privatize industries and reduce spending on education and health. And instead of caring for their unemployed workers, countries were pressured to pay back loans to banks from rich Western countries, even though the banks often lent money irresponsibly. These concerns were voiced loudly by the ‘anti-globalization movement,’<sup>4</sup> a broad coalition of people and organizations critical of neo-liberal capitalism and the policies and actions of the IMF, the World Bank, and the WTO. The anti-globalization movement was a strong advocate for the rights of the poor, particularly under-paid workers and people losing access to basic needs because of reduced State assistance.

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<sup>3</sup> Kim, S.S. (1999). East Asia and Globalization: Challenges and Responses. *Asian Perspective* 23(4), 5-44. <https://doi.org/10.1353/apr.1999.0001>.

<sup>4</sup> Tandem & Tadem. (2003). Anti-Globalization Movements in Southeast Asia. *Asian Studies: Journal of Critical Perspectives on Asia*, 39(1-2), 164-198.

### **Key Term: The Anti-Globalization Movement**

The purpose of the anti-globalization movement was to protest the impact of the global economy, or more precisely, neo-liberal economic theory. It was made up of a diverse range of interest groups from environmentalists, development activists, feminists, peace activists, human rights defenders, and students to name but a few. Their focus was global economic organizations such as the Bretton Woods institutes, trans-national corporations and wealthy countries. They were also concerned with Third World debt and the exploitation of developing countries by the developed world, leading to a famous protest in Seattle in 1999 against a meeting of these organizations. By the mid-2000s, however, the movement had dispersed. Many shifted their interest to anti-war protests against the invasion of Iraq by the USA. Others joined the World Social Forum to address issues of inequality between the rich First World and the poor Third World.

## **11.6. Integrating Human Rights and Development**

Even before the Asian financial crisis, questions had started to emerge about the neo-liberal approach to development. The benefits of economic growth and progress were not trickling down to the poor and marginalised as envisaged. In many cases, development initiatives such as infrastructure projects themselves caused suffering and harm to the people who were dependent on the land and natural resources for their lives and livelihood. Attention was therefore directed towards integrating human rights into development planning and action. A number of interventions were adopted that stressed the link between human rights and development, the indivisible link between economic, social, and cultural rights, and civil and political rights, and the link between peace, development, human rights, and democracy.

### **11.6.1 Gender and development**

By the early 1970s, there was growing recognition that development processes were not benefiting women as much as men. In response to these concerns, the idea of *Women in Development* (WID) emerged.

WID<sup>5</sup> recognised that women were not just mothers and passive beneficiaries of development in general, and welfare and family planning programs in particular. It recognised that women were also active economic agents with key roles in production and economic development, and their contributions needed to be recognised and enhanced. Strategies adopted by development agencies to integrate women in development included amongst others, integrating gender dimensions into development and development programming, and strengthening women's active involvement in development processes. Tools like gender analysis and gender mainstreaming were used to facilitate such strategies.

However, it soon became clear that women's lives would not change for the better simply by integrating women into development processes unless gender stereotypes, relations, and development processes were also transformed. This recognition came to be known as '*Gender and Development*'.<sup>6</sup> Gender and development laid stress on the need to address the causes of women's

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<sup>5</sup> Women in Development. (1992). *Women2000*. No. 1. 1992

<sup>6</sup> *Gender and Development*. UNESCWA. <https://www.unescwa.org/sd-glossary/gender-and-development-gad>

subordination and existing power relations between men and women.<sup>7</sup> Gender and development resonated with the fundamental principle of substantive equality recognised in the UN Convention on the Elimination of All forms of Discrimination against Women (CEDAW).

### **11.6.2 Recognition of the Right to Development**

The Universal Declaration of Human Rights (UDHR) recognised civil and political rights as well as economic, social, and cultural rights. However, the solidarity at the end of World War II that had brought nations together to adopt the UDHR soon broke down. While socialist States were keen to recognise economic, social, and cultural rights as legally binding, Western States merely considered these to be aspirational. As a result, two separate UN Covenants (the International Convention on Civil and Political Rights (ICCPR)) and the International Convention on Economic, Social and Cultural Rights (ICESCR)), were formulated and adopted to give binding force to the rights recognised in the UDHR. At the same time, despite the tension between socialist and capitalist countries, developing nations continued to push for recognition of the '*Right to Development*' arguing that former colonisers had an obligation to assist the developing world with large scale aid transfers. Throughout the 1970s, the international community held discussions on different aspects of the Right to Development until in March 1979, the Commission on Human Rights (Resolution 4 (XXXV), March 1979) expressly recognised it as a human right and asked for further studies to be conducted on the conditions required for its effective enjoyment. These studies led to the development of the draft Declaration on the Right to Development, subsequently adopted by the UN General Assembly in December 1986. The Declaration was reaffirmed at the 1993 World Conference on Human Rights in Vienna. Accordingly, the Vienna Declaration and Program of Action recognised the Right to Development as a universal and inalienable right and an integral part of the human rights held by every person, thereby putting to rest debates between civil, political, and economic, social, and cultural rights. Attention then shifted to implementation of the Right to Development. Also, the end of the Cold War helped to create a space for open discussions on these ideas.

Article 1 of the Declaration on the Right to Development states:

*The right to Development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*

This definition of the Right to Development in Article 1 has the following key elements:

- The Right to Development is an inalienable human right held by individuals and peoples; and
- Such a right enables them to participate in, contribute to, and enjoy a process of economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.

Every right has corresponding obligations. Accordingly, the Declaration places obligations on individuals and peoples, the State, and international community, for realising the right to development.

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<sup>7</sup> To further understand the shift from "women in development" to "gender and development" see: Razavi Shahrashoub & Miller Carol. (1995). *From WID to GAD: Conceptual Shifts in the Women and Development Discourse*. United Nations Research Institute for Social Development. Occasional Paper 1, February 1995.

*Individual and peoples:* Article 2 states that all human beings, acting individually and collectively, have a responsibility for development and to take appropriate action towards it;

*State:* As per Article 3, States have the primary responsibility for creating the national and international conditions favourable for the realisation of the right to development. These conditions, as explained in different articles of the Declaration, include formulating appropriate national development policies, eliminating obstacles to development and strengthening respect for human rights and fundamental freedoms. Obstacles to development as identified in the Declaration include massive and flagrant violations of human rights and failures on part of the State to observe civil and political rights as well as economic, social and cultural rights.

*International community of States:* States also have a responsibility to cooperate with each other to promote, encourage, and strengthen universal respect for and observance of all human rights and fundamental freedoms. Such cooperation includes formation of international development policies to facilitate realisation of the right to development.

The Declaration on the Right to Development marks a divergence from the usual approach to development which focused on economic growth as regards output of material products and marketable services. By recognising development to be a process which facilitates the enjoyment of all human rights and which calls for the elimination of barriers preventing their enjoyment, the Declaration draws focus on equity, justice, participation, and freedoms. Instead of relying on the benefits of economic growth trickling down to the poor, it stresses adjusting the process of economic growth through development policy to enable the full realisation of human rights. Arjun Sengupta, the UN Independent Expert on the Right to Development in his report to the United Nations (1999) elaborated on the implications of having a rights-oriented approach to economic growth:

*... if poverty has to be reduced, if the poor have to be empowered, or if the poorest regions have to be uplifted, the structure of production has to be adjusted to produce these outcomes through development policy. The aim of policy should be to achieve this with the minimum impact on other objectives, such as the overall growth of output. But if there is a trade-off, such that growth will be less than the feasible maximum, in order to satisfy the conditions of equity, it will have to be accepted. If this development process has to be participatory, the decisions will have to be taken with the full involvement of the beneficiaries, keeping in mind that it involves a delay in the process, that delay has to be minimised. If a group of destitute or deprived people have to have a minimum standard of well-being, a simple transfer of income through doles or subsidy may not be the right policy, and they may have to be provided with the opportunity to work or to be self-employed, which may require generating activities that a simple reliance on market processes may not be able to ensure.*

Though the Declaration is non-binding in nature, it has influenced the work of human rights treaty bodies, the UN system agencies, and other international organisations in shaping global partnerships for development.

### **11.6.3 Concept of sustainable development: The Brundtland Report**

In 1987 the World Commission on Environment and Development, chaired by Gro Harlem Brundtland came out with the report titled “Our Common Future”. The Commission had been established by the United Nations General Assembly to, amongst others, to propose long-term environmental strategies for achieving sustainable development.

The work of the Commission is important as it provided a definition of the concept of sustainable development: *development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*

At the time the Commission was putting together the report (1984-1987) the world was seeing a drought crisis peak in Africa, the Bhopal gas leak tragedy in India, explosion of liquid gas tanks in Mexico City, pollution of rivers and the Chernobyl nuclear reactor explosion amongst other such disasters. In this context, the Commission in its report noted that economic growth and the environment were inseparable from each other. The understanding of sustainable development as presented in the report helped in giving direction to policy making at national and international levels in the next decades.

#### **11.6.4 Adoption of a human security approach**

Development thinking was expanded further in 1994 with the UNDP's Human Development Report which introduced the concept of 'Human Security.' The introductory paragraphs explain the link between human security and development:

*The world can never be at peace unless people have security in their daily lives. Future conflicts may often be within nations rather than between them – with their origins buried deep in growing socio-economic deprivation and disparities. The search for security in such a milieu lies in development, not in arms. More generally, it will not be possible for the community of nations to achieve any of its major goals—not peace, not environmental protection, not human rights or democratization, not fertility reduction, not social integration—except in the context of sustainable development that leads to human security.*

Under the leadership of Secretary General Boutros Boutros-Ghali, the UN sought to set a new security agenda by changing the way people thought about and discussed the concept of security. It suggested that the causes of conflicts in future could be rooted in socio-economic deprivations and inequalities, and such conflicts could be addressed only through development that enabled people to live secured lives.

Security, in such a context, is not about national security (the most common type of security), but about security at the individual level or human security. National security is focused on keeping the nation secure, which means protecting the government, the territory, and perhaps the ideas of the State. Human security enables people to live freely without fear. The 1994 report outlined seven dimensions of human security. These are economic, food, health, environment, personal, community and political. Each of these dimensions also represent different facets of development. For example, food security necessitates assurance that local systems of food production and distribution are effective. Similarly ensuring health security requires establishment of a health care system that offers quality health care and is accessible to all without any discrimination. And last but not the least, political security requires the development of institutions and processes that facilitate liberties and protects the rule of law, so that individuals can pursue the lives they want freely and without fear of anyone in society, be it family, neighbours, government, or other predatory forces in society.

**Table 11-1: Seven Dimensions of Human Security and Links to Human Rights**

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

### **11.6.5 Human development and the Capabilities Approach**

In 1990, the first Human Development Report (HDR) was launched by the United Nations Development Programme (UNDP) and a new approach to understanding and measuring development was introduced. The human development approach pioneered by economist, Mahbub Ul Haq, was anchored in the capability theories developed by Martha Nussbaum and Amartya Sen<sup>8</sup>. Salient features of this approach are<sup>9</sup>:

- Human development is defined as a process of expanding people's choices to achieve whatever a person values. The focus is on people, therefore, moving away from the assumption that economic growth will automatically result in greater well-being for all (i.e. the trickle-down theory).
- The process of expanding people's choices has two elements: (1) enhancing human capabilities; and (2) creating conditions to enable people to make use of their acquired capabilities, be it for leisure, productive purposes, or being active in cultural, social, and political affairs.
- Such capabilities are dependent on many elements, but three essential ones are being able to live a long healthy life, being knowledgeable, and having access to the resources needed for a decent standard of living. These elements are essential as in their absence many opportunities become inaccessible to individuals. Additional elements include having the political, social, and economic freedoms to access opportunities to be creative and productive, to be guaranteed human rights, and to be able to enjoy personal self-respect (Adam Smith explained self-respect as the ability to mix with others without feeling ashamed to appear in public).
- Human development can be measured in terms of three essential elements: longevity, knowledge, and decent living standards. The relevant indicators are life expectancy, adult literacy, and the purchasing power to buy commodities to satisfy one's basic needs.

Thus, the human development approach brought together two trajectories of development: production and distribution of commodities, and the expansion and use of human capabilities. Twenty years after adoption of this approach, a review was undertaken in 2010 (Human Development Report, 2010). It found that while substantial progress had been made in terms of health, education, and access to goods and services, inequalities both within and across countries had also increased. It also revealed that production and consumption patterns had become unsustainable. A new definition of human development was adopted that recognised the need for equitable and sustainable development:

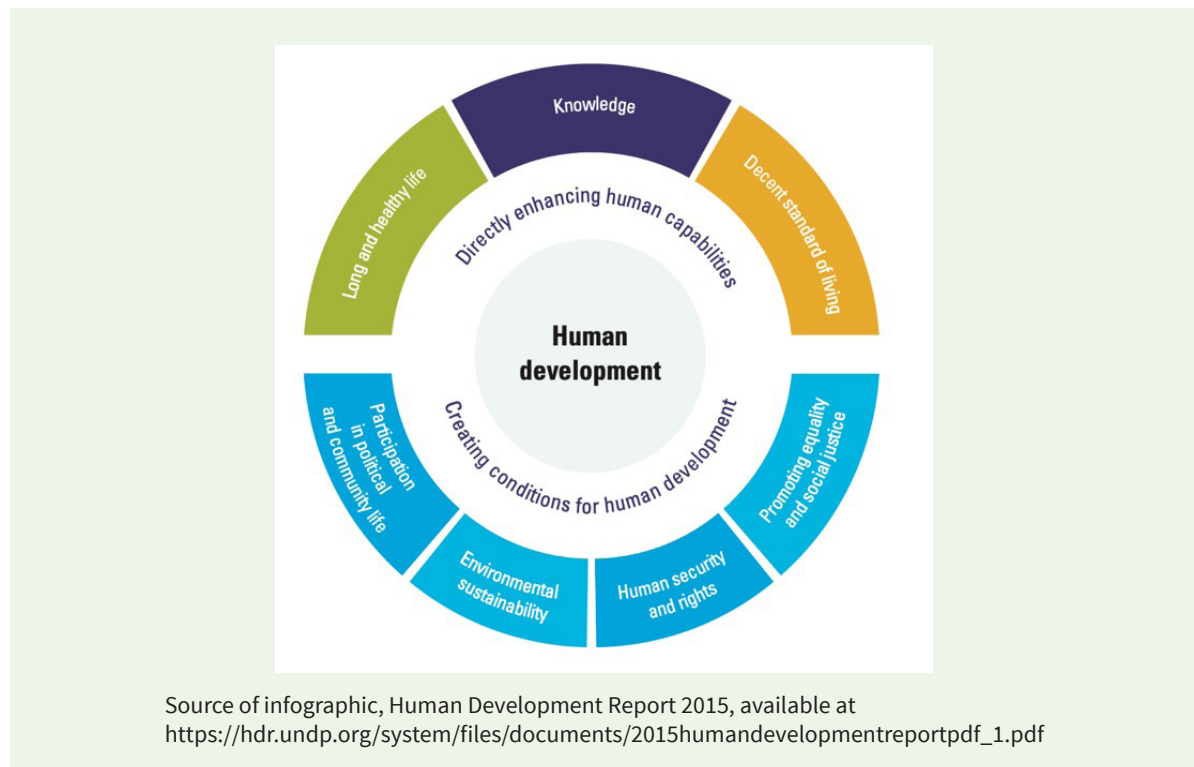
<sup>8</sup> *The Capability Approach*. (2011, April 14). Stanford Encyclopedia of Philosophy. <https://plato.stanford.edu/archives/sum2020/entries/capability-approach/#:~:text=The>

<sup>9</sup> Summarised from: United Nations Development Programme.(1990). *Human Development Report 1990: Concept and Measurement of Human Development*. New York.

*Human development is the expansion of people's freedoms to live long, healthy and creative lives; to advance other goals they have reason to value; and to engage actively in shaping development equitably and sustainably on a shared planet. People are both the beneficiaries and the drivers of human development, as individuals and in groups.*

Further, the Human Development Report, 2010 introduced new indices for addressing contemporary challenges that took into account gender inequality, multidimensional poverty and inequalities with respect to life expectancy at birth, education and income.

**Figure 11-1: Dimensions of Human Development**



#### **11.6.6 The Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs)**

At the end of the 1990s, 189 Member States of the United Nations adopted another approach to address extreme poverty and its many manifestations. The Millennium Development Goals (MDGs) were launched on 1 January 2000 by world leaders with the commitment to establish national policies and strategies to address poverty, hunger, maternal and child mortality, communicable disease, education, gender inequality, environmental damage, and the global partnership. The MDGs provided a framework for the international community to work towards a common goal.

### Spotlight: Eight Goals of the MDGs

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

At the end of the MDG implementation plan in 2015, it was found that while significant progress had been made in achieving the targets, the poorest and most vulnerable across regions and countries had been left behind. Gender inequality continued to persist and large gaps existed between the richest and poorest households and between rural and urban areas in terms of access to nutritious food, education, healthcare, sanitation facilities, drinking water, etc. It also found that climate change and environmental degradation affected the poorest the most, posing a critical challenge for the global community. To address these and other challenges, a new set of goals, the Sustainable Development Goals (SDGs), was announced. Sustainable development was at the core of the new agenda, and 17 goals were adopted. The 2030 Agenda for Sustainable Development Declaration stated:

*We resolve, between now and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources. We resolve also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.*

However, the 2030 Agenda did not explicitly mention achievement of the full realisation of human rights as a goal although as evident from the paragraph below, human rights were at the core of the agenda.

*We envision a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realisation of human potential (paragraph 8, 2030 Agenda for Sustainable Development).*

**Table 11-2: The Connection Between the 17 Sustainable Development Goals and Specific Human Rights**

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

## 11.7 Introduction to a Human Rights-Based Approach to Development

The **Rights-Based Approach to Development** (RBA) is a strategy for operationalising human development. It calls for all plans, policies, and processes of development to be anchored in a respect for human rights principles. As the previous sections in this chapter illustrate, development can be measured in terms of economic growth, a person's human development, increased infrastructure, or by an individual's increased capacity. However, these measurements alone do not guarantee that rights are not violated by development processes. RBA help to ensure that vulnerable sections of populations are not excluded from or disproportionately impacted by development processes and strategies. Vulnerability in such context is understood in terms of gaps in the enjoyment of human rights, barriers faced in accessing information related to public policy and projects as well as abilities of influencing decision-making thereof. RBA was adopted by development aid agencies and UN organisations such as the United Nations Development Program (UNDP), the United Nations Population Fund (UNFPA), and the UN Refugee Agency (UNHCR).

Nonetheless, it must be understood that RBA is an *approach* or a way to think about development in society and is distinct from charity and needs-based approaches.

The charity-based approach involves donations of food, clothing, medical care, shelter, and money in response to immediate suffering. It is based on the generosity of the giver and the person(s) who receive such charity cannot demand it. They can only make appeals to human kindness and compassion. Moreover, goods received through charity may not bring about real change in the lives of people. Once donations are exhausted, such persons may continue to be in the same position of vulnerability as before.

Under the needs-based approach, development interventions are based on the needs expressed by the target group themselves. The needs-based approach calls upon development actors to engage in a dialogue with the target group to identify their needs and the best possible means to address them. Although this approach helps to address the actual needs of people, it does not bring about systemic change. Further, similar to the charity approach, it is based on the interests, financial resources and priorities of the development actors, with the target groups having no claim over the resources. By contrast, rights-based approaches recognise that every individual holds a range of rights, and governments have a responsibility to respect, protect, and fulfil them. Rights based approaches also recognise that if governments fail to meet their obligations, individuals have the right to seek accountability for such failures through mechanisms available at the national, regional, and international levels.

Consider the case of a mother and child begging on the pavements of a busy city street (the case study was presented in the introduction of the first chapter and also discussed in Chapter 3). What would be the response of actors under the aforementioned three approaches?

*Charity-based approach:* Compassionate passers-by may give money and/or food to the mother. However, many others will simply ignore the pair. Thus, mother and child are dependent on the benevolence of strangers as regards meeting their basic needs of food, clothing, and shelter.

*Needs-based approach:* A public-spirited individual asks the mother about her needs. The mother requests access to regular meals, shelter, and work so the person puts her in touch with a temple that provides meals and shelter to the needy, and occasional work. However, the temple relies on public funds. If funds are scarce, the temple will be forced to reduce the number of meals it can provide to the poor.

*Rights-based approach:* Mother and child have rights to the minimum necessities of life. States, therefore, have an obligation to provide for the basic necessities to enable everyone to live with

human dignity. Such obligations may be discharged first, by recognising economic, social, and cultural rights in the constitution, and second, by adopting policies which ensure, for example, provision of food at subsidised rates to the destitute, provision of shelters for the homeless and work opportunities for the unemployed. At another level, States should enquire into the bigger picture and identify the reasons why people are reduced to beg on streets. The reasons may range from migration from rural areas in search of employment, loss of job in the city with no social security to fall back on, or human trafficking. The State has the responsibility to look into each such reason and address them through laws, plans and policies so that all individuals are able to live their lives with human dignity.

### Reflection and Discussion: Response to Covid-19 Pandemic

The first response of many governments to the COVID-19 pandemic was to impose lockdowns. Factories other than those producing essential goods, offices, markets, restaurants, and educational institutions were all shut down indefinitely. As a result, migrant workers living on daily wages were adversely impacted. Since they could not work, they received no daily wages. After exhausting their savings, they were left without the means to provide for food, rent, and other necessities. Many did not even have the money to return home. Moreover, they had no idea when they would be able to start working again or whether their previous jobs would still be available after lockdown.

What would be the response to the situation faced by migrant workers from a charity-based, needs-based, and rights-based perspective?

Would you agree with the statement that the three approaches complement each other? Give reasons why.

The rights-based approach is anchored in international human rights law, namely the rights guaranteed in the core human rights treaties and corresponding State obligations. This approach recognises that individuals have a range of rights (civil, political, economic, social, and cultural) which are universal, inalienable, and indivisible. As economist, Amartya Sen, elucidates, deprivation of one's economic, social, and cultural rights impact upon the necessary capability, choice, security, and power to live life with human dignity. For example, deprivation of the right to food and health reduces the ability of a person to make use of economic opportunities to increase their standard of living. Similarly, deprivation of a basic education impacts on a person's ability to evaluate public policy and influence decision-making. The thrust of rights-based approaches is to strengthen enjoyment of rights by creating a level playing field so all persons are freely able to make informed decisions and exercise their choices in a market-based economy. At the same time, rights have corresponding obligations. The human rights treaties impose obligations on States to adopt legislative, administrative, budgetary, judicial, and other measures to respect, protect, and fulfil rights. Chapters 12 and 13 discuss legislative, administrative, judicial, and other measures that *protect* individual rights from being violated by businesses, *recognise* rights of individuals to a clean and healthy environment, and which *facilitate* the meaningful participation of individuals and communities in social, environmental, and human rights impact assessments of business and development projects.

In short, rights-based approaches to development seek to make economic growth pathways more inclusive and justice-oriented by putting the focus on:

- *Accountability*: States have an obligation under international human rights law to respect, protect, and fulfil the rights guaranteed therein. States are accountable for their failures in meeting such obligations.

- *Substantive equality and non-discrimination:* Equality and non-discrimination are the fundamental principles underpinning international human rights law. Therefore, States have an obligation to ensure equality not only in law, but also in practice by addressing the structural, social, and cultural barriers preventing individuals from exercising and enjoying their rights.
- *Participation:* The claims of individuals/communities to a set of legislative, regulatory, administrative, judicial, and other measures or arrangements is at the centre of rights-based approaches to development. While some measures require the State to refrain from taking particular action (negative duties), others involve making choices about a range of issues. For example, what are the best ways of providing affordable healthcare or adequate housing to all? Or how does a government generate the financial resources needed to strengthen the quality of healthcare and primary education? Or what are the best ways to generate employment in rural areas? Key to the success of rights-based approaches is individual/community participation in the making of policy choices by aiding in the design and implementation of such arrangements. Inclusion of rights holders in formal and informal spaces of decision-making, recognition of the right to access information, and respect for the freedoms of speech, expression, association, and assembly are factors that make such participation possible and meaningful.

Based on these fundamental ideas, different organisations have defined rights-based approaches differently. However, common to all these definitions is the understanding that adoption of a rights-based approach to development leads to enhanced respect and protection of rights, inclusive societies, and empowerment of the vulnerable and marginalised. Also, different from the charity and needs-based approaches, rights-based approaches to development are political, in the sense that they involve law and policy-making and their proper enforcement. As such, they are transformative as they seek to empower the poor and vulnerable to exercise their capabilities and choices.

### **Spotlight: Some Definitions of RBA**

*A rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights* (Mary Robinson, UN High Commissioner for Human Rights).

*The human rights approach to development requires empowering people to make their own decisions, rather than being the passive objects of choices made on their behalf* (United Kingdom Development Agency, DFID).

*A ... human rights approach translates poor people's needs into rights, and recognises individuals as active subjects and stakeholders. It further identifies the obligations of States that are required to take steps—for example, through legislation, policies and programs—whose purpose is to respect, promote and fulfil the human rights of all people within their jurisdiction* (Swedish Development Agency, Sida 2002: 34).

## 11.8 Conclusion

This chapter highlights the interlinkages between human rights and development. There are different approaches to development. While traditionally, the focus of development has been on economic growth, approaches such as that of human security, human development and sustainable development goals have sought to infuse human rights in development planning and action. The rights-based approach to development, the current practice in development, incorporates human rights standards and principles into the planning and delivering of development, and ensures such rights are maintained therein.

### A. Chapter Summary and Key Points

#### Key facets of Development

There are some important facets of development. First, development can be understood in static and dynamic terms. As a static concept, it refers to a condition of well-being. As a dynamic concept, it refers to the process of change from one state of condition to another. Second, development exists in different spatial scales: individual, community, national, regional and international. Change at one level does not necessarily result in the same change at another. For example, development at the individual level does not automatically lead to development of the community that the individual is part of. Third, development has a political aspect as it involves public policy and planning, distribution of resources, and issues of sustainability, inclusiveness and social justice.

#### Approaches to Development

Post-war reconstruction and development was overseen at the international level by the United Nations (which established organizations to manage economic and social development) and also by the World Bank and other development banks. However, focus on these development approaches created inequalities between nations and within nations. This led to recognition of the right to development, and developing of approaches that focussed on gender equality, human security, human capabilities and sustainable development. These pathways strengthened the links between human rights and development.

#### Rights Based Approach to Development (RBA)

Rights based approaches to development, distinct from needs based and charity based approaches, is anchored in international human rights law and focusses on accountability of duty bearers, equality and non-discrimination and participation of people. Rights based approaches are transformative in nature as they lead to enhanced respect and protection of rights, inclusive societies and empowerment of the vulnerable and marginalised.

### B. Typical Exam or Essay Questions

- What are the differences between charity-based, needs-based, and rights-based approaches to development?
- What are the main features of rights-based approaches to development?
- Globalization brings many positive and negative changes in the development of a country. What do you think are three positive impacts caused by globalization on development, and three negative impacts?
- What are some of the major differences between a right to development and a rights-based approach to development?
- How is participation in development ensured? Who should participate, and how should they do it?

## C. Further Reading

### Development

#### Useful websites on development research and reports are:

United Nations Development Programme (UNDP): *Human Development Report* (2021/2022 edition is available at [https://hdr.undp.org/system/files/documents/global-report-document/hdr2021-22pdf\\_1.pdf](https://hdr.undp.org/system/files/documents/global-report-document/hdr2021-22pdf_1.pdf), accessed on 23 November 2022).

World Bank: World Development Indicators

United Nations Conference on Trade and Development (UNCTAD): *The Least Developed Countries Report* (2022 edition is available at [https://unctad.org/system/files/official-document/ldc2022\\_en.pdf](https://unctad.org/system/files/official-document/ldc2022_en.pdf), accessed on 23 November 2022).

#### There are a range of textbooks on development:

- Sachs, W (ed), *The Development Dictionary – A guide to knowledge and power*, London: Zed Books, 1996.
- Chew, SC, and Denmark, RA (eds), *The Development of Under-Development: Essays in Honor of Andre Gunder Frank*, New Delhi: Sage Publications, 1996.
- Kothari, A, Salleh, A, Escobar, A, Denmark, F, and Acosta (eds), *Pluriverse: A Post-Development Dictionary*, New Delhi: Tulika Books, 2019.
- Rahnema, M, and Bawtree, V, *The Post-Development Reader*, London: Zed books, 1997.

#### Students can also search for the following authors who have written and published on development:

- Amartya Sen
- John Martinussen
- Vandana Desai
- Paul Collier
- William Easterly
- Arturo Escobar
- Martha Nussbaum
- Joseph Stiglitz
- Dambisa Moyo

### Right to Development

The right to development is mainly studied as part of human rights history.

- Office of the United Nations High Commissioner for Human Rights (OHCHR): A webpage on the right to development can be found at the OHCHR with links to the Task Force and the Working Group on development.

Authors who have written about this include:

- Arjun Sengupta
- Brigitte Hamm
- Bonny Ibhawoh

## **Rights-Based Approach (RBA)**

Many organizations have guides to RBA but a useful starting point is the HRBA Portal for Practitioners at the UN which contains an extensive list of resources, case studies, and introductions. Alongside the guide are many studies on the use of RBA in practice, which can also be found at the HRBA portal.

### **Organisations that have produced guides on RBA include:**

- UN Women
- UNICEF Finland
- United Nations Population Fund (UNFPA)
- United Nations Development Programme (UNDP)
- Action Aid
- Danish International Development Agency (DANIDA)
- Equitas
- Care
- Save The Children



# Chapter 12

## BUSINESS AND HUMAN RIGHTS\*

### Reader's Guide

States have the primary responsibility to protect human rights from actions of non-state actors. Businesses are a category of non-state actors who have considerable influence in shaping economies and policy making at the national as well as international or regional levels. This chapter provides an overview of the standards which have been established over the years to strengthen accountability of business actors towards human rights. This chapter should be read along with the chapters on environment and development.

### 12.1 Introduction

Businesses contribute greatly to national development, with the richest States in Southeast Asia benefiting considerably from burgeoning economies. Yet, those self-same businesses can violate human rights by treating workers badly, polluting the environment, engaging in dangerous or corrupt business practices, or by instigating development activities with the potential to displace or marginalize entire communities. However, under the international human rights regime, it is States which hold the primary obligation to respect and protect the rights of anyone living in their jurisdiction against the actions of private entities. In practice though, the challenges in

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implementing such obligations are myriad. For example, businesses often exert influence over governments through dynamic supply chains which now make it possible for larger corporations to engage in transnational business through third parties, thereby reaping huge profits whilst minimising legal responsibilities. In addition, capital mobility allows businesses to move to countries offering the most attractive conditions, giving them leverage over both States and workers. Through this so-called race to the bottom, a company will invariably seek out locations offering the lowest wages and the weakest regulations to increase its profits at the expense of its workers. However people are no longer powerless in this paradigm because in recent decades, a growing movement to strengthen business accountability has steadily been gaining traction.

This chapter first initiates a discussion on the nature of human rights violations occurring from the actions of business entities. Next, it examines the existing norms and standards for business accountability before determining how civil society organisations and victims have responded. Along the way, numerous case studies will be introduced to broker understanding of the tools used to strengthen business accountability towards human rights.

### **Key Terms: Businesses and Some Common Practices**

**Business:** The general term 'business' is used to cover any profit-making organisation from small companies owned by individuals to large multinationals traded on stock markets (meaning anyone who can afford to buy shares can also be a part investor). Likewise, businesses can employ one person or thousands across many countries. Nonetheless, as legal entities, they will have rights and duties almost akin to individuals (although the implications of these are sometimes contested).

**Transnational Corporations (TNCs) or Multinational Corporations (MNCs):** Both these terms refer to corporations that operate in more than one country potentially employing thousands of people, and the economies of which can be similar in size and scope to that of some countries.

**Capital mobility:** Refers to the ability of business enterprises and investors to move their money (capital) and operations between countries. Such mobility makes it hard to regulate capital or to obtain remedies for human rights violations.

**Race to the bottom:** Occurs when a business shops between countries to seek the lowest wages and weakest regulations to maximise its profits. This puts pressure on States to weaken labour and environmental protections to attract investment.

## Reflection and Discussion: Adverse Impact on Rights Resulting from Business Operations

### *In what ways can businesses adversely impact rights?*

Consider the case studies below. Identify the different actors in the scenario. Identify the problem, if any. Reflect on the actions that should be taken to address the problem.

- (a) Factory workers are exposed to hazardous working conditions as they are forced to work without adequate safety equipment.
- (b) Chemical effluents from the production process of a business are directly released into a community's drinking water supply.
- (c) Women employees are paid less than men for the same work.
- (d) A business files a criminal defamation suit against a journalist for publishing a story about illegal activities on its premises.
- (e) A business is required under law to share data about the internet usage of its customers to governments which then uses it to take criminal action against political dissenters.
- (f) A business contracts the production of goods to local suppliers which then go on to produce the goods in unhealthy and unsafe working conditions.
- (g) A food company manufactures energy drinks. While very popular amongst school-age children, energy drinks are high in sugar and research shows they can lead to health issues such as obesity.
- (h) Public hearings are held by a government agency as part of an environmental impact assessment required under the law for granting clearances to business projects. But government officers do not allow those affected from sharing their fears about the potential adverse impacts of the proposed project on their lives and the environment.
- (i) Companies make investments in country X which is under military rule despite the military using such investments to fund its operations.

These cases highlight that both States and businesses have obligations which may differ depending upon the circumstances. While States have an obligation to introduce laws and policy frameworks that respect human rights standards and regulate the actions of businesses, companies also have an obligation to abide by such regulations to prevent their actions adversely impacting rights. Further, victims of human rights violations occurring in the context of business operations must be able to exercise their right to remedies.

However, what happens if international human rights standards are not mirrored in domestic law and practice? Will businesses still have an obligation to integrate human rights standards into their operations? For example, in the absence of domestic standards and their effective enforcement, do companies have an obligation to ensure labour standards are respected in their supply chains, thereby voluntarily exiting from the 'race to the bottom'?

At times, businesses may indirectly contribute to human rights violations such as when internet usage data is shared but then used by governments to target political dissenters. In such cases, while States are clearly obliged to respect freedom of speech, do businesses also carry human rights obligations?

Moreover, while a company may not intend to adversely impact human rights, such impacts may be directly linked to its products (e.g. the high sugar content in energy drinks), its operations (e.g. projects requiring the holding of public hearings to secure environmental clearances), or its relationships (e.g. investing in countries under military regimes). What actions should be taken to protect people's rights?

While these questions will be explored in the following section, note that it may be useful to revisit the above examples later.

## 12.2 Accountability for Rights Abuses Linked with Business Operations

The previous section highlighted the wide range of human rights abuses that may occur in business contexts such as: infringements on civil and political rights (e.g. rights to free speech and assembly); non-compliance with labour standards; discrimination on the basis of gender; lack of enforcement of standards relating to the protection of the environment; and lack of standards relating to food safety and nutrition.

The framework for strengthening the accountability of actors in business contexts evolved slowly; from the International Labour Organisation's (ILO) development of labour standards to the adoption of self-regulation by businesses in the form of corporate social responsibility and voluntary principles, to the development of the Respect-Protect-Remedy framework under the UN Guiding Principles on Business and Human Rights. At the same time, efforts continue towards developing a binding treaty on business and human rights. The following section offers an introduction to these standards and frameworks.

### 12.2.1 *Recognition of labour rights as Human Rights*

The International Labour Organization or ILO plays a significant role in strengthening enjoyment of workers' rights. Founded in 1919 as part of the Treaty of Versailles that brought an end to World War I, it was devised during the Paris Peace Conference when the Allied victors saw a need to create a body alongside the League of Nations to protect and promote labour rights. Significantly, those attending the peace discussions recognised that any chance of a lasting and universal peace must also promote social justice and safeguard the interests of labour as many believed that the wholesale exploitation of workers contributed to the outbreak of war. The preamble of the 1920 ILO Constitution notes this by stating:

[W]hereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required.

Unsurprisingly, the term 'human rights' cannot be found in the ILO's Constitution given that it was written decades before the Universal Declaration of Human Rights (UDHR) was adopted. The earliest statement referring to the term dates back to the 1944 Declaration of Philadelphia, annexed to the ILO Constitution, which positions workers' rights as human rights, stating that "all human beings have rights to ... freedom and dignity." But it was not until after World War II that the ILO actually integrated human rights into workers' rights. As a specialized agency of the UN, the ILO works in parallel with the UN human rights regime. The ILO's current mandate sees labour rights in a broader context:

The main aims of the ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection, and strengthen dialogue on work-related issues.

The rights to decent work, fair wages, freedom of association, and freedom to bargain are crucial for the realization of a range of human rights. Over the years, the organisation's support of human rights has become stronger. Consequently, in 2014, the ILO clarified where it saw its work relative to human rights:

Given the normative role of the ILO, and the reality that labour rights are human rights, we actively support the UN's human rights treaty bodies and their vital role in promoting and protecting human rights internationally.

... For the ILO, international labour standards are integral to the larger international human rights framework and, for nearly 100 years, have been the principal means through which the ILO has interacted with stakeholders in the world of work.

The ILO has a tripartite governance structure with representatives from governments, employers, and workers whose roles are to engage in dialogue and strengthen mechanisms to protect the rights of workers. Having said this, the ILO rarely imposes sanctions on governments or business. Rather it registers complaints in order to send a message to investors, consumers, and workers.

### **Spotlight: An Overview of Labour Rights**

Labour rights are found in a number of human rights treaties and ILO conventions. While an extensive list would be too long to include here, some core ones include:

- The right to work (UDHR, Art 23; ICESCR, Art 6)
- The right to choose one's employment (UDHR, Art 23; ICESCR, Art 6)
- The right to just and favourable conditions at work (UDHR, Art 23; ICESCR, Art 7)
- Equal pay for equal work (UDHR, Art 23; ICESCR, Art 7)
- The right to a living wage or a sustainable wage (UDHR, Art 23; ICESCR, Art 7)
- The right to form and join trade unions (UDHR, Art 23; ICESCR, Art 8)
- The right to limited working hours and holidays with pay (UDHR, Art 24; ICESCR, Art 7)

Additional rights include:

- Maternity leave
- Minimum wage
- Minimum working age
- Equal rights to promotion at work
- Equal working rights between men and women

### **12.2.2 Challenges to labour rights in Southeast Asia**

The tripartite mechanisms established by the ILO operate best when workers are able to articulate their interests without fear of reprisal. Unions comprise one such mechanism. However, in Southeast Asia, State control over unions is commonplace. There is also a long history of intimidation with union leaders even being killed, in part, due to their implied link to communism during the Cold War. Accordingly, countries like Thailand have a very low rate of unionization because workers fear the consequences of joining such organizations. Seen as burdens by some, overly assertive workers may therefore be driven out of their jobs. As a result, employees in the region organize and bargain informally rather than through the tripartite scheme. While union action (e.g. strikes by labourers in the garment industry in Cambodia and Myanmar) does occur, it is often treated as illegitimate and criminal. More common are scenarios like the wildcat strikes in Vietnam or inconspicuous worker networks that seek informal protection and improvement from local officials and owners. These should not be regarded as failures of tripartism, but rather a failure to uphold the standards for tripartite governance. Complicating efforts to strengthen union rights are the large number of available workers in the region and the ability of businesses to use migrant labour to both undercut costs and disempower the workforce.

### Spotlight: Wildcat Strikes in Vietnam

When faced with unfair work conditions, factory workers in Vietnam often participate in wildcat strikes. Wildcat strikes are informal or unannounced, and are technically illegal. They occur because the national trade union, the Vietnam General Confederation of Labour, falls under the authority of the government. Having little other choice, workers may, without warning but for a specific reason, collectively stop working and go outside, or otherwise bring operations to a halt. With the managers at a disadvantage, the strikers may fare better in discussions for higher wages or better conditions. Brokering may occur through dialogue, or the employees may simply hold up numbers showing how much they think they should be paid. It will be up to the managers to choose whether to meet their demands or wait for assistance from the authorities. While risky, these kinds of strikes can sometimes be effective.

To know more, see:

Anner, M. S. (2017). *Wildcat strikes and Better Work bipartite committees in Vietnam : toward an elect, represent, protect and empower framework*. ILO.

## 12.3 Self-Regulation by Businesses

Previous sections in this chapter highlighted factors such as non-integration of human rights standards into domestic law, weak enforcement of human rights standards and regulatory frameworks, and the ability of big businesses to influence State action as contributing to the creation of conditions for harmful business practices to flourish with impunity. While it may be true that businesses are ultimately motivated by profits, human rights compliance cannot be easily avoided. First, companies are now realizing they need a “social license to operate,” that is, a level of ongoing acceptance for the business and its standard practices by its employees, stakeholders, and the general public. This social license can only develop over time as a company gains the trust of stakeholders including the community in which it operates. Second, compliance also lowers the risk of complaints and court cases which can be expensive in the long run. As a consequence, more and more businesses now see the logic in human rights compliance, and are self-regulating by adopting appropriate policies and practices. The next section discusses two important categories of self-regulation: corporate social responsibility and the United Nations Global Compact. Self-regulation is a horizontal duty, that is, the duty legal entities have to respect the rights of others living in society.

### Key Terms: Vertical and Horizontal Effects

**Vertical effects:** The subject of international human rights law is people. When States ratify/accede to such treaties, they accept obligations to respect, protect, and fulfil the rights of all people living within their jurisdiction. This relationship of rights and obligations created between a State and its people is known as a vertical effect.

**Horizontal effects:** Article 29 of the UDHR states that every person has a duty to respect the rights of others living in society. States enact laws and establish mechanisms so that action can be taken against those who violate the rights of others. For example, criminal laws provide for the punishment of people causing harm to the life and security of others. Similarly, laws on pollution regulate the actions of businesses to enable those living in the proximity of their operations to enjoy their rights to health. Horizontal effects capture the idea that a State discharges or fulfils its international obligations when it enacts various types of laws to regulate the conduct of private persons.

### **12.3.1 Corporate Social Responsibility**

Corporate Social Responsibility (CSR) may be considered both as philanthropy and/or a strategic business management concept.

CSR as philanthropy takes the form of charity. Such activities, while contributing to the good of society and enhancing the lives of people (e.g. by promoting arts and culture, organising free medical camps, or by supporting campaigns for the protection of endangered wildlife) also help to increase the brand value of corporate actors. However, these undertakings may not be grounded on commitments towards human rights, sustainable development, and/or respect for the environment.

In light of the above, CSR can also be adopted as a strategic business management policy whereby companies consciously integrate social and environmental concerns in their business operations and interactions with stakeholders. CSR is guided by the “Triple Bottom Line Approach”<sup>1</sup> under which enterprises assess their positive and negative impact on “people, planet, and profit” to achieve a balance between economic, environmental and social imperatives, and the expectations of its shareholders and stakeholders. This approach is used as a framework for measuring corporate performance against the goal of sustainable global development.

Accompanying the rise of social media and a general rise in consumer awareness, in recent years, companies have started using CSR as a pragmatic response to public and civil society pressures. Allegations such as environmental pollution, the disruption of local livelihoods, evictions, and the exploitation of labour in supply chains have all worked together to pressure businesses to become more environmentally and socially responsible.

### **12.3.2 Global Compact**

In the 1980s, attempts were made at the UN to develop binding norms to hold businesses accountable for human rights violations. After the failure of this initiative (discussed later in the chapter), the UN took a different approach. In 1999, the United Nations Global Compact was launched under the leadership of UN Secretary General Kofi Annan as a call to companies to align their strategies and operations with universal principles related to human rights, labour rights, environmental sustainability, and anti-corruption. Members of the Global Compact are expected to incorporate these principles into their business strategies and day-to day operations. In addition, they are expected to make annual public disclosures known as “Communications on Progress” on their implementation of the ten principles as articulated in the Global Compact. If a company continuously fails to report on its progress, it may be expelled from the Compact and its failure made public.

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<sup>1</sup> Miller, K. (2020, December 8). *The Triple Bottom Line: What it is & why it's important*. Harvard Business School Online. <https://online.hbs.edu/blog/post/what-is-the-triple-bottom-line>

### Spotlight: Ten Principles of the UN Global Compact

**Principle 1:** Businesses should support and respect the protection of internationally proclaimed human rights; and

**Principle 2:** Businesses should not be complicit in human rights abuses.

**Principle 3:** Businesses should uphold freedom of association and the effective recognition of the right to collective bargaining;

**Principle 4:** Businesses should eliminate all forms of forced and compulsory labour;

**Principle 5:** Businesses should effectively abolish child labour; and

**Principle 6:** Eliminate discrimination in respect of employment and occupation.

**Principle 7:** Businesses should support a precautionary approach to environmental challenges;

**Principle 8:** Businesses should undertake initiatives to promote greater environmental responsibility; and

**Principle 9:** Encourage the development and diffusion of environmentally-friendly technologies.

**Principle 10:** Businesses should work against corruption in all its forms, including extortion and bribery.

These ten principles were derived from the UDHR, the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on the Environment and Development, and the United Nations Convention Against Corruption.

The Global Compact (GC) has around 8,000 business partners, and another 4,000 non-government partners (such as academics and NGOs). The importance of the GC lies in the fact that it is business-initiated with companies themselves volunteering to participate. As such, they decide how to implement the principles and undergo a self-reporting mechanism. The GC also encourages the establishment of local networks to enable business and non-business partners to work on best practices to develop their CSR. Significantly, however, no independent mechanism exists to monitor compliance to the ten principles.

The GC was critiqued on three fronts.<sup>2</sup> First, many activists believed that it gave the opportunity to companies to wrap themselves in the U.N flag (blue washing) and project their public image as ethically responsible. And second, it was argued that globalisation which had opened up a State's borders for different kinds of economic transactions had also seen the growth of the World Trade Organisation and its ability to impose legally enforceable constraints on national governments. However, though globalization also saw an expansion of corporate rights and power, it did not see development of any institution, comparable to the WTO, which could enforce corporate obligations and responsibilities. The GC, while becoming a global forum to discuss corporate actions, did not have any authority other than issuing communications. Third, relatedly, it was critiqued that the GC had no teeth as it lacked legally binding, enforceable mechanisms to hold corporations accountable for their actions.

<sup>2</sup> Knight, G., & Smith, J. (2008). The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility. In J. Leatherman (Ed.), *Discipline and Punishment in Global Politics*. Palgrave Macmillan.

### **Spotlight: Self-Regulation by Businesses**

The following are examples of business initiatives in Southeast Asia that address environmental and human rights concerns. Both initiatives were adopted in response to the global scrutiny of certain industries as regards worker abuses including forced labour.

#### ***The Sustainable Palm Oil Initiative (SPO)***

The palm oil industry is known for its negative environmental impact and its exploitation of labour. As a response, it collaborated with other stakeholders and started the SPO (a major private/public partnership) to find solutions to its own problems through such actions as dialogue, certifications, and better planning. This resulted in the Roundtable on Sustainable Palm Oil (RSPO), which led to a number of regional government plans and policy changes.

#### ***Shrimp Sustainable Supply Chain Task Force (SCTF)***

Another example of an industry-led initiative can be found in the SCTF which operates out of Thailand. This is an international industry alliance of retailers, manufacturers, governments, and NGOs whose purpose is to ensure that Thailand's seafood supply chain is free from illegal and forced labour. The task force has three objectives: (1) to track the supply chain of shrimp and verify the source of any shrimp being exported, (2) to improve the code of conduct in Thai ports, and (3) to improve the sustainability of fishing and reduce its environmental impact.

More information about these initiatives are available on their websites: RSPO and Seafood Task Force

## **12.4 Standards and Norms Linking Business and Human Rights**

In the late 1970s, bodies in the UN such as the ECOSOC commissioned studies on human rights violations caused by the actions of TNCs. Groups of developing States (such as the UNCTAD and G77) also complained about the lack of business accountability. During this period, other developments alongside the UN also occurred.

### **12.4.1 OECD guidelines**

The Organization for Economic Cooperation and Development (OECD) adopted the *Guidelines for Multinational Enterprises* (1976), as part of the *Declaration and Decisions on International Investment and Multinational Enterprises*. The Guidelines contain recommendations on responsible business conduct from participating governments to multinationals operating in or from these States. These voluntary principles and standards cover a variety of areas including employment and industrial relations, human rights, the environment, information disclosure, competition, taxation, and science and technology. Significantly, they differ from other codes of conduct in that they are the only multilaterally endorsed and comprehensive code governments are committed to promoting. Observance is supported through the use of National Contact Points which are responsible for promoting the guidelines and helping to resolve complaints received therein. Though the OECD framework is by its very nature only a recommendation, it directs governments and business towards best practices. Notably, they have been through several rounds of review and updates since 1976.

#### **12.4.2 Norms on the responsibilities of transnational corporations and other businesses**

In 2003, a Sub-Commission of the United Nations Human Rights Commission endorsed the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms). The Norms were fundamentally different to the Global Compact in that they were not voluntary and directly imposed obligations on business. Article 1 of the Norms stipulated that:

States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

Therefore, Art 1 of the Norms, while recognising the State's primary responsibility to respect, protect and promote rights, also placed a similar obligation on transnational corporations and other business enterprises to promote, respect, and protect the rights recognised in international and national law within their spheres of activity and influence. At the time, businesses fiercely resisted the idea of being held responsible as a duty holder under international human rights law. Concern was also raised about the vagueness of the legal obligations, the lack of voluntary buy-in, and the nature of the proposed sanctions. Ultimately, the Norms were not adopted. Almost a decade and a half later, the adoption of similar standards were once again discussed in the UN demonstrating the Norms were actually years ahead of their time. It seems in 2003, the international community had not been ready, neither legally nor politically, to accept stronger or direct business accountability.

#### **12.4.3 United Nations guiding principles on business and human rights**

It is against this backdrop that the Guiding Principles on Business and Human Rights (UNGPs) were finally adopted by the Human Rights Council in 2011. First introduced by Professor John Ruggie (the UN Special Representative for Business and Human Rights) in 2007 and known widely as the Protect, Respect and Remedy Framework, significantly, the Guiding Principles do not create new international law obligations, but instead clarify the responsibilities of States and businesses for “enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities ...”<sup>3</sup> As stated in the General Principles, these are grounded in recognition of:

- (a) States' existing obligations to respect, protect, and fulfil human rights and fundamental freedoms;
- (b) Requirement of business enterprises as specialized organs of society performing specialized functions to comply with all applicable laws and to respect human rights; and
- (a) The need for appropriate and effective remedies in case of violations of rights.

These and other key elements of the UNGPs will be discussed in the next section.

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<sup>3</sup> OHCHR. (2011). *Guiding principles on business and human rights*. Available at [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf), accessed on 17 February 2023.

#### **12.4.4 Binding treaty on business and human rights**

In 2014, the UN Human Rights Council established an open-ended intergovernmental working group (IGWG) with a mandate to establish an international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights. Finally, in 2021, the third revised draft of the instrument was presented for discussion but it rapidly exposed some fault lines. Despite ignoring the UN intergovernmental process for seven years, the United States attended the 2021 session asserting that though it wanted to “collaborate to find a path forward,” it would take a step back to explore alternative instruments. Similarly, the European Union, which is participating as a block, also urged its members to explore more “consensus-based ideas.” However, a large group of global south countries including South Africa, Cuba, Venezuela, Namibia, Paraguay, Bolivia, Ecuador, India, and Palestine have continued to strongly support the process. After a few days, the session ended with the promise of further consultations to be undertaken by a working group called the “friends of the Chair” to build support and agreement for the instrument. However, the success of this process will depend on the political commitment of all Member States.<sup>4</sup>

### **12.5 Key Pillars of the United Nations Guiding Principles on Business and Human Rights**

As mentioned in the previous section, the three pillars of the UNGPs are that: (1) States have the duty to protect human rights; (2) Businesses have a responsibility to respect human rights; and (3) States must provide access to appropriate and effective remedies when such rights are violated within its territories and/or jurisdictions. The following section discusses these pillars in greater detail particularly the obligation of States to protect in the context of specific issues such as extra-territorial obligations, the privatization of public services, the obligations of businesses in conflict situations, and international trade. Finally, it will examine ten years of implementation of the UNGPs.

#### **12.5.1 Corporate responsibility to respect**

The corporate responsibility to respect means that businesses should refrain from infringing the rights of others, and address any adverse impacts that may occur. This responsibility extends to enterprises owned or controlled by the State or which receive support and services from it. Crucially, this covers actual and potential human rights impacts generated by business activities. Further, corporations are expected to carry out **human rights due diligence** to avoid impinging such rights.

Human rights due diligence requires all businesses to have a policy that contains plans and procedures to ensure human rights are respected throughout its operations. In this respect, companies are expected to periodically review their operations, identify areas of concern, and take corrective action. The latter includes taking such steps as: consultation with affected groups; dissemination of any findings; providing remedies for any direct or indirect violations; and following-up to ensure all human rights issues are adequately addressed. These reviews should be ongoing in nature.

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<sup>4</sup> Human Rights Council. (2021, December 29). *Report on the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*. A/HRC/49/65. p. 7

## **Key Term: Human Rights Due Diligence**

According to Professor John Ruggie, human rights due diligence has four components:

- (1) A statement of policy articulating the company's commitment to respect human rights;
- (2) Ongoing assessments of the actual and potential human rights impact of company activities and relationships;
- (3) Integration of human rights throughout the business to ensure efforts to meet the responsibility to respect are not undermined; and
- (4) Tracking and reporting of the company's performance.

As mentioned earlier, States have a responsibility to protect human rights from the actions of non-State actors by putting in place a framework of laws and policies to regulate their actions and, crucially, by enforcing it. Thus, an important component of the duty to respect is complying with a State's domestic law. Examples include: laws protecting people against contaminated food, or air and water pollution; labour laws complying with ILO conventions; legislation requiring the informed consent of indigenous people before acquisition of their land; and laws requiring the informed consent of individuals before taking part in drug trials, etc.

However, the responsibility to respect is not limited to compliance with domestic law provisions. It also extends to global standards of expected conduct and is applicable to all businesses in all situations. In particular, it is triggered in situations where national laws are not in consonance with international standards, are weak in nature, or when the State itself is responsible for violating rights. Some examples include situations where:

- The military takes over the government through a coup, suspends enjoyment of fundamental rights, and invites transnational corporations to do business there.
- A government enters into a joint venture with an extractive industry business and takes responsibility for securing the environmental clearances. Subsequently, it organizes public hearings to obtain environmental clearances as required under the law but with a heavy police presence and without disclosing full information to the affected communities.
- In order to attract foreign direct investment, Special Economic Zones (SEZs) are created by the State. The incentives offered include exemption from the application of labour laws.

The responsibility to respect is not the same as corporate social responsibility but instead focuses on the enterprise's core operations or the way in which it conducts its business. Beyond this, it may engage in voluntary activities promoting human rights as part of its mandate. However, it cannot seek to offset its failure to respect human rights with benefits provided under such initiatives.

### **Reflection and Discussion: Why would companies accept the responsibility to respect?**

Companies may say human rights due diligence just adds to their burdens, so why should they accept such responsibilities?

Securing a legal license to operate from the government is not enough. A company also needs a social license to operate. Human rights due diligence can be a game changer for companies for the following reasons:

- “Knowing and showing” is necessary for companies to demonstrate that they respect human rights. If companies don’t know, they cannot show – and in such cases, claims to respect human rights will have little value.
- Human rights due diligence helps companies lower their risks by giving attention to stakeholder-related risks. Businesses, especially in the extractive and infrastructure sectors, often face community resistance on issues relating to the environment and human rights. Such resistance can force companies to write off entire investments which can run into billions of dollars.
- Human rights due diligence can provide protection to companies against claims of mismanagement by stakeholders. Further, such undertakings provide proof that reasonable steps were taken to avoid violations where cases are filed under alien tort statutes or similar legislation.

#### **12.5.2 State responsibility to protect**

The State has a duty to protect the human rights of people within its territory against abuses by third parties, including businesses. This duty necessitates taking appropriate steps to prevent, investigate, punish, and redress such abuses.

The Guiding Principles recommend States consider a smart mix of measures, national and international, mandatory and voluntary, to foster business respect for human rights. Appropriate measures include:

- Enforcing laws that require businesses to respect human rights and periodically assessing the adequacy of such laws to address gaps, if any;
- Ensuring other laws and policies aimed at governing corporations (e.g. corporate law) foster respect for human rights;
- Providing guidance to businesses on how to ensure respect for human rights throughout their operations;
- Encouraging, and where possible, requiring businesses to communicate how they address their human rights impacts; and
- Encouraging State agencies controlling business enterprises, or extending support and services to them, to adopt due diligence measures.

The following paragraphs discuss the State duty to protect in the context of extraterritorial obligations, the privatization of public services, violations caused by businesses in conflict areas, and international trade.

### 12.5.2.1 Extraterritorial obligations

States have a duty to stipulate clear expectations that business enterprises domiciled in their territory or jurisdiction respect human rights throughout their operations, including in foreign lands. This is known as an **extraterritorial obligation (ETO)**. States may adopt a range of approaches with respect to this duty, such as:

- Imposing requirements that parent companies report on the global operations of their entire enterprise
- Adopting criminal laws allowing for prosecution based on the nationality of the perpetrator, regardless of where the offence occurs

The concept of extraterritorial obligations has been clarified in the Maastricht Principles. ETOs are of particular importance to Southeast Asia because of the Bangkok *Declaration on Extraterritorial Human Rights Obligations* drafted in the region. The issue has become key because of a number of projects here. For instance, the Thai National Human Rights Commission has conducted investigations into human rights threatened by cross-border investment projects.<sup>5</sup>

#### Spotlight: Law on Extraterritorial Obligations Enacted by France<sup>6</sup>

France adopted its Duty of Vigilance Law in 2017 which established a general and binding duty of vigilance on large companies in France to identify and prevent risks to human rights and the environment that could occur as a result of their business activities. Such activities can be attributable to the company itself, their suppliers or subcontractors, or any enterprises under their control. In brief, the law requires, first, for companies to create and implement publicly available vigilance plans for which they can be held accountable and, second, to ensure access to remedies should infringements occur. Enactment of the law was spurred by a disaster in Bangladesh during which the Rana Plaza building collapsed in 2013 claiming the lives of more than 1,100 workers and injuring thousands more. As many as 29 western fashion brands sourced from factories housed in the building.

In another example, six French and Ugandan civil society organisations filed a lawsuit against the French company, Total, in France over an oil field project in Uganda and Tanzania in 2019. The organisations argued that under the Duty of Vigilance law, Total's oil projects in Uganda and Tanzania had failed to comply with the company's legal obligations to prevent human rights violations and environmental harm. This led to two years of legal wrangling over procedural issues in which Total argued the case should be heard by the Commercial Court (which enables corporate representatives (as lay judges) to render justice between businesses). Countering, civil society organisations argued that the case did not concern corporate management but involved serious human rights and environmental violations and should therefore be heard by the Civil Court. Finally, in December 2021, the French Supreme Court (France's highest court) passed a decision in favour of the latter and ruled that the civil courts had jurisdiction thereby enabling the Civil Court of First Instance to examine the case on its merits.

<sup>5</sup> For more information, see: Middleton, C. (2018) National Human Rights Institutions, Extraterritorial Obligations and Hydropower in Southeast Asia: Implications of the Region's Authoritarian Turn. *ASEAS - Austrian Journal of South-East Asian Studies*, 11(1), 81-97. <https://doi.org/10.14764/10.ASEAS-2018.1-5>

<sup>6</sup> *Total lawsuit (re failure to respect French duty of vigilance law in operations in Uganda)*. (2019, October 23). Business and Human Rights Resource Centre. <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/#:~:text=In>, accessed on 10 February 2023.

### 12.5.2.2 Privatisation of public services

It is crucial to note that a State does not relinquish its obligations when it privatizes delivery of services that may impact upon the enjoyment of human rights. Such services may relate to the provision of water, electricity, public transport, health, and education, etc. Therefore, States must exercise oversight to ensure businesses perform these services in a manner consistent with its human rights obligations.

#### **Reflection and Discussion: Privatization, Nationalization and Human Rights**

Privatization is a process through which the private sector becomes wholly or partially responsible for activities that are traditionally performed by governments. It can take many forms, ranging from the sale of State-owned businesses, services, or resources, to the private sector, to arrangements such as public-private partnerships. Neo-liberalism promotes it as “freedom from government” and sees it as an expansion of personal freedom. However, many believe its benefits may not reach the public as a whole. For example, when goods and services are privatized, a government may reduce its expenditure but without State subsidies, citizens may find those goods and services to be more expensive. For some types of public service, such as water or electricity supply, there is also a risk (in the absence of clear State regulations and oversight) that private companies may cherry pick profitable concessions and the communities they serve, while neglecting to provide basic services to poorer communities.

The arguments for privatization are:

- Private companies are better at running businesses
- Considerable revenue can be raised from the sale of public goods
- There is less corruption in private companies

The arguments against privatization are:

- Some people cannot afford the costs charged by private companies
- Companies are only interested in profit
- The services provided by profit-driven businesses may prove inadequate

#### **Discussion**

If the below services are privatized, or only run by private companies, what are some potential human rights concerns?

- Public transport
- Water
- Healthcare
- Education
- Internet access
- Prisons

In thinking about these concerns, consider the following:

- Why are these services important to the lives of people?
- What would be the impact if the poor are not able to afford such services?
- What are the risks of privatizing prison services?

### **12.5.2.3 Violations caused by business enterprises in conflict areas**

The risk of violations of human rights by businesses is increased in conflict areas. In most conflict situations, a State's human rights architecture may not work as intended thereby failing to provide adequate protection. In such cases, "home" States, or States in which transnational corporations are registered or domiciled may have a critical role to play in curbing these types of abuse. In this regard, the Guiding Principles identify measures that home States can take, such as:

- Fostering closer cooperation among their development agencies, foreign and trade ministries, and export finance institutions, and amongst these agencies and host-government actors;
- Developing early warning indicators to alert government agencies and business enterprises to problems;
- Attaching appropriate consequences to any failure by enterprises to cooperate in these contexts, such as withdrawing existing public support or services and denying their future provision; and
- Exploring civil, administrative, or criminal liability for enterprises domiciled in their territory or jurisdiction that commit or contribute to gross human rights abuses.

#### **Spotlight: Conflict Diamonds**

The United Nations defines conflict diamonds as those originating from areas controlled by forces or factions opposed to legitimate and internationally-recognised governments, and are used to fund military action in opposition to those governments. For example, diamonds have been used to fuel armed conflicts in Angola, Sierra Leone, and the DR Congo.

Becoming operational in 2003, the Kimberley Process is an international, multi-stakeholder initiative created to increase transparency and oversight in the diamond industry to eliminate such trade. A core element is the Kimberley Process Certification Scheme (KPCS) under which States implement safeguards on shipments of rough diamonds and certify them as "conflict free." The Kimberley Process unites 59 member countries around the world, including the European Union which stands as one nation. Industry and civil society actors participate in the process as observers. Under the terms of the KPCS, participants must:

- (a) Satisfy minimum requirements and establish national legislation and institutions, and import/export controls;
- (b) Commit to transparent practices and to the exchange of critical statistical data;
- (c) Trade only with fellow members who also satisfy the fundamentals of the agreement; and
- (d) Certify shipments as conflict-free and provide the supporting certification.

### **12.5.2.4 International trade**

An increase in international trade itself is not necessarily bad for human rights. For developing countries, increasing trade can bring wealth, develop industries, and create jobs. Referring to the example of conflict diamonds discussed earlier, one of the motivations driving the Kimberley Process was to protect the legitimate trade in diamonds which contributes significantly to the economies of some developing countries. However, an unfair trade system can do more harm than good. For decades, trade policy focused on liberalisation and deregulation, often to the detriment of human rights and the environment. If developing countries are forced to buy expensive goods

from richer nations and their local industries cannot compete, there are risks that jobs will be lost and the cost of living will rise. Studies have shown that when developing countries become dependent on food imports, they leave themselves open to many risks. For example, if agricultural production decreases and the price of food increases, food becomes prohibitively expensive. Such a scenario happened in the Caribbean nation of Haiti which lived off cheap American imports until food prices increased as a result of shifts in oil prices and the agro-fuel industry, causing over a million people to go hungry. Similarly, in Southeast Asia, the 2007 global food crisis (when the price of grain sometimes tripled in cost) led to food riots in Indonesia and shortages in Myanmar. The Philippines was also heavily affected as it is one of the largest rice importers in the world. Other Southeast Asian countries like Thailand and Vietnam benefited greatly as they are among the largest exporters of food in the world. This example shows that the benefits of global trade are often not equally shared with some countries getting richer at the expense of others.

The World Trade Organization (WTO), the main body managing global trade, has been criticised for not taking human rights seriously enough when reaching trade agreements. One of the most vocal concerns pertains to Trade-Related Intellectual Property (TRIPs) and people's access to medicine. During the peak of the AIDS crisis in the 1990s, drugs were available to keep people with the HIV virus alive, but at a cost of up to USD15,000 a year per person, which was way out of reach for most Southeast Asians. Much cheaper options of only USD1 a day were available, but only because they were produced by companies not paying the associated intellectual property costs. When countries like Thailand chose to use the cheaper medicine, pharmaceutical companies and the United States government protested saying they should pay for the intellectual property rights.

Given this context, the Guiding Principles recommend that States, when entering into trade agreements with other States, ensure the terms contain adequate policies and the regulatory ability to protect human rights. Moreover, when acting as members of multilateral institutions (such as the World Trade Organisation and the International Monetary Fund), assurances should be made that the ability of Member States to meet with their duty to protect human rights is not restrained.

### **Spotlight: Regional Comprehensive Economic Partnership**

The Regional Comprehensive Economic Partnership (RCEP) is an agreement between ASEAN Member States and their trading partners, Australia, China, Japan, South Korea, and New Zealand. The text of the agreement has not been made public. However, based on information leaked from various sources, it is feared the RCEP would allow governments to treat foreign investors as locals thereby enabling large corporations to grab land and displace local farmers. In addition, further provisions on intellectual property may criminalise seed-sharing amongst farmers, severely impacting local knowledge and the food sovereignty of families and communities. Women's Groups such as the Asia Pacific Forum on Women, Law and Development (APWLD) have strongly opposed the agreement. They argue that women farmers, women workers, and women-led small enterprises would be worst hit from the trade agreement. In particular, it is argued that it would undermine production of more affordable generic versions of life-saving medicines, negatively impact farmers and indigenous peoples' rights to seed and food sovereignty, lock in privatisation of public services, push workers' wages down, and restrict the ability of governments to introduce the industrial and fiscal policies necessary to protect and regulate public interest. Women's groups have alleged that open market access in the RCEP would drastically cut tariffs on agricultural products with terrible consequences for small scale producers in developing countries like Indonesia and force the country to rely heavily on imports for several food products. They have also criticised governments for continuing to negotiate the trade agreement in the midst of the Covid-19 pandemic.

## **Reflection and Discussion: Should intellectual property rights over Covid-19 vaccines be waived?**

In October 2020, South Africa and India asked the WTO to waive parts of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to make it easier for developing countries to produce or import Covid-19 drugs. TRIPS governs patents, trademarks, copyright, and other intellectual property rules globally.

Should such waivers be granted?

### ***Arguments for the waiver***

- The waiver is essential to address inequity in the global distribution of Covid-19 vaccines. While wealthy countries are able to control a major share of existing vaccine supplies, intellectual property rights hinder the distribution of affordable vaccines and drugs in developing countries, denying people their right to health.
- Vaccine manufacturers relied heavily on public-funded research into the coronavirus. For example, the Moderna vaccine was funded exclusively by the US government.
- Without competition, producers are able to put a high price on vaccines.

### ***Arguments against the waiver***

- Protecting intellectual property rights encourages research and innovation.
- The waiving of such rights will not, in fact, lead to a surge in manufacturing of Covid-19 vaccines.
- The waiver will also not help to remove barriers to vaccine equity such as raw material scarcity and supply chain issues.

The proposal by India and South Africa failed to make any headway, even a year later. While more than 100 countries supported the waiver, some including those hosting major pharmaceutical firms (such as Switzerland), opposed it. In May 2021, the US finally extended its support to the waiver and urged others to do the same to pave the way for additional manufacturers to increase production therefore enabling supplies to meet the global need.

### **12.5.3 Access to remedy**

Both States and businesses have a responsibility to ensure victims have access to effective judicial and non-judicial remedies upon violation of their rights. These may be in the form of apologies, restitution, rehabilitation, compensation, punitive sanctions, as well as prevention of harm through injunctions or guarantees of non-repetition.

Examples of State-based grievance mechanisms include the courts, labour tribunals, national human rights institutions, national contact points under the OECD Guidelines on MNCs (or government-supported offices whose core duty is to advance the effectiveness of the Guidelines), and ombudsperson offices, etc. Moreover, States have a responsibility to create public awareness and understanding as to how these mechanisms can be accessed and eliminate any barriers to accessibility.

Business enterprises by themselves or with stakeholders, industry associations, or multi-stakeholder groups can also establish grievance mechanisms to address abuses resulting from business activities. Mostly dialogue-based in nature, some examples of these can be seen below.

## Spotlight: Examples of Grievance Mechanisms Established by Businesses

Heineken is a Dutch multinational company with breweries in many countries. Its website offers information about its human rights policy and its grievance mechanism, the ‘Speak Up Policy.’ Detailed information is also available about how such mechanisms can be accessed and its working processes. The fact anyone from the international supply chain can access the grievance mechanism is a good practice.

UNIQLO is a Japanese designer, manufacturer, and retailer with over 3,000 stores worldwide. In 2015, it was criticised by NGOs for labour rights violations, after which the company took swift action by issuing statements in the relevant languages and publishing them on their website. UNIQLO also published information about its first-tier suppliers. However, the company still does not make information about its complaints and resolutions public, preventing verification of its processes. Thus, there is an absence of transparency and accountability.

### 12.5.4 Ten years of implementing the guiding principles: A review

2021 marked ten years of the adoption of the UN Guiding Principles on Business and Human Rights. To mark this milestone, the UN Working Group on Business and Human Rights undertook a stock-taking exercise of the first ten years of their implementation by States and businesses. Some findings of the review included:<sup>7</sup>

- **An authoritative standard for responsible business:** The UNGPs established a globally agreed upon authoritative standard regarding the obligations of States and businesses with regard to human rights across all business contexts and successfully clarified the different but complementary roles of both. The UNGPs also introduced the expectation that businesses should exercise human rights due diligence and established it as a cornerstone of the business responsibility to respect human rights. Further, by recognising access to effective remedy for victims of business-related harms as a core pillar, the UNGP helped to shift focus from corporate philanthropy to accountability as an essential feature of responsible business practice. Such normative development is vital as norms help to shape laws, policies, and practices.
- **Human rights due diligence:** The first ten years of implementation of the UNGPs saw an evolution of norms; from the practice of a few companies, to soft law, and then to hard rules. With respect to soft laws, the standard of corporate human rights due diligence has been incorporated into the ISO 26000 standard on social responsibility and the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017). It has also been accepted as a standard of reference for the United Nations Global Compact and business and industry platforms such as the International Council on Mining and Metals. Further, financial institutions such as the European Investment Bank, the International Finance Corporation, and the Inter-American Development Bank have included human rights due diligence in their operational policies. Other than these, human rights due diligence has been incorporated into the domestic law of several countries such as the Law on the Duty of Vigilance of Parent and Outsourcing Companies adopted by France in 2017. (Since publication of the review, Norway adopted its Transparency Act in July 2022 and

<sup>7</sup> UN Working Group on Business and Human Rights. (2021, June). *Guiding Principles on Business and Human Rights at 10: Taking stock of the first decade*. A/HRC/47/39.

Germany its Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains in January 2023). Despite these promising developments, many States are wary of developing mandatory measures for fear of exposing domestic businesses to a comparative disadvantage.

- **National Action Plans (NAPs):** The development of NAPs on business and human rights has been the most visible sign of acceptance of the Guiding Principles by States. The process helps to improve policy coherence by bringing together stakeholders that traditionally may be reluctant to engage in direct dialogue. However, the NAPs of many States lack quality in content and may not reflect concrete State action and inclusive stakeholder engagement. Moreover, limited resources of designated State agencies to build capacity or raise awareness with regard to business and human rights, and a lack of political power or mandate from the highest political levels to influence key ministries regulating and incentivising businesses, remain key challenges.
- **Domestic policy coherence:** The UNGPs underlined the need for policy coherence across government departments and agencies, thus, creating synergies towards achieving the objectives with the expectation that laws and policies governing the operation of business enterprises (corporate laws) be leveraged to shape responsible business conduct. Similarly, States are expected to integrate human rights while pursuing investment policies, when acting as economic actors, or when outsourcing public services to private actors. However, the potential of States to achieve policy coherence has shown little progress. Rather, States continue to over-emphasise voluntary measures such as awareness-raising, training, research, and the promotion of good practices.
- **Multilateral policy coherence:** The UNGPs underlined the role of multilateral institutions in fostering responsible business and the need for international policy coherence. While some international financial and development institutions incorporated the standards of human rights due diligence in their policy and practice, many others have not. A survey done by the Sustainable Stock Exchanges Initiative revealed that only 16 out of the 56 stock exchanges had explicitly referred to the UNGPs in their Environmental, Social and Governance (ESG) disclosure guidance. Research indicates that many financial actors fail to connect human rights standards with ESG criteria, even though several of the indicators reflect human rights issues. A siloed approach is reflected in the functioning of multilateral institutions as well. Critics have argued that while the UN 2030 Agenda for Sustainable Development recognizes businesses as partners in achieving the Sustainable Development Goals (SDGs), there is no acknowledgement of the fact that corporations may also be complicit in creating some of the problems associated with sustainable development. Notably, there is no reference to the responsibility of corporations in SDG 17 on Partnerships for the Goals. Similarly, while the UNGPs recognize that corporations have human rights obligations in the context of climate change, the same is not reflected in the Paris Climate Agreement.
- **Business commitment to the Guiding Principles:** Many companies have publicly committed to the UNGPs; an assessment of the top 50 publicly listed companies in the stock exchanges of Indonesia, Malaysia, the Philippines, Singapore, and Thailand carried out in 2019 revealed that 37.1% had stated as such. Benchmarks and ratings have also been developed to assess corporate respect for human rights. For example, the Corporate Human Rights Benchmark rank global companies on their human rights performance. The 2020 version assessed the disclosures of 230 global companies and revealed that though a number of companies had publicly made strong commitments to the UNGPs and adopted rigorous procedures, a disconnect remained between commitments and processes on the one hand and actual performance on the other. Furthermore, businesses still lacked understanding about what the concept of human rights due diligence actually entailed.

Other key challenges included integrating human rights among small and medium-sized enterprises constrained by limited resources, and the application of the principles to entities in the informal economy which employ more than 6 out of 10 workers in the world.

- **Access to remedy:** Victims of human rights violations resulting from business operations continue to face barriers in accessing both judicial and non-judicial remedies, including: a lack of access to information, a lack of trust in the mechanisms and issues relating to gender sensitivity, and ineffective transparency and monitoring.

Despite these challenges, the UNGPs have created a consolidated web of pressure in which a range of different actors are now mandating or incentivising business to respect human rights. Business and industry platforms, investors, States, multilateral lenders, and civil society organizations have all contributed towards fostering this convergence to shape responsible business conduct.

### **Spotlight: National Action Plans in Southeast Asia**

In Southeast Asia:

- Thailand was the first State to prepare and publish its NAP on business and human rights.
- Indonesia, Malaysia, and Vietnam are in the process of developing their first NAPs.

## **12.6 Responding to Business Violations in Southeast Asia**

Most cases of human rights violations by businesses involve on the one hand, the people and communities whose lives, health, and livelihoods are made vulnerable by such operations, and on the other, the offending companies which, with considerable resources, will vigorously seek to defend their actions and practices. In such cases, seeking accountability will not be an easy process. Although legal actions (often accompanied by campaigns and advocacy) are a commonly used strategy, in most cases, victims may only be able to file lawsuits with the support of legal aid organizations. Another strategy lies in consumer activism. With the rise of social media allowing consumers to easily express their feelings about products and services to potentially millions of onlookers, businesses must now consider their public image like never before. Accordingly, a company seen to harm the environment or mistreat workers may face consumer boycotts or even demonstrations. For example, protests and boycotts such as those against Nestlé, Nike, and McDonalds, set in motion processes that forced a change in the business practices of these companies. This method of accountability can be very effective, but only if consumers with adequate buying power engage in it.

## Reflection and Discussion: Responding to Business Violations in Southeast Asia

Six case studies have been presented: a transboundary project on the Mekong River; a mining project in the Philippines; a mining project in Malaysia, a labour issue in Indonesia; transboundary actions by workers against a global brand; transboundary civil society actions against Thai fisheries; and a case study involving use of mechanisms at different levels for ensuring accountability of sugar producers for infringing rights of Cambodian villagers.

While studying the case studies, reflect and discuss on:

- (a) The victims and the nature of harm suffered by them;
- (b) The strategy or the combination of strategies used by victims or support groups as the case may be to secure accountability;
- (c) If remedy was received at the end, the nature of remedy?
- (d) If remedy could not be received by the victims, then what were the reasons?
- (e) The challenges faced by the victims / support groups to access justice.

## Case Studies: Securing Remedies for Business Violations

### Case Study 1: Xayaburi Dam Project, Thailand Court's Decision<sup>8</sup>

On 17 August 2022, the Thai Supreme Administrative Court ruled to dismiss a lawsuit, filed by 37 Thai villagers against five Thai state agencies for their role in approving the Xayaburi Hydropower dam's power purchase agreement (PPA).

Filed 10 years ago, the Xayaburi lawsuit was the first community-filed lawsuit related to dam building on the Mekong River, and the first lawsuit on a transboundary project. The lawsuit was filed against five Thai State agencies, including the National Energy Policy Council, the Thai Cabinet, and the Electricity Generating Authority of Thailand (EGAT) for their role in approving the project's PPA. The lawsuit asserted that the PPA was illegal under both the Thai Constitution and the 1995 Mekong Agreement. The claims were made based on the Thai agencies' failure to provide information, assess impacts (including transboundary impacts), and ensure public participation in the decision to purchase power from the dam.

The 1,285-megawatt Xayaburi dam was the first to begin construction on the lower Mekong mainstream. While located in northern Laos, it is largely a Thai project. The developer, Xayaburi Power Company Limited, is majority-owned by a consortium of Thai companies led by CK Power Public Company Limited, a subsidiary of Ch. Karnchang, a major Thai construction company. The dam was financed by a syndicated loan from six Thai banks and 95% of the electricity generated was to be sold to Thailand.

While the court acknowledged the dam did have adverse environmental and social impacts, it found the power purchase agreement did not directly impact people and the environment. In other words, the decision to purchase power from the Xayaburi dam was effectively separated from the dam's construction and operation. Yet the PPA is a key agreement that enables dams to be built. Without a PPA which confirms a market and buyer exists for the

<sup>8</sup> Sohsai, P., & Lee, G. (2022, August 18). *Court dismissal of Xayaburi dam lawsuit highlights the need to strengthen accountability of cross-border investments*. International Rivers. <https://www.internationalrivers.org/news/court-dismissal-of-xayaburi-dam-lawsuit-highlights-the-need-to-strengthen-accountability-of-cross-border-investments/> accessed on 17 February 2023.

electricity, it is very unlikely for such a large dam to secure the loans necessary to proceed with construction.

Furthermore, PPAs can significantly influence how a dam is operated, given the agreement includes electricity generation targets and financial penalties in cases when targets are not met. The way dams operate have significant impacts on the river and communities. The impacts of the Xayaburi dam, which started operations in 2019, are clear and widespread, as documented in the evidence the plaintiffs filed to the Supreme Administrative Court in February 2020.

No transboundary impact assessment was ever conducted for the dam. Its environmental impact assessment (EIA), completed in 2010, only assessed potential impacts in the areas to be flooded for the reservoir and up to ten kilometres downstream. An independent review of the EIA, commissioned by International Rivers in 2011, found the EIA had flaws and failed to meet even minimum standards for consultation and public participation. The poor quality of the EIA and project documents is also evident in the Mekong River Commission's Technical Review Report (TRR), which found multiple gaps and flaws.

The court also determined that under the Environment Quality Promotion and Conservation Act (1992), power purchase agreements are not listed as among projects requiring an EIA despite their decisive role in the building of large-scale dams in neighbouring countries, including on the Mekong mainstream, that have major and widespread environmental and social impacts. This oversight calls for an urgent improvement of laws and regulations related to EIAs and cross-border investments, for example, by adding PPAs as a list of 'projects' requiring an environmental impact assessment. Such changes can also help better align Thai laws and regulations with commitments already made by the Thai government under its first National Action Plan on Business and Human Rights (NAP, 2019-2022) which includes commitments to review and amend laws, regulations, policies, and related measures to better protect and respect human rights and remedy human rights violations in cross-border investments.

### **Case Study 2: Landmark Ruling against Marcopper Mining Corporation in Philippines<sup>9</sup>**

In a landmark decision decades in the making, a local court in Marinduque has ruled in favour of at least thirty plaintiffs against the Marcopper Mining Corporation, for a mine spill that wreaked havoc on the community on 3 December 1993. It is one of the worst mining disasters to hit the country.

In a decision dated 16 May 2022, Judge Emmanuel Recalde of Branch 38 of the Marinduque Regional Trial Court granted 200,000 pesos in temperate damages and 100,000 pesos in moral damages to each of at least 30 plaintiffs in the case filed in 2001. Another one million pesos as exemplary damages was awarded to all the plaintiffs. The temperate damages had been paid per a memorandum agreement dated 16 July 1994.

"This is a victory for the plaintiffs who have waited two decades for justice as much as it is for the other plaintiffs who unfortunately died in the course of this case. [...]" said Elizabeth Manggol of the Marinduque Council for Environmental Concerns (MACEC).

"Large-scale mining projects present inevitable damage. The Marcopper disaster is a warning we should heed with the ongoing and planned large-scale projects in the country. The existing

<sup>9</sup> *In historic decision, court awards damages to Marcopper survivors* (2022, May 23). Legal Rights Center. <https://www.business-humanrights.org/en/latest-news/philippines-court-rules-against-marcopper-mining-corporation-for-one-of-the-worst-mining-disasters-to-hit-the-country/>, accessed on 17 February 2023.

Mining Act is problematic. The alternative minerals management bill (AMMB) is urgently needed to safeguard the environment from mining and prevent disasters like this,” said Attorney EM Taqueban, executive director of the Legal Rights and Natural Resources Center (LRC) [...], a non-governmental organization that [...] served as legal counsel for the plaintiffs.

“[...] With this ruling, Judge Recalde has shown that environmental cases do have a fighting chance in our judicial system,” said Attorney Ryan Roset, direct legal services coordinator for LRC.

### **Case Study 3: Defamation Case against Activist by Gold Mining Company in Malaysia<sup>10</sup>**

ELAW has worked for years with partners in Malaysia to protect the community of Bukit Koman from a polluting gold mining operation. Villagers conducted environmental surveys to identify contaminants. When Shirley Hue, Vice Chairperson of the Bukit Koman Anti Cyanide Committee, announced the survey results at a press conference, Raub Australian Gold Mining company sued for defamation.

On hearing the ruling, ELAW partner, Theivanai Amarthalingam, from Friends of the Earth Malaysia wrote, “Shirley Hue is one of the youths of this community who never gave up and continued to fight to the end, knowing well that if she lost, she would have to pay hundreds of thousands in Malaysian Ringgit in damages and costs. But she had the support of the community all the way and the community shares her victory.”

The Federal Court recognized the rights of activists to bring issues affecting communities to the attention of authorities, stating, “We must not lose sight of the fact that the existence of activist groups is very much part of today’s society, so much so that it is undeniable that they have contributed much the general well-being of society at large ... We now live in a much more liberal society where the concept of transparency and accountability are very much part and parcel of our lives. Hence, the freedom of speech entrenched in our Constitution must be construed in that context.”

This victory has inspired ELAW partners around the world. “Congratulations for a wonderful victory,” wrote D Nagasaila from Chennai, India. “It’s a win, not just for the villagers, the activists and you all in Malaysia, but also a victory to celebrate for all activists around the world”.

ELAW Staff Scientist, Dr Mark Chernaik, has worked since 2008 to help partners in Malaysia understand how the facility in Bukit Koman was impacting air quality. Mining expert and ELAW Director, Glenn Miller, travelled to Bukit Koman to tour the impacted area, meet with decision-makers, and talk about the risks the mining operation posed to the community.

“We appreciate what each and every one in ELAW has done for all of us and the communities we work with,” says Theiva before going on to say, “The gold mining company is no longer in operation and is under liquidation, but we continue to fight because the mine needs to be closed and rehabilitated. The question remains as to who will pay for the rehabilitation cost. We have taken this issue up with the government and we are waiting to see what they intend to do. In the meanwhile, we will continue pursuing the closure and rehabilitation of the mine”.

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<sup>10</sup> Keenan, M, ‘A victory and the long road to justice in Malaysia’ Business & Human Rights Resource Centre, 29 March 2019, available at <https://www.business-humanrights.org/ar/%D8%A3%D8%AD%D8%AF%D8%AB-%D8%A7%D9%84%D8%A3%D8%AE%D8%A8%D8%A7%D8%B1/a-victory-and-the-long-road-to-justice-in-malaysia/>, accessed on 17 February 2023.

#### **Case Study 4: Rehiring Woman Union Leader at Jakarta Garment Factory after Protests<sup>11</sup>**

*What's the story?*

Three workers at PT Tainan Enterprise, a garment factory in Jakarta, Indonesia, were fired in August 2021, allegedly for joining a branch of the Federasi Serikat Buruh Garment Tekstil (FSB Garteks or Federation of Textile and Garment Workers Union). In May 2022, PT Tainan fired Rahmawati, the next president of the union. Tainan agreed to rehire Rahmawati in November 2022 after government mediators intervened as well as international buyers and IndustriALL Global Union.

[...]

*Who is PT Tainan Enterprise Indonesia?*

Tainan Enterprises was founded in 1961 in Tainan, Taiwan. The company has factories in nine countries around Asia with an annual revenue of NT\$5.76 billion (USD186.15 million). PT Tainan Enterprise Indonesia is a wholly-owned subsidiary of Tainan Enterprises with a garment factory in North Jakarta, Indonesia, which makes clothes for well-known brands like Ann Taylor, Calvin Klein, Gap, J Crew, Macy's, and Zara.

*Union busting: First wave*

In August 2021, workers at the North Jakarta branch voted to join Garteks union. IndustriALL alleges that the company fired Ahmad Faisal, the president of the Garteks union, Tulam, the vice president for the union, and Hendra Radista, the vice secretary of the union. In December 2021, the Indonesian Ministry of Manpower ordered PT Tainan to rehire Faisal, Tulam, and Hendra Radista, but the company ignored and concealed the order. Instead, the company negotiated to give them a severance pay package in exchange for a management agreement signed in February 2022 allowing other workers the right to organize.

*Union busting: Second wave*

At the same time, PT Tainan started to issue warning letters to Rahmawati, the newly elected president of the Garteks union who had worked at the company for 16 years, claiming that she wasn't meeting production targets. Despite the prior agreement to respect unionizing rights, Rahmawati was fired in May 2022.

*Government order*

In August 2022, the Indonesian industrial relations mediator ruled that PT Tainan had violated the law as well as the signed agreement with the union, and ordered the company to reinstate Rahmawati in her original position with back pay. Several international buyers including Gap, J Crew, and Macy's, also told the Business & Human Rights Resource Centre that they had written to PT Tainan about the matter.

*Buyer response*

"We have shared our expectation with PT Tainan that they follow the Ministry of Manpower's recommendation on this case once it is issued, and they have committed to doing so." – Gap company statement

<sup>11</sup> Rogozenska, E, 'Tainan Enterprises rehires woman union leader at Jakarta garment factory after government mediator, buyers and union intervene' CorpWatch, 25 November 2022, available at <https://www.corpwatch.org/tainan-enterprises-rehires-woman-union-leader-jakarta-garment-factory-after-government-mediator>, accessed on 17 February 2023.

### *Union leader rehired*

On 1 November 2022, PT Tainan Enterprise Indonesia agreed to rehire Rahmawati and pay her back salary. Said Christina Hajagos-Clausen, textile director for IndustriALL Global Union, “We welcome the reinstatement of Rahmawati, and take the opportunity to reiterate that PT Tainan must allow workers to organize freely. This would include reinstating all sacked union leaders among their workforce.”

### **Case Study 5: Amazon Workers in 30 Other Countries Protest on Black Friday<sup>12</sup>**

Amazon workers and activists in 30 countries marked the traditional start of the holiday shopping season with a series of walkouts and protests to demand better pay and working conditions.

In Manhattan, activists, labour unions, and Amazon workers marched outside company founder, Jeff Bezos’ penthouse in the tony Flatiron district.

Outside St Louis, a few dozen workers walked out of the massive STL8 facility on Friday afternoon. It’s the second wildcat strike at the 900,000-square-foot fulfilment centre, where workers also picketed in September to protest pay and working conditions. Workers at the location are calling for a raise of USD10 an hour and the improvement of working conditions they say lead to too many workers being injured on the job.

The groups involved with the campaign are promoting it on Twitter under the hashtag #MakeAmazonPay. They have a range of demands. Many are asking for increased pay, an end to worker surveillance, and a pace of work conducive to an above-average rate of workplace injuries.

Labour actions are also planned at Whole Foods stores, which Amazon owns, and at other locations in Bessemer, Alabama; Columbia, Maryland; Detroit, Michigan; Durham, North Carolina; Garner, North Carolina; Joliet, Illinois; Philadelphia, Pennsylvania; Portland, Oregon; and Washington, DC.

In Germany, workers demonstrated at nine out of 20 warehouses Amazon has in the country, the company told Reuters, although it said the “vast majority” of employees reported to work as usual.

In Coventry, England, workers rallied in the evening outside an Amazon facility, saying “We are not robots.”

In Buenos Aires, Argentina, some activists rallied in front of the National Congress building holding signs reading, “Make Amazon Pay.”

“On Black Friday, in what has already been named #MakeAmazonPay day, unions, civil society and progressive elected officials will stand shoulder to shoulder in a massive global day of action to denounce Amazon’s despicable multimillion dollar campaigns to kill worker-led union efforts,” Christy Hoffman, general secretary of UNI Global Union, a group spearheading the protests, said in a statement. “It’s time for the tech giant to cease their awful, unsafe practices immediately, respect the law and negotiate with the workers who want to make their jobs better.”

<sup>12</sup> Sherter, A, ‘Amazon workers in 30 other countries protest on Black Friday’ CBS News, 28 November 2022, <https://www.cbsnews.com/news/amazon-black-friday-strikes-protests-manhattan-st-louis-30-countries/>, accessed on 17 February 2023

Asked for comment on the protests, Amazon sent CBS MoneyWatch a statement on Monday that defended its record while offering few specifics.

“A coalition of organizations are continuing to encourage protests at Amazon. These groups represent a variety of interests, and while we are not perfect in any area, if you objectively look at what Amazon is doing on these important matters you’ll see that we do take our role and our impact very seriously. We are inventing and investing significantly in all these areas, playing a significant role in addressing climate change with the Climate Pledge commitment to be net zero carbon by 2040, continuing to offer competitive wages and great benefits, and inventing new ways to keep our employees safe and healthy in our operations network, to name just a few,” the statement said.

#### *Global protest*

Among the countries where Amazon is facing strikes and protests, according to UNI: Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Cambodia, Canada, Czech Republic, France, Germany, Hungary, India, Japan, Netherlands, Poland, Slovakia, South Africa, Turkey, and the UK.

Monika di Silvestre, an official with Ver.di, a German labour group helping to organize the #MakeAmazonPay campaign, told Bloomberg that workers are particularly concerned with Amazon’s use of computers to monitor their productivity.

“The workers are under a lot of pressure with these algorithms,” she said. “It doesn’t differentiate between workers, whether they are old or have limited mobility. Workers stay awake at night thinking only of their productivity stats.”

#### **Case Study 6: Boycotts of Thai Fisheries**

The Guardian (a UK-based news outlet) ran a series of articles and videos with titles such as ‘Globalised slavery: How big supermarkets are selling prawns in supply chain fed by slave labour’ and ‘Shrimp sold by global supermarkets is peeled by slave labourers in Thailand’ that went viral throughout 2014 and 2015. These stories became the rallying cry around which governments and consumers around the world criticised Thai Fisheries. In particular, they condemned the prevalence of human trafficking causing the EU to give Thailand a yellow card (or a threat to issue a trade ban) against the industry. Some consumers also filed lawsuits against Mars, Procter & Gamble, Nestlé, and Costco Wholesale for selling slavery-tainted seafood products such as farmed shrimp and pet food. Others boycotted products or food retailers buying from Thai Fisheries. The boycotts have since relaxed, but they did compel both government and business action around Thai Fisheries. Whether those efforts will lead to substantive improvements is yet to be seen.

#### **Case Study 7: Ensuring Accountability of Sugar Producers for Infringing the Rights of Cambodian Villagers**

Villagers from Oddar Meanchey province in Cambodia complained that a subsidiary of Mitr Phol, Thailand’s largest sugar producer, had forcibly evicted them from their land in 2008-2009 for the purpose of establishing sugar plantations. The villagers complained they had been subjected to violence and their homes and belongings had been burnt. In addition, as a result of losing their land, they also lost their incomes and livelihood and their children were unable to attend school.

In 2013, a complaint was filed by Thai NGOs on behalf of the affected families with the National Human Rights Commission of Thailand (NHRCT), alleging that subsidiary companies of Mitr Phol were implicated in serious human rights violations in relation to land concessions in Oddar Meanchay. In 2015, NHRCT issued its report, finding that Mitr Phol had indeed breached the responsibility to respect under the UN Guiding Principles on Business and Human Rights. It also stated that even though Mitr Phol had ceased its operations in Cambodia and returned the land concessions, it still had an ongoing responsibility to provide compensation and appropriate remedy for the human rights impact suffered by the families. In response to the recommendations of the NHRCT and advocacy by civil society, the Thai Cabinet in May 2016 issued a regulation to monitor the extraterritorial obligations of Thai investments abroad. The extraterritorial obligation of Thai investors abroad and their duty to comply with human rights due diligence was also included in the National Action Plan on Business and Human Rights launched by the Thai government in 2019.

In 2011, the evicted families filed a complaint against Mitr Phol with Bonsucro, an industry-dominated sustainable sugar multi-stakeholder initiative. After the complaint was filed, Mitr Phol, instead of addressing the issues, withdrew from Bonsucro. However, three years later, Mitr Phol was reinstated even though it had failed to engage with the complaint resolution process. In 2016, a fresh complaint was filed by the villagers before the Bonsucro grievance mechanism. Two years later, the complaint was dismissed by Bonsucro on the grounds that it had not received credible evidence of any wrongdoing on the part of Mitr Phol. Following this, a complaint was filed against Bonsucro with the UK National Contact Point for Responsible Business Conduct, for failing to hold a member company accountable for human rights violations. The UK National Contact Point ruled that multi stakeholder initiatives like Bonsucro were bound by international human rights norms codified in the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.

Mitr Phol's suppliers included Coca-Cola, Pepsi, Nestle, Mars Wrigley, and Corbion. In response to Oxfam's "Behind the Brands" campaign, Coca-Cola issued a statement acknowledging its responsibility to take action and use its influence to help protect the rights of local communities. The company stated that it would be auditing its supply chain and was committed to zero tolerance for land-grabbing in its supply chain. However, it failed to use its leverage to compel the company to provide redress to the victims in Cambodia. Although in 2018, Coca-Cola informed Inclusive Development International that it was no longer sourcing sugar from Mitr Phol, it did not make a public statement about the termination of the supply relationship. In 2019, PepsiCo, in response to a complaint made by Inclusive Development International issued a statement that while it had sourced cane sugar produced by Mitr Phol in Thailand in the past, it did not source sugar from Mitr Phol in Cambodia.

In 2018, Hoy Mai and Smen Te filed a case before a Thai court on behalf of more than 700 Cambodian families, claiming that their land had been appropriated. In 2019, the Bangkok Civil Court ruled that the case of more than 700 families could not be treated as a class action, observing that collecting evidence in the case would be difficult as the human rights violations had taken place in another country. Moreover, since the complainants did not understand the Thai language, sending notifications to all representatives of the class action suit would be problematic. Thus, the court would only be open to accepting complaints from individuals. An appeal against the decision was made as a result of which the Appeals Court in Thailand allowed the villagers to move forward with their class action against Mitr Phol in July 2020.

Inclusive Development International observed that allowing the class action suit was a huge step forward for victims of corporate abuse in Southeast Asia and beyond. The lawyer for the complainants also observed that it would have been very difficult for the Cambodian villagers to approach courts in Thailand individually as they did not have the financial or other resources to do so. The transboundary class action suit is the first of its kind in the ASEAN region.

In December 2021, the Cambodian villagers filed a petition in the United States District Court of Georgia, Atlanta Division, to compel Coca-Cola to turn over the findings of its audit of Mitr Phol so they could be used in the class action suit filed before the Court in Thailand. The Court rendered a decision in January 2022. It noted that the information sought by the applicants was essential to the full and fair adjudication of the proceedings in the Thai Court and ordered Coca-Cola to turn over the requested documents to the applicants.

Inclusive Development International, Equitable Cambodia, the Cambodian League for the Promotion and Defense of Human Rights (LICADHO), and the Community Resource Centre Foundation in Thailand are some of the organisations which have granted support to the Cambodian villagers in their struggle to access justice.

## 12.7 Conclusion

This chapter highlighted the evolution of norms, standards, and practices with respect to business and human rights. The case studies discussed highlight the asymmetry in power relations between business entities and those impacted by their operations. Also highlighted was the problem of policy coherence. For example, a government may develop a national action plan to implement the UN Guiding Principles on Business and Human Rights, yet many of its existing laws may fail to reflect the commitments made by the State in this regard. In such cases, while self-regulation by businesses can help to strengthen compliance, a binding treaty would make the process of enforcing rights easier for victims.

### A. Chapter Summary and Key Points

#### **Labour Standards: Business and Human Rights**

Over the years, several frameworks for strengthening the accountability of actors for human rights violations caused by business operations were evolved including ILO efforts to increase the protection of labour rights, the adoption of self-regulation by businesses, and more recently, current developments towards the use of binding norms.

The ILO was one of the earliest mechanisms established to promote and protect labour rights. The organization itself works through a tripartite structure (government, employer, and worker representatives) to set labour standards and develop policies and programmes. However, for such a structure to work effectively, the need for strong trade unions to represent labour interests is paramount and many Southeast Asian States have not encouraged their growth.

#### **Self-regulation: Business and Human Rights**

On the other hand, some businesses, realising the growing importance of gaining a “social license to operate” are themselves complying with standards that are respectful of human rights and the environment, and are effectively self-regulating. Corporate social responsibility and the United Nations Global Compact comprise two such categories.

Corporate social responsibility, when adopted as a strategic business management concept (as opposed to charity), seeks to integrate social and environmental concerns in a company’s business operations.

Likewise, the United Nations Global Compact refers to a voluntary initiative of diverse businesses. As participants, they are expected to incorporate the ten principles on human rights, labour, environment and announce their strategies, policies, and procedures whilst also making annual public disclosures on the progress of its implementation.

#### **United Nations Guiding Principles on Business and Human Rights**

While a significant development, it is vital to note that self-regulatory frameworks cannot be

enforced by victims of violations or others. In order to address this limitation, efforts are currently underway to develop binding norms on business and human rights. With the agreement still under discussion in the UN, other standards or frameworks evolved to clarify the human rights obligations of business enterprises such as the Guidelines for Multinational Enterprises adopted by the Organisation for Economic Cooperation and Development (OECD) in 1976 and revised subsequently. The United Nations Guiding Principles on Business and Human Rights served a similar purpose in 2011.

The Guiding Principles on Business and Human Rights do not create new international law obligations, but clarify the responsibilities of States and businesses with regard to human rights under existing international human rights standards. The UNGPs rests on three pillars: (1) the obligation of businesses to respect human rights, (2) the obligation of States to protect human rights, and (3) the obligations of both to provide effective remedies in case of violations.

The corporate responsibility to respect requires businesses to refrain from flouting the aforementioned rights. While corporations are expected to abide by the existing domestic legal framework, where such laws are not in consonance with international human rights law, they should abide by global standards of expected conduct. A key aspect of the obligation to respect is the duty to carry out human rights due diligence which entails: adopting a human rights policy, consistently carrying out assessments of actual and potential human rights impacts, integrating human rights throughout business operations, and tracking and reporting on performance.

Under international human rights law, States have a duty to protect the rights of people within its territory and jurisdiction. The UNGPs clarify that States also have a responsibility to take steps to prevent business enterprises domiciled in their jurisdiction from committing human rights abuses in their foreign operations.

The third pillar of the UNGPs is access to remedy. Both States and businesses are therefore responsible for ensuring that victims of violations have access to remedies which may include an apology, restitution, rehabilitation, compensation, punitive sanctions as well as injunctions, or guarantees of non-repetition.

### **Ten Year Review of the Guiding Principles**

A ten-year review of UNGP implementation conducted in 2021 by the UN Working Group on Business and Human Rights revealed that they have been successful in establishing a globally agreed authoritative standard regarding the obligations of States and businesses which have helped to shape laws, policies, and practices such as those outlining standards of due diligence. Nevertheless, while many States took the initiative to develop national action plans to implement the Guiding Principles, there appeared to be a lack of policy coherence amongst different government agencies. Similarly, a lack of policy coherence was observed in the actions of businesses, financial actors, and amongst multilateral agencies.

### **Seeking Accountability from Businesses for Human Rights Violations**

Tactics for seeking accountability from businesses for human rights violations include litigation, campaigns, advocacy, and consumer activism. However, the litigation process in particular is challenging because in most cases, those impacted may lack access to the knowledge and resources necessary to start a fight against a big corporation especially as the process itself may take years. Moreover, corporations also create barriers by initiating civil and criminal actions against human rights defenders in retaliation. Further, as the case studies have shown, in order to herald change, law reform and changes in policy may first be necessary. In such cases, therefore, a combination of different tactics may be advisable to focus the attention of decision-makers. Finally, due to their knowledge and expertise, the support of legal aid organizations and civil society organizations at the national, regional, and international levels may also play a critical role in these struggles for justice.

## B. Typical Exam or Essay Questions

- Examine a court case against a business in your country. What rights did the business violate, and what was the outcome of the case? Do you think it was fair?
- Are transnational companies an “unfortunate necessity” for developing countries, given that they may provide jobs and economic growth at the expense of human rights?
- How can extraterritorial obligations be used to increase business accountability?
- What are the strengths and weaknesses of the United Nations Guiding Principles on Business and Human Rights? How can they make companies more accountable, and how can companies avoid this accountability?
- Are trade unions active in your country? Why, or why not? How do they address labour rights?
- What is the relationship between global trade and human rights in areas such as access to medicine or communication technologies?

## C. Further Reading

For cases, commentary, and general information on development and human rights, some authors to search for include:

- John Ruggie
- Surya Deva
- David Kinley
- Andrew Clapham

Some web pages with valuable resources include:

Business and Human Rights Resource Centre: Contains extensive case studies and up-to-date news on business and human rights issues around the world. Available at <https://www.business-humanrights.org/en/>, accessed on 2 March 2023.

Forum-Asia: Many helpful case studies on business activities in the region can be found in ‘Corporate accountability in ASEAN: A human rights-based approach’ Forum Asia, 2013, available to download at <https://forum-asia.org/?p=16404>.

Götzmann, N, and O’Brien, CM, ‘Business and human rights: A guidebook for national human rights institutions’ International Coordinating Committee of National Human Rights Institutions (ICC) and the Danish Institute for Human Rights (DIHR), available at <https://respect.international/wp-content/uploads/2018/08/Business-and-Human-Rights-A-Guidebook-for-National-Human-Rights-Institutions.pdf>, accessed on 2 March 2023.

Canadian Human Rights Commission: See especially, ‘Business and human rights 101: A national human rights institution primer’ 2015, available at [https://apf-prod.s3.amazonaws.com/media/resource\\_file/Business\\_101\\_NHRI\\_Primer\\_ICC\\_Fact\\_Sheet.pdf?AWSAccessKeyId=AKIA57J6V557ISASX34R&Signature=yZeODrkgBcCEpKuWwgDBXHnLGaE%3D&Expires=1677759254](https://apf-prod.s3.amazonaws.com/media/resource_file/Business_101_NHRI_Primer_ICC_Fact_Sheet.pdf?AWSAccessKeyId=AKIA57J6V557ISASX34R&Signature=yZeODrkgBcCEpKuWwgDBXHnLGaE%3D&Expires=1677759254), accessed on 6 March 2023.

International Work Group for Indigenous Affairs (IWGIA): ‘The indigenous world 2022: Business and indigenous peoples’ rights’ IWGIA, 1 April 2022, available at <https://iwgia.org/en/ip-iw/4695-iw-2022-business-and-indigenous-peoples-rights.html>, accessed on 2 March 2023.

- Human Rights Watch (HRW) and Amnesty International (AI): Both organizations have programmes and conduct research on business and human rights. See, for example, ‘Economic justice and rights’ Human Rights Watch, available at <https://www.hrw.org/topic/economic-justice-and-rights>, and ‘Business and human rights’ Amnesty International, available at <https://www.amnesty.eu/business-and-human-rights/>, both accessed on 2 March 2023.
- Office of the United Nations High Commissioner for Human Rights (OHCHR): Contains a number of publications including FAQs and introductions to the Global Compact (available at [https://www.ohchr.org/sites/default/files/Documents/Publications/Embedding\\_II.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Embedding_II.pdf)) and the Guiding Principles (available at [https://www.ohchr.org/sites/default/files/Documents/Issues/Business/IntroductionsGuidingPrinciples\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/IntroductionsGuidingPrinciples_en.pdf), both accessed on 2 March 2023).
- Useful resource material can be found on the websites of various UN bodies including the UN Secretary General’s Special Representative on Business and Human Rights, the Forum on Business and Human Rights, and the Global Compact.
- International Labour Organization (ILO): Although it has no specific program on business and human rights, the website covers many other topics such as multilateral enterprises, globalization, labour law, and development, etc.
- University research centres: Many universities have research centres and publish materials on the topic, including New York University, Harvard University, the Danish Institute for Human Rights, and the think tank, Institute for Human Rights and Business (IHRB).
- Business and Human Rights Journal: This journal provides an authoritative platform for all debate on the subject. Available at <https://www.cambridge.org/core/journals/business-and-human-rights-journal>, accessed on 2 March 2023.
- Key challenges to building relations between communities and extractive industry companies can be found in Chatham House, ‘Revisiting approaches to community relations in extractive industries: Old problems, new avenues?’ 4 June 2013, available at <https://justice-project.org/wp-content/uploads/2017/07/chatham-house.pdf>, accessed on 10 February 2023.
- ‘Managing non-technical risk at the project level’ Social and Environmental Risk Management Conference, 2011, adapted from Goldman Sachs Investment Research, ‘The top 190 projects to change the world’ 2008.

# Chapter

# 13

## Environment and Human Rights\*

### Reader's Guide

By the 1980s a consciousness had emerged that while humans had developed the scientific and technological power to transform their environment, human activities could also have a devastating impact on the environment, threatening life and health of humans themselves. The first standards on environmental protection emerged out of this consciousness. Regulations were imposed on actions of humans that could cause harm to the environment. As concerns over sustainable development and climate change grew, it was realised that the environment itself had to be nurtured so that it could continue to sustain life. Consequently, the right to a safe, clean, healthy and sustainable environment was recognised as a human right. This chapter provides an overview of the evolution of the human right to a clean, healthy and sustainable environment, discusses the normative content of the right including the corresponding obligations on States and the challenge of climate change. This chapter should be read along with the chapters on development, and on business and human rights.

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## 13.1 Introduction

In the 1960s and 1970s high profile environmental disasters like the Minamata mercury poisoning tragedy in Japan and the Cuyahoga river fire of 1969 in the United States made people, particularly from industrialized nations, realize the harm caused by environmental degradation. Other developments such as the anti-whaling movement and books like Rachel Carson's *Silent Spring* (1962) which highlighted the dangers of pesticides, also helped to bring the environment into public consciousness. In the decades following, these concerns began to be linked to human rights.

## 13.2 Human Rights and the Environment

### Reflection and Discussion: Identifying Environmental Concerns

How many of the following problems exist in your country or community?

- air pollution
- over-logging of forests
- dirty or contaminated water
- industrial pollution, pollution from factories
- noise pollution from traffic
- contaminated food
- unclean water for drinking or washing
- destruction of natural forests
- agricultural pollution
- destruction of marine environments such as coral reefs and beaches

Do further research to find out the impacts of these concerns.

Also, consider who created the problem?

Are some groups or individuals more impacted than others?

In what ways can these issues be resolved?

### Spotlight: Major Environmental Disasters (1960 – 1980)

#### ***Minamata Mercury Poisoning***

In 1922, the Cisso Corporation started manufacturing chemicals for plastic production from their factory in Minamata Bay, Japan. During the post-World War II production boom, signs appeared that Cisso's wastewater was contaminating the fish and shellfish of Minamata Bay. Dead fish were found floating in the bay, cats and dogs mysteriously died, and an increasing number of children were born with deformities. Though complaints were made to Cisso in the late 1950s, and compensation was paid to some victims, the pollution continued until a 1968 court case finally put an end to the disposal of waste water in the bay. In total, there were over 2,000 victims, with compensation being paid to around 10,000 people.

### ***Cuyahoga River Fire of 1969***

With a history of fires, the Cuyahoga River was once the most polluted river in the US. One fire in 1959 caused five deaths but it was the 1969 fire that finally coincided with a society that had become more environmentally aware and prompted the US Congress to pass the 1970 National Environment Protection Act leading to the creation of the Environmental Protection Agency. This agency's first policy was to enact a mandate that all rivers in the US be clean enough to allow swimming. Since then, the Cuyahoga River has received billions of dollars in clean up funds and is now home to about sixty species of fish. It has not seen a fire since 1969.

### ***Three Mile Island and the Chernobyl disaster***

In 1979, a nuclear plant at Three Mile Island in Pennsylvania, USA, experienced a partial reactor meltdown resulting in a small amount of radioactive contamination. Studies later showed this accident did not have a major adverse effect on people's health or the surrounding environment, but it did make people aware of the potential risks of nuclear energy. Seven years later, the meltdown of Chernobyl's nuclear reactor in the Soviet Union (now in the Ukraine) had a more disastrous effect, causing a fallout reaching across Europe that affected thousands of people.

### ***Bhopal Gas Leak***

In 1984, in Bhopal, India, gas leaked from a plant owned by Union Carbide resulting in 5,200 deaths and causing thousands more to suffer permanent or partial disabilities. In 1989, settlements were reached and approved by the Supreme Court of India and again upheld in 1991 and 2007, although many victims' families never saw any form of compensation. The government closed the site and all operations, preventing a clean-up until after 1994.

### ***Exxon Valdez Oil Spill***

In 1989, the oil tanker, Exxon Valdez, struck a reef as it entered Alaska's Prince William Sound, tearing open its hull and pouring around 20 million gallons of oil into the remote and biodiverse area. The resulting slick damaged more than 1,000 miles of coastline and killed an untold number of animals. Exxon paid billions in clean-up costs and to fight legal court cases. Despite this, evidence of pollution can still be detected to this day.

In the 1980s, a global movement took shape around the call for environmental justice in response to some infamous disasters such as the one at **Bhopal**, where a factory leak of poisonous gas killed over 5,200 people. Caused by Union Carbide, the company escaped conviction in part because of its transnational status. Concern also grew over the threat of nuclear energy in response to the **Three Mile Island** and **Chernobyl** incidents. Finally, the **Exxon Valdez oil spill**—at the time, the largest oil spill with the greatest environmental impact—also caused much outrage locally and globally because people felt the corporation had not done enough to avoid environmental destruction.

Today, the rights to a clean, healthy, and sustainable environment are of widespread concern in Southeast Asia because of the environmental impact of development strategies, for example, harm from pollution caused by industrial activities and exclusion from access to resources such as land, forests, and rivers, or their degradation. Cross-boundary problems like the haze caused by widespread forest burning in Indonesia have also impacted Singapore and forced States to respond through regulation and treaties. Likewise, many indigenous groups are now challenging development projects that encroach upon their customary lands and way of life.

One particular concern is that the benefits and burdens of changes to the environment are not equally distributed. Called **environmental injustice (or sometimes environmental racism)**, this is where the extraction or enclosure of resources, or the pollution or degradation of the

environment disproportionately affects certain ethnic, racial, or economic groups to the benefit of more privileged groups. A common example of this occurs in cases of **resource extraction** where poor and indigenous populations often bear the greatest burden from mining activities and its associated pollution. At a transnational scale, environmental injustice can also occur between countries, when rich countries avoid pollution in their own territories by giving incentives to corporations to outsource manufacturing processes to poorer countries (for example, by strengthening domestic environmental protection regulations). Fortunately, there is a growing awareness around environmental injustice that has in part built the movement for the human right to enjoy a safe, clean, healthy, and sustainable environment.

### Key Terms: Environment Movement; Resource Extraction

**Environment Movement:** A political movement that emerged during the 1970s aimed at protecting ecosystems from destructive human practices. The movement is now global and also very diverse, and takes the form of political 'green' parties, environmental NGOs, protest movements, and other forms of social movement.

**Resource Extraction:** The process of taking resources out of the environment, applying particularly to resource extraction industries such as mining and logging.

As people have started mobilising to protect the environment, attacks against human rights defenders in the field have also increased. In 2023, the NGO, Global Witness, published a report documenting 177 lethal attacks against land and environmental defenders around the globe in 2022 with 88% of the killings taking place in Latin America. 16 killings were documented in Asia, 11 of which took place in the Philippines.<sup>1</sup>

### Spotlight: Harassment of Activists in Southeast Asia

Hundreds of environmental activists have been killed in the past decades in Southeast Asia. Most cases remain unsolved with justice yet to be meted out for these crimes. Others have been subject to harassment or legal processes.

**Cambodia:** On 5 May 2021, the Phnom Penh Municipal Court convicted and sentenced four environmental rights defenders from the organisation, Mother Nature Cambodia, on charges of incitement and causing social unrest. The defenders had been protesting against the exploitation of Boeung Tamok Lake, one of the largest lakes in Phnom Penh.<sup>2</sup>

**Philippines:** Gloria Capitan was one of the leaders of the Coal-Free Bataan Movement, opposing the operation and expansion of coal plants and open storage of coal that had harmful consequences for the local population. On 1 July 2016, she was shot and killed by two unidentified men on a motorcycle.<sup>3</sup>

<sup>1</sup> *Standing Firm: The land and environmental defenders on the frontlines of the climate crisis.* (2023). Global Witness.

<sup>2</sup> Narim, K. (2021, May 5). Mother Nature activists found guilty, jailed for planning one-woman march. *Cambojanews.com*. <https://cambojanews.com/mother-nature-activists-found-guilty-jailed-for-planning-one-woman-march/>

<sup>3</sup> *Case History: Gloria Capitan.* (2016, July 1). Frontline Defenders.

**Thailand:** In July 2017, seven women human rights defenders were charged with violations of the Public Assembly Act and intimidating public officials. The defenders were part of a community-based group working to address environmental rights violations arising from the negative impacts of the open-pit copper gold mine in Thailand's Lori Province. Although charged for their involvement in a peaceful gathering held in November 2016 to protest the extension of a gold mine concession on preserved forest land to Tungkom Co Ltd in April 2018, the women human rights defenders were acquitted by the Loei Provincial Court.<sup>4</sup>

**Indonesia:** Indra Pelani was a 22-year-old member of a network of people monitoring illegal activities in the forestry and agriculture sector. He was attacked, beaten, and killed while travelling to the Jambi branch of Friends of the Earth Indonesia in 2015.<sup>5</sup>

### 13.3 Evolution of Environmental Standards

Until the 1960s and 1970s, the laws regarding the environment were less concerned with protecting the environment than protecting those seeking to exploit it. Over the years, such thinking slowly changed leading eventually to the development of jurisprudence on environmental protection. The first major step towards the claim that a clean environment is a human right was introduced in the Stockholm Declaration (1972) adopted at the first international conference on environment, the United Nations Conference on the Human Environment.

Principle 1 of the Stockholm Declaration reads:

Humans have the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he [or she] bears a solemn responsibility to protect and improve the environment for present and future generations.

(Note that the original term 'man' has been supplemented to include women.)

Although not explicitly recognising a clean environment as a human right, the Declaration clearly affirmed the interdependence between a clean environment and human rights. It also affirmed the responsibility to protect and improve the environment, not just in the present but also for future generations. This gave rise to the possibility of inter-generational rights, that is to say, people who are yet to be born may also have rights and not just current inhabitants of the planet.

The Stockholm Conference and Declaration were important as they marked the beginning of a dialogue between industrialised and developing nations on the link between economic growth, the pollution of the environment, and the wellbeing of people around the world. It influenced the adoption of laws and institutions in the next few decades. Some of the outcomes of this UN Conference included the establishment of the UN Environment Program (UNEP), and the Convention on the Laws of the Sea (UNCLOS). It also influenced developments at the regional level. In Europe, the Environment Committee at the Organisation for Economic Cooperation and Development (OECD) was established. Similarly, in Africa, the *African Charter on Human and Peoples' Rights* adopted in 1981 recognised the right of peoples to a satisfactory environment favourable to their development (Art 24).

<sup>4</sup> *Thailand: Ongoing judicial harassment against seven KRBKG members.* (2017, July 27). The Observatory for the Protection of Human Rights Defenders. <https://www.omct.org/en/resources/urgent-interventions/ongoing-judicial-harassment-against-seven-krbkg-members>

<sup>5</sup> *INDONESIA: Mr. Indra Pelani, a Land Rights activist brutally murdered in Jambi.* (2015, April 9). Asian Human Rights Commission. <http://www.humanrights.asia/news/hunger-alerts/AHRC-HAC-004-2015/#:~:text=Suddenly>

In 1983, the UN General Assembly established the World Commission on Environment and Development (WCED), chaired by Norwegian Prime Minister, Gro Harlem Brundtland. In 1987, the Commission presented its report entitled 'Our Common Future' before the United Nations General Assembly. The report, also known as the Brundtland Report, recognised the links between development paths followed by nations and environmental degradation. It also, for the first time, presented a definition of the concept of sustainable development. The release of the Brundtland report was followed by the United Nations Conference on Environment and Development (UNCED) in 1992 to mark the 20th anniversary of the Stockholm Conference. The UNCED, also known as the Earth Summit, was held in Rio de Janeiro in Brazil and brought together political leaders, diplomats, scientists, media representatives, and non-government organisations from across the world. The objectives of the Earth Summit were to build upon the hopes and aspirations of the Brundtland report and to agree upon concrete measures to reconcile economic activities with the protection of the planet to ensure a sustainable future for all. The Earth Summit recognised that integrating and balancing economic, social, and environment concerns to meet human needs was vital for sustaining human life on the planet, and doing so required new perceptions about the ways humans produced and consumed, about their ways of living and working, and the ways in which decisions were made. The Summit led to several important outcomes, such as the adoption of the Rio Declaration on Environment and Development, although some argue that compared to the Stockholm Summit and Declaration, it did not foreground specifically the human right to a clean, healthy, and sustainable environment.

### **Spotlight: Outcomes of the Earth Summit**

- The Convention on Biological Diversity
- The Framework Convention on Climate Change
- Principles of Forest Management
- The Rio Declaration on Environment and Development
- Agenda 21
- Creation of the Commission on Sustainable Development

In 2015, the United Nations General Assembly adopted a resolution entitled, 'Transforming Our World: the 2030 Agenda for Sustainable Development.' The agenda expressed the commitment of world leaders towards achieving sustainable development in its three dimensions (economic, social, and environmental) in a balanced and integrated manner. Further, it recognised the interdependence between eradication of poverty, combating inequality within and among countries, preserving the environment, and creating sustainable economic growth. Based on these and other principles and commitments, the world leaders adopted the seventeen (17) Sustainable Development Goals (SDGs) that focused on ending poverty and other deprivations, improving health and education, reducing inequality, encouraging economic growth, addressing climate change, and preserving oceans and forests. Seven years later, in July 2022, the United Nations General Assembly declared the ability to live in a "clean, healthy and sustainable environment" to be a universal human right.

**Spotlight: Resolution, UNGA, Human Right to a Clean, Healthy and Sustainable Environment (26 July 2022)**

*Recognizing that sustainable development, in its three dimensions (social, economic and environmental), and the protection of the environment, including ecosystems, contribute to and promote human well-being and the full enjoyment of all human rights, for present and future generations,*

*Recognizing also that, conversely, the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights,*

*Reaffirming that international cooperation has an essential role in assisting developing countries, including highly indebted poor countries, least developed countries, landlocked developing countries, small island developing States, as well as the specific challenges faced by middle-income countries, in strengthening their human, institutional and technological capacity,*

*Recognizing that, while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by women and girls and those segments of the population that are already in vulnerable situations, including indigenous peoples, children, older persons and persons with disabilities,*

*Recognizing also the importance of gender equality, gender-responsive action to address climate change and environmental degradation, the empowerment, leadership, decision-making and full, equal and meaningful participation of women and girls, and the role that women play as managers, leaders and defenders of natural resources and agents of change in safeguarding the environment,*

*Recognizing further that environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights,*

*Recognizing that the exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment,*

*Reaffirming that States have the obligation to respect, protect and promote human rights, including in all actions undertaken to address environmental challenges, and to take measures to protect the human rights of all, as recognized in different international instruments, and that additional measures should be taken for those who are particularly vulnerable to environmental degradation, Noting the framework principles on human rights and the environment,*

*Recalling the Guiding Principles on Business and Human Rights, which underscore the responsibility of all business enterprises to respect human rights,*

*Affirming the importance of a clean, healthy and sustainable environment for the enjoyment of all human rights,*

*Taking note of all the reports of the Special Rapporteur (formerly the Independent Expert) on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,*

*Noting “The highest aspiration: A call to action for human rights”, which the Secretary-General presented to the Human Rights Council on 24 February 2020,*

*Noting also that a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies,*

*Recognizes the right to a clean, healthy and sustainable environment as a human right;*

*Notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;*

*Affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;*

*Calls upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.*

## **Reflection and Discussion: The Human Right to Environment**

Read the UNGA Resolution on Human Right to Clean, Healthy and Sustainable Environment (2022) and:

- Note and reflect upon the links between sustainable development, protection of environment, climate change and human rights.
- Note the groups who are made most vulnerable by damage to the environment and reflect on their vulnerabilities.
- Reflect on why actions related to climate change and environmental degradation need to be gender responsive?

Developments at the international level have had an influence in the Southeast Asian region as well. In June 2012, the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Declaration on Environmental Sustainability. The Declaration reaffirmed the commitment of Member States to implement multilateral and regional agreements on development and the environment so as to achieve the goal of a clean and green ASEAN. That same year, in November, it adopted the ASEAN Human Rights Declaration which explicitly recognised the right to a clean environment:

*Every person has the right to an adequate standard of living ... including: ... [t]he right to a safe, clean and sustainable environment (Art. 28f).*

Though such declarations are non-binding in nature, ASEAN also adopted a binding agreement on the transboundary issue of haze. Whilst non-binding, the declarations are still important as they demonstrate that Member States recognise the importance of protecting the environment as they move forward in strengthening the ASEAN community.

### **Spotlight: The Southeast Asian Haze**

Caused by the burning off of agricultural land, this occurs every year around August to September. The fires are often started illegally as a cheap way to clean land before sowing another crop. Although palm oil plantations and timber reserves are generally blamed for the fires, recent research now points to other causes as well, including businesses clearing land by fire, conflict over land titles (especially of forests), and ineffective firefighting or peatland water management by the Indonesian government. Much of the haze comes from Indonesia, but Malaysia is also a contributor. Affected countries include Malaysia, Singapore, Brunei DES, and Indonesia, and sometimes southern Thailand, and the Philippines.

## **13.4 Elements of the Rights to a Clean, Healthy and Sustainable Environment**

The right to a clean, healthy and sustainable environment includes both substantive elements and procedural elements. Substantive elements refer to those rights, the enjoyment of which is dependent on the right to a clean, healthy and sustainable environment. In other words, environmental protection is essential for the enjoyment of these rights. These substantive rights include: civil and political rights such as the rights to life; and economic, social and cultural rights such as the rights to health, food, adequate standard of living, and housing. Procedural elements refer to rights that enable enjoyment of the substantive rights. These rights primarily include right to access information, right to participation and right to access justice.

### **Spotlight: Elements of a Right to a Clean, Healthy and Sustainable Environment**

The elements of the right to clean, healthy and sustainable environment include:

Protection from pollution, which can include:

- Air pollution
- Water pollution: pollution of drinking water, as well as pollution of water bodies that are sources of irrigation
- Soil pollution or contamination of the soil
- Pollution caused by waste disposals and garbage

Protection from global warming and climate change which results in:

- Severe storms
- Hotter temperatures
- Increased drought
- Rising sea levels threatening coastal and island communities
- Loss of species on land and in oceans
- Scarcity of food as fisheries and crops get destroyed
- Displacement and poverty

Procedural rights:

- Rights to access information
- Rights to participate in decision-making
- Rights to access justice

### 13.4.1 Substantive rights

The substantive right to a clean environment is recognized in different laws, both international and domestic. In international law, apart from soft law documents, such as the Stockholm and Rio Declarations, other treaties provide elements of a human right to a clean environment. Explicit recognition of some aspects of the right to a clean environment can be found in Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1976 (ICESCR) guaranteeing the right of everyone to the enjoyment of the highest standards of physical and mental health. Article 12.2b reads:

*The steps to be taken by the State parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the improvement of all aspects of environmental and industrial hygiene (Art 12.2b).*

The Committee on Economic, Social and Cultural Rights, in its General Comment 14 has interpreted the right to health to include underlying determinants of health such as safe and potable water, adequate sanitation, adequate supply of safe food, nutrition, and housing, healthy occupational and environmental conditions, and access to health-related information. Further, it is now recognised that environmental harm can put at risk enjoyment of the right to adequate food, adequate housing, water, and the right to a livelihood.

At the national level, courts in many countries have interpreted the right to life that is recognised in most constitutions as a fundamental right to include the right to a clean environment. In India, in the case of *Rural Litigation and Entitlement Kendra Dehradun and others v State of UP and others* (1985), the Supreme Court held that Art 21 of the Indian Constitution which reads “No person shall be deprived of his life or personal liberty save in accordance with the law” ought to be given a broad interpretation. The court decided that Art 21, commonly referred to as “the right to life,” included a right to a clean environment, observing that the concept of life went further than the right to merely exist and included a certain quality of life which necessitated a clean environment.

In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Another*, regarding a 1996 ruling about the wrongful dismissal of a school teacher, a Malaysian court held that the right to life included a right to a clean environment. Other countries have incorporated the right directly into their constitutions. One example is the 1987 Constitution of the Republic of the Philippines, Section 16, Art II which reads:

*The State shall protect and advance the right of the people to a balanced and healthful ecology in accordance with the rhythm and harmony of nature.*

The Philippine Supreme Court has interpreted the right to a balanced and healthy ecology very broadly. In the case of *Minors Oposa v Factoran* (1993), it was argued that children (as represented by their parents) would be denied a healthy environment if forests were destroyed as a result of timber licenses issued by the government. The court went as far as to hold the right was so fundamental, that even if the Constitution had not recorded it officially, it would still have authority. In other words, in the Philippines, the right to a clean environment is considered an inalienable human right which does not require legislative confirmation to have the weight of law.

### **Spotlight: *Minors Oposa v Factoran* (1993), Supreme Court of the Philippines**

A group of children (some of whom were the children of environmental activist Antonio Oposa) brought a class action lawsuit to stop the destruction of rainforests, cancel existing timber licensing agreements, and prevent the acceptance of new ones. The case was based on a reading of the 1987 Constitution of the Philippines (Section 16) which recognises the right of people to a “balanced and healthful ecology” and the right to “self-preservation and self-perpetuation.” The concept of “intergenerational equity” was used to argue that natural resources belong to children as well as adults, and by harvesting all the country’s resources, adults were stealing from their children and from future generations.

The Supreme Court ruled in favour of the children, finding:

- the right to a clean environment, to exist from the land, and to provide for future generations is fundamental; and
- there is an intergenerational responsibility to maintain a clean environment, meaning each generation has a responsibility to the next to preserve the environment.

#### **13.4.2 Procedural rights to a clean, healthy and sustainable environment**

The procedural right to a clean environment is summarised in a number of international documents. An early elaboration can be found in Principle 10 of the *Rio Declaration* (1992), which reads:

*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

When breaking down this principle, it can be seen that a procedural right to a clean, healthy, and sustainable environment consists of three main elements: (1) a right to environmental information; (2) a right to participate in environmental decision-making; and (3) access to courts or other forms of administrative mechanisms in the event of a dispute.

The procedural rights to a clean, healthy and sustainable environment have also been elaborated upon in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters, commonly known as the Aarhus Convention as it was adopted in 1998 that was adopted in 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the Environment for Europe Process.

### Spotlight: The Aarhus Convention (1998)

This European-based convention is part of the 'Environment for Europe' process. It codifies procedural rights to a clean environment including obligations to enforce a system of environmental governance where citizens have rights to access information, participate in decision-making, and access justice. The Convention has 46 members from Europe and Central Asia and is seen as the best model for procedural rights. It is hoped it can also become a regional treaty for Southeast Asia or a guide for domestic legislators.

#### 13.4.2.1 Right to Environmental Information

Without information, it may be almost impossible to create a coherent and strong argument against a proposal or project which may harm the environment and the people who depend on it. Without these laws, people could even wake up to find a large construction site next to their house. When attempting to find out what is being built, they may be denied information. If parents, they may be worried about the dangers of pollution or the impact of increased traffic on their children. If farmers, they may worry about the impact on their farmland. If business owners, they may be concerned about the impact on their businesses. Whatever the worry, without access to information, there is no way for any of these groups to understand, prepare for, or potentially challenge the consequences of the construction. Clearly, access to information should be a requirement to ensure people know about, and can prepare for, impacts to their local environment. Further, information will also enable them to launch protests or suggest modifications to the construction to reduce its impact on local communities.

Indonesia has had a freedom of information law since April 2008. In Thailand, access to information was first guaranteed in Section 48 of the 1997 Constitution which states:

*A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.*

This constitutional provision is given legislative force through the Thai Official Information Act of 1997. In Malaysia, the states of Penang and Selangor have freedom of information laws but there is no national law. In countries like Singapore, no such law exists at all.

Although laws on freedom of information have been adopted, yet barriers exist in accessing information. The procedure established by States for accessing information may be time consuming and burdensome. Further, clauses such as 'security of the State' as present in Section 48 in the 1997 Constitution of Thailand may be used by States to withhold information. This is particularly true of countries like Malaysia where freedom of information laws in certain States may be impeded by the *Official Secrets Act* (1972) which allows government agencies wide discretion to declare information secret. In fact, the Act has such wide-ranging powers that any document may be declared secret, making access to information quite difficult.

#### 13.4.2.2 Right to Participate in Decision-making

##### Key Terms: Participation in Decision-making

**Environmental Planning Regulations:** Environmental Planning Regulations govern land use. For example, these regulations would help to: determine whether businesses and factories can be set up in particular areas; identify the areas that can be developed as residential areas; where roads may or may not be built; identify the areas that are to be developed as parks, etc.

**Environmental Impact Assessment:** Environmental Impact Assessment (EIA) is a tool used to assess the likely impact of a project on the environment. It is also used to assess the impact of the project on social and economic aspects. Such studies are conducted prior to decision-making and the purpose is to find ways and means to reduce the adverse impacts and plan the proposed project to suit the local environment.

There are several ways the public can participate in decision-making. Two of the more common methods are through **environmental planning regulations** (sometimes called town and country planning regulations) and **Environmental Impact Assessment** (EIA) regulations, both of which should include public participation. Urban planning should allow public participation during the drafting of long term plans for a town or city. Provisions should also allow the public to voice their concerns or opposition to more specific planning decisions, especially when their immediate environment is impacted. This would include, for example, opposition to the construction of a chemical plant near a housing area.

An EIA is a study, ideally done by a neutral organization (although this is rare in practice), which assesses the environmental impacts of a planned project. There is no single standard for conducting EIAs, although international best practices have now been established. Ideally, the EIA report should detail how the air, water, land, and other resources will be affected. Sometimes, this also includes assessment of social as well as livelihood impacts. In addition, an EIA also includes mitigating measures that may be taken to lessen adverse impact on the environment and social and economic conditions of the local communities. Further, EIAs include mechanisms of consultation with the public or public hearings. However, public hearings and participation do not have any meaning unless the EIA process ensures that the inputs of the public are considered seriously and responded to in the decision-making process. In other words, the right to be heard does not simply entail having those views listened to by the relevant authorities. They must also be seriously considered. In order for this to happen, the entire process must be transparent with the final decision being taken in such a way that clearly demonstrates that the views of the public were given due consideration and remedial measures were adopted where needed. For example, a final report should have a section dedicated to the consideration of public opinion including the reasons why these opinions were accepted or rejected, as well as modifications that were made to the project.

States may attempt to limit, or even falsify, participation in a variety of ways. Examples include allowing smaller groups to participate who they know will support the project, while preventing dissenters from being heard. Other cases are when States hold public meetings while setting up road blocks to prevent access to the meeting. Similarly, States may delay participation to the point where it becomes meaningless because the project has already started. In worst case scenarios, the public is simply excluded from the entire process.

Participation is only inclusive if it ensures all groups have access to it. Groups that are vulnerable to being left out of participation processes may include women and indigenous persons.

Often, women are significantly impacted by environmental damage. For example, in some societies, it is women who mostly engage in agricultural work and thus may be impacted at multiple levels by loss of access to land or contamination of the soil. They may face adverse health impacts from working in the soil, or have to shoulder the burden of taking care of family members whose health is also impacted. Women are often left out of public participation processes as not enough thought is given to the barriers they may face in accessing such processes. For example, in many societies, women may not be active in the public sphere and as such be unaware of public hearings. And even if they have information, they may have to travel long distances to attend the hearings. Thus, it is important for policy makers and administrators to, first acknowledge that women as a group may experience the environmental harm in different ways to men, and second, to plan public participation processes in such ways to remove the barriers women may face in accessing them.

Indigenous people are amongst those made most vulnerable from projects that result in significant changes to the environment. In Southeast Asia, such development projects have included dam projects such as a cascade of dams proposed for the Salween River in Myanmar and at the Thailand-Myanmar border, and the **Son La Dam** in Vietnam. Indigenous people are made vulnerable because their voices are rarely heard during the decision-making process. The reasons for their exclusion can be many. First, they lack the economic, social, or political power. And second, often their traditional rights over control, access, and use to land and other resources are not recognised in law. Thus, since they do not hold land ownership documents, the State may not consider them rightful owners of the land.<sup>6</sup>

### Spotlight: Son La Dam, Vietnam<sup>6</sup>

The building of the Son La Dam displaced over 91,000 people, one of the largest displacements of indigenous people in Southeast Asia. While some faced no long-term ill-effects, others who lost access to their land lost their means of livelihood which they struggled to, or could not, recover. Compensation and housing in some cases was either insufficient or unsuitable, putting stress on communities. Unable to recover from the forced displacement process, many communities simply disappeared.

Noting these different barriers faced by indigenous groups, the **UN Declaration on the Rights of Indigenous Peoples 2007** recognised that indigenous groups must be consulted before any decision is taken to remove them from their land or territories. Article 10 of the Declaration reads:

*Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and where possible, with the option of return (Art 10).*

This process to acquire free, prior, and informed consent has become important in planning development projects, although it is not always implemented meaningfully in practice. This process includes the following elements:

- Free: Free of force, corrupt practices, and interference or pressure from outside the community.
- Prior: Consent must be achieved in a suitable time frame before decision-making.

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<sup>6</sup> Son La Dam. (n.d.). International Rivers. <https://archive.internationalrivers.org/campaigns/son-la-dam>

- Informed: All information must be made available to the community in a manner that can be clearly understood.
- Consent: Following their own decision-making processes, the community must agree.

### Reflection and Discussion: Meaningful Participation

A government wishes to establish a national park in a tropical forest known for its wild species of birds and animals. Many surrounding villages support the development because they believe it will benefit the economy through increased tourism, but indigenous groups living alongside or inside the forest, fear they will lose their land and livelihoods because shifting cultivation and hunting—both traditional practices important to livelihoods and cultural identity—will be prohibited in the park. The first public meeting organized by the government ended with the indigenous and village groups arguing and not finding a resolution. Following this, the government decides it has met its obligation for public participation and begins to evict the indigenous groups from the forest to establish the national park and its facilities.

#### Questions

- Has the government met its obligation for participation?
- If the villagers outnumber the indigenous people by at least five to one, is it fair and democratic that the villagers' views be the ones accepted in the report?
- Are there alternative solutions to this dispute?

#### 13.4.2.3 Access to justice

Another aspect of procedural rights is the right to access justice in cases where a person or group has suffered environmental harm. Under most legal systems, one of the requirements of filing a case before a court is the requirement of *locus standi*. It means that in order to be eligible, a person will usually have to prove they have been directly affected by the act through damage to themselves or their property, or through an economic loss.

In environmental cases, the requirement of *locus standi* creates barriers in accessing justice. First, in many instances, the victims are usually poor and do not have the ability to engage in expensive litigation. Also, the damage or economic loss may not be obvious because it may not yet have occurred – for example, the impacts of deforestation or of pollution may only have long term effects. Further, in cases that concern the impact of pollution or destruction of the environment on basic rights, it may be easier to prove the damage if communities as a group are considered victims.

In order to address these barriers, many countries have given a broad interpretation to the requirement of *locus standi* in environmental rights cases. Countries like New Zealand and Holland have laws outlining the scope of groups or individuals who can appear in court to challenge environmental decisions. Other countries like India, have broadened the concept of *locus standi* to allow anyone to bring a case to court, even if they have not been directly affected as long as there is sufficient public interest in the matter. This is called Public Interest Litigation, a type of legal case that does not exist in Southeast Asia. In this way, a concerned citizen or lawyer can bring a case to court for the public good. For example, the Indian lawyer, MC Mehta, took on many environmental cases in the 1980s in the public interest to protect: the Ganges River from pollution; historic monuments like the Taj Mahal from air pollution caused by iron and glass factories; and to seek prohibition of the use of leaded petrol, which led to the introduction of unleaded petrol in India.

The legal system in many countries also allows class actions to be filed. A class action is a type of civil lawsuit which is brought on behalf of many similarly situated people who have been harmed in the same way by the same entity. Class actions, as seen from the example of the case of the Oddar Meanchey villagers affected by Mitr Phol (a company based in Thailand which is discussed in the chapter on business and human rights), enables people who do not have the resources to litigate individually to sue the responsible party together in a single case.

### **Key Term: *Locus Standi***

*Locus standi* in Latin means a place to stand and its legal meaning refers to the right to bring a case to court. For most courts, this means a person must have experienced negative consequences because of someone else's actions, entitling them to some form of redress.

In most Southeast Asian countries, the laws of *locus standi* are ambiguous or weak. Generally speaking, a person must prove he or she has an interest in the matter beyond that of an average person. This may include an environmental NGO with a special interest in wildlife or pollution in some jurisdictions. The previously mentioned *Minors Opasa v Factoran* case in the Philippines saw the Supreme Court extending *locus standi* to future generations. In this case, the citizens argued that deforestation would impact the right of future generations to the forest and that future generations have *locus standi* as they would be directly affected by these decisions. The court held they did have an interest because a clean environment was a human right and deforestation an environmental issue. The court said:

*The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines. Consequently, since the parties are so numerous, it becomes impracticable, if not totally impossible, to bring all of them before the court. [...] The plaintiffs' personality to sue (locus standi) on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.*

Unfortunately, this progressive approach to *locus standi* has not been embraced throughout Southeast Asia. Malaysia, for example, has extremely restrictive rules on *locus standi*. In short, unless one can show a direct relationship to the issue at hand, either through personal damage or monetary loss, the court may refuse to hear the complaint. Restricting access to courts has led some groups to find alternative methods of voicing complaint such as public demonstrations. Some well-known protests which have gained worldwide attention include those opposing the **Letpadaung copper mine** in Myanmar and the **Pak Mun Dam** in Thailand.

## Spotlight: Environmental Protests in Southeast Asia

### Letpadaung Copper Mine, Myanmar<sup>7</sup>

Open since 1996, the copper mine had already displaced around 26 villages and up to 2,500 people, though this number is disputed between villagers, the mine owner, and the government. Many villagers claimed they were not adequately compensated for loss of their land and assets, and their remaining land was polluted by the mine. Although protests had been going on for many years, they were harshly put down by State officials in 2012, resulting in 100 people being hospitalized. The protests did cause the government to initiate a parliamentary investigation but controversially, this found largely in favour of the mine.

### Pak Mun Dam, Thailand

The Mun river is the largest and longest river in Northeast Thailand. The Pak Mun Dam Project, approved in 1989 was a project of the Electricity Generating Authority of Thailand (EGAT), with funding by the World Bank. The project raised protests amongst the affected villagers who called EGAT to provide compensation for damages to communities, the ecology, destruction of rapids, impact on fish migration in the Mekong and more such issues. Villagers began to mobilize and demonstrate in various sites including the Provincial Hall, Government House and other such locations throughout Thailand. As the network grew, they formed an organisation, called the Assembly of the Poor.<sup>8</sup>

## 13.5 State Obligations: Substantive and Procedural Rights

Substantive and procedural rights are key to understanding how the right to a clean environment is put into practice. In order to have a full understanding of the rights, there is a need to examine the corresponding obligations on States as well. John Knox, the first UN Special Rapporteur on Human Rights and the Environment, has elaborated upon such obligations<sup>9</sup>. As elaborated by the Special Rapporteur, States have the following obligations: (a) to adopt and implement legal frameworks to protect against environmental harm that may infringe upon the enjoyment of human rights; (b) to regulate private actors to protect against such environmental harm; and (c) to provide access to remedies for harm.

### 13.5.1 Obligation to adopt legal frameworks

States have an obligation to adopt legal and institutional frameworks to protect against and respond to environmental harms that can impact upon the enjoyment of human rights. Laws should be adopted to provide for standards and mechanisms aimed at reducing and eliminating the pollution of air, water and soil, protecting against natural disasters, protecting coastlines, forest covers, ground water, etc. Legislation should also be adopted for the realisation of procedural rights, such as adopting laws that: facilitate access to information, mandate the conducting of environmental impact assessments, require the holding of public hearings, and facilitate access to remedies, etc.

The Special Rapporteur elaborated that the obligation to protect human rights from environmental harm does not require States to cease all activities that may cause environmental degradation.

<sup>7</sup> *Activists, Locals Reject Letpadaung Inquiry*. (2013, March 12). The Irrawaddy. <https://www.irrawaddy.com/news/burma/activists-locals-reject-letpadaung-inquiry.html>

<sup>8</sup> To know more about the movement, read: *Pak Mun Dam: A struggle of fishers, an epic of river protection*. (2014, December). International Rivers. <https://archive.internationalrivers.org/resources/8483>

<sup>9</sup> Knox, John. (2012). *Preliminary Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*. A/HRC/22/43. available at: A-HRC-22-43\_en.pdf

Rather, States are required to strike a balance between environmental protection and other issues of social importance such as economic development and the rights of others. But the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights. The law and policy framework adopted by States must be such that enables the State to take reasoned decisions in this regard.

Further, the obligation to adopt legal frameworks also includes the obligation to implement the framework as regulations to protect guaranteed rights serve little purpose if they are not fully enforced. In order to meet this obligation, States have a duty to establish institutions such as independent regulators to monitor compliance and impose penalties in case of breaches.

### **13.5.2 Obligation to protect against private actors**

As discussed in previous chapters, under the international human rights regime, States have a duty to protect against human rights abuses by non-State actors. This standard is also a cornerstone of the Guiding Principles on Business and Human Rights discussed in the chapter on business and human rights. As per the duty to protect, States have a responsibility to take appropriate steps to prevent, investigate, punish, and redress human rights abuses through effective policies, legislation, regulations, and adjudication. As discussed in the chapter on business and human rights, an important aspect of the duty to protect is enacting legislation to ensure due diligence compliance by private actors. Due diligence compliance is closely related to obligations under procedural rights.

### **13.5.3 Obligation to provide access to remedies**

It is an established principle that States should provide effective remedies for violations of rights. This is also one of the founding principles of the Guiding Principles on Business and Human Rights. Relaxation of the requirement of *locus standi* and the class action mechanism, both important components of access to remedy, has already been discussed in the previous section. In cases involving environmental harm, depending on the nature of the case, remedies may be granted with the purpose of: environmental restoration, providing redress to those affected, implementing legislation, reinforcing the rule of law, and promoting sustainable development. Principles such as “polluter pays” and the “precautionary principle” help to fashion remedies. Concerns of balancing economic growth, social progress, and environmental protection also play an important role.

#### **Key Terms: Remedies in Environmental Cases**

**Polluter Pays Principle:** The “polluter pays” principle is a commonly accepted practice which requires that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment. This principle is reaffirmed in Principle 13 of the 1992 Rio Declaration.

**Precautionary Principle:** The definition of the precautionary principle is contained in Principle 15 of the Rio Declaration. Principle 15 states that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. Further, it states that in order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. The precautionary principle seems to be widely recognised by States and may be drawn upon as a guide in decision-making.

### Spotlight: State Obligations Relating to Environmental Harm

Developed by the Special Rapporteur on human rights and the environment, these obligations are:

#### **Substantive Obligations**

States should have laws against environmental harm that may interfere with the enjoyment of human rights. Examples of these laws are standards for air and water quality, and anti-pollution measures.

#### **Procedural Obligations**

States have obligations to:

- make assessments of environmental impacts and make environmental information public;
- ensure public participation in environmental decision-making on the basis of freedom of expression and association; and
- ensure there are remedies for people whose rights have been interfered with by environmental harm.

### Spotlight: Klity Creek Case, Thailand

Klity Creek is located in the Kanchanaburi province of Thailand and is home to about 400 ethnic Karen people, most of whom are subsistence farmers of rice, cassava, and vegetables. It was also the site of a lead-processing factory, the Lead Concentrate (Thailand) Co Ltd. Villagers in the Lower Klity Creek were exposed to lead from contaminated water and food, leading them to file three cases before the court with the help of human rights groups and lawyers. These included two civil cases demanding damages, and one administrative case holding the company and the State authority accountable for the pollution caused by the factory.

The people won the civil cases for compensation. In 2017, the Supreme Court of Thailand upheld a decision of a lower court to award compensation of 36 million baht to 151 Karen-Thai villagers for the damages suffered by them. The amount of compensation was based on how the pollution had affected villagers' lives as well as past and future medical expenses.

On January 10, 2013 the highest administrative court in Thailand ordered the government to clean up toxic lead in the creek until test results from the water, soil, vegetables and aquatic animals in and around the creek fall below permissible levels.

## 13.6 Climate Change and Human Rights

The final section will discuss the relationship between climate change and human rights.

Climate change simply refers to long-term shifts in temperatures and weather patterns. In 1988, the United Nations Environment Program established the Intergovernmental Panel on Climate Change (IPCC) to review the knowledge and science of climate change, its social and economic impacts, and potential response strategies. Since then, the work of the IPCC has informed international climate policy-making. The fifth report of the IPCC confirmed that one of the primary causes of climate change was **anthropogenic emissions** or emissions resulting from or produced by human activity. Such activities include the burning of fossil fuels, deforestation, land use and land use changes, livestock production, fertilisation, waste management, and industrial processes. These

activities result in greenhouse gas emissions that envelop the earth like a blanket, trapping the sun's heat and raising temperatures in the process. Examples of greenhouse gas emissions that are causing climate change include carbon dioxide and methane. The consequences of climate change include, amongst others, droughts, water scarcity, rising sea levels, forest fires, flooding, melting polar ice, extreme weather conditions, and declining biodiversity.

In Southeast Asia, a major concern is the damage done to river deltas as a result of rising sea levels, as well as salt water intrusion during drought periods. For example, the river deltas in Vietnam, Thailand, Myanmar, and in neighbouring Bangladesh are some of the most agriculturally productive and populous areas in the region. Rising sea levels could force millions of people to leave their homes, turning them into environmental migrants. Further, as these areas are fertile and produce food that is also exported to other countries, their degradation can adversely impact food security on a massive scale. Other issues of concern include more extreme weather events, such as stronger typhoons hitting the Philippines, Vietnam, and Myanmar; harsher winters in northern Myanmar, and Vietnam; and droughts. The Maldives and Tuvalu are two countries in the Asia-Pacific that could even cease to exist as it is projected that rising sea levels could place the entire island States under water. Thus, climate change can impact, directly and indirectly, a wide range of human rights.

In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was adopted in May 1992 and opened for signature at the Earth Summit in Rio de Janeiro in June 1992. Ratified by 197 States, it sets out the legal framework for inter-governmental efforts to tackle climate change. The objective of the Convention is to stabilise greenhouse gas concentrations:

*at a level that would prevent dangerous anthropogenic (human-induced) interference with the climate system (Article 2).*

It further states that:

*such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*

The Convention recognises the principle of common but differentiated responsibility and respective capability. It acknowledges that countries on account of their past and present greenhouse gas emissions and capabilities, have different levels of responsibility to act on climate change. For this purpose, it divides countries into three main groups according to their differing commitments.

Annex I countries include industrialised nations that were members of the Organisation for Economic Co-operation and Development (OECD) in 1992 plus countries with economies in transition.

Annex II parties consist of OECD members of Annex I. Annex II parties are required by the Convention to provide financial resources to enable developing countries to undertake emissions reduction activities and to help them adapt to the adverse effects of climate change. Further, they are required to take all possible steps to promote the development and transfer of environmentally-friendly technologies to EIT (or economies in transition) parties and developing countries.

Non-Annex I parties are mostly developing countries, and the Convention recognises that certain groups of developing countries are especially vulnerable to the adverse impacts of climate change such as those with low lying coastal areas and those prone to desertification and drought. Others that rely heavily on income from fossil fuel production and commerce are recognised

to be vulnerable to the potential economic impacts of climate change response measures. The Convention provides for a framework that would address the special needs and concerns of these vulnerable countries such as investments, insurance, and technology transfer.

The Kyoto Protocol was adopted in 1997 to strengthen the effectiveness of the UNFCCC. It imposed obligations on industrialised countries and countries in transition to achieve quantified reduction targets for a basket of greenhouse gasses. Similarly, in December 2015, the Paris Agreement was adopted and requires all parties to determine, plan, and regularly report on commitments made by countries to mitigate climate change.

The Paris Agreement aims to enhance implementation of the UNFCCC by strengthening the global response to climate change. For this purpose, it requires that every five years parties to the agreement should come up with more ambitious national climate goals. Thus, the Paris Agreement is intended to provide a framework for dialogue between countries on the three pillars of collective climate action:

- (1) Climate change mitigation: Refers to efforts to reduce or prevent emissions of greenhouse gasses. It means using new technologies and renewable energies, making older equipment more energy efficient or changing management practices or consumer behaviour. Such efforts can be as complex as planning a new city, or as simple as making improvements to the design of a cooking stove.
- (2) Climate adaptation: Recognising that it is no longer possible to halt the impacts of climate change, adaptation refers to strategies aimed at adapting to a warming world.
- (3) Climate finance: Refers to local, national, or transnational financing that enables societies and economies to adapt to the adverse effects of climate change and reduce its impacts.

Human rights groups have been successful in including human rights in the preamble to the Paris Agreement:

*Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.*

The Office of the High Commissioner of Human Rights (OHCHR) has clarified the essential obligations of States and other duty bearers such as businesses with respect to climate action. These are:

- (1) States have the obligation to respect, protect, fulfil and promote the human rights of all persons without discrimination. Climate change negatively impacts on people's rights to health, housing, water, and food. Thus, States have the responsibility to take action to limit the emission of greenhouse gasses. Such actions include adoption of regulatory measures to mitigate climate change.
- (2) States have to ensure that all persons have the necessary capacity to adapt to climate change. Factors such as discrimination and access to education may limit the adaptive capacities of some groups and increase their climate vulnerability. States have the responsibility to address these barriers and devote adequate resources to the realisation of the economic, social and cultural rights of all persons, particularly those who face the most risks.

- (3) States have the responsibility to guarantee effective remedy to victims of violations of rights. Victims of climate change should have access to meaningful remedies. Applying this principle to climate action, States have the responsibility to regulate the emissions of State entities as well as businesses operating under its jurisdiction, even if the harms or emissions occur outside its boundaries.
- (4) Under the International Covenant on Economic, Social and Cultural Rights, States have the obligation to allocate the maximum available resources for the progressive realisation of rights. Thus, States have the responsibility to mobilise resources to prevent foreseeable human rights harms caused by climate change. Such measures can include imposition of carbon taxes with adequate safeguards to minimise impact on the poor.
- (5) Climate change knows no borders and thus requires a global response. States have the obligation to share resources, knowledge and technology in order to address climate change. The ICESCR recognises that everyone has the right to enjoy the benefits of science and its applications. In this regard, States have the responsibility to support the development of climate mitigation and adaptation technologies and their dissemination. States should facilitate technology transfers as needed and take steps to ensure that global intellectual property laws do not obstruct the dissemination of mitigation and adaptation technologies. At the same time, States should ensure that appropriate incentives are provided to encourage innovations and development of such technologies.
- (6) States should ensure equity in climate action. It is now recognised that while climate change affects all, the people who have contributed the least to greenhouse gas emissions are those who are most affected. States should ensure that efforts to mitigate and adapt to the impacts of climate change benefit people in developing countries, indigenous peoples, people in vulnerable situations, and future generations. Further, States should take steps to ensure that a gender perspective is integrated in all planning for climate change mitigation and adaptation.
- (7) And last but not least, States should be respectful of the right to free, active, meaningful, and informed participation in its climate action efforts. In this regard, it should establish open and participatory institutions and processes. It should make early-warning information regarding climate effects and natural disasters available to all sectors of society. Further, adaptation and mitigation plans should be developed in consultation with affected groups, be publicly available, and transparently financed. Human rights impact assessments of climate actions should be undertaken so as to ensure they are respectful of human rights.

### **Reflection and Discussion: Human Rights Impact of Climate Change**

1. What are the current and possible future human rights implications of climate change in your country?
2. Look into the trends and human rights consequences of the following climate change implications. Are particular groups affected and why by:
  - rising sea levels
  - more storms or typhoons
  - more droughts
  - changes to agricultural production
  - diseases such as malaria migrating to new areas
  - hotter temperatures and heatwaves
3. What can be done to address the climate crisis in terms of climate change mitigation (reducing emissions of greenhouse gasses) and climate change adaptation (altering our behaviours, systems, and ways of life)? From where should the financial resources for such actions be drawn? Consider the following:
  - What can individuals, families and communities do?
  - What should States do?

## **13.7 Conclusion**

This chapter has described the links between human rights and the environment. Environmental rights defenders and civil society climate change activists have played a vital role in drawing the attention of the world to the problems of environmental degradation and the adverse impact of climate change on the lives of vulnerable communities, and in pushing world leaders to take appropriate action. A clean environment is integral to human rights but much still needs to be done to ensure that the recently recognized human right to a clean, healthy, and sustainable environment is realized in practice.

### **A. Chapter Summary and Key Points**

#### **Human Rights and Environment**

Human rights and environmental protection are interdependent. Today, the right to a clean, healthy, and sustainable environment has become a widespread concern because of the environmental impact of development strategies such as the harms caused by pollution, exclusion from access to resources, and the degradation of resources. The impact of changes to the environment is not equally distributed. The extraction or enclosure of resources, and the pollution or degradation of the environment disproportionately affects particular ethnic, racial, or economic groups, while bringing benefits to more privileged sections of society. This is known as environmental injustice or environmental racism.

#### **Evolution of Environmental Standards**

The adoption of the Stockholm Declaration 1972 marked the beginning of a dialogue on the links between economic growth, pollution of the environment, and wellbeing around the world. In 1983, the World Commission on Environment and Development released the report, 'Our Common Future' (also known as the Brundtland Report) which introduced a definition of the concept of sustainable development. The Earth Summit was held in Rio de Janeiro in 1992. The Summit had several important outcomes including adoption of the Rio Declaration on Environment and Development and the creation of the Commission on Sustainable Development. Subsequently

in 2015, the UN General Assembly adopted the 2030 Agenda for Sustainable Development, recognising the interdependence between the eradication of poverty, efforts to combat inequality, preservation of the environment, and the creation of sustainable economic growth. In July 2022, the UN General Assembly adopted a resolution recognising the ability to live in a clean, healthy, and sustainable environment as a human right. While not legally binding on Member States, it does send a message that States need to adopt measures to address pressing environmental problems. It also provides a tool to activists to hold governments accountable to their human rights commitments.

### **Elements of the Right to a Clean, Healthy and Sustainable Environment**

In order to be enforceable, a right should be recognised in law (substantive aspect of a right). At the same time, the law must provide for mechanisms (procedural rights) to exercise and enforce it. The right to a clean, healthy, and sustainable environment can be understood in terms of substantive and procedural rights.

At the international level, the substantive right to a clean, healthy, and sustainable environment is recognised in soft law instruments such as the Stockholm and Rio Declarations. It is also recognised in binding treaties, the principal being the International Covenant on Economic, Social and Cultural Rights (ICESCR). At the national level, it may be recognised in constitutions such as in India and the Philippines where the fundamental right to life has been interpreted to include the right to a clean, healthy, and sustainable environment. Finally, it may be recognised in specific laws relating to pollution.

The procedural right to a clean, healthy, and sustainable environment recognised in instruments such as the Rio Declaration 1992 and the Aarhus Convention 1998, has three main elements: (1) the right to environmental information, (2) the right to participate in environmental decision-making, and (3) access to remedies.

With regard to substantive and procedural rights, States have obligations to: adopt and implement legal frameworks recognising the right to a clean, healthy, and sustainable environment; protect the right from the actions of State and non-State actors such as businesses; and provide access to remedies to victims of any infringement of such rights.

### **Climate Change and Human Rights**

Climate change has an impact on peoples' lives, in terms of their health, ability to grow food, adequate housing, safety, and housing.

There is consensus that human-made greenhouse gas emissions are a primary cause of climate change. The United Nations Framework Convention on Climate Change (UNFCCC) sets out the framework for governments to take action to address climate change. It also establishes the principle of common but different responsibilities recognising that while all States have the obligation to address global environmental destruction, not all States are equally responsible. The principle balances the need for all States to take responsibility for global environmental problems on the one hand, and recognises the wide difference in levels of economic development between States and their abilities to address these problems on the other.

The three pillars of collective climate action are climate change mitigation, climate adaptation, and climate finance. A human rights-based approach to climate action stresses State obligations towards human rights such as: to take action to limit the emission of greenhouse gasses; to ensure that all persons have the necessary capacity to adapt to climate change and to address the barriers that prevent vulnerable groups from acquiring such capacities; to guarantee effective remedy against violations of such rights; to mobilise and allocate the maximum available resources to address human rights harms caused by climate change; to share resources, knowledge, and

technology with other States and strengthen efforts to address climate change; to take steps to ensure equity in climate action; and to take steps to respect the right to free, active, meaningful, and informed participation in climate action efforts.

## B. Typical Exam or Essay Questions

- What are the dimensions of the human rights to a safe, clean, healthy, sustainable environment, and how is each dimension measured?
- How could a human rights based-approach to climate change address responses to environmental refugees or increased disasters?
- Examine a protest by an environmental group in your country. This could be a protest about a dam or a development. What do the protestors say and how does the government respond? How can the benefits of the development compare to the environmental impact?
- What will be the major impacts of climate change in your country? Are there any preparations for this?
- What are the challenges in your country for a group of people to bring a court case based on environmental degradation?

## C. Further Reading

Carson, R, *Silent Spring*, Boston: Houghton Mifflin, 1962.

United Nations, 'Transforming our world: The 2030 agenda for sustainable development' UN, 2015, available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>, accessed on 29 November 2022.

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Authors on human rights and the environment include:

- James Crawford
- Robert Hitchcock
- Ann Marie Clark
- David Boyd
- John Knox
- Jennifer Clapp
- Rachel Carson

Reports of United Nations Special Rapporteurs on Human Rights and Environment, and Climate Change



# Chapter 14

## Democracy and Human Rights\*

### Reader's Guide

This chapter considers democracy and human rights by focusing on the links between the two. Initially, it seeks to build an understanding of democracy before examining the concept as a human right. Next, the idea that democracy and human rights are interdependent and mutually reinforcing is looked at and in particular how civil and political rights such as the right to vote, freedom of information and expression, and the rights to peaceful association and assembly lay the foundations for democracy. Finally, this chapter will provide an overview of the nature of democracies in Southeast Asia.

### 14.1 Introduction

Although most countries in Southeast Asia claim to be democratic, in practice many democratic principles are overridden thereby preventing people from fully expressing their free will or engaging meaningfully in public affairs. At the same time, democratic transition in Southeast Asia has not necessarily led to a consolidation of democracy. Moreover, the last decade has also witnessed democratic decline in many countries, with increased human rights violations, controls on civil society, and restricted popular participation. Concurrently, some countries such as Thailand and Myanmar have experienced real setbacks as a result of military interference. This combination of

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a failure to consolidate democracy in countries already experiencing democratic transitions and the inability of non-democratic regimes to change has led to an increasingly pessimistic view of democratization. Further, support seems to be rising for strong rulers, efforts to override political voices, and the restriction of spaces where people can exercise their political will. Consequently, within the region, States are now redefining the concept by using such terms as “Guided Democracy” or the “Roadmap to Democracy,” both of which have been used to justify limitations on democracy and human rights.

Throughout Southeast Asia, people now argue about the meaning and value of democracy. Does it simply entail the holding of elections? Or should it also fulfil people’s civil and political rights? Is democracy really the best political system? To understand how democracy and human rights are related and challenged in Southeast Asia, this chapter will discuss the relationship between human rights and democracy by contextualising civil and political rights in the context of democracy. As such, it will elaborate on the political rights which form the foundation for democratic processes before discussing the state of democracy in Southeast Asia.

## **14.2 Theoretical Issues and Context**

### **14.2.1 *Understanding democracy***

While many consider democracy to be the best political system, it has been much debated as to its nature and scope. Recently, its perceived superiority over other political systems has been challenged due to its reliance on certain types of human rights, the notions of equality and participation, and the checks and balances applied to constitutional governments.

Central to its concept, democracy is about the ability of people to participate in government, thus ensuring popular rule that serves the public interest. Under such a system, representative governments should come to power via genuine periodic competitive elections. Thus, elections comprise the means of assuring a social contract between a government and its people, and specifically one which offers protection, holds it accountable, and allows the population to exercise its rights.

This basic understanding aside, no single definition of democracy prevails. One approach focuses on procedural practices such as electoral processes which emphasize how a government comes to power and which allows citizens to select candidates for political office. However, the ‘electoral democracy’ model limits its interest to free and fair elections with less attention given to how elected governments rule. By contrast, the substantive approach extends beyond elections and takes into account human rights, politics, and the living conditions fostered by the regime. Thus, the ‘participatory democracy’ concept emphasizes the full and meaningful participation of people in decision-making processes to ensure citizens have their needs and interests taken into account. As a counter-balance, such systems also permit criticism of the government. The ‘liberal democracy’ concept extends the scope of democracy even further by demanding that governments respect and protect individual (and collective) freedoms, rights, and liberties through the rule of law. At the same time, minority voices must also be heard despite the majority having ultimate control of government processes. To facilitate political competition, the liberal concept of democracy therefore values rights to free speech, assembly, and association.

Another ideal of democracy covers the fair distribution of power. For example, the separation of powers works as a check and balance to ensure power does not become centralized into one branch, party, or individual. Separation of power should not only occur within the government, but should also apply to different parts of the country and different groups of people, for example, businesses, government officers, and civil society. In this respect, an independent judiciary is both a feature of and also a means to monitor this separation of power. Without an independent

judiciary capable of enforcing the rule of law, human rights will be unprotected. However, it is important to note that while human rights are better safeguarded in democracies, they can and should be respected and protected in any political system.

All these ideas of democracy therefore rely on the respect of civil and political rights by the State. As will be discussed below, only when civil and political rights are fully respected and protected are democratic procedures and systems possible. In a strong democracy, governments allow for dissent. Similarly, they should foster, rather than inhibit, the flow of ideas, information, and opinion. Democratic institutions depend on an informed electorate, enabling more pluralistic viewpoints and contrasting perspectives. An uninformed electorate will be unable to fulfil its democratic role to decide what is best for the community and country.

Reflecting the discussion above, in 2002, the UN Commission on Human Rights issued Resolution 2002/46<sup>1</sup> stating that the essential elements of democracy should include:

- Respect for human rights and fundamental freedoms, including freedom of opinion and expression, and freedom of association;
- Access to power and its exercise in accordance with the rule of law;
- The holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people;
- A pluralistic system of political parties and organizations;
- The separation of powers;
- An independent judiciary;
- Transparency and accountability in public administration; and
- A free, independent, and pluralistic media.

#### **14.2.2 Human right to democracy**

Democracy and human rights are both based on the recognition of individuals as sovereign agents having liberty and integrity with access to equal representation and participation in a governing system that is accountable. Thus, human rights and democracy are interdependent and mutually reinforcing; civil and political rights lead to a more democratic society under which people's rights are mostly improved. Many principles of human rights are also vital to democracy such as the rule of law, participation, equality, and self-determination. Accordingly, in many ways, human rights and democratization can be said to share similar goals.

Democracy is considered the most suitable system to protect human rights because it ensures voices are heard and diverse interests are represented in the political system. This implies individuals know their needs, concerns, and values best and that participation and representation will prevent those in power from imposing their will on the masses. In addition, the presence of opposing voices in a political process ensures that no one person or group can control the agenda because when voices are silenced and people are unrepresented, repression and oppression of human rights is often the result.

Although a clear relationship exists between human rights and democracy, this does not mean there is a human right to democracy. The 1993 Vienna Declaration and Programme of Action<sup>2</sup>

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<sup>1</sup> Available to download at [ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2002-46.doc](https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2002-46.doc), accessed on 14 October 2023.

<sup>2</sup> Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>, accessed on 13 October 2023.

(VDPA) recognized the interdependent and mutual reinforcement of human rights and fundamental freedoms when it stated in Art 8 that:

*The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.*

The importance of democracy is particularly underscored, especially to developing countries, noting that the process of democratization should be supported by the international community through developmental assistance, and that the UN, civil society, and other organizations need to support democratization throughout the world. Nevertheless, democracy was still not presented as a human right that should be guaranteed to everyone.

In 1999, the United Nations Commission on Human Rights adopted Resolution 1999/57 on the “Promotion of the right to democracy.”<sup>3</sup> This was the only time UN human rights mechanisms specifically endorsed the right to democracy. Notwithstanding, the Resolution still does not affirm the right to democracy but only the “rights of democratic governance” which include civil and political rights as guaranteed in the International Covenant on Civil and Political Rights (ICCPR) like freedom of thought and expression, the rights to peaceful assembly, information, universal and equal suffrage, and the right to political participation. The Resolution also refers to transparent and accountable government institutions and “the right of citizens to choose their governmental system through constitutional or other democratic means.” Other documents simply refer to civil and political rights as necessary State processes.

In other words, international human rights standards have yet to recognize a human right to democracy. There is no legal obligation for States to respect, protect, and fulfil democracy, but only to guarantee the rights necessary for democratic governance. As seen in international human rights laws, the term “democratic society” is used when noting that reasonable limitations of rights are ones acceptable to a democratic society. This implies that democratic governance is a minimum threshold regarding the exercise (and limitation) of rights.

### **14.3 Civil and Political Rights as the Foundation for Democracy**

Human rights and democracy are seen as interdependent and mutually reinforcing as democracy depends on the existence of human rights and vice versa. As such, States cannot propose to have human rights unless they also support democracy. This goes beyond discussions on civil and political rights as economic and cultural rights are likewise part of democratic governance. Civil and political rights provide the means to ensure accountability and the responsibility of those in power, allowing people to defend and speak up for their rights. Similarly, a failure of democracy also occurs if a group’s economic or cultural rights go unprotected. When democratic institutions fail, this undermines both civil and political rights, and economic, social and cultural rights. On the other hand, by guaranteeing human rights, individuals can engage in the democratic process more meaningfully as informed citizens. Leaving minority groups out of democratic processes, however, undermines other human rights. Only with a democratic voice will people be able to articulate the rights they need and desire. For example, throughout Southeast Asia, many politically marginalized groups are also marginalized socio-economically, so guaranteeing their civil and political rights would enable them to engage and participate in the political process to advocate for their rights, as witnessed by many regional grassroots movements campaigning for livelihood rights.

While often grouped together, the history of civil and political rights differs and implies a different but related set of individual rights in relation to the State. Always perceived as the first generation

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<sup>3</sup> Available to download at [https://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=4670](https://ap.ohchr.org/documents/alldocs.aspx?doc_id=4670), accessed on 13 October 2023.

of rights, civil rights emerged in the 18<sup>th</sup> century when individuals were seen as independent citizens whose personhood should be free from and protected by the sovereign State. Later, when such rights extended to include new groups in the political system during the 19<sup>th</sup> century, political rights emerged. Parliaments and national and local governments were the institutions allowing people to exercise ‘the will of the people,’ a concept that emerged during the 18<sup>th</sup> century European Enlightenment and still forms the basis of political rights and democracy today. The third generation of rights (social and economic rights) were conceived in the 20<sup>th</sup> century and cover welfare rights and the struggle for equality and equal access to resources and opportunities.

Political rights are a small but vital category of rights grounded by the notions that (1) the system is chosen by the people, and (2) any political system, whether democratic, communist, monarchic, or religious, must recognize that people have a right to express their political views and participate in political activities. Democratic rotation to government offices, freedom of speech, press freedom, the right to assembly, rights to political participation, to meet, discuss and publicly express political views, to vote, use government services, or stand for public office, are among the political rights that should be exercised as a check and balance to State power.

Most human rights require being physically present in a State’s territory, but political rights are slightly different. Some political rights only apply to citizens, such as the right to take part in public affairs or to vote. Non-citizens cannot vote in the elections of another country, nor can they become politicians there. This does not mean non-citizens lose their political rights, but that they only hold such rights in their country of citizenship. Whether citizens can use their political rights outside the territory of their country of citizenship depends on whether overseas voting is allowed. The next section discusses key civil and political rights.

#### **14.3.1 Freedom of expression**

Article 19 of the ICCPR outlining freedom of expression is one of the more famous human rights. It has a long history, with earlier versions appearing in the US Constitution and the French Declaration of the Rights of Man. It also appears in many constitutions around the world. Freedom of expression is in Art 19 of both the Universal Declaration of Human Rights (UDHR) and the ICCPR. The UDHR simply states:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.*

Though the UDHR clearly outlines the right, ambiguity still exists as to its elements. First, opinions and expressions are considered distinct in this article but no clarity is provided as to the meaning of either. Further, nothing is said on the limitations to this right although Art 29 of the UDHR clearly states that all rights have their limits. In the process of codifying this right into the legally-binding ICCPR, modifications were made, fixing some of these concerns. The first two sub-paragraphs detailing the elements of the right, assert:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

At the regional level, the 2012 ASEAN Human Rights Declaration contains a similar provision albeit leaving out the “regardless of frontiers” part. Thus, Art 23 states that:

*Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.*

In the ICCPR, freedom of opinion is now distinct from freedom of expression. The ability to interfere with someone's opinion, or forcing people to change opinion, is difficult as they concern private thought processes. It is only when opinions are given expression that rights are violated. Article 19(2) outlines the main elements of freedom of expression: that people have a freedom to express, and also a right to seek, receive and impart information, none of which should be limited by one's mode of expression.

Freedom of expression can be divided into three rights: to seek, to receive, and to impart information. The right to seek information implies States should not prevent people from accessing available information. This could be as simple as offering access to libraries, newspapers, books, radio, television, or the internet. Information about government services is also something people should have access to, including how to obtain a driver's license, vote, or start a business. However, there are usually limitations on accessing private and secret information. This right obligates States to not interfere with people accessing information. Blocking the media, censoring the internet, or banning radio or television channels could be seen as violations of this right.

The right to receive information implies a right to receive certain types of information, for example, warnings about the weather if a cyclone is coming, or health information to help people avoid diseases, or details on development projects that would impact livelihoods. Such rights could also include political information enabling people to know when and how to vote, or receiving information about their political choices. Some Southeast Asian countries adopt specific rights to information to enforce such rights, for example, the Public Information Disclosure Act in Indonesia, the Right to Information Act in Thailand, and the Philippines Executive Order No 2 (2016). Other countries have chosen to only define information that cannot be accessed, for example, Malaysia's Official Secrets Act (1972) defines classified information that cannot be accessed for whatever reason, while States such as Singapore simply offer constitutional guarantees to freedom of expression and the right to information without adopting specific laws to enforce it.

But what are States obligated to tell people? Much debate exists on what kind of information States should make available to the public. One example is sex education. For some, sex education is a reproductive right, but the religious and moral values of some countries may prohibit teaching people about sex. Another example can be found in the field of healthcare. Should people be informed about healthy and unhealthy activities? Should governments inform people that sugary drinks are bad for their health? Such debates reflect the contention between freedom of choice, public interest, public order, and government obligations.

The last element is the right to impart information, which basically refers to freedom of expression. This allows people to express anything, whether ideas, views, or simply engaging in conversation. The right to impart information mainly implies negative duties on States (or the duty not to interfere); positive duties include educating people enough to express their views, for example, by teaching people how to read and write. States should also provide venues where people can talk, for example, by having a media that allows for public participation, or even public spaces where people can express themselves. Expression can take many forms beyond writing and speaking. Art is a form of expression, as is film, dance, theatre, music, and dress.

Freedom of expression may be limited by the State, and is often restricted on grounds of politics and morality. Legitimate restriction of freedom of expression requires that three criteria must be met. First, limitations must be written in the law and cannot be based simply on a person's or a

State's opinion or belief. Second, there must be a valid reason for the law beyond personal or State preference. In other words, the law must serve a purpose in society. Third, these necessary limits must be for one of five reasons:

- *To ensure the rights of others:* Expression cannot interfere with someone's privacy or publicly defame them. People cannot talk or write about others if it damages their image (for example, by wrongly calling them a criminal).
- *To protect national security:* State secrets and peace in society must be maintained. As such, treasonous speech is prohibited (for example, by calling for the violent overthrow of a government).
- *To maintain public order:* Expression cannot incite people to disorder or threaten the safety of others (for example, by asking people to riot).
- *To maintain public health:* Spreading information that may create health problems is prohibited (for example, by claiming that sleeping with a virgin will cure HIV/AIDs).
- *To maintain public morals:* Laws on morality must be respected (for example, by prohibiting the distribution of pornography).

These limitations are based on the rule of law and prevent States from arbitrarily limiting expression – they also cannot be applied discriminatorily. These limitations also apply to other rights such as association, assembly, and movement.

Every country in Southeast Asia has debated freedom of expression and has limited it through the use of libel, defamation, slander, treason, pornography and other indecency laws, intellectual property and copyright, blasphemy, computer crime acts, and national secrecy acts, among others. One of the most draconian laws challenging freedom of expression can be found in Thailand's lèse-majesté laws. Article 112 of the Thai penal code criminalizes "Whoever defames, insults, or threatens the King, the Queen, the Heir-apparent, or the Regent" and is often interpreted to cover ranges of political comments and critiques of the government. Such laws have existed in many monarchies around the world, but most have fallen out of use or been repealed, as in England and Japan. In Thailand, however, it has been used rigorously especially since the 2000s to silence the opposition. Since the rise of pro-democracy movements in 2020, at least 257 individuals have been charged under the lèse-majesté law in 278 cases. Insulting the monarchy in Thailand has resulted in jail sentences of over 30 years, even though the law states a maximum penalty of only 15 years.

Similarly, Malaysia's sedition laws have been used against political opponents, or even people merely expressing political opinions which were interpreted as critical of the government. The law bans any act, speech, or publication that brings contempt against the government or Malaysia's nine royal sultans, and prohibits people from inciting hatred between different races and religions, or questioning the special position of the ethnic Malay majority and the natives of Sabah and Sarawak. Similar laws can be found in Vietnam where Art 88 of the Penal Code makes it a crime of "conducting propaganda against the Socialist Republic of Vietnam." Propaganda is often defined broadly as can be seen by the number of bloggers and political commentators who have been jailed.

Another tactic to limit freedom of expression in the region is the use of defamation laws by States, companies, and individuals. This is more prevalent in cases where public comments are made to protect human rights or to check and balance the power of the authorities/businesses. In particular, there has been an increase in cases of so-called 'strategic lawsuits against public participation' or SLAPP in the region. Recent cases include a woman in Indonesia complaining about bad hospital service who was sued by the hospital (the charges were eventually dropped); Thai human rights defenders who were sued by a Thai mining company for alleging human rights violations; and trade union members, workers, human rights defenders, and media who were sued by a chicken

farming company for reporting about alleged labour rights violations in Thailand.<sup>4</sup> Governments also use defamation to silence critics. For example, an author of a book on the death penalty in Singapore was charged with criminal defamation because the book claimed that in some cases, the courts were not free and fair.<sup>5</sup> In another case, three human rights activists were sued by the Royal Thai Army for reporting about alleged torture cases.<sup>6</sup>

In a number of countries such as Singapore, Malaysia, and Thailand, defamation is a criminal offence subject to jail time as opposed to civil cases where the guilty are mostly fined. In General Comment No 34, the Human Rights Committee has observed that defamation should not stifle freedom of expression and that defamation cases should be heard in civil court. Such an argument was directly pointed out to the Philippines in 2012 when an individual complaint was made to the Human Rights Committee (the treaty body of the ICCPR) by a journalist who was jailed for two years for writing a story about an alleged adulterous politician.<sup>7</sup> Generally speaking, the use of defamation, libel, or slander has been an effective economic measure to silence the media. These cases can result in awards of huge amounts of money, effectively bankrupting media organizations. The use of defamation by companies is worrisome because it can limit people's rights to express their views about the quality of service or the activities of companies, effectively limiting consumer rights.

### **Reflection and Discussion: Limitations of Freedom of Expression and Fake News**

It is generally accepted that freedom of expression has its limits. Even though censorship is controversial, many consider it necessary to protect groups such as children from violent and sexually explicit material. Similarly, others believe speech which may insult or incite violence should be prohibited. The challenge is where to draw the line between the artistic or political and something which is considered pornographic or dangerous. These are noted as "special duties and responsibilities" in Art 19(3) of the ICCPR.

*19(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

- (a) For respect of the rights or reputations of others;*
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

<sup>4</sup> See the report, Strategic Lawsuits Against Public Participation: Southeast Asia cases & recommendations for governments, businesses & civil society. (2020). In *Business & Human Rights Resource Centre*. <https://www.business-humanrights.org/en/from-us/briefings/strategic-lawsuits-against-public-participation-southeast-asia-cases-recommendations-for-governments-businesses-civil-society/>

<sup>5</sup> *Singapore: Must release British author of death penalty book*. (2010, July 19). Amnesty International. <https://www.amnestyusa.org/press-releases/singapore-must-release-british-author-of-death-penalty-book-2-2/>

<sup>6</sup> *Thailand: Amnesty International Thailand's Chair and other activists face jail for exposing torture*. (2016, July 26). Amnesty International. <https://www.amnesty.org/en/latest/press-release/2016/07/drop-complaint-against-ai-thailand-chair/>

<sup>7</sup> Manek, N. (2012, February 7). *Prison time for libel infringes human rights, UNHRC decides*. The Bureau of Investigative Journalism. <https://www.thebureauinvestigates.com/blog/2012-02-07/prison-time-for-libel-infringes-human-rights-unhrc-decides/>

What are legitimate grounds for the limitation of freedom of expression, in particular, in light of a State's attempts to restrict freedom of expression as discussed above? Should the government control fake news to ensure information is publicized with responsibility? If so, how can we ensure that freedom of expression is not unduly limited? These are among some of the key controversies around freedom of expression.

Apart from the debates on what constitutes public order or national security, public morals is another area leaving room for interpretation which often leads to restriction of rights by the dominant views in society. Across Southeast Asia, the production and sale of pornography is illegal. While it is generally accepted that child pornography must be banned, debate is ongoing as to whether pornography is permissible with consent. Many countries in Southeast Asia have pornography laws, mainly on sale and distribution, and on personal use (personal use is criminalized in Malaysia). There are few, if any, cases of people being jailed for pornography, although seizures of pornographic movies are common perhaps due to copyright or illegal sales issues and not necessarily due to content. The strongest pornography laws can be found in Indonesia where the Bill on Pornography was passed in 2008 (a modified version of the 2006 Bill against Pornography and Porno-Action). While many harsher provisions of the 2006 version were dropped, the law still criminalizes a wide range of activities. Debate over this bill was heated because it can be used to criminalize fairly innocuous activities which most people do not consider pornography, such as kissing in public or dancing in a nightclub. The debate mainly took place between conservative religious groups who supported the bill and wanted stricter moral standards in society, and women's groups, artists, and supporters of freedom of expression. The concerns were not so much about 'hardcore' pornography which may be downloaded from the internet, but about social activities such as dress and dancing. The concept of "porno-action" which remains in the Bill, expands the definition of pornography from media and images to behaviour. Cases on this law include the imprisonment of the editor of Playboy (who was released on appeal), the arrest of four night club dancers, the raid of a gay party, and the arrest of men engaging in "deviant sexual acts."

Examining the limitations which a State can put on freedom of expression, it is questionable if such a law is needed. While the State justifies it as necessary to protect public morals, it does not represent the standards of morals for society in general, but only for a smaller group of religious conservatives. Taking the Indonesian case above, a human right to pornography cannot be argued, yet there is a right not to be treated as a criminal just because one's clothes or behaviour are not considered acceptable by a religious group.

Another controversy around freedom of expression is whether the right covers only the expression of truths. Should there be controls over the dissemination of fake news? What if the fake news does not affect public health or public order, should it still be controlled and penalized? What then is the 'truth' that should be allowed? How can we ensure that the authorities do not use this to speak their truth as the only truth?

In 2019, Singapore passed a law that criminalized posting or failing to correct "online falsehoods" that harm the public interest. Similarly, during the COVID-19 pandemic in 2021, the Malaysian government issued the Emergency (Essential Powers) (No 2) Ordinance under the Proclamation of Emergency which makes it a criminal offence to create, publish, or disseminate "fake news" relating to COVID-19 or the proclamation of emergencies in the country, or to fail to take down such material upon the government's request. Likewise, also in 2021, Indonesia passed Ministerial Regulation No 5 that allows the government to order removal of "prohibited" materials within 24 hours again to combat fake news. These laws and regulations are heavily criticized for giving States tools to restrict freedom of expression through a wide interpretation of the laws.

## Spotlight: Laws Criminalising Anti-government Expression

### **Malaysia's sedition laws**

Sedition is the act of trying to incite a revolution or insurrection. The Malaysian Sedition Act was originally written by its British colonizers but has since been adopted by the Malaysian government. It defines sedition as creating “hatred or contempt or to excite disaffection” against the government. It can also mean to incite race riots, to own a seditious publication, or to excite disaffection against the government. Given the broad nature of these definitions it can be easy for the government to define criticism of the government as sedition, as it has frequently done in recent years. For example, people have been charged for saying “damn UMNO” (the ruling party), or for criticizing a Sultan.

### **Singapore's ISA (Internal Security Act) laws**

Singapore's ISA laws were originally used by the colonial British government to fight the communist insurgency in the 1950s. Although they have been kept and updated as anti-terrorism laws, for much of their history, they have been used to jail political opponents. The ISA allows arrest without a warrant and also permits “preventive detention” or pre-trial detention undermining the right to a fair trial. Around 2,400 people have been arrested under the ISA law – for example in Operation Spectrum, a number of social workers were accused of planning a communist insurgency and arrested in 1987. They claimed they were coerced into signing confessions while in detention.

### **Vietnam's Penal Code, Article 88**

Article 88 of the criminal code prohibits the distribution of “anti-government propaganda” which has been broadly defined as any criticism of government activities. Thus, it has been used to jail government critics, land rights activists, bloggers, pro-democracy activists, and human rights defenders. Similarly, a number of bloggers writing on corruption, environmental damage caused by mining, and Chinese activities in the South China Sea were arrested and jailed for between 5-15 years.

### **14.3.2 Right to peaceful association and assembly (Articles 21 and 22 of the ICCPR)**

The right to associate enables people to form groups which would then allow them to advocate for their own rights. While the main focus is on groups of a political nature (for example, political parties), the right extends to, for instance, student groups, trade unions, and those interested in specific issues such as women's rights.

The right to associate in order to form political parties is contentious in some Southeast Asian countries. For example, in Vietnam and Laos, it may not be legal to form political parties. Although Vietnam's Constitution and law does not explicitly prohibit other political parties, it states in Art 4 that:

*The Communist Party of Vietnam [is] the faithful representative of the interests of the working class, labourers and the whole nation. [It] is the leading force of the State and society.*

Therefore, the Communist Party may be considered the only legitimate form of association in the country.

Similarly, Singapore does not allow unregistered public meetings and can disband parties receiving money from overseas. As can be seen, the trend in Southeast Asia seems to be for States to limit rights to form civil society groups, for example, the Laws of Association and NGOs (2015) in Cambodia, and regulations on the conditions for establishing an association in Vietnam, due to increasing fears about political opposition and vocal dissent.

The right of peaceful assembly means the right to meet publicly in groups. The assembly can take any form such as protests, sit-ins, candle light vigils, and marches, to name but a few. It also includes online gatherings. The main political purpose of this is for people to meet and talk about politics, to protest, or to advocate for specific issues. It also covers non-political meetings such as cultural activities or funerals. This is a derogable right that can be limited during states of public emergency and “in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” The lockdown and restriction of public assembly during the COVID-19 pandemic were some examples of the legitimate derogation of rights in the interests of public health. However, it is debatable whether or not some States exploited the situation to control public demonstrations – for example, Thailand’s state of public emergency was extended until late 2022 when COVID-19 cases in the country were low, partly to control its pro-democracy protest movements. As reported by the Thai Lawyer for Human Rights, more than 1,469 people who participated in the demonstrations were prosecuted for violating public emergency orders during the pandemic.

In Southeast Asia, some States have severely restricted freedom of assembly although not all contravene human rights. Laws which are reasonable and objective enable peaceful assemblies. In practice, these restrictions have severely limited the ability of people to assemble in public. All countries require authorities to be notified beforehand, and many have broad powers to deny such requests. Countries with the strictest regulations in the region are Singapore and Vietnam, where protestors are regularly arrested or jailed. Cases of violent crackdowns of demonstrations also occurred during the 2020-2021 pro-democracy protests in Thailand.<sup>8</sup>

### Reflection and Discussion: Key Controversies

The ICCPR guarantees “the right of *peaceful* assembly” which implies that a violent assembly is not a guaranteed right.<sup>8</sup> Also, this right is always discussed in relation to duties and responsibilities towards public order (or those not participating in demonstrations).

In recent years, the right to assembly has been tested to its limits. For example, in Thailand during the political conflicts of 2008, protesters in Bangkok seized the international airport in 2008, stopping travellers from entering or leaving the country. This caused disruption to tens of thousands of people. Later in 2020-2022, when protesters expressed critical views about the monarchy, they were seen as a threat to national security. So, when protestors close off streets and restrict or deny a person’s ability to travel to work, what should be the balance between exercising one’s right to assembly and public interest? When should an assembly be seen as violent? When is it legitimate for States to restrict a violent assembly?

The nature of the rights should be interpreted in a way to facilitate the exercise of such rights. This applies to how we understand the nature of a “peaceful assembly.” In order to identify the non-violent nature of an assembly, we must first consider the violence originating from the participants. If the violence was committed by State authorities, agents provocateurs, or members of counter-movements, it should not make the assembly non-peaceful. The act of specific participants in an assembly does not make it violent. It should only be deemed violent if by intention or aim, it incites others to use violence.

<sup>8</sup> For more information on this topic, see the Human Rights Committee’s General Comment No 37 (2020) on the right to peaceful assembly (Art 21), CCPR/C/GC/37, 17 September 2020, available at <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-37-article-21-right-peaceful>, accessed on 11 October 2023.

### **14.3.3 Right to take part in public affairs and to access public services (Article 25 of ICCPR)**

This right is expressed in a couple of different ways: the right to stand for office, and to be elected. This is one of the very few rights limited only to citizens. Citizens have a right to be part of an elected government. Taking part in public affairs could include participating in referendums or public assemblies. However, the right to be elected can be subject to reasonable and objective limitations which are common to all countries. Some common limitations include citizenship, age, and residence restrictions. Other limitations are more questionable, such as the need to be a graduate (as was previously the case in Thailand), a member of a political party (Vietnam), follow a certain religion (Brunei), or to be in the military (this applied to 25% of the Myanmar government before the 2021 coup). The question is when are such limitations justified, and when can they be considered discriminatory?

Rights to access public services covers the right to work for the government or to take up a public office. Ideally, these jobs (for example, judges, policemen, government broadcasters, teachers, civil servants, and so on) should be accessible to everyone although the government can introduce reasonable restrictions, for example, by looking at the merits of candidates. Violations may arise if States demand that certain positions only be filled by members of the main political party, or by a particular gender. Most violations in this area occur when people lose government jobs because of their political beliefs.

This right seeks to prevent elite groups from controlling jobs in public service because government employees should be representative of the society they work for, avoiding the exclusion of, for example, minorities or indigenous groups (who are rarely government officers). Countries like India have attempted to remedy such discrepancies by reserving some public service positions for people from scheduled castes and tribes, or the most marginalized groups.

### **14.3.4 Right to vote (Article 30 of ICCPR)**

Fundamental to democracy is the assumption that governments serve the people and that people should be able to choose how they want to be governed, resulting in governments that represent the ‘will of the people,’ a term originating from the European Enlightenment but which has since been picked up and used around the world. The ‘will’ is therefore based on the well-known and vital political right, the right to vote and the right to be elected through a voting system. However, the right to vote is interpreted differently by States due to the great variety of political systems – in some cases, this right fails to specify which positions should be up for election such as head of State. However, politicians in legislatures are mostly voted in.

Moreover, the right to vote requires that voting be “genuine” meaning voting should be done at a free and fair election that is actually competitive. The process is detailed in the ICCPR as (emphasis added):

*To vote and to be elected at **genuine periodic** elections which shall be by **universal and equal suffrage** and shall be held by **secret ballot**, guaranteeing the **free expression of the will of the electors**[.]*

The procedure has a number of elements. First, elections must be periodic in that they should occur at regular intervals. While no timescale is given, most countries hold elections every 3-6 years. The election must be genuine, meaning the results must reflect the will of the people. This implies candidates should be able to freely compete for posts and people can freely express their political choices. Non-genuine elections occur when there is no real opposition or when the opposition has no opportunity to gain power. Rules governing the right to vote (or suffrage) should be based on every person getting a vote (or universal suffrage) with reasonable limitations such as age and citizenship. Further, each person’s vote should be counted equally, preventing some from gaining more than one vote or having more influence. Finally, voting should be secret to keep

political views private and to keep the voter safe from repercussions for voting a particular way. For example, wives should be able to vote separately from their husbands, or villagers from their village leaders, so they both have a free choice and will not be coerced to vote a specific way. Voting rights can be compromised when elections are considered unfair due to discrimination and restrictions on the right to vote. Elections may be deemed unfree if officials withhold information from the people, arrest and silence opposition groups, and manipulate conditions.

While there have been elections in most Southeast Asian countries since the 1940s, many were not fully representative, especially during the period of colonialism. The election systems in some Southeast Asian countries raise the question whether they are genuine and represent the will of the people. For example, in Vietnam and Laos, the president and prime minister are elected by the National Assembly respectively. But assembly elections are controlled by the communist party of the country which vets every candidate before they can run for a post. As a result, there is no genuine competition from the opposition or independent candidates. In Brunei, no direct legislative elections have taken place since 1962 as the Sultan appoints the Legislative Council. For elections of village-level councils, all candidates must be vetted by the government, thereby raising independence issues. In some countries, not all politicians are elected as governments frequently reserve seats for special groups. For example, Myanmar's elections under the 2008 Constitution reserved 25% of parliamentary seats for the military. Under most of its constitutions, Thailand does not allow the public election of senators and recruits most through appointments. Further, elections under dictatorships (for example, in Indonesia, Thailand, and the Philippines from the 1960s to the 1980s) are rarely free and fair. Hence, the famous People's Power movement in the Philippines that initiated protests against an election rigged by President Marcos. Likewise, Indonesian elections from the 1960s to the 1980s were widely recognized as seriously flawed as there was no freedom of association or expression, criticism of the government was banned, opposition parties were banned or forced to merge, and some voters, such as government officers, were pressured to vote for the ruling party. While all States place limitations on voting rights, usually relating to age and citizenship, debate is ongoing in many countries as to whether people living overseas, prisoners, or Buddhist monks should be able to vote.

## **14.5 Democracy and Human Rights in Southeast Asia**

Democracy in the region is a fairly recent trend and is still a contentious concept. While there have been democracies and elections from the 1940s, it was not until the People's Power protests of the 1980s and 1990s in the Philippines, Indonesia, and Thailand that democracy became established in most Southeast Asian countries. But the governments which called themselves democratic did not necessarily improve human rights in their countries, nor did they respect full democratic principles. For a start, some were not actually democratic despite claims to the contrary. Second, the process of democratization can be difficult and at times may experience violent disruption. During the transition from military dictatorship to different political forces competing in elections, a country may experience a period of protests demanding change or conflict between the incumbent and new political actors.

To begin with, the change to democratic regime was rapid. Southeast Asia went from two democracies in the mid-1980s to seven in the early 2000s. In other regions, democratization moved at a much slower pace. Most of the democratic shift in Southeast Asia was led by mass movements of people, for example, the People's Power in the Philippines in 1986 to protest against State violence and election fraud, mass demonstrations against the military government in Thailand's Black May event of 1992, and the protests against dictatorial rule in Indonesia in 1998.

Considering the state of democracy and freedom, Southeast Asia is far from being democratic. From 2010 onwards, the state of democracy in the region can even be said to be in decline, both in terms of procedural democracy where coups took power and moved countries to military rule (Thailand during 2006-2009 and 2014-2019; Myanmar from 2021) and in terms of substantive democracy where rights and liberties were further restricted (particularly in the Philippines and Cambodia,

and to a certain extent, Indonesia). For most of the region's recent political history, only countries such as the Philippines, East Timor, and Indonesia may be considered *liberal democracies* where no political force including the military has privileged access to power. In these cases, political participation goes beyond regular elections and there are checks and balances to government power, including the rule of law. That said, during President Rodrigo Duterte's rule (2016-2022), the Philippines experienced a human rights setback as evidenced by increased unlawful killings in his "war on drugs" and attacks on freedom of expression. This puts the Philippine's status of liberal democracy into question.

Formally, Singapore and Malaysia adopted democratic institutions and processes and could have been considered *electoral democracies* with regular elections where parties and candidates competed for power – however, popular participation has mostly been limited to elections. In electoral democracies, also called formal or procedural democracies, elections themselves are no guarantee of democracy. Myanmar during the 2010s, before the 2021 military coup can be seen in this category where an elected government rules a country without full control, especially as in this case, the military preserved 25% of the parliamentary seats. States where elections are conducted but the regime is more authoritarian in nature despite adopting formal democratic institutions and processes (such as the Cambodian People's Party which has single control and suppresses opposition voices in the country) may be called pseudo-democracies. Thus, Vietnam and Laos, which are still under single party communist rule, are non-oppositional authoritarian regimes. As such, there is limited popular participation in politics and no strong opposition movement. In other words, while such regimes may have an appearance of democratic institutions and processes, they lack the building blocks of even minimal democracies such as independent opposition parties. Brunei Darussalam, which remains an absolute monarchy, also falls under this category.

Notwithstanding the above, some promising changes have occurred at the regional level. During their 13<sup>th</sup> Summit in Singapore (2007), ASEAN countries adopted the ASEAN Charter which explicitly established democracy as a principle, even stating that one of its purposes was to promote democracy. The adoption of the Charter can be seen as a radical shift in ASEAN's position. While ASEAN countries have tended to be hostile towards democracy, the adoption of the Charter acknowledges that ASEAN is a collective based on the principle of democracy. Despite their accommodation to this principle, most Southeast Asian States still find democracy a challenge to reach.

#### **14.5.1 Southeast Asian versions of democracy**

Despite the seeming acceptance of democratic forms of government, democracy is still a contested concept in Southeast Asia. The current view that democracy is the best method of government only occurred after a long process of democratization which took place both at the domestic level, where people fought for their political rights, and the international level where other States and international organizations pressured or encouraged Southeast Asian governments to become democratic. Also, the process of democratization has been applauded by the international community including States and international organizations. Indeed, the international community has been very keen to provide support to democratizing countries in the form of aid, political and economic relations, and even military assistance. As an example, Cambodia after the Khmer Rouge and Myanmar during political transitions in the 2010s, have attracted a lot of support and aid as a result of their democratization. Further, most countries in the world associate themselves with democracy as a source of their legitimacy – even North Korea calls itself the Democratic People's Republic of Korea. This is possible because democracy has no single meaning and few, if any, countries openly reject democracy because all want to be seen as working in the interests of its people. Such tendencies, however, emerged along with objections to substantive democracy and human rights.

Southeast Asia has witnessed a number of attempts to redefine democracy to, allegedly, fit better its local needs and context. For example, the idea of “Guided Democracy” has been used in Indonesia from 1959 until the New Order in 1966 to justify restricting rights and liberties and public participation in the name of political stability. Those in power have argued that democracies must be guided to avoid conflict and chaos. Similar attempts include the assertion that democracy must be determined by local contexts or systems of governance. The Myanmar government used the term “Roadmap to Democracy” to justify delaying handing over power to democratic forces, insisting that seven steps be achieved first. Announced in 2003, the steps included activities like holding a national convention, writing a constitution, and holding an election. The roadmap was used to justify the continuing rule of the military government. Despite completion of the seven steps, as of 2015 the military has still not fully left the government. Similarly, since the 1950s, the military and a number of Thai political leaders argued for “Thai-style democracy” which emphasizes what is perceived as inherent Thai culture, such as order, unity, and morality, instead of democratic principles like equality, human rights, and participation.

## 14.6 Conclusion

Human rights and democracy, two concepts widely accepted in international politics, still struggle to find their place in Southeast Asia. Civil and political rights form the foundation of a democratic regime as they allow people to be protected from the State and to have access to the government. Democracy, on the other hand, guarantees that governments will respect the human rights of its people. The discussion about civil/political rights and democracy has always been subject to debate about their limitations in line with a State’s permitted concepts of public order, national security, or its understanding of public morals.

This chapter discussed the principles of civil and political rights by referring to international standards. It also put the discussion in the context of Southeast Asia to show the contentious nature of the concepts. Underlining this discussion is the implication that despite the controversies, people in the region have long recognized and struggled for democracy which led to democratic transition in many countries.

### A. Chapter Summary and Key Points

Democracy is about the relationship between a State and its citizens and concerns the commitment a State has to its citizens in the form of a social contract (whereby individuals from different groups equally elect a government which will then work towards the interests of the people). The people will also have the right to participate in and monitor the performance of the State.

Electoral democracies focus on the existence of elections as a process to recruit representatives of people to rule. As witnessed in many countries, however, elections alone do not make a country democratic. Discussion about democracy should also take into account, for example, its substantive aspects which include respect for human rights and meaningful popular participation.

Human rights and democracy are interdependent and mutually reinforcing. Civil rights protect the population from unwarranted State intervention. Political rights allow access to the State and its government apparatus which, in turn, makes democracy possible as such participation ensures the government represents the will of the people.

Debates on democracy in Southeast Asia reflect cultural relativism with respect to human rights. Often seen as a Western idea, democracy is sometimes questioned as to its suitability in the Southeast Asian context. This has led to a faltering democratization process in the region with the process either going into direct decline or being interpreted in a way that fails to promote the rights of the people.

## B. Typical Exam or Essay Questions

### Individual Study Questions

- What is the state of democracy in your country? Who are the key actors in bringing about democratic change and what are the challenges they face?
- How free are the people in your country to associate and assemble? Do laws and regulations control the exercise of these rights? Do you think these controls are legitimate?
- Looking at the democratization process in your country and in the region, who were the key actors in bringing about change? What human rights were promoted during this process?

### Group Discussion Questions

- Can human rights be fully protected in political regimes other than democracy? Discuss what is needed for a regime to guarantee human rights and whether that is possible in other regime types.
- Do you agree that everyone should be equally protected and enjoy equal participation in public affairs? Are there any groups you think should not be allowed to participate in politics equally? How about criminals, the uneducated, or the corrupt?
- Should there be limits on freedom of expression and the right to peaceful assembly? Exchange cases you know about and discuss whether limitations are needed and what implications (if any) these have on democracy.

## C. Further Reading

Diamond, L, 'Democratic regression in comparative perspective: Scope, methods, and causes' *Democratization*, 2021, Vol 28, No 1, pp 22-42.

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Matthews, T, 'To be equal and free: The nexus between human rights and democracy' Heinrich Boll Stiftung, 2019, available at [https://eu.boell.org/sites/default/files/2019-12/E-Paper\\_Human\\_Rights\\_and\\_Democracy.pdf](https://eu.boell.org/sites/default/files/2019-12/E-Paper_Human_Rights_and_Democracy.pdf), accessed on 11 October 2023.

Mietzner, M, *Democratic Deconsolidation in Southeast Asia. Elements in Politics and Society in Southeast Asia*, Cambridge: Cambridge University Press, 2021.

Nowak, M, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 1993.

Schmitter, PC, and Karl, TL, 'What democracy is ... and is not' *Journal of Democracy*, 1991, Vol 2, No 3, pp 75-88.

Sørensen, G, *Democracy and Democratization: Processes and Prospects in a Changing World*, 3<sup>rd</sup> ed, Boulder, CO: Westview Press, 2008, pp xiii-xiv, 1-78.

Tilly, C, *Democracy*, Cambridge: Cambridge University Press, 2007.

### Online Resources

Freedom House is an NGO that promotes democracy and monitors the state of political and economic freedom in countries around the world. It also publishes reports such as 'Freedom in the World.' It is available at <https://freedomhouse.org/explore-the-map?type=fiw&year=2023&mapview=trend>, accessed on 11 October 2023.

For a brief overview of democracy (including some valuable resources), see 'Democracy' United Nations, available at <https://www.un.org/en/global-issues/democracy#:~:text=Democracy%20in%20the%20founding%20documents%20of%20the%20United%20Nations&text=The%20UN%20does%20not%20advocate,equality%2C%20security%20and%20human%20development>, accessed on 11 October 2023.

# Chapter 15

## Human Rights in Southeast Asian History\*

### Reader's Guide

It is difficult to point to one simple and undisputed history of human rights in Southeast Asia. This chapter attempts to examine the increasing influence of human rights in Southeast Asia by first analysing how people have risen to assert their rights against colonizers, dictators, and other oppressive forces, and second, by detailing how States were compelled to take note of human rights, sometimes reluctantly, in response to demands by civil society and international bodies.

### 15.1 Introduction

Two debates on the history of human rights prevail. The first concerns historiography and questions how history is written, particularly whether it is more apt to propose a straightforward narrative or a range of views. Should this story have one start point and a single narrative? Is it a simple tale of a set of rights and freedoms gradually becoming accepted in the region until a norm was reached? Or is a single narrative too simplistic? The second debate asks what such a history should include. More detail-oriented, this concerns the events, people, and organizations that played a role in the

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rise of human rights. While this chapter focuses more on the latter and will therefore detail the relevant periods and events, the first debate on how history should be written will also be referred to.

A major issue in this historiography concerns the question, how does such a history understand the meaning of ‘human rights’? The three ways to approach this debate are:

- Human rights refers to a set of ideas advocating the dignified treatment of people, a concept that already existed in religions and other social or moral values. This associates the spread of human rights with the rise of religions and the development of communities organized around shared values. Those supporting this idea see human rights as emergent with the spread of Buddhism, Hinduism, and later, Islam and Christianity, linking it to the establishment of religious rules and principles. Under this approach, human rights can be said to have always existed in the region.
- Human rights refers to all the ways people are protected from the power of the State, and encompasses the means to restrict that power. This viewpoint associates human rights with the rise of States and the various declarations and constitutions on the rights of man emerging primarily from the European Enlightenment of the 1700s. As such, human rights cannot be said to have existed before the States themselves were formed because their primary purpose is to limit State power. Under this approach, human rights in the region began following protests against abuses of colonial power, and morphed into self-determination movements which used the idea of rights to argue for independence, before finally becoming the constitutions and other mechanisms which now define State duties and obligations.
- Human rights refers to a universal standard of protection above and beyond the State. This viewpoint associates rights with the adoption of the Universal Declaration of Human Rights (UDHR) at the United Nations (UN) in 1948. Here, the meaning comprises a set of rights for all humans, regardless of States, religions, or pre-existing moral values. As such, human rights cannot be said to have emerged without a concurrent belief that humans, regardless of their status, also have inherent rights. Under this approach, rights are enforced through international systems (especially the UN) and its laws.

The content of human rights engenders further debates. For example, should history outline popular movements against the State - how they defied dictatorships, formed democracies, and used protest to ensure the protection of people’s rights? Or should it focus on how international laws on human rights influenced States and forced behaviour change? Or perhaps the emphasis should be on how human rights operated alongside political, economic, and social development in the region? Who or what had the most influence on Southeast Asian human rights? Was it civil society movements, government activity or economic development? Such a history can be written in a number of different ways and because there is no one correct answer to these questions, this chapter will examine a range rather than a single history of human rights.

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

### **Reflection and Discussion: What does the history of human rights entail?**

For some historians, human rights can be traced to the European Enlightenment when the concepts of equality and dignity first gained serious traction. However, others noted such rights were not universal – for example, slavery still existed and most women were excluded from what were then seen as ‘men’s rights.’ Still others pinpointed their origin to the establishment of the UN and the idea of universal rights as espoused by the UDHR, which assumed human rights were universal and inherent, and which prohibited States from selectively applying such rights. More recently, Samuel Moyné (see Further Reading) argued that the rights movement was not recognised until as late as the 1970s because prior to this period, the idea had been discussed but not taken seriously. Only in the 1970s did civil society use human rights in advocacy and States began to accept they were deserving of universal protection.

How do you understand the history of human rights? Which dates do you consider significant? When did individuals begin to receive protection from the powers of the State? When did the world start to take human rights seriously? Finally, when did people begin to realize they should treat each other with respect, an idea already found in major religions?

## **15.2 The Pre-Colonial History of Human Rights**

Some concepts of rights existed in all periods of history throughout Southeast Asia. Although hardly universal, believers of religious or political ideologies were governed by their edicts. Another relevant factor was the great diversity of political units found in pre-colonial times. While the world today consists almost entirely of Nation States, in pre-colonial Southeast Asia, political units ranged from monarchies and sultanates to tribes, merchant city-States, and ethnic groups, etc. Relations between ruler and subject differed from system to system, making it difficult to define a single, or even dominant, equivalent to human rights. By modern standards, the era of sultanates, kingdoms, tribes, and colonies was brutal: slavery was common; equality between genders or classes was practically unheard of; kingdoms could literally assert ownership over people and land, freely enslave individuals, and extract steep taxes from the rural poor. In addition, most political units were deeply patriarchal. As previously mentioned, although by current standards these systems are not considered fair and just, one could argue they were in the context of the moral and legal systems of the time.

One particular challenge to writing a history of human rights lies in this relative nature of morality. Should historians equate all moral values to current standards thereby reaching the inevitable conclusion that earlier societies were unjust and discriminatory? Or are morals relative to time and place? Is it accurate to harshly judge historical acts of mistreatment such as slave ownership, or should these actions be considered acceptable under the moral code of the time?

## **Reflection and Discussion: How was pre-colonial history taught at your school?**

History is usually told from the viewpoint of the powerful and often fails to mention the condition of people working in the fields or the poor. In your primary and high schools, were ordinary people ever mentioned in textbooks at all? Was pre-colonial history taught as a period of peace and happiness? Did textbooks imply people had rights in this period?

How should topics like slavery be taught in history? Now seen as a serious and morally abhorrent crime, slavery was clearly legal in the 18th century and just another form of ownership, perhaps even equivalent to owning a car nowadays. Should history describe slave owners as law abiding citizens adhering to the legal and social standards of the time, or as 'evil' people who viewed human life as property?

## **15.3 From Colonialism to Self-Determination**

### **15.3.1 Colonialism**

European colonialism fundamentally changed the social and political structure of Southeast Asia, but again, it is too simple to regard it as a heinous political and economic phenomenon that enslaved millions. Under colonial rule, individuals enjoyed some rights, although admittedly, the type and scope of these were determined by colonial companies or governments in faraway empires. Moreover, colonial laws were premised on the assumption that local populations were undeserving of the same rights and protection as their colonizers. However, the most searing indictment of colonialism lies in its main function – to garner goods and almost unimaginable profit to Western empires which, they believed, could only be achieved by exploiting local resources and labour. As a result, colonialism frequently led to economic difficulties in Southeast Asian societies where markets and trade routes were acquired by force if necessary. Only a few groups, including hill tribes or communities distant from colonial centres, were able to avoid at least some of these problems.

### **Key Term: Colonialism**

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

In much of Southeast Asia, colonialism constituted a move from local to foreign domination, rather than from freedom to servitude. While the negative impacts were severe and had long-term repercussions, at the same time, as mentioned above, some positive developments did occur. The rule of law was introduced, albeit not to current day standards. Likewise, although the struggle for equal rights was still strewn with barriers, some women's rights were established. Developments in technology, such as medicine and telegraphs, led to better healthcare and improved communications which connected Southeast Asia to the world. Further, the establishment of governments and bureaucracies led to more humane treatment. For example, the introduction of jails across the region resulted in less frequent use of the death penalty and corporal punishment. Nevertheless, such advances cannot be regarded as early versions of human rights because they were not based on a desire to treat people with dignity, nor did they attempt to create equality. Rather, they may be seen as a deliberate attempt to introduce European moral values to better manage colonial populations.

### 15.3.2 Nationalist movements in the 1900s

Nationalist movements first began to emerge in the late 19th century across Southeast Asia. They were led predominantly by Western-educated elites with liberal views who sought to liberate humans from the oppressive power of States by advocating for the recognition of certain freedoms, such as the right to vote, express oneself, and own property. These early nationalist movements did not immediately or exclusively focus on independence; rather they aimed to glean greater freedoms for local populations. For example, inspired by the ideas of Jose Rizal, the first nationalist movement in the Philippines of the late 1800s, while pressuring Spain to pull out of the country, also aimed to turn the Philippines into an equal and genuine Spanish province. Similarly, the student and monk movements in Myanmar of the early 1900s raised the issue of equality for Myanmar citizens, with similar campaigns taking shape in Vietnam, Malaysia, and Indonesia. Around the same time, even uncolonized nations like Thailand under the reign of King Chulalongkorn banned slavery and torture, introduced a modern system of government, and reformed education. Despite these movements referencing human rights, they were not understood in the same way as they are today. Instead, the focus was on citizen's rights, political rights, and freedom from abuse by colonial governments.

#### **Key Term: Nationalist Movements**

These movements are made up of national groups aiming to gain independence typically from a colonial government, although in some cases, the desire may also stem from a group's ethnicity or religion. While anti-colonial movements (also called national liberation or independence movements) were most common in Southeast Asia, they also exist at the sub-national level such as in Aceh, Mindanao, or Southern Thailand.

Independence movements in Southeast Asia developed alongside challenges to colonialism across the globe. Particularly from 1900 onwards, administrative and political reforms led to greater levels of local representation and participation. For example, in Indonesia, the Netherlands introduced an 'Ethical Policy' in 1901, pledging welfare and modernization to the Indonesians for the wealth it had generated during the colonial era. However, while the policy may have had good intentions and was likely the most liberal of its kind in the region (most other empires considered colonial populations inferior), it was ultimately unsuccessful due to inadequate financial and political support. Likewise, administrative reforms initiated in Burma in the 1920s were introduced after similar changes in India. In British Malaya, as a ploy to pacify Islamic rulers, reforms included decentralization primarily to redistribute power back to the local sultans. It has been suggested that the concessions made by colonial governments amounted to an acknowledgement that Southeast Asian nationals had indeed been mistreated.

A major turning point towards independence came with the Japanese occupation of Southeast Asia and the ensuing retreat of the former colonizing countries during World War II. To begin with, war brought with it significant violations of rights. The Japanese used forced labour throughout Asia to build roads, railways, and other constructions, resulting in the deaths of hundreds of thousands of labourers. In addition, over 16,000 prisoners of war, including nationals of Western countries, were captured during fighting and also put to work. Moreover, Japan forced many thousands of young women from predominantly Korea and China, but also Japan, Taiwan, the Philippines, Indonesia, Malaysia, Vietnam, Thailand, East Timor, and the Dutch East Indies into sexual slavery to service Japanese soldiers. To make matters worse, while the Japanese occupation of Southeast Asia may at first have appeared to liberate these countries from colonialism, the limitations of such 'liberation' soon became apparent. For instance, in Burma, independence fighters, including Aung San and Ne Win (both of whom would later become leaders of post-war Burma) were originally

trained and supported by the Japanese but soon switched sides to the British after realizing the emptiness of Japanese promises of independence.

With the defeat of the Japanese, some Southeast Asian nationalist movements assumed again they would achieve independence, but again, this failed to materialize. Instead, many colonial nations returned to reclaim their territories such as the Dutch to Indonesia, the French to Indochina (Vietnam, Cambodia, and Laos), and the British to Malaysia and Burma. And so the next phase became a struggle for self-determination.

### **15.3.3 Struggles for self-determination**

The struggle for self-determination may be considered the first human rights movement in Southeast Asia. Across the region, nationalist movements campaigned for freedom from colonial rule, claiming it as their right. This right to decide one's own political systems and manage one's own resources would later gain recognition as a human right.

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

Another influence was the United Nations. With the adoption of the UN Charter and the Universal Declaration of Human Rights or UDHR, colonial powers were forced to acknowledge the right to self-determination as part of international law. Thus, nationalist movements across Southeast Asia drew upon the language and promises of the UN Charter in their claims for self-determination and racial equality. Self-determination is mentioned in Articles 1.2 (on the UN's purpose) and 55 (on economic and social cooperation) of the UN Charter. Self-determination is also recognised as a human right in the Preamble to the UDHR. Further legal standards on self-determination include the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, and the first articles of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). However, disagreement still existed regarding the meaning of self-determination as the term was only vaguely defined.

## **15.4 From Independence to Authoritarianism**

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

Upon independence, these countries were pressured to align themselves politically in the global order. Most Southeast Asian countries joined the **Non-Aligned Movement (NAM)**, a group of States choosing not to align closely with either side in the Cold War, and became known as the Third World. Newly independent countries shared many interests. They were concerned about the economic

and military power of the First and Second Worlds, and they were united in a mutual dislike of discrimination and racism, still common as a result of colonial legacies (such as the apartheid regulations of South Africa). They also recognized that to counter the economic might of European and North American countries, close alliances would be a necessity.

### **Key Term: Non-Aligned Movement (NAM) in the Three Worlds**

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

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

Independence brought with it new human rights tests and challenges. Colonialism and World War II had taken its toll on Southeast Asia. Throughout the region, even after borders were drawn and independence gained, disagreement remained as to how nations should be governed, and by whom. The new governments faced internal conflict from ethnic minorities, religious groups, and competing political ideologies. For example, the leading role of the military in the Burmese independence movement allowed it to dominate politics in the newly independent State. In other countries, other governing ideologies and experiments were tested, often at the expense of the people. Most of these governments were **authoritarian**, a political system where power is concentrated and people have little say in how the country is run. In much of the region, State power could not be questioned and human rights were routinely ignored. In addition, forty years of Cold War added to the violence, all of which resulted in a period of widespread and systematic human rights violations. But as will be illustrated, it was precisely this suffering that inspired populations to mobilize against military rule. Features of this period were the pervasiveness of authoritarian rule by military strongmen; the conflict and atrocities created by the Cold War; and the growing push for democratization by people in the region. The next section examines these three features.

## Key Terms: Forms of Political Power

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

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

### 15.4.1 Authoritarianism and military rule

While not all countries in Southeast Asia have endured military rule, it is by far the most common type of non-democratic government in the region. During the 1970s, the military controlled all but two countries (Singapore and Malaysia). The reasons are mostly analogous and involve internal conflict, some as a result of ethnic insurgencies (Burma), political uprisings (the communist movements in Indonesia, Cambodia, Vietnam, Laos, and Thailand), or unstable democracies (Thailand). In such cases, the military intervenes purportedly to create stability and order. Military governments primarily come to power through coups d'états, and some countries in the region, Thailand in particular, have been prone to many.

**Table 15-1: Where have coups occurred in Southeast Asia?**

| Country     | Occurrence of Coups in Southeast Asia                                                                                                                                                                                                                                                             |
|-------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Thailand    | 22: Around twenty-two since 1932, the most recent in 2014.                                                                                                                                                                                                                                        |
| Lao PDR     | 8: Laos endured eight coups in the 1960s, three of which were successful.                                                                                                                                                                                                                         |
| Vietnam     | 5: South Vietnam experienced around five coups in the 1960s.                                                                                                                                                                                                                                      |
| Philippines | 5: Around five coups since the Marcos regime; all but one were unsuccessful.                                                                                                                                                                                                                      |
| Myanmar     | 2: Following independence in 1948, General Ne Win seized power through a military coup in 1962. The country remained under military rule until 2010 when elections were held and a nominal civilian government was formed. In February 2021, the military once again seized power through a coup. |
| Cambodia    | 2: Lon Nol came to power in a 1970 coup. In 1997, Hun Sen consolidated his power in another coup.                                                                                                                                                                                                 |
| Indonesia   | 1: Suharto came to power in 1965 following a coup.                                                                                                                                                                                                                                                |
| Timor-Leste | 1: A coup occurred after independence from Portugal in 1975 and before Indonesia annexed it.                                                                                                                                                                                                      |
| Brunei      | None                                                                                                                                                                                                                                                                                              |
| Malaysia    | None                                                                                                                                                                                                                                                                                              |
| Singapore   | None                                                                                                                                                                                                                                                                                              |

The human rights record of Southeast Asian military governments has generally been poor with widespread suppression of political rights and freedoms and high incidences of disappearances, torture, and arbitrary detentions as even a brief examination will show. During the Marcos regime in the Philippines, martial law was established which criminalized political activities, instigated a media shutdown, and allowed for the arrest of political opponents. During his regime, businesses

were taken over and given to the Marcos family who amassed great wealth as a result. Similarly, the Suharto family in Indonesia is also known for the riches it gained while in power. Suharto was estimated to be worth USD15 billion when he stepped down from government. During this period, the military became known for its extra-judicial killings, suppression of free speech, the arrest of political opponents, and general military interference into government activities.

### **Spotlight: Some Military Governments in Southeast Asia**

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

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

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

Lao PDR: Phoumi Nosavan (1959-1960)

Philippines: Marcos (1972-1986)

Thailand: Phibunsongkhram (1938-1944 and 1948-1957); Sarit Thanarat (1959-1963); Thanom Kittikachorn (1963-1973); Surayud Chulanont (2006-2008); Prayut Chan-o-cha (2014-until elections in 2023)

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

Despite the above violations, military governments often have the support of large swathes of society. In particular, the wealthy elite welcome such governments as they allow the economy to grow and business to develop, although this is usually achieved through corruption rather than establishment of the rule of law. Both Marcos and Suharto were welcomed by the middle classes, as their many rights violations were also tolerated. As discussed in the next section, the international community likewise tends to extend support to military governments in furtherance of its own interests.

#### **15.4.2 The impact of the Cold War**

The Cold War not only affected security around the world but also had economic and political repercussions. As regards economic factors, the USA and its allies promoted capitalist economic systems, while the Soviet Union sought to establish communist governments. As regards politics, both sides were willing to support dictatorships and ignore human rights violations for State support of their respective ideologies. The USA, which sees itself as a great supporter of democracy, not only tolerated authoritarianism but openly supported, for example, the regimes of Suharto, Marcos, the Lon Nol military government in Cambodia, and the South Vietnamese military governments. Equally, despite committing many atrocities, the Khmer Rouge was supported by China. The US and other Western States also allowed the Khmer Rouge to maintain its seat at the UN to avoid the possibility of the Vietnamese-backed Cambodian regime gaining it. In other words, during the Cold War, alliances took precedence over human rights. As regards security, both sides gave military support to insurgent forces actively involved in conflicts in the region. As such, the Cold War instigated a period of instability and conflict where human rights frequently went unprotected.

As a consequence, tensions grew significantly during this period. The Western non-communist world was especially concerned that the spread of communism could lead to a 'domino effect' whereby if one country fell, all others in the region would topple too like a line of dominos. The victory of communists in Vietnam, Cambodia, and Laos, the strong communist movements in Thailand, Myanmar, Malaysia, and the Philippines, all reinforced this fear. As such, all the major Southeast

Asian countries which constituted the founding countries of the Association of Southeast Asian Nations (ASEAN)—that is, Indonesia, Malaysia, the Philippines, Singapore, and Thailand—clearly shared this authoritarian anti-communist view. Southeast Asia, in effect, became a battleground between the US, China, and the Soviet Union.

The human cost of the Cold War was revealed most dramatically during the American War in Vietnam (or Vietnam War as it is known in the West). Following the first Indochina War between the French and the Viet Minh from 1945 to the mid-1950s, Vietnam was divided into North and South Vietnam. While officially between North (supported by its communist allies) and South Vietnam (supported by the US and other anti-communist forces), the war spilled across the country's borders to Laos and Cambodia to the detriment of the local population.

The American War in Vietnam played a significant role in the evolution of human rights, both regionally and internationally. During the conflict, international standards were routinely disregarded, prisoners of war abused, and civilians targeted. Further, the guerrilla style of conflict brought the war to small communities, killing many innocent civilians. Because North Vietnam used Laos and Cambodia as supply routes, the US illegally bombed both countries in violation of international law, leaving over a million dead. It was these war crimes that exposed a need to strengthen international humanitarian law. For example, US bombing operations, particularly those in Cambodia and Laos, failed to make a distinction between civilians and combatants, resulting in the widespread suffering and death of civilian populations, and which some have argued, led to the rise of the Khmer Rouge. Because this type of conflict was not specifically governed by the laws of armed conflict, some suggest these gaps in international law made it possible for the US to disregard the impact of its actions on civilian populations. As a result, more humanitarian protection was introduced in 1977 in the form of the two Additional Protocols to the Geneva Conventions.

### **Spotlight: Operation Menu**

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

### **15.4.3 Atrocities in Southeast Asia**

During this period of authoritarianism and conflict, significant gross and systematic violations of human rights occurred. The most significant of these was the Cambodian 'genocide' where 1.7 million Cambodians died as a result of the Khmer Rouge's actions and policies. Following a mix of Marxism, Maoism, and Leninism, the Khmer Rouge rose to power in the early 1970s, preaching peace and justice to rural communities who had experienced US carpet-bombings and the Vietnamese occupation of eastern Cambodia. As such, they advocated abolishing religion, private property, and money, in pursuit of a peasant utopia. After taking over Phnom Penh on 19 April 1975, the Khmer Rouge expelled people from the city to join large agrarian projects. Anyone deemed an intellectual, professional, capitalist, politician, or trader was targeted, and most frequently, killed. From 1975-1979, more than 1.7 million people died, many of starvation, because the ill-conceived agrarian projects also failed to deliver enough food, while others were executed or tortured. Whether the deaths during the Khmer Rouge can actually be called 'genocide' is a

technical argument concerning legal definitions of the term. Tragically, it occurred only thirty years after a post-holocaust world vowed to itself, “Never again.”

### **Spotlight: Khmer Rouge**

The Khmer Rouge, sometimes known as Democratic Kampuchea, Angkhar, or the Pol Pot regime, was the self-proclaimed communist regime that controlled Cambodia from 1975 to 1979. It came to power after a turbulent period in Cambodia’s history involving civil war, coups, and the American War in neighbouring Vietnam which split across its border. Cambodia avoided taking sides for much of the 1960s, but the military government which came to power through a coup in 1970 took a strong anti-North Vietnamese position, thus dragging Cambodia into the conflict. When Khmer Rouge forces captured Phnom Penh under the leadership of Pol Pot, it systematically destroyed various pillars of society including the money markets, organized religion, and family life, and forced the inhabitants of cities and towns to live and work in rural areas where overwork and malnutrition became the norm. Fear of losing power caused the regime to instigate a reign of terror during which people were tortured and killed for being “enemies of the revolution.” Over one million people died as a direct result of the regime’s policies, including about 100,000 in prisons like the infamous Tuol Sleng in Phnom Penh. The Khmer Rouge was finally overthrown by the Vietnamese army in early 1979 which then proceeded to install a new government.

Similarly, from 1965-1966, Indonesia launched a brutal crackdown on a supposed communist coup killing as many as one million people suspected to be members of the communist party, and imprisoning thousands more. The killings were mostly carried out by paramilitary groups and are still not openly discussed there. However, recent films and books have created a space in the media for discussion of those turbulent times. After suppressing the communists, the Indonesian military used similar tactics to occupy East Timor (1975-1999) during which an estimated 200,000 East Timorese, or about a third of its population, were killed as illustrated by the notorious incident known as the **Santa Cruz Massacre**.

### **Spotlight: The Santa Cruz Massacre**

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

Other events in Southeast Asian post-war history followed a similar pattern. These include the numerous massacres of Vietnamese villagers during the American War, the killing of university students at Thammasat University in Thailand in 1976, and the killings of villagers and political opponents throughout Myanmar as a consequence of its military dictatorships (for example, the Depayin massacre of around 70 LDP supporters in 2003). Although the carnage empowered the human rights movement, it is telling to point out that few, if any, of the perpetrators have ever been brought to justice.

## 15.5 The Democratization of Southeast Asia

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

### Spotlight: Democratization

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

Democratization simply refers to the process of becoming a democracy. It can take many forms, from sudden regime change to uprisings (such as the People's Power movement of 1986), to slow and gradual transitions (for example, when Myanmar's military government gradually increased the number of elected representatives from 2008 onwards). Regardless of how democratization occurs, the result allows people to play a greater role in the political system, leading to better protection of human rights.

### 15.5.1 Theories of democratization in Southeast Asia

What causes a country to become democratic? Looking at the examples across Southeast Asia, no clear pattern emerges. While some experienced little change, others made momentous transitions from authoritarianism to democracy. One theory proposed by Samuel Huntington in his book, *The Third Wave: Democratization in the Late Twentieth Century*, is that democratic change does not occur individually to States, but is more akin to a wave sweeping across regions or even the globe. Known as Huntington's Waves, the third wave of democratization occurred from 1970 to the late 1980s. In Southeast Asia, only events in the Philippines—which overthrew its dictator, President Marcos, during the People's Power movement in 1986—fit the pattern. Instead, the wave of democratization hit Southeast Asia later, with democratization occurring in three other countries in the following decade (Cambodia in 1991, Thailand in 1992, and Indonesia in 1999).

### Key Term: Huntington's Waves

Influential in the study of democracy, Huntington introduced the phrase, "the third wave of democratization" as a social science concept of the 1990s. Defined as:

*a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly outnumber transition in the opposite direction during that period of time[,]*

This process began in Portugal in the mid-1970s and spread across the globe from South America to Asia and Eastern Europe by the end of the 1980s. It was preceded by two other waves that took place from 1828-1926 and after World War II from 1943-1964.

A combination of factors may explain the slow progress of democratization in Southeast Asia. In particular, since the threat of communism was of great concern to the West in the 1970s, it extended support to military dictatorships to strengthen its fight against communism. Moreover, the communist regimes also rejected the liberal democratic models. In this context, those in civil

society, advocating for democracy had little support in the international community. In fact, their calls would not be heard until the end of the Cold War.

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

Culture, especially the influence of Confucianism, is another factor which delayed Southeast Asian countries from democratizing. Characterized by its emphasis on collectivism, hierarchy, discipline, and conformism, Confucian beliefs can conflict with the values of democracy which prize individual freedom, equality, and the right to hold opposing political opinions. While Confucianism is mainly associated with Chinese culture, it has influenced other non-Chinese countries in Southeast Asia. In the context of their economic success, many Southeast Asian leaders embraced the collectivism of Confucian values, later rebranding them as 'Asian Values.' Accordingly, they opposed democracy as mostly reflecting the Western value of individualism, and argued for the superiority of Asian Values as being culturally more relevant whilst also, coincidentally, allowing for quicker economic growth.

### **Key Term: Asian Values**

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

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

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

In the Philippines, the ruling government under President Marcos was ousted through a 'People Power Revolution' after more than two decades in power. Democratization began with an election in February 1986 with President Marcos running for a fourth term. He was opposed by Mrs Corazon

Aquino, whose husband was among those killed by his regime. As predicted, the fraudulent election gave victory to President Marcos but in so doing, sparked the anger of the people. Around 500,000 people, including prominent figures, took to the street on the day Marcos was sworn in, which resulted in his removal from power. President Marcos and his family were then forced to leave the country and Corazon Aquino was appointed president in his stead.

In Thailand, following weeks of violence in May 1992, democratic transition began with an agreement between the military junta led by General Suchinda and opposition forces to amend the constitution with the ultimate aim of reducing the role of the military in politics. This amendment led to the adoption of the 1997 constitution, a foundation of Thailand's democracy.

Similar to Thailand, democratization took place in Indonesia following huge protests against the government caused by frustration at the collapsing economy as a result of the economic crisis of 1997. With riots in the streets and military and political groups divided in their support, President Suharto handed power to Vice President Habibie in May 1998. A constitutional amendment was negotiated between Habibie, his ruling Golkar Party, the military, and opposition forces. Based on this democratic constitution, parliamentary and presidential elections were held in 1999, the first election after more than 30 years of military-backed authoritarian rule under Suharto.

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

### **Reflection and Discussion: Why do countries become democratic?**

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

Find out what happened when your country democratized, talk to those who lived through the change and ask them why they think it happened, which groups of people supported the change and why they did so.

## **15.6 The Emergence of Universal Human Rights**

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

### **15.6.1 The rise of civil society: Women and students**

Throughout Southeast Asian history, people have organized into civil society groups to oppose ruling powers. Some took the form of nationalist movements, others became revolutionary armies, and more recently, social movements were formed. In this section, the term 'civil society' refers not to revolutionary armies or opposition governments, but groups of people organizing outside the military and State. These mainly formed from the late 1960s and went on to become either social movements (such as People Power in the Philippines) or NGOs. Two important precursors to civil society and human rights movements will now be briefly examined: women's rights and student movements.

Today, many people would never question whether women are equal to men in value and rights. But not long ago, in Southeast Asia and throughout the world, equal rights for women was an outrageous notion. However, by the 1970s the women's rights movement had gained momentum, first in the West, and soon after in developing countries. For the first time, women's rights were being discussed in the media, at university, and in politics. In Indonesia, Gerwani (a women's organization working in the 1950s and 1960s) had attracted millions of members and was advocating for equality but its close association with communism led to its abandonment by the late 1960s.

While the women's rights movement was able to establish the broader acceptance of human rights in the region, other activists encountered more difficulty. Why? First, many supporters of women's rights were already working in government, and in some cases, were the wives and daughters of officials. Next, the women's rights movement was not overtly political in the sense of challenging State power, and as such, were not considered an anti-government force. Another reason was the existence of a developed civil society network in pre-existing women's organizations working on issues like education, health, and employment. Finally, many Southeast Asian governments already had women's commissions, development plans, government-run shelters, established departments, ministries, and social welfare programs, all of which allowed for greater engagement between women and the government. For all these reasons, human rights activism first developed through the women's rights movement in many Southeast Asian countries.

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

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

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

### **Reflection and Discussion: Is history made by people or organizations?**

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

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

#### **15.6.2 The rise of civil society: From NGOs to new social movements**

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

Just why human rights organizations appeared in these three countries at about the same time could be due to all experiencing similar political upheavals at roughly the same time – martial law in the Philippines, the 1973 coup in Thailand, and Suharto's 'New Order' of the late 1960s. A period of great upheaval in many Southeast Asian societies, not only were students politically active, even farmers, workers, and peasants were organizing into protest groups. In addition, communist and anti-communist groups were actively recruiting in villages, universities, and workplaces. Most of these groups sought a solution to their problems, whether it be democracy, peace, or better treatment, and in the next decades, some would finally turn to human rights.

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

It should be remembered that in the early 1970s no human rights treaties were in effect in any country, the UN did not protect human rights, and for most countries, human rights were

considered solely a domestic issue and not open to criticism by other countries. One challenge for those seeking to document the history of rights is that when these organizations began, they did not label their activities as advocating for human rights per se. Rather they defined their work under such terms as civil liberties, civil rights, constitutional rights, peasant mobilization, rights of prisoners of conscience, and so on. It was not until sometime later, in the 1980s, that the term would be adopted to describe all these diverse activities.

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

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

### **Spotlight: Philippines – The People Power Movement**

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

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

The rise of new social movements is commonly attributed to globalization because it is argued that global media and technology allows people to be better informed about their rights, thus empowering them to organize protests. Globalization was at the same time the reason many NGOs and social movements gained in strength and importance, because while also being the target of protests, such interdependence of economies, populations, and cultures can lead to instability in the economy, the environment, and the workplace.

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

### ***15.6.3 Southeast Asia and the UN human rights system***

Southeast Asian countries have played an active role in the United Nations and in the development of international human rights. Among the member States which voted in favour of the UDHR on 10 December 1948 were Burma, the Philippines, and Siam (as Thailand was then called). The other eight of the eleven countries in Southeast Asia were not yet in existence and at the time, the General Assembly only comprised of 58 member States. Southeast Asia's contribution to the UDHR was not limited to voting, as the Philippine diplomat, Carlos P Romulo, also helped in the drafting process. He would later become president of the 1949 UNGA. As an outspoken anti-colonialist, Romulo ensured that the UDHR did not ignore the rights of colonized people. Previously, he also led a successful campaign to ensure the UN Charter explicitly state that human rights applied to all "without distinction as to race, sex, language, or religion." Romulo's influence shows that the Philippines has been actively involved with the UN since its very inception, even holding a seat at the first convening of the Commission on Human Rights in 1947.

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

At this time, human rights were driven by issues of racial discrimination and self-determination. However, it could be argued that Southeast Asian States have had an inconsistent relationship with the UN human rights system, especially during the Cold War. While many actively participated, it was not always in a positive manner. Some were accused of using the system to protect themselves and their allies, or to challenge the very principles of human rights. The delayed ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is one such inconsistency. While the elimination of racial discrimination was a cause these States and the NAM promoted, few countries in the region ratified the convention. By 1990, only four had done so. The Philippines was the first in 1967, followed by Laos in 1974, Vietnam in 1982, and Cambodia in 1983.

### **Reflection and Discussion: How active is your country in the UN system?**

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

Southeast Asian States challenged the international human rights system in a variety of ways, but one collective challenge was particularly notable – the Bangkok Declaration. In the lead up to the 1993 World Conference on Human Rights (as discussed in Chapter 1), ministers and representatives of some Asian States met beforehand in Bangkok to bring a regional understanding of human rights to the global conference. This regional understanding, as led mainly by Singapore and Malaysia, argued that human rights vary from country to country, thereby dismissing the idea of a universal standard. As such, human rights could be modified by States to suit their specific cultural and historical contexts. Moreover, they argued human rights should be considered a sovereign issue and thus, free from foreign interference. In other words, human rights should not even form part of international affairs. This is known as the Asian Values debate.

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

### **Reflection and Discussion: How is the universality of human rights also an issue of national sovereignty in Southeast Asia?**

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

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

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

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

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

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

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

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

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

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

#### **15.6.4 Historical developments test and shape human rights in Southeast Asia**

How Southeast Asian States espouse human rights continues to be tested by developments in the region. For example, the global spread of COVID-19 in 2020 resulted in restrictions on certain human rights under the guise of public health regulations. Governments used State law to enact repressive measures against movement, assembly, and communication, especially amongst vulnerable groups such as migrants, refugees, minorities, and low-income groups. The mandate of dealing with a pandemic provided political leaders with an opportunity to extend or strengthen their hold on power. Individuals also gave up private information to the State and private corporations in order to access much needed vaccinations, services, and welfare. Altogether, control over the freedom of citizens to organize, travel, participate politically, and to determine the flow of information constituted ways civil society shrank during the pandemic.

Moreover, Southeast Asia has once again become the geopolitical battleground of superpowers—now the United States and China—over maritime access to the Pacific. As these competing hegemonies vie for political and economic clout, citizens of the region will have little choice except to face whatever human rights outcomes arise from the delicate balance of power in the region.

Finally, political use of disinformation has been on the rise through social media. Powerful groups even employ troll farms to spread disinformation, systematically targeting members of the public in order to drastically influence their emotions and opinions. Indeed, political and economic matters may be so reframed as to encourage believers to *willingly* suspend their rights. Such are the ways disinformation transforms public opinion and challenges the truthful communication necessary to support democratization.

### **15.7 Is there a history of human rights in Southeast Asia?**

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

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

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

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

## **A. Chapter Summary and Key Points**

### **Introduction**

There is no single, simple, and undisputed history of human rights in Southeast Asia, nor is there a single starting point. This leads to two debates: (1) how to write a history of human rights in the region, and (2) what to include in this saga? How human rights are interpreted influences this debate. For example, are they a set of ideas advocating the dignified treatment of people already existing in religions and a society's moral values? This viewpoint associates the spread of human rights with the rise of religions and the development of organized communities. Supporters of this idea see human rights emerging with the spread of religions and links them to the establishment of religious rules and principles. Another approach argues that human rights are linked to the ways people are protected from the power of the State, and so considers such rights as originating with the formation of States. A final perspective is that human rights are a universal standard of protection above and beyond the State, enabled by international laws and organizations which is how they are mostly seen today.

### **The Pre-Colonial History of Human Rights**

Rights have existed in all periods of Southeast Asian history, but were limited to an individual's religion or place of residence. The diversity of political units (such as sultanates, kingdoms, tribes, and colonies) meant relations between rulers and ruled differed in each, for each had its own legal system, social structure, morals and values as pertaining to human life, and therefore their own concept of rights.

## **Colonialism**

In some cases, colonial rule granted rights but more often than not, unequally (for example, colonizers and the colonized were treated differently). Although colonialism had many negative impacts, it did introduce the rule of law, recognise some women's rights, and improve health and education for some. Nationalist and later independence movements from the late 19th century demanded more freedoms and equalities for local citizens, with the focus on citizen's rights, political rights, and freedom from abuse by colonial governments. A major turning point came with the Japanese occupation of Southeast Asia which despite at first appearing to liberate people from colonialism, did not in fact achieve that goal. With the defeat of the Japanese, many nationalist movements assumed independence was again just around the corner. Instead, colonial nations returning to reclaim their territories triggered a series of wars of independence in the region.

## **Struggles for Self-Determination**

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

## **Authoritarianism and the Cold War**

Most Southeast Asian countries had authoritarian or military governments during the Cold War due to internal conflict, political instability, or powerful militaries. Widespread and systematic human rights violations occurred at this time. Military governments generally have poor human rights records, as can be seen in the regimes of Pol Pot in Cambodia, Marcos in the Philippines, and Suharto in Indonesia. During the Cold War, political alliances took precedence over human rights. Conflicts were common, such as the American War in Vietnam and communist insurgencies in most other Southeast Asian countries. Moreover, the conduct of these wars commonly disregarded international standards. The greatest atrocities of this time were the Cambodian 'genocide' and Indonesia's brutal suppression of a supposed communist coup in the mid-1960s.

## **Democratization of Southeast Asia**

From World War II to the 1990s, nearly all Southeast Asian countries became more democratic. However, democratization was slow due to anti-communist activities, economic growth, and the support of Asian Values through Confucianism. Strong democratic movements include the Philippine's People Power Revolution and Thailand's May 1992 event.

## **The Emergence of Universal Human Rights**

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

## **Southeast Asia in the UN Human Rights System**

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

## B. Typical Exam or Essay Questions

- What violations occurred in the early history of your country? How did society or the State justify violations such as slavery or the caste system?
- What are the positive and negative aspects of colonial legacy in any selected country? Consider the laws introduced and how they either supported or violated people's rights.
- Was the self-determination movement in your country linked to human rights?
- How did national or local groups fight for independence? Did they use or violate human rights?
- What was the impact of the Cold War on democracy and rights in your country?
- Was the introduction of human rights the result of foreign influence, or was it developed inside your country? What factors influenced the first human rights advocates and organizations in your country?
- Is it true that military governments abuse human rights more than democratic governments?
- How does the current respect for human rights in your country compare to how they were regarded in 1990 or 1970?
- What is the history of either the student movement or the women's rights movement in your country? Who were the first figures and what did they advocate for?

## C. Further Reading

While many histories of Southeast Asia are taught in university classrooms, it should be noted that few writers actually discuss human rights.

### General History of Southeast Asia

Students can search for the following authors who have written and published on this topic:

- Clive Christie
- Milton Osbourne
- Craig Lockhard
- Clark Neher
- David Chandler
- DR SarDesai
- Martin Stuart-Fox
- Benedict Anderson
- Jonathan Rigg
- Nicholas Tarling

### Writers Addressing Particular Rights in History

Students can search for the following authors who have written and published on specific human rights topics:

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

### **The Cold War and Military Governments**

Students can search for the following authors who have written and published on the Cold War and military governments with specific reference to Southeast Asia:

- Benedict Anderson (on Indonesia and Thailand)
- Than Myint U, Mary Callahan, Martin Smith, and David Steinberg (on Myanmar)
- Much has been written on the Vietnam War or the American War in Vietnam, including documentaries available on YouTube, original documents from the Virtual Vietnam archive, and documents from both the Vietnamese and US governments
- Much has also been written on the Khmer Rouge period by authors such as David Chandler, Ben Kiernan, Elizabeth Becker, and Chanrithy Him. Especially useful are the archives of the Documentation Centre of Cambodia (DC Cam, available at <https://www.dccam.org/homepage>), and the Cambodian Genocide Program at Yale University (available at <https://gsp.yale.edu/case-studies/cambodian-genocide-program>)

### **Debates on the History of Human Rights**

Students can search for the following authors who have written and published on the history of human rights:

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

### **Human Rights Historians**

For more general commentary on the history of human rights, students can search for the following authors:

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

### **Online History Resources**

Asian Studies WWW virtual library (available at <http://vlib.org/AsianStudies>)

Journal of Southeast Asian Studies (available at <https://www.cambridge.org/core/journals/journal-of-southeast-asian-studies>)

Journal of Current Southeast Asian Affairs (available at <https://journals.sagepub.com/home/saa>)

Southeast Asian Studies (available at <https://englishkyoto-seas.org/>)

Journal of Southeast Asian Human Rights (available at [https://www.sciencegate.app/source/311438?utm\\_content=cmp-true](https://www.sciencegate.app/source/311438?utm_content=cmp-true))

## About ASEAN University Network - Human Rights Education (AUN-HRE)



**ASEAN University Network**  
Human Rights Education (AUN-HRE)

Recognizing that respect for human rights and fundamental freedoms is one of the key principles for ASEAN Community building, the ASEAN University Network - Human Rights Education (AUN-HRE) was established by the ASEAN University Network Board of Trustees in 2009 with the objective of building a culture of human rights and peace in the region. The specific objectives of AUN-HRE are:

- \* To further efforts by different bodies in promoting human rights and peace education in ASEAN/SEA;
- \* To mainstream human rights and peace education envisioned by ASEAN Vision 2025 and to support the realization of SDGs (4.7);
- \* To strengthen capacities of lecturers/ students on research and education;
- \* To provide platform for exchange and collaboration within and beyond SEA region; and
- \* To develop materials and human resources for human rights and peace education.

With these objectives AUN-HRE has been organising: training workshops for lecturers at regional and national levels; essay competitions amongst undergraduate students in the region; and colloquiums on issues of interest expressed by its network members. It has also been producing textbooks and teaching manuals on human rights and peace.

AUN-HRE has 30 members and 2 associate members. The secretariat of AUN-HRE is hosted by the Institute of Human Rights and Peace Studies at Mahidol University in Thailand.

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## About the Institute of Human Rights and Peace Studies (IHRP), Mahidol University



**Institute of Human Rights  
and Peace Studies**  
Mahidol University

The Institute of Human Rights and Peace Studies (IHRP) was established in 2011 by the merging of two centres at the Mahidol University: Center for Human Rights Studies and Social Development and Research Center for Peacebuilding.

The Center for Human Rights Studies and Social Development (CHRSD) was established in 1998. For more than ten years, it served as an academic institution specialized in human rights, with a track record in providing postgraduate education as well as training programs to students, human rights workers, human rights defenders, members of civil society organizations and government

officials. The MA in Human Rights started by the CHRSD is the longest running graduate degree program in Human Rights in Asia.

The Research Center for Peacebuilding was founded in November 2004 as a research center with the impetus to be part of the peaceful solution to conflicts in Thailand especially the conflict in three southernmost provinces: Pattani, Yala, and Narathiwat. The Center developed and implemented considerable action and participatory research projects. These projects focussed on facilitating cooperative efforts to deal with the conflicts through opening space for dialogue at all levels and identifying needs of community and society. Also, the projects provided inputs to policy makers on transforming conflicts and building just and peaceful societies.

Combining the experience and perspective of both these centres, IHRP is uniquely interdisciplinary in its approach and is committed to the advancement of human rights and peace by: educating human rights and peace practitioners; promoting outreach programs to community and international organizations; and conducting cutting edge research on important issues. The four academic programs implemented by it are:

1. Ph.D Human Rights and Peace Studies (International Program)
2. M.A. Human Rights (International Program)
3. M.A. Human Rights and Democratisation (International Program)
4. M.A. Human Rights and Peace Studies (Thai Program)

IHRP also hosts the secretariat of ASEAN University Network - Human Rights Education (AUN-HRE) and Strengthening Human Rights and Peace Research and Education in ASEAN / Southeast Asia (SHAPE-SEA).

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## About Norwegian Centre for Human Rights (NCHR), University of Oslo



UiO : **Norwegian Centre for Human Rights**  
University of Oslo

The Norwegian Centre for Human Rights (NCHR) is a multi- and interdisciplinary centre. Through research, teaching, and dissemination, the Centre shall promote the subject of human rights as an academic field, and strengthen its international position as a central actor and attractive collaborative partner within the human rights field. The NCHR emphasizes the connection between research, education, and practical application, among other things through international projects and programmes.

Website:  
<https://www.jus.uio.no/smr/english/about/>



