# JSEAHR

## JOURNAL OF SOUTHEAST ASIAN HUMAN RIGHTS

Volume 3 | Issue 1

A production of:

SEPAHAM INDONESIA

UNIVERSITAS JEMBER

# JSEAHR

Volume 3 | Issue 1

June 2019

This journal is indexed by:

A Production of SEPAHAM Indonesia and The Centre for Human Rights, Multiculturalism, and Migration at University of Jember

# The Journal of Southeast Asian Human Rights

*A Bi-annual Publication of:*

*The Journal of Southeast Asian Human Rights (JSEAHR)* explores human rights realities in South East Asian region from various perspectives. The JSEAHR is a peer-reviewed journal co-organized by the Indonesian Consortium for Human Rights Lecturers (SEPAHAM Indonesia) and the Centre for Human Rights, Multiculturalism, and Migration (CHRM2) University of Jember. Published twice a year, the Journal welcomes empirical, multi-disciplinary, and doctrinal approaches to explore the historical and recent situation of human rights in South East Asia. The combination of editorial board members from South East Asia, Europe, and Japan creates a unique forum for South East Asian and other scholars to exchange ideas of interest about human rights issues in the region.

# Editorial Staff

# Table of Contents

*Journal of Southeast Asian Human Rights, Vol. 3 No. 1 June 2019 pp. i-iii*
*doi: 10.19184/jseahr.v3i1.11573*


# Preface

On behalf of the editorial office, we are really grateful to publish Volume 3 Issue 1 2019 of the Journal of Southeast Asian Human Rights (JSEAHR). All manuscripts were selected by the editorial team by virtue of their substance, analytical ability and a particular relevance to human rights issues in the region. Additionally, all manuscripts were carefully evaluated by anonymous reviewers in order to guarantee the neutrality of substantial and quality assessments. Finally, the Editor-in-Chief chose eight manuscripts from various academic backgrounds with different approaches to enrich this June edition. We believe that all published manuscripts met academic standards and are ready to distribute human rights knowledge for all readers.

This is the third volume of the Journal and with each issue we have been able to reach a wider range of academics and therefore provide a larger platform. Volume 3 Issue 1 of the Journal begins with a provocative commentary by Guy Ankerl challenging the well-accepted notion that humans are born free and equal. Following this introduction, research is presented within the Philippines, Cambodia, Malaysia, Thailand, and Indonesia. As an academic journal, we are proud to present the findings on topics such as constitutional enforcement, the detention of refugee children, migration and human trafficking, and the right for women to access higher education.

Yet, the editorial office also admits that all of the articles still cannot respond to all current human rights issues in Southeast Asia. All countries in the region have their distinct rule of law, democracy, and human rights concepts which make human rights issues in the region dynamic. The complexity of human rights issues in Southeast Asian countries is marked by the variance of democracy, ideology, racial sentiment and religious influence. These socio-political landscapes have gone hand in hand with the lack regional legal framework to tackle human rights violations making the region fragile regarding the mechanisms for human rights protection. For example, Southeast Asia has been silent in response to the Brunei plan to introduce Sharia Law which threatens the death penalty for sexual minorities and adultery.[1] This "inhumane and cruel" plan has not only shocked

[1] See Mustafa Akyol, "Opinion | Stoning Gay People? The Sultan of Brunei Doesn't Understand Modern Islam", *N Y Times* (12 April 2019), online:

the international community but might also worsen the human rights transition in the region.

Besides facing a future of human rights that is in peril, Southeast Asia has also faced religious radicalism and extra-legal enforcement of discriminatory laws by religious hardline groups in Myanmar and Indonesia. While radicalism in Indonesia has affected communal conflicts and persecuted minorities, hate speech by radical Buddhist groups in Myanmar forced the Rohingya to flee from their homes which resulted in a catastrophic humanitarian crisis in the region. Unfortunately, the Southeast Asian human rights mechanism is weak to respond human rights violations due to the principle of sovereignty and non-intervention. These two magic words have been notoriously used by all countries in Southeast Asia as an excuse for no improvement, protection or fulfillment of human rights.[2]

The complex reality of human rights in Southeast Asia has also dealt with the claim that human rights in Southeast Asia is part of "Asian Values," which give more focus on economic and development rights than civil and political rights.[3] The genuine nature of a human rights dimension that does not discriminate against a particular group or individual has never been seriously taken in the political realm. For example, the rights of religious and sexual minorities, including the 1965 massacre that killed almost a million of Indonesians, had not been tapped by either presidential candidate during the 2019 Indonesian election.[4] Both candidates failed to fully address human rights issues within their platform.

The failure of these presidential candidates to address human rights issues will not only be an Indonesian issue. The Association of South East Asian Nations (ASEAN) community today is plagued with immeasurable counts of human rights violations, and Indonesia is not excluded. As a prominent part of ASEAN, Indonesia must lead by example to secure human rights for its citizens. All countries in the region must be aware that the global world has changed rapidly. While countries in the Middle East have been in war in the last decade, most countries in Western Europe, East Asia and Northern America have developed their human rights protection and promotion. They also shifted their attention to a

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<https://www.nytimes.com/2019/04/09/opinion/bruneis-stoning-law-is-out-of-touch-with-modern-islam.html>.

2 Attilio Pisanò, "Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration" (2014) 15:4 Hum Rights Rev 391 at 409.

3 See for a more detailed analysis about "Asian Values" at Pisanò, *supra* note 2.

4 Soe Tjen Marching, "2019's real winner: Stigma of human right victims", *Jkt Post* (22 May 2019), online: <https://www.thejakartapost.com/academia/2019/05/22/2019s-real-winner-stigma-of-human-right-victims.html>.

new paradigm of human rights fulfilment under the title Sustainable Development Goals (SDGs).

The universality of the SDGs, and it's 232 indicators of success, when dealing with human rights issues may seem to be a bit idealistic. How could a framework encapsulate all countries' needs according to each of the nations' specific cultures? More than ever, ASEAN countries need to express their own ideals according to their own needs. This calls not for a relativist view of human rights but a carefully crafted particularization and identification of ills; voices from Southeast Asia should have more room to express ASEAN's human rights' needs.

To respond to these human rights realities, JSEAHR caters to academics and researchers as a space for open dialogues to demonstrate the multi-faced nature of human rights in the region. The Journal provides a place for empirical, multi-disciplinary, and doctrinal approaches in exploring historical and recent conditions of human rights in Southeast Asia in order to bring attention to issues that may have been once overlooked.

Finally, as the Editor-in-Chief, I would like to thank the support of Jember University, all researchers at the Centre for Human Rights, Multiculturalism and Migration (CHRM2), and also the members of the Indonesian Consortium for Human Rights Lecturers (SEPAHAM) Indonesia. We also would like to thank to all anonymous reviewers for this volume and the tireless support from Eleanor C. Jones of the VIA Global Fellows who edited all manuscripts for them to meet the academic standard of article publication.

*Journal of Southeast Asian Human Rights, Vol. 3 No. 1 June 2019 pp. 1-6*
*doi: 10.19184/jseahr.v3i1.11492*


# Human Beings are Born Neither Free nor Equal

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In this study, we are concerned with the social-political implications of fundamental observations that we can make concerning all individual human beings and their societies. In light of these observations, the contribution of the Enlightenment to the world's "epistemological progress" seems dubious. The original intent of the Western Enlightenment was to liberate mankind from unfounded prejudices and bias. But, in reality, the liberal social contract is based on the *anthropologically* naive idea of "self-made," "self-created" men—in the broadest sense of the term. This is an unrealistic utopia that the West tries to present as universally valid, and therefore imposes it also on other spheres of civilization by the strait jacket of colonialization.

In short, the so-called individualistic liberal ideology does not promote the unimpeded empirical reconnaissance of Nature but replaces the Creator with human artificiality.

We begin our reasoning *in medias res.* The founders of individualistic liberalism—John Locke, Adam Smith, Jean-Jacques Rousseau—try to reconstitute human society based on contracting between free and independent parties. For them, in general, the reciprocal ("horizontal") relation—exchange–should be the typical "median" ground relation that fundamentally constitutes society. (This ideal-typical mental experimentation is also beyond John Rawls' *Theory of Justice.*[1] The Enlightened will free society from "tribal" links and create a universal model of society comprising independent, responsible, free human beings. In principle, the enlightened society should be based on the empirical observation of Nature (of mankind) and not on some farfetched daydreaming.

In reality, because of the characteristic *anthropobiological conditions* of the human species, contractual relations—deals between equal, free, and responsible partners based on consensus—are not and cannot otherwise be the *first perceived* (human) relation. Without touching the question of how the human race—as such—came into existence, in general, the newborn man's first experienced relation is subordinate to and dependent on his breeder. This exposed, helpless situation creates the prototypical human relation (perhaps a "tribal" one in the broader sense of the term, since the upbringing can be done institutionally, or perhaps separately from the blood-relationship). What is essential is that this primary relation is not a reciprocal contracting market-like relation. In the human

[1] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

race, the newborn's brain is only 30% of that of an adult.[2]

No human individual comes into the world free and self-supporting (by the way, without his self-will). All become full-fledged adults after an unavoidable commitment to the (pre)existing society. In reality, not a single human society is created from nothing.

All these statements seem commonplace, truisms, but nevertheless neglected in the liberal reconstruction of the society. The market-based, modern model of society, the idea of a society composed strictly of contracts among independent (self-created) individuals, glosses over the basic factual biological condition of mankind. It is a product of pure imagination.

Society with all its attributes should exist before the human being becomes adult and able to conclude contracts freely between equal parties. A whole society comprising equal adults who encounter one another by chance, without tribal attachment, looking for initial cooperation, is a myth, a cock and bull story as is the legend of the twins, Romulus and Remus, suckled by a she-wolf. This and similar fairy tales exist to corroborate, to "prove," that the first relation between human beings could be equal and not inter-generational.

Indeed, general experience shows that most human relations do not originate from a chance human encounter in a marketplace between individuals without existing deep "antecedent relations." For this very reason, to declare that the model of the human society should be fully based on contracts among free and equal individuals is unrealistic (in the best case, utopian). The "discovery" of contracts between equal individuals as an ideal for society, put forth by, among others, Herbert Spencer in his *Sociology*[3] and J.J. Rousseau in his *Contract Social*[4] in the XVIII century, cannot bring so-called progress, since the declaration, the positing of this idea itself doesn't transform the main natural (anthropological) parameters of mankind. Only perhaps a biological discovery that would allow the human being to be immediately independent—in *statu nascenti*—as are some other breeds or species of animals—would bring a societal change. All efforts to base the constitution of human society mainly on "horizontal" market-contracts, deals between equal anonymous individuals, are ahistorical. *"We are born late into history that is well under way."* For biological reasons—necessarily—all societies exist only in continuity.

Instead of scrutinizing the imagination of some reputed authors again, we examine here directly the variety of human relations that constitute observable human societies. This concise study is based on our work *Global Communication*

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[2] Kate Wong, "Why Humans Give Birth to Helpless Babies", (28 August 2012), online: *Sci Am Blog Netw* https://blogs.scientificamerican.com/observations/why-humans-give-birth-to-helpless-babies/.

[3] Herbert Spencer, *The Study of Sociology* (London: Henry S. King & Co.).

[4] J J Rousseau, *Contrat Social* (Paris: Librio, 2015) at 13; *cf.* André Lalande, *Vocabulaire technique et critique de la philosophie* (Presses Universitaires de France, 1972) at 185.

*without Universal Civilization*[5] and our article *The Relativity of Human Rights* in the New Era of Society Based on Contracts Between Equals.[6]

We look now at what relations a human being must bear before he or she can have horizontal trade between free and equal individuals.

The *lineage,* the relation between mother and child, is the foremost one, which itself is already a continuation of the previous relation between a mother and father. New scientific research shows that the apprenticeship of *mother tongue*—regarding its phonetic articulation and pronunciation—begins even in the mother's womb. This first human relation integrates the infant *eo ipso caste* progressively in a *determined language community*. Even if this mother-child relation could be undone by foster parents, the mother-child relation remains the typical, "mean" relation involving inherited qualities. Biological research will advance and deepen these considerations, but the *in vitro* birth will remain an exceptional human artifice for circumventing Nature. Language is a social phenomenon; therefore, by way of native language, belonging to a speech community will be an inalienable (cultural) part of the identity of each individual.

The first declared effort of the Enlightened Days was to abolish the "caste," the nobility with its entitled inherited prerogatives. However, this "noble egalitarian" idea becomes a simple manoeuvre between social classes if the right of material inheritance remains intact. The new order simply concentrates, *implicitly and essentially,* the privileges on moneyed classes, called the capitalist class. This opens an *econocratic* era.

The most liberal philosophers became the apologists of the econocratic societal systems of capitalism under the regime of a formal procedural equality of individuals. One of the prominent contemporary apologists of this order, John Rawls, wrote: "The unequal inheritance of wealth is no more inherently unjust than the unequal inheritance of intelligence."[7] Of course, Rawls, as an enlightened author, cannot address this argument to God but to the society, and since the right of inheritance of wealth is manmade and that of intelligence not, this thesis is untenable. Rawls himself adds casually that the inheritance of wealth "is presumably more easily subject to social control."

Indeed, beyond the giving of nurture, the relation of lineage, the battle for collective subsistence, creates economic relations: production, cooperation and exchange. This could be composed of horizontal market-relations. It became the prototypical model for the Enlightened constitution of the last centuries in Western civilization. If the inheritable capital—means of production and even natural resources—accumulates in some private hands and the others rely only on their capacity for work, we have a capitalistic system.

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5 Aziz Enhaili & Guy Ankerl, "Global Communication without Universal Civilization" (2000) 33 INUPRESS 775 at 501.

6 Guy Ankerl, "The Relativity of Human Rights in the New Era of Society Based on Contracts Between Equals" (2011) 1:1 23 at 14–36.

7 John Rawls, *A Theory of Justice* (Cambridge: Belcamp Press, 1978) at 278.

As mentioned, the biological fundamentals of the human species oblige us to recognize that human society cannot be reconstituted uniquely as a network of equal anonymous partners encountered in the marketplace for an exchange (perhaps resulting from the professional division of labour in the society). The relation resulting from lineage is pre-existent.

Beyond the natural necessary relationship between the "rising generation" and the adult one there is another—more comprehensive, not transversal but "longitudinal"—generational relation. For the continuity and change in history we can speak also about an inter-generational relation, though this is not to be confused with the actual relation between adult and adolescent. Indeed, the human race doesn't proceed in interrupted succession—as with some seasonal animals—but as a continuity, even if from time to time catastrophes create disruptions.

This is a succession of (adult) generations that should be distinguished from relations resulting from the coexisting adult and adolescent, since the mentality of youth *as such* from that of an adult is different. Thus, this can be called the relation between parent and child, while that between successive generations (of adult cohorts) can be called a *historical* one.

At least in the Neolithic age, around 6000 years ago, the historical dialogue is assured mostly by (ideographic or phonetic) *scribal tradition.*

Communities that are comprehensive enough in time and space to constitute a relatively permanent self-sufficient entity, can be called *civilizations*. Each perpetuates a cumulative "collective knowledge" and has a common consciousness based on accepted evidence and memory of general observation. The imperfection of knowledge is completed by beliefs.

Value orders are neither innate nor universal but civilizationally immanent. They vary according to time and space. It is just the different rankings of values that characterize the various civilizations.[8] Some successions in value orders could be interpreted as "progress" or "decadence," as normless libertarian decomposition is frequently the last phase of an era of civilization.

Because of all the given determinants of all human societies by (impotent) birth and nurture, "rational choice theory cannot provide a universal theory of human behaviour."[9] A realistic constitution cannot be constructed on the premise that human society is composed solely from calculated cooperative-associative acts of a heteronomous set of individuals, independent of their various origins. The liberal constitution is an arbitrary dream based on "curtailed reality."

Present Western thought tries to invalidate all non-individualistically based non-market-oriented societal constitutions by "archaizing" them. Indeed, non-Western contemporary civilizational spheres are ranged in one epistemological

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8 See Guy Ankerl, "Tolerance: Variation of the Concept According to Different Civilizations" in *Democr Toler* (Paris: UNESCO, 1995) 59 at 59–78.

9 Duncan J Watts, *Everything Is Obvious* (London: Atlantic, 2011) at 252.

agglomeration, ready for colonialization by New Imperialism, as does the London University with the School of Oriental and African Studies (SOAS).

The postulated value orders of societies are civilizational immanent. The continuity of a civilization is assumed, anchored by its scribal tradition (phonetic or ideographic) inherited and accepted by the "newcomers"—as noted, again unilaterally—from the past. The human being—in addition to the newborn-parent relation experience—is also nested in the scribal tradition of the civilization into which he is born.

We can conclude that only a very limited number of the whole set of human relations can be ruled by a constitutional principle of (market-like) egalitarian exchanges that result from so-called rational human behaviours. The contemporary globalist societal doctrine, the individualistic economism, is a "dystopia." The human being is not free-floating. The "omni mobile" individual's whole personality is enveloped in a halo of his particular lineage, his mother tongue and scribal tradition largely defining his individual identity by external determinants, outside his self-will (own free will). The world cannot be reconstituted from a set of anonymous strangers' self-projects.

A fundamental misconception of individualistic, egalitarian, liberalist social reform is that it tries to obliterate the (anthropological, cultural) differences, the givens of grown-ups of the human race, instead of simply fighting against all kinds of supremacism. The simple ascertainment of anthropological, cultural differences in the organization of the society can't be condemned as racist or sexist. Only the arbitrary hierarchical categorization of human beings could be the object of reasonable debate.[10] And in this sense, in our Western civilization, even the (inherited) economic situation of human beings is the object of gross—nonprocedural but *de* facto daily—latent and even open discrimination.

## BIBLIOGRAPHY

Ankerl, Guy. “The Relativity of Human Rights in the New Era of Society Based on Contracts Between Equals” (2011) 1:1 23.

Ankerl, Guy. “Tolerance: Variation of the Concept According to Different Civilizations” in *Democracy and Tolerance* (Paris: UNESCO, 1995) 59.

Cavalli-Sforza, Luigi Luca & Francesco Cavalli-Sforza. *Qui sommes-nous?: Une histoire de la diversité humaine* (Flammarion, 1997).

[10] Luigi Luca Cavalli-Sforza & Francesco Cavalli-Sforza, *Qui sommes-nous ?: Une histoire de la diversité humaine* (Flammarion, 1997); David Reich, *Who We are and how We Got Here: Ancient DNA and the New Science of the Human Past* (Oxford University Press, 2018).

Enhaili, Aziz & Guy Ankerl. "Global Communication without Universal Civilization" (2000) 33 Études internationales 775.

Lalande, André. *Vocabulaire technique et critique de la philosophie* (Presses Universitaires de France, 1972).

Rawls, John. *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

Reich, David. *Who We are and how We Got Here: Ancient DNA and the New Science of the Human Past* (Oxford University Press, 2018).

Rousseau, J J. *Contrat Social* (Paris: Librio, 2015).

Spencer, Herbert. *The Study of Sociology* (London: Henry S. King & Co.).

Watts, Duncan J. *Everything Is Obvious* (London: Atlantic, 2011).

Wong, Kate. "Why Humans Give Birth to Helpless Babies", (28 August 2012), online: *Scientific American Blog Network* https://blogs.scientificamerican.com/observations/why-humans-give-birth-to-helpless-babies/.

**Guy Ankerl** is a professor of Sociology. He was appointed as a professor of Sociology at the University of Montreal in 1996. He published numerous scientific articles and books, including *Beyond Monopoly Capitalism and Monopoly Socialism* (1978), *Experimental Sociology of Architecture* (1981), *Rapid urbanization in the Third World* (1984), and *Coexisting Contemporary Civilizations: Arabo-Muslim, Bharati, Chinese, and Western* (2000). Apart from that, he is an expert consultant for the United Nations, the ILO, the Ministry of Finance of Canada, and the Swiss National Science Foundation scientific research for urbanization issues around the world.

*Journal of Southeast Asian Human Rights, Vol. 3 No. 1 June 2019 pp. 7-38*
*doi: 10.19184/jseahr.v3i1.8411*


# Narrating Human Rights in the Philippines: Collective Memories of the Filipino Youth on the Marcos Regime

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**Abstract**
The 2016 national elections in the Philippines have been regarded as the most revealing and consequential democratic practice to the human rights situation in the country for two reasons. First, the overwhelming election of Rodrigo Duterte to the presidency was because of his campaign promise to rid the country of drugs and criminality within "3 to 6 months" through bloody and violent means. Second, the son and namesake of the late dictator Ferdinand Marcos, whose authoritarian regime in the 1970's was responsible for countless human rights violations, narrowly lost his vice-presidential bid by a mere 270,000 votes. These turns of events beg the question: how could Filipinos, who experienced a bloody and violent regime at the hands of a dictator, choose to elect national leaders widely associated with human rights violations?

This paper addresses this question through the use of in-depth interviews with Filipino college students in key cities in the Philippines in order to describe the Marcos regime from the perspective of the generation that did not experience the period. The research aimed to understand how memories of past human rights violations are formed and shaped, how these memories are crucial to the improvement of the human rights situation in society, and how to ensure that mistakes of the past are not repeated.

The study found that widespread revisionist notions about the Marcos regime can be attributed to the absence of meaningful martial law and human rights education in the country. However, the study also found that young Filipinos regard the social institution of education as the most trustworthy bearer of information on human rights and violent regimes. This highlights the crucial role of schools and educators in promoting human rights in society.

Keywords: *Collective Memories, Martial Law, Marcos Regime*

## I. INTRODUCTION

"If I become president, I advise you people to put up several funeral parlor businesses because I am against illegal drugs[...]I might kill someone because of it," Rodrigo Duterte warned during his campaign in 2015.[1] Despite this and other

[1] Santos, Rudy. "Duterte: If I win, better put up more funeral parlors", (26 November 2015), online: <https://www.philstar.com/headlines/2015/11/26/1526317/duterte-if-i-win-better-put-more-funeral-parlors>.

controversial pronouncements during the campaign period, Duterte, a confessed mass murderer,[2] was elected the 15th president of the Philippines, marking the end of the post-Marcos democracy.[3] Because of this, the 2016 presidential elections in the Philippines has been regarded as the most revealing and consequential democratic exercise to the human rights situation in the country for two reasons. First, the overwhelming election of Rodrigo Duterte to the presidency promises to rid the country of drugs and criminality within "3 to 6 months" through bloody and violent means. Since then, Duterte's anti-drug campaign has claimed more than 12,000 lives, [4] mostly urban poor, in what the Human Rights Watch concludes as amounting to "crimes against humanity."[5] Second, the son of the late dictator Ferdinand Marcos whose authoritarian regime in the 1970's was responsible for countless human rights violations (torture, forced disappearances, unjust imprisonment, etc.) was almost elected to the vice presidency, losing by just 270,000 votes.

These two reasons, in turn, begged the question: how could Filipinos, who experienced a bloody and violent regime at the hands of a dictator, choose to elect national leaders widely associated with human rights violations? These turns of events have generally been attributed to a widely invoked rhetoric that Filipinos easily forget the sins of the country's past. Scholarly literature that attempts to substantiate this claim, however, has generally been limited to rhetorical analyses without the benefit of empirical research. This paper addresses this gap through the use of in-depth interviews with Filipino university students in six key cities in the Philippines to describe the martial law from the perspective of the generation that did not experience the Marcos Regime.

This paper, therefore, provides an overview of the collective memories of the Filipino youth on the martial law and the mechanisms through which these memories have been narrated to them. The next section provides a description of the concept of collective memory and its significance to human rights and martial law in the Philippines. Next, the data collection process and the research sites are described. Following the description, the research findings are then presented in four parts: (1) the collective memories of the Filipino youth on the martial law, (2) the human rights violations that occurred during that period according to them, (3) the mechanisms in which these memories were constructed, and (4) the

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2 Curato, Nicole. "We Need to Talk About Rody" in Nicole Curato, ed, A Duterte Reader: Critical Essays on Rodrigo Duterte's Early Presidency" (Cornell University Press, 2017) 1.

3 Casiple, Ramon C. "The Duterte presidency as a phenomenon" (2016) 38:2 Contemporary Southeast Asia: A Journal of International and Strategic Affairs.

4 Human Rights Watch. "Philippines: Duterte's 'Drug War' Claims 12,000 Lives", (18 January 2018), online: Human Rights Watch <https://www.hrw.org/news/2018/01/18/philippines-dutertes-drug-war-claims-12000-lives>.

5 Human Rights Watch. "Philippines: Police Deceit in 'Drug War' Killings", (2 May 2017), online: *Human Rights Watch* <https://www.hrw.org/news/2017/03/02/philippines-police-deceit-drug-war-killings>.

trustworthy bearers of knowledge and information about the period. This paper concludes with the compelling findings of study, particularly on how the Marcos regime and the human rights situation during that period is narrated and transmitted to the Filipino youth.

## 1. Collective Memory, Human Rights, and Martial Law

Collective memory generally refers to "the shared meaning a group of people gives to the past" with the basic premise that memory extends beyond the individual mind and private recollections of the past can be examined and understood as a social artifact.[6] These memories are then demonstrated in how individuals participate and consume materialised repositories, such as culture-specific symbols, myths, commemorative rituals, and grand narratives.[7] As such, significant researches affirmed the importance of shared experiences in the development of a group's collective memory.[8] For example, shared experiences in commemorating independence day by using, for one, culture-specific symbols, such as traditional attire, contribute to the development of a collective identity. In this paper, collective memories are examined in terms of how and whether or not the Filipino youth subscribe to the symbols, commemorative rituals, and grand narratives about the martial law.

The definition of collective memory as an object or collection notions about a person or events commonly accepted by the group was the initial depiction of the concept.[9] Recent works, however, have treated collective memories as more of a process that involves integrating personal remembrances to be shared by all.[10] This framework for understanding collective memories recognizes and emphasizes that personal remembrances may hold multiple and contradictory visions of the past and that these visions may interact and influence other members of a group.[11] More importantly, this framework emphasizes the characteristic of collective memories as something that is reconstructed in relation to the present. This is

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6 Edy, Jill. "Communication and Collective Memory", (30 August 2016), online: Oxford Bibliographies <http://www.oxfordbibliographies.com/view/document/obo-9780199756841/obo-9780199756841-0126.xml>.

7 (a) Schwartz, Barry. "Introduction: The expanding past" (1996) 19:3 Qualitative Sociology.
(b) Zerubavel, Eviatar. Social mindscapes: an invitation to cognitive sociology, ed (Cambridge: Harvard University Press, 2009).

8 Gongaware, Timothy B. "Collective Memories and Collective Identities" (2003) 32:5 Journal of Contemporary Ethnography 483.

9 Halbwachs, Maurice & Lewis A Coser. On collective memory, ed (Chicago: University of Chicago Press, 1992).

10 Kuhn, Annette. "Memory texts and memory work: Performances of memory in and with visual media" (2010) 3:4 Memory Studies 298.

11 Schuman, Howard & Jacqueline Scott. "Generations and Collective Memories" (1989) 54:3 American Sociological Review 359.

apparent because notions by different individuals about the past are negotiated into a common contemporary understanding.[12] Recent scholarship on this subject, therefore, adopts a social-constructionist perspective in which meanings assigned to the past are dynamic and commonly influenced by current circumstances.[13]

Collective memories are also explored through the lens of cultural memories by Assman and Czaplicka, who emphasized the role of social institutions and cultural artifacts in transmitting memories of the past to succeeding generations and sustaining these efforts.[14] These cultural memories that narrate the past and carry the meanings assigned to it are embodied and maintained through literature, [commemorative] rituals, monuments, and institutionalized observances.[15]

On the mechanism of negotiating memories of a violent past into a comprehensible form that can be transmitted to younger generations as part of their identity, Shahzad's examination of the construction of collective memories of Canadian youth on the war on terror offers a possible explanation.[16] Shahzad introduced the role of mnemonic tools which serve as carriers of memories and meanings of Canada's participation in the war on terrorism. He proposes three directions in which memories are constructed: (1) remembering and forgetting, (2) affirmation and opposition and (3) suppressing and revising. Shahzad also conclude that the youth's interpersonal relationships with their friends, teachers and family are integral to the processes of mediation and interpretation of these memories. The non-linear interrelationship among these three social groups shape collective memories as dynamic, fragile, multiple, contested, and distinct from individual memory.[17] The presence of these three features also creates a multi-dimensional characteristic of collective memories of the Canadian youth on the war on terror. This is the reason why there can be different narratives about a single event. As Shahzad articulates, collective memories are complex constructions.

Memory has been cited as a necessary foundation of human rights as evidenced by various social movements[18] that aim to counter re-occurrence of past human rights violations through constant remembrances of the terror

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[12] Hayashi, Isao. "Materializing Memories of Disasters: Individual Experiences in Conflict Concerning Disaster Remains in the Affected Regions of the Great East Japan Earthquake and Tsunami" (2017) 41:4 Bulletin of the National Museum of Ethnology.

[13] *Ibid.*

[14] Kidron, Carol. "Memory", (28 November 2016), online: Memory - Anthropology - Oxford Bibliographies <http://www.oxfordbibliographies.com/view/document/obo-9780199766567/obo-9780199766567-0155.xml>.

[15] Assmann, Jan & John Czaplicka. "Assmann, J., & Czaplicka, J. (1995). Collective memory and cultural identity" (1995) 65:1995 New german critique.

[16] Shahzad, Farhat. "Collective memories: A complex construction" (2011) 5:4 Memory Studies 379.

[17] *Ibid* at 387-388.

[18] Human Rights Watch. "'Never Again'", (23 September 2008), online: Human Rights Watch <https://www.hrw.org/news/2005/01/23/never-again>.

experienced during a violent regime .[19] Human rights advocate and Nobel Peace Prize laureate, Liu Xiaobo, understood the mechanisms through which social institutions, in this case the communist regime in China, can effectively exploit memories of past human rights violations.[20] Speaking of the 1989 Tiananmen Square massacre, Liu warned:

> "The combination of terror, indoctrination and distortion of history, combined with the analgesic effect of prosperity and personal profit, has effectively washed away national memory. The truth can be hidden by the power of the rod; memories can be replaced with lies; common sense can be warped by clever wordplay; and an individual's conscience can be bought with money[...]The generation of people who lived through 1989 is unwilling to discuss June 4th publicly, and the vast majority of people born after 1989 don't really understand June 4th."[21]

Acknowledging and integrating past human rights violations in education has been regarded as imperative in creating a just and humane society. How contemporary Europe deals with the holocaust is an example of how entire societies ensure the remembrance of past human rights violations. The holocaust is the most vivid and potent example of state-sponsored, human rights violations. Looking into how contemporary societies in Europe deal with this past is crucial in understanding how other societies that experienced similar state-sponsored violence can honor the victims and avoid its re-occurrence. Severe sanctions and punishments for denying the holocaust and revisions on how it should be understood and accepted are embedded in European laws. However, without diminishing the purpose of anti-negationist (of the holocaust) laws, recent observations argue that education is the more effective mean in ensuring memories of the holocaust.[22]

The United Nations Educational Scientific and Cultural Organization (UNESCO) proclaims the indispensable role of education in aiding "young people to have a better understanding of the past" and in preventing any form of

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[19] Jelin, Elizabeth. "The Politics of Memory" (1994) 21:2 Latin American Perspectives 38.

[20] Reiss-Andersen, Berit. "Statement by Ms Berit Reiss-Andersen, Chair of the Norwegian Nobel Committee", (13 July 2017), online: NobelPrizeOrg <https://www.nobelprize.org/prizes/peace/2010/statement/>.

[21] Xiaobo, Liu. "Remembering June 4th for China's Future" (2005) 4 China Rights Forum.

[22] (a) Heinze, Eric. "Law and Historical Memory: Theorising the Discipline", (2018), online: Verfassungsblog <https://verfassungsblog.de/law-and-historical-memory-theorising-the-discipline>.

(b) Bunch, Kelly, Matthew Canfield & Birte Schöler. "The Responsibility of Knowledge: Developing Holocaust Education for the Third Generation", (2005), online: Humanity In Action <https://www.humanityinaction.org/knowledgebase/226-the-responsibility-of-knowledge-developing-holocaust-education-for-the-third-generation>.

recurrence of the holocaust.[23] UNESCO further recognizes the importance of valuing memories of the holocaust as follows:

> "Understanding how and why the Holocaust occurred can inform broader understandings of mass violence globally, as well as highlight the value of promoting human rights, ethics, and civic engagement that bolsters human solidarity at the local, national, and global levels [...] The Holocaust illustrates the dangers of unchecked prejudice, discrimination, antisemitism and dehumanization. It also reveals the full range of human responses—thereby raising important considerations about societal and individual motivations and pressures that lead people to act as they do—or to not act at all."[24]

In this section, the concept of collective memories, its significance to the discourse of human rights, and the role of education in its transmission is introduced. The next section discusses briefly how the Philippines' experience of state-sponsored violence, in the form of the Marcos regime, is being examined through the lens of collective memories.

## 2. Memories of Filipinos on the Martial Law

Except for commentary articles published in national broadsheets and news websites[25] and a few critical essays published as scholarly articles[26] that diagnosed and reflects on the "historical amnesia" of Filipinos on the martial law, there has been no venture that provides primary data to examine collective memories of Filipinos on the martial law. However, martial law "memory entrepreneurs"[27] and

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[23] Ch'oe, Su-hyang, Alexander Leicht & Karel Fracapane. Education about the Holocaust and preventing genocide: a policy guide, ed (Paris: United Nations Educational, Scientific and Cultural Organization, 2017).

[24] *Ibid* at 7.

[25] Such as:

a) Remoto, Danton. "Martial law memories", (22 September 2017), online: philstarcom <https://www.philstar.com/opinion/2017/09/22/1741731/martial-law-memories>.

b) Royandoyan, Ramon H. "The Ninoy Aquino legacy: Martial law for millennials", (29 November 2015), online: Inquirer Lifestyle the Ninoy Aquino legacy Martial law for millennials Comments <https://lifestyle.inquirer.net/214579/the-ninoy-aquino-legacy-martial-law-for-millennials/>.

c) Philippine Center for Investigative Journalism. "Memory, Martial Law, and Ninoy Aquino", (20 August 2014), online: The PCIJ Blog <http://pcij.org/blog/2014/08/18/memory-martial-law-and-ninoy-aquino>.

[26] Such as Claudio, Lisandro E. "Memories of the Anti-Marcos Movement" (2010) 18:1 South East Asia Research 33.

[27] Quinsaat, Sharon. "The Marcos Dictatorship, Historical Remembrances, and Collective Memory", (25 February 2016), online: Mobilizing Ideas

contemporary scholars agree on a similar observation on the presence of a dominant and persistent discourse that portrays the Marcos regime as the "'heyday' or period of economic prosperity and social harmony" in the Philippines.[28]

This narrative, that paints the Marcos regime as the golden age in Philippine history, gained a following and traction in the 2016 national elections when Ferdinand Marcos, Jr ran for vice president. In making sense of why the Philippine electorate seemed poised to elect the heir of a dictator, Arguelles points to the "absence of an inclusive national collective memory of the Marcoses' rule."[29] Arguelles recognized the crucial role of the country's social institutions, such as schools, media, family, and state, in transmitting memories about the Marcos regime. The quality and content of the transmitted memories, so far, is revealed in the popularity and almost election of Marcos to the second highest elected post in the country. Arguelles further suggests that Rodrigo Duterte is playing a major role in shaping the Filipinos' memories of what the Marcos regime was.[30] By devaluing the commemoration of the People Power Revolution that ousted Marcos and authorizing the burial of the same dictator in the Heroes' Cemetery, Duterte is re-configuring how Filipinos deal with their past martial law. Plainly said, Duterte is manipulating his constituents into evaluating the Marcos regime as a period of economic prosperity and social harmony.[31] Considering that Duterte himself declared martial law in Mindanao less than a year into his presidency, Arguelles's argument is moving closer to the truth.

## II. RESEARCH METHODS

The findings presented in this paper are based on in-depth interviews conducted between May 2017 and February 2018 with 30 students from six different universities in the country. Interviews were also conducted with 10 university teachers in the social sciences, two pastoral care managers, and two student prefects. Research ethical approval was provided by the research unit of Xavier University.[32]

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<https://mobilizingideas.wordpress.com/2016/02/25/the-marcos-dictatorship-historical-remembrances-and-collective-memory/>.

[28] McCargo, Duncan. "Duterte's mediated populism" (2016) 47:1 Journal of Contemporary Asia 142.

[29] Arguelles, Cleve. "It takes a nation to raise a dictator's son", (4 April 2016), online: New Mandala <http://www.newmandala.org/it-takes-a-nation-to-raise-a-dictators-son/>.

[30] Arguelles, Cleve. "Duterte's Other War: The Battle for EDSA People Power's Memory" in A Duterte Reader: Critical Essays on Rodrigo Duterte's Early Presidency, ed (2017).

[31] *Ibid* at 268-269.

[32] Xavier University is the institutional affiliation of the author and which adheres to research ethical standards thru its Institutional Research Ethics Board. See: <http://www.xu.edu.ph/university-libraries/138-memo/sy-2018-2019/3441-institutional-research-ethics-board>.

The research sites covered in this report are listed in Table 1 and shown in Table 1 as follows:

**Table 1: Research sites and number of interviews.**

| University | Research Sites | Data Gathering Period (2017) | No of Students Interviewed | University Associates Interviewed | Martial Law Victims |
|---|---|---|---|---|---|
| Mindanao State University- Main Campus | Marawi City | May- July | 5 | 2 | 0 |
| Xavier University | Cagayan de Oro | June- July 2017 | 5 | 4 | – |
| Universidad de Sta Isabel | Naga City | Aug | 5 | 3 | 0 |
| Leyte Normal University | Tacloban City | October | 5 | 3 | 2 |
| Ateneo de Manila University | Quezon City, Metro Manila | December | 5 | 0 | 0 |
| Ateneo de Davao University | Davao City | February 2018 | 5 | 2 | 0 |

## 1. Research Sites

Key informants that provided insights on the collective memories of the Filipino youth on the martial law were socially engaged students in six key universities in the Philippines. The next section provides a brief description of these universities and the context of the research site.

Mindanao State University (MSU) is a government-subsidized university located in Marawi City. Two weeks after the data gathering was completed in MSU, the city became the site of intense fighting between government forces and the ISIS-affiliated terrorist group, Maute, on May 23, 2017. The following day, President Rodrigo Duterte declared martial law in the entire island of Mindanao. By December 2017, roughly two months since the Marawi siege was declared

over, Philippine congress voted to extend the martial law until 2018.[33] Amnesty International released their report on the Marawi siege and detailed violations of international humanitarian law (IHL) and international human rights law (IHRL) committed by both the Philippines military and the Maute-ISIS group:

> "[Maute-ISIS] committed unlawful killings, pillage, hostage-taking, and mistreatment of prisoners. There were also allegations that militants used child soldiers [...] Local human rights groups documented cases of enforced disappearances and extrajudicial executions by [Philippine] government forces."[34]

The second research site was Xavier University in Cagayan de Oro, a city four hours away from Marawi. The university is part of the network of schools in the Philippines run by the Jesuit order and where majority of the students are Catholic. In the days leading to Marcos's burial in the Heroes' Cemetery, a black banner was hung in the university gates with the words "Marcos is not a Hero." Many in the city, including its own student population and alumni, questioned this move, citing the Catholic value of forgiveness as called for in this case. In a statement released by the university, its president, Fr Roberto Yap, reminded the Xavier community that "'moving on' must always be in consonance with the mission to promote justice; forgiveness demands justice.[35] The criticism received by the university in this episode demonstrates the gap between the values it professed to promote (truth, justice, personal care) and what is actually transferred to the students.

Universidad de Sta Isabel is another Catholic university; this time ran by the Daughters of Charity in Naga City. During the interviews, the students revealed that all the elected positions in the city were won by the Liberal Party. The Liberal Party of the Philippines is known as the electoral party of the Aquinos, the political rivals of the Marcoses. Today, Naga City is mostly known as the hometown of Leni Robredo who defeated Ferdinand Marcos, Jr in the vice-presidential race.

Leyte Normal University is a state-subsidized university in Tacloban City in the province of Leyte. Internationally, Tacloban is probably most known as the

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[33] Reuters. "Battle over: Philippines declares end of Marawi siege after dozens of militants die in final showdown", (23 October 2017), online: South China Morning Post <https://www.scmp.com/news/asia/southeast-asia/article/2116564/battle-over-philippines-declares-end-marawi-siege-after>.

[34] Amnesty International. "Philippines: 'Battle of Marawi' leaves trail of death and destruction", (2017), online: Amnesty International <https://www.amnesty.org/en/latest/news/2017/11/philippines-battle-of-marawi-leaves-trail-of-death-and-destruction/>.

[35] Xavier University Ateneo de Cagayan. "XU STATEMENT: Marcos is not a hero, not now, not ever", (2016), online: Xavier University Ateneo de Cagayan <http://www.xu.edu.ph/xavier-news/55-2016-2017/2244-xu-statement-marcos-is-not-a-hero-not-now-not-ever>.

city badly hit by super typhoon Haiyan in 2013. In the Philippine political sphere, Tacloban is known as the birthplace of Imelda Romualdez, the wife Ferdinand Marcos. The eastern Visayas region, including Tacloban, is the political stronghold of the Romuladez clan.

Ateneo de Manila University is a private university in Metro Manila also run by the Jesuits. The university was a cultivating ground of youth activism early on in Marcos's first term in the 1960's which intensified when martial law was finally declared. In the aftermath of Marcos's reign, 11 Ateneo students[36] and 1 Jesuit priest were martyred. [37] Being the capital of the country, Metro Manila is a venue and witness to the vibrant, yet sometimes violent and chaotic, public demonstrations against the Marcos dictatorship.[38]

Finally, Ateneo de Davao University or ADDU is another Jesuit university, this time, located in the hometown of Rodrigo Duterte. Davao City is the stronghold of Duterte where he ruled as mayor for 20 years. His daughter, Sarah, is now the mayor of the city. Just like Xavier and Ateneo de Manila, ADDU is known for its liberal, culturally centered education, and, like all Jesuit universities in the Philippines, is the most influential university in the city. In 2016, ADDU released a strong statement condemning Duterte and the Supreme Court's actions that permitted Marcos's burial in the Heroes' Cemetery.[39]

## III. RESEARCH FINDINGS AND ANALYSES

The overarching inquiry that this research aimed to resolve is "why Filipinos chose to elect national leaders associated with human rights violations." Following Arguelles' proposal, that the answers lie in the Filipinos' lack of "inclusive national collective memory of the Marcoses' rule, this paper will now proceed to describe the collective memories of the Filipino youth on the Marcos regime and the mechanisms in which these memories were constructed and transmitted.

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[36] Montiel, Cristina Jayme. Living and dying: in memory of 11 Ateneo de Manila martial law activists, ed (Quezon City: Ateneo de Manila University Press, 2007).

[37] Bantayog. "ALINGAL, Godofredo B. – Bantayog ng mga Bayani", (9 October 2015), online: Bantayog ng mga Bayani <http://www.bantayog.org/alingal-godofredo-b/>.

[38] Formerly accessed in this address: <http://www.officialgazette.gov.ph/edsa/the-ph-protest/> however, as of July 2018, articles from the Aquino administration have been allegedly deleted by the Duterte Administration. Source: <https://www.rappler.com/nation/207248-official-gazette-website-down>.

[39] See Ateneo de Davao University. "APILA: Marcos Burial is Historical Injustice Rewritten", (22 November 2016), online: Ateneo de Davao University - Davao City - Philippines <http://www.addu.edu.ph/blog/2016/11/22/apila-marcos-burial-is-historical-injustice-rewritten/>.

## 1. Collective Memories of the Filipino Youth on the Martial Law

To document the collective memories of the Filipino youth on the martial law, the research provides the meanings that the youth attach to the martial law, which largely defined the Marcos regime and the human rights violations they believed to have occurred during that period.

When asked "what does martial law mean to you," the study documents seven classifications in the themes that emerged in the Filipino youth's descriptions regarding the period: (1) inconclusive descriptions, (2) the regime of Marcos, (3) as a mechanism to quell civil unrest that led to state-sponsored violence, (4) a mere embodiment of Philippine politics, (5) a period parallel with Duterte's presidency, (6) beneficial consequence and negative consequences and (7) an ambivalence to its meaning.

### a. Inconclusive Descriptions of the Martial Law

Majority of the responses elicited by the question "What does martial law mean to you" could be best described as inconclusive. Many of the students interviewed seemed to struggle in describing what is martial law. This is partly because the martial law period in the Philippines was described to them disparately at different levels in their school life. As expressed by one student, "it is something disputed whether it was good or bad." Many responses could also be described as an attempt to capture the complexity of the conditions during the martial law period. Here, the students' responses do not conclusively describe martial law as either bad or good but alludes to an unnamed effect to the masses.

### b. The Regime of Marcos

Martial law was undoubtedly the regime of Ferdinand Marcos. In the words of "Jan" from Mindanao State University, "Marcos was very intelligent. As a product of a political family, he was already wealthy. But he really wanted absolute power which was not possible in a democratic country like ours." A number of students also alluded to a well-known theory that Marcos and/or his "cronies"[40] were responsible for the Plaza Miranda Bombing[41] which was the prelude to declaring

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[40] Marcos cronies refer to the loyal friends and relatives of Ferdinand Marcos who benefited from his authoritarian rule. For more information, see:
Roa, Ana. "Regime of Marcoses, cronies, kleptocracy", (29 September 2014), online: Inquirer News Regime of Marcoses cronies kleptocracy Comments <https://newsinfo.inquirer.net/641277/regime-of-marcoses-cronies-kleptocracy>.

[41] The Plaza Miranda bombing happened during the campaign rally of Liberal Party in August 1971 at the Plaza Miranda in Manila which caused nine deaths. See <http://malacanang.gov.ph/75022-defend-it-at-plaza-miranda-a-history-of-the-countrys-foremost-public-square/>.

martial law. They believed that the bombing became the perfect justification to put the entire Philippines under an authoritarian rule. There were also responses which implied role of his wife, Imelda Marcos, and several students also describe the martial law as a conjugal dictatorship[42]. And, because the martial law was the absolute rule of Marcos over the entire country, the students do not acquit him of the human rights violations that transpired in his term.

c. Quelling the Civil Unrest Led to State-Sponsored Violence

A few students referenced the general purpose of martial law as provided in the constitution when asked to describe the period. For some students, the martial law was declared to "quell rebellion and civil unrest" and induce some sort of beneficial social change, but things went awry after a few years into its implementation. For them, martial law was declared by Marcos so that the government can regain control of its citizens and to induce beneficial change to society. However, in the latter years of its implementation, martial law strayed from this original purpose.

Furthermore, the students saw the declaration of martial law to be well within the powers of a president, as it was provided in the constitution of that period.[43] Martial law was seen as the last resort to "deal with the social unrest" and "restore peace and order" in Philippine society which, for the students, meant Marcos had only "wanted what was good for the country." However, a few students also admitted that martial law could have been used by Marcos to justify the extension of his term as president.

d. The Martial Law is an Embodiment of Philippine Politics

The martial law seemed to have activated the cyclical run of political leaders in the country, wherein a tyrant, after a long period of rule, is eventually replaced by a liberal. Marcos' dictatorial rule ended after 20 years when he was replaced by the wife of his political rival and democracy icon, Cory Aquino.[44] Years after, former actor Joseph Estrada was elected to the presidency but was later convicted of plunder[45], a charge that Marcos was also found guilty of.[46] In the same way that

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[42] Conjugal dictatorship refers to the joint authoritarian rule of Ferdinand and Imelda Marcos during the martial law. For more information see:
Mijares, Primitivo. The conjugal dictatorship of Ferdinand and Imelda Marcos, 1st ed (Union Square Publications: San Francisco, California, 1976).

[43] The 1935 Philippine Constitution can be accessed at
"The 1935 Constitution | GOVPH," online: Official Gazette of the Republic of the Philippines <http://www.officialgazette.gov.ph/constitutions/the-1935-constitution/>.

[44] Beech, Hannah. "Corazon Aquino 1933-2009: The Saint of Democracy", (17 August 2009), online: Time <http://content.time.com/time/magazine/article/0,9171,1914872,00.html>.

[45] Aglionby, John. "Philippines: Estrada to stand trial for plunder", (21 January 2001), online: *The Guardian* <https://www.theguardian.com/world/2001/jan/21/philippines>.

Marcos was ousted, Estrada was replaced by Gloria Arroyo in what was known as EDSA [People Power Revolution] II. And similar to Marcos, Arroyo had been accused of electoral fraud throughout most of her term.[47] After 10 years, she was eventually replaced by a member of the Aquino political family, Noynoy Aquino who ran on a campaign of liberal and anti-corruption platform. In the 2016 elections, Filipino voters elected Duterte whose campaign promises bordered on authoritarianism.[48] As one student summarized: "it's always the rise of a tyrant, then a liberal will come."

Furthermore, a few students pointed to the observation that the end of martial law was only instigated by elites when they themselves could no longer withstand the economic and political woes that had long been experienced by ordinary Filipinos. Only Filipino citizens and freedom activist were negatively impacted by the martial law in the form of human rights violations and therefore did not entice the political and economic elites in the Philippines to move against the Marcos regime in its early years. As one student reminded, "that's why Marcos stayed in power so long because many of [the elites] were on his side."

e. Finding Parallels with Duterte

The students also alluded to the parallels in Marcos's regime and Duterte's presidency. For Marcos, the problem he needed to deal with was communism and for Duterte it is illegal drugs. However, while Duterte declared martial law in the entire Mindanao, this is not what the students see as similar in his and Marcos's rule. As one student from Davao City noted, "this time is different from [Marcos's] because Duterte's martial law is very divisive. Many people favor martial law, especially here in Mindanao."

Instead, what the students find similar between Marcos and Duterte is that both preferred the iron-fist methods in quelling the social ills in their presidential watch, communism and illegal drugs respectively. Additionally, they found similarities in the widespread of extra-judicial killings during their presidential terms and the predominance of oligarchy during their rule.

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[46] Supreme Court of the Philippines. "G.R. No. 152154. July 15, 2003", online: Supreme Court of the Philippines <http://sc.judiciary.gov.ph/jurisprudence/2003/jul2003/152154.htm>.

[47] The Telegraph. "Former Philippines president pleads not guilty to electoral fraud", (23 February 2012), online: *The Telegraph* <https://www.telegraph.co.uk/news/worldnews/asia/philippines/9099960/Former-Philippines-president-pleads-not-guilty-to-electoral-fraud.html>.

[48] Curato, Nicole. "Flirting with Authoritarian Fantasies? Rodrigo Duterte and the New Terms of Philippine Populism" (2016) 47:1 Journal of Contemporary Asia 142.

### f. Beneficial Consequences and Negative Implications of the Martial Law

A significant number of the insights from the youth depicts the martial law period positively. The initial theme that emerged along the lines of positive depictions of the Marcos regime was public order. The description of Marcos' martial law as peaceful and orderly was first documented in Marawi City, a week before the city itself and the entire island of Mindanao was placed under martial law by Duterte. Since then, research has documented similar positive descriptions of Marcos's martial law in all the research sites which includes: "people were more disciplined [back then]," "there were less killings," and "it was more peaceful."

Other themes that emerged in the students' description of the martial law in positive light invoked the ensuing benefits of Marcos's rule: economic prosperity, the accomplishments of Marcos and the emergence of the post-Martial Law Filipino identity which valued democracy and freedom.

Despite the previous categories of responses that ranged from neutral to positive, a larger number of the youth's descriptions of the martial law still lean towards negative: corruption, violence, injustices, and human rights violations.

For some students, the martial law was defined by the widespread social injustices perpetrated during the period. Among the incidents that students believed to have been facilitated by the martial law and wherein no person was ever held accountable are the accident in the manila film centre, the Jabidah Massacre, and the *Palimbang* Massacre.

Many students attribute the current social and political upheavals in the country as one of the consequences of the martial law. A number of them conceded that Marcos might have meant well by declaring martial law, but, in the end, his regime eventually caused more harm than good. In the words of one student, "Marcos was actually a good leader, but, his martial law, for the lack of a better term, f****d us more than its good intentions."

### g. An Ambivalence to the Meaning of Martial Law

Finally, an important theme that emerged in the responses of Filipino students when asked to describe the Marcos regime is their ambivalence in describing and evaluating the period for the reason that they "did not experience" it. As one student puts it, "for me, I have no right to judge because I did not experience [the martial law] in my own senses. But I also believe that what they told me is true."

## 2. Human Rights Violations During the Martial Law

The Republic Act 10368 (RA 10368), or the Human Rights Victims Reparation and Recognition Act of 2013, acknowledges the "victims of summary execution,

torture, enforced or involuntary disappearance, and other gross human rights violations committed during the regime of former President Ferdinand E. Marcos covering the period from September 21, 1972 to February 25, 1986."[49] Another way that the study drew out meaningful responses from the students was to specifically ask whether they believe there were human rights violations that occurred during the martial law.

Even among those who professed support for the martial law, all the students in the study conceded that martial law was rife in human rights violations. In this portion, the students were asked to enumerate the human rights violations they felt were violated, curtailed, or suspended during the Marcos regime. It is important to note that in this portion of the interview, students were asked to freely identify or enumerate the human rights violations they believed took place during that period rather than requiring them to choose from pre-identified choices. Therefore, some of the human rights violations identified by the students do not fall within those recognized by the Philippine government in RA 10368.

According to the students, the most widespread the human rights violations that occurred during the Marcos regime are warrantless arrests and curtailment of the freedom of speech. Other prominent responses include violations of the right to assembly, right to information, right to life, right to justice, and the right to free will.

While most students negated the notion that these human rights abuses were justified, there were prominent voices which expressed that they felt these violations were necessary and unavoidable given the circumstances of that period. The following responses illustrate how students justify the human rights violations that occurred during the Marcos regime:

> "If you cross the line, the government will really counteract. And then, here comes the media that [hypes] everything so martial law is immediately portrayed as human rights violations."

> "I guess it's only right if it is constitutionally right..."

### 3. Mechanisms in Which the Martial Memories are Constructed, Narrated, and Transmitted

Given the knowledge and insights of the Filipino youth about the martial law that were summarized in the previous section, the next order of inquiry is now identifying and describing the mechanisms through which these insights were constructed and passed on.

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[49] "Republic Act No. 10368 | GOVPH," online: *Official Gazette of the Republic of the Philippines* <https://www.officialgazette.gov.ph/2013/02/25/republic-act-no-10368/>.

Since some students view the martial law in a favourable light, or at least saw the human rights violations as justifiable, this section attempts to discuss the social institutions that played significant roles in forming how they view the martial law. Specifically, the social institutions examined in the study are: education, mass media, religion, and government. As previously stated, the term, "memory," is used in this paper to describe the knowledge, opinion, attitude, and general insights of the youth on the martial that were discussed in the previous section.

a. Education

The social institution of education and the mechanism itself are identified by the students as the most influential in how they formed their knowledge and subsequent opinions of the martial law. However, some students confide that what is taught about the martial law in classrooms is contradicted by the accounts of their family members who lived during that period or teachers themselves contradict what is written in the official textbooks.

In March 2016, prior to the election of Rodrigo Duterte, the Department of Education, the Philippine branch of government that manages primary and secondary education in the country, issued a statement which assured their commitment to provide "more in-depth and enriched discussion on Philippine History which will include the Martial Law period [...] to enable learners to remember and understand the country's history and the impact of Martial Law to the lives of Filipinos today."[50]

Without prompting, all the students interviewed for this study recounted that, at some point in their student life, martial law was discussed by one of their teachers, generally in their social science subjects. Almost all of the students confirmed that their prevailing opinion of the martial law period was largely influenced by what is written in textbooks, what was taught by teachers in the classroom, and the school activities such as seminars and symposia that discuss the period.

While studies confirm that martial law was covered in social studies and history subjects as far back as primary and secondary education, this period was only discussed as an event that occurred during the presidency of Ferdinand Marcos and in the context of why the 1986 EDSA People Power Revolution took place. As one student lamented, "we had four history subjects in [secondary] schools and it seems a waste that we did not discuss the martial law." Some students also made the observation that how martial law is discussed depends on the leanings of the teacher and the policy of the school. While there may be a directive that attempts to ensure the coverage of martial law in the classroom, it

[50] Macas, Trisha. "DepEd vows to educate students on Martial Law period", (3 March 2016), online: GMA News Online <http://www.gmanetwork.com/news/news/nation/557703/deped-vows-to-educate-students-on-martial-law-period/story/>.

has not been missed by the students' observation that this topic is either inadequately discussed or is largely dependent on the teacher's inclinations.

The same practice is also observed in college subjects where martial law is only discussed in detail depending on the political leanings and experiences of the professor. For example, one student in Ateneo de Manila cited that her teacher in psychology narrated her experiences as an activist during the period. Another student observed: "Some teachers mention it in passing while some teachers feel strongly about the topic especially for those who were activists during that period. It also depends on the school..." In all the schools, except Ateneo de Manila University, the students revealed that there is also little information taught about the martial law in their history classes in college.

While few and sporadic, the next section provides the existing mechanisms of integrating martial law in the curriculum:

i. Philippine history

Philippine History is a required course for all college students in the country. The subject traces the development of the Philippines into a nation from pre-colonialism to the formation of its government as a republic. While all students interviewed for this study indicated this subject as among those that cover the topic of the martial law, they also confide that very minimal discussion is allotted to the topic. Whether the topic of the martial law is given substantial discussion in the semester is generally dependent on the inclinations and teaching methods of the teacher. In most cases, very little details are added to the discussion on the martial law other than it was an event that transpired during the presidency of Ferdinand Marcos.

The teachers interviewed for this study confirm martial law is considered as a "priority topic" for coverage in Philippine History; however, discussions are *pahapyaw,* or minimal, due to the time constraints in covering many topics. Furthermore, prescribed textbooks in Philippine history generally emphasize the Spanish colonization and allot only one to two pages on martial law.

ii. Other subjects that integrate the Martial Law

Aside from Philippine history, university subjects identified by students that integrate the topic of martial law in the discussion are Theology, International Humanitarian Law, Comparative Politics and/or Philippine Politics, Philippine Constitution, Philippine culture for Teacher Education students, and Sociology. The course description and the manner of integrating martial law are summarized in Table 1. A discussion on how Ateneo de Manila University integrates martial law in their curriculum is provided in the next section.

**Table 2: Subjects identified by students that integrate the martial law in the discussion.**

| College Subjects | Generic Description | How Martial Law is Discussed in the Subject |
|---|---|---|
| **Theology** | Generally offered in Catholic universities in the Philippines which introduces students to the basic understanding of the Catholic faith. | "...based on the [biblical] scriptures what was happening during Martial Law was wrong." |
| **International Humanitarian Law** | Commonly taken by students in a political science course. Discusses priorities and humanitarian concerns in armed conflict. | In the context of universal human rights and global organizations on human rights. |
| **Comparative Politics and/or Philippine Politics** | Commonly taken by AB Political students. This subject discusses theories in political science. | "[Martial law] was discussed as an example of the state protecting itself by suppressing its citizens" and in comparing past and present political systems. |
| **Philippine Constitution** | Usually a required subject for all college students in the Philippines. This subject discusses the 1986 Constitution. | The 1986 Constitution was enacted to replace the 1973 Constitution adopted during the Marcos regime. |
| **Philippine Culture for Education Majors** | A required course for Teacher education students, specifically those majoring Social Studies. This subject discussed the diverse cultures in the Philippines. | In the context of the plight of indigenous peoples during the Martial Law. |
| **Sociology** | Usually a required subject for all college students in the Philippines. This subject discusses sociological theories. | "Martial law as arena for inequality" |

Most students qualify that the time and topics allotted in the discussions on the martial law is short and few. When asked to elaborate on the themes and topics that emerged in these discussions, the following common answers:

1. Independence and Freedom
2. Human rights violations
3. Oligarchy
4. Manipulation of the minds o he people
5. Politics and amendments to the constitution
6. Abuses of the military on the people
7. Accomplishments of Marcos
8. The premise and conditions that led to the declaration

iii. Martial Law as discussed in Ateneo de Manila

In Ateneo, the students who started college in August 2015, roughly a year before the issue on Marcos's burial in the Heroes' Cemetery, revealed that the university has always provided venues for discussion about the Martial Law. The discussions on this period just intensified and increased a year later when, by then president Duterte, declared he will allow Marcos's burial. Ateneo students revealed that they were given limited information about the martial law in their primary and secondary education, but they acknowledged that Ateneo's framing of the topic improved and changed their knowledge about the period.

In the words of the students themselves, below are examples of how Ateneo and its teachers effectively integrate the topic of the martial law in varying subjects, aside from Philippine History. These examples can also serve to illustrate how university-level education in the country can improve the knowledge of Filipino students about the Marcos regime:

a. "In English 11, we analysed an article about a Martial Law slay victim. That was a concrete evidence. Then, we were required to make a feature article on an interview we conducted with a Martial Law victim. I took that subject way before issue of Marcos' burial."
b. "In our Sociology-Anthropology subject, we were made to watch a film entitled 'Batch 81' in relation to the topic of deviance. In a scene, one character was asked if martial law was bad, and he did not answer. That's how my instructor inserted a discussion on the martial law."
c. "My Psychology professor and her husband were activist during the martial law. She shared how the period caused a collective trauma to the nation."

iv. University campus activities

Finally, aside from the curricular subjects, students also identified campus activities that discussed the topic of the martial law which are elaborated as follows:

a. Public Lectures, Symposia and Round Table Discussions
   Xavier University students recalled a public lecture in 2016 in which a journalist talked about her experiences during the martial law victim talked. The "*Pakighinabi* Conversation Series" is a regular round table discussion designed to provide members of the Ateneo de Davao community "a platform to discuss multidisciplinary issues and concerns in an open and friendly manner".[51] Among the matters previously tackled in this project was the Marcos burial wherein lawyers and members of an NGO discussed the issue.
b. Alternative Classes
   TALAB- *Talakayang Alay sa Bayan* (Discussions for the Nation) are alternative class sessions in Ateneo de Manila where invited speakers discuss pressing social issues in the country, including the Marcos burial. Talks that delve into the martial law period intensified after issue on Marcos' burial.
c. Art Exhibits and Film Screenings
   One respondent recalled a campus activity wherein documentaries about the martial law were screened and after which family members of victims talked about their experiences during the period. The student government of Ateneo de Manila organized an art exhibit that showcased the artworks that portrayed the martial law.

Detailed in this section are the mechanisms in which the social institution of education contributed to the construction and transmission of knowledge and information and in influencing their opinions about the martial law period. At present, these mechanisms include the inclusion of the topic of the martial law period college subjects such as those within the social sciences but most especially in Philippine History. The students interviewed in the study also acknowledged that campus activities, such as public lectures and art exhibits about the martial law, also raised their awareness and influenced their insights regarding the period.

v. Human rights education in the Philippines

The prevalence of human rights violations during the martial law is commonly acknowledged even by students who gave favourable descriptions of the Macros regime. The following section, therefore, summarizes how notions regarding human rights were formed in the consciousness of the Filipino youth through education.

In all the universities visited in this study, there is no dedicated subject on human rights. However, the students identified courses they have taken wherein

[51] Suarez, Patricia. "Pakighinabi: Diversity and Freedom of Religion", (11 July 2017), online: *Ateneo de Davao University - Davao City – Philippines* <http://www.addu.edu.ph/blog/2017/07/11/pakighinabi-diversity-and-freedom-of-religion/>.

they recall that human rights were discussed. A summary of these courses is provided in Table 3.

**Table 3: University subject that incorporate topics on human rights education.**

| Academic Strand | Subject | Usual Themes/Points of Entry to Discuss Human Rights.* |
|---|---|---|
| Humanities | Theology** | ■ On Catholic social teachings<br>■ "Dignity of the human person; every person has dignity and human rights"<br>■ "What's happening now with the EJKs [in Duterte's war on drugs] is taking away their fundamental right to live." |
| | Philosophy of the Human Person* | ■ Free will and freedom<br>■ Determinism |
| | Filipino | On Filipino literature that discussed human rights. |
| | Literature | Literary pieces such as poems, stories, novels that discussed concepts of human rights. |
| Social Sciences | Sociology | ■ Culture<br>■ Self-determination |
| | International Humanitarian Law | On Universal Declaration of Human Rights |
| | Philippine Constitution | Human rights protected by the Philippine constitution |

*Phrases enclosed in quotation marks are direct quotation.
**These subjects are required courses in Jesuit universities.

vi. College activities

Aside from the college subjects identified above that incorporate concepts of human rights in the instructional delivery, the students recalled campus activities which discussed human rights. They are as follows:

1. Symposium organized every semester by students taking up International Humanitarian Law.
2. Community-based activities that conduct seminars on democracy and principles of utilitarianism organized by Political Sciences majors.

3. Forum that discussed the emerging issues in Duterte's presidency especially the extrajudicial killings and human rights violation.

To summarize, Filipino college students interviewed in this study affirmed the significance of education in the formation of their knowledge about the martial law and human rights.

b. Family

The family is the strongest social institution in Filipino society. Examinations on the social life in the Philippines identify the family as the "all-dominating unit" and is even acknowledged in the 1987 Philippines constitution, which explicitly refers to the "Filipino family" as the "foundation of the nation."[52] This overreach of the family's influence in how the youth's insights of the martial law are constructed has been documented in this research. A few students confide that, while they have one or two family members who express favourable descriptions of the martial law, their insights on the Marcos regime is largely influenced by what has been taught in schools or accounts from books. The youth's insights on the Marcos regime is still largely the product of the country's educational institutions because, as articulated by one student from Tacloban City, "[martial law] is not a household topic."

c. Skepticism on the Portrayal of the Martial Law by the Mass Media

While a few students acknowledged that their knowledge and opinions of the Marcos regime were partly influenced by the documentaries and shows that feature interviews with martial law victims, the overall assessment of the youth's regard of the mass media is that of skepticism. There were students who felt the media's portrayal of the martial law is either presented purposefully out of context or tilted towards an angle that serve their own interests.

Another student deplored, "the media is also partly to blame why the public forget and do not care about the martial law period anymore. They do not continuously remind the public on the martial law. The media only cares about what is 'trending;' they also do not focus on the direct victims of the period."

d. Religious Institutions

Similar to the family, religion in the Philippines is an important part of social life. A 2017 survey by the Social Weather Station revealed that religion is important to 85% of Filipinos.[53] The proportion of those who say religion is very or somewhat

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[52] Miralao, Virginia. "The Family, Traditional Values and the Sodocultural Transformation of Philippine Society" (1997) 45:1 Philippine Sociological Review.

[53] Santos, Krisia & Marie Marchadesch. First Quarter 2017 Social Weather Survey: 48% of Filipino adults attend religious services weekly; 85% said religion is important, tech. (Quezon City: SWS, 2017).

important was highest among members of Iglesia Ni Cristo at 96%, followed by Catholics and other Christians (both at 85%), and Muslims (71%).

Religious institutions in the Philippines are no stranger to the horrors of the Marcos regime. The infamous Palimbang massacre took place in a mosque where, one survivor recounted, more than 1,000 people were locked up inside and never seen again.[54] Religious men and women, including priests, nuns, and pastors who died in their fight against the dictatorship are recognized in the *Bantayog ng mga Bayani* or Monument of Heroes.[55] Images of the EDSA revolution that eventually ousted Marcos in 1986 always include the religious groups that mobilized the larger population. In 2016, the Catholic Bishop's Conference of the Philippines stated its strong dissent and staged protests against the hero's burial accorded to Marcos.

This study attempted to gauge whether the significance of the religious institutions in Philippine society, particularly the Catholic Church and its stance against the Marcos regime, have something to do with how Filipino youth understand the martial law. Indeed, interview responses document that the Filipino youth are aware that religious institutions, most prominently, the Catholic church, were among the victims of the Marcos regime. Furthermore, they acknowledged the role of religious groups in the ousting of Marcos through the EDSA People Power revolution. However, the study also reveals that these realizations do not necessarily mean that they consider religious groups or the Catholic church as influential in their perceptions of the martial law. As one student shared, "I've been educated in elementary and high school in schools run by priests, but their religious teachings do not really have an influence on me." Another student from a Catholic university offers an explanation to the youth's indifference of the Catholic Church's pronouncements about the Marcos regime: "I am not religious, so I am not influenced."

### e. Commemorations and Testimonies of Martial Law Victims

The indifference of the youth on the influence of religious groups and the mass media to their perceptions on the martial law extends to the testimonies of the victims and commemorations. One student pointed out that even before martial law was declared, student activists were already being raided which only intensified later.

The general sentiment of students on the commemorating any event related to the Marcos regime such as the anniversary of the declaration the martial law and the EDSA People Power revolution is indifference. One student argues that, if the reason for these commemorations are, "just to appreciate human rights and equality, it is [not worth] opening up old wounds of the past." Another student

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[54] See: <http://verafiles.org/articles/vera-files-fact-sheet-palimbang-massacre-and-marcos-other-tr>.
[55] See: <http://opinion.inquirer.net/107302/priests-religious-fought-marcos-tyranny>.

pointed out that commemorating martial law related events, such as the anniversary of its declaration, is also dependent on the agenda of the sitting administration. The contribution of commemorations to the construction and transmission of the Filipino youth's insights on the martial law is summarized by one student: "[they] only serve as an attachment to the past, but it does not influence [our] opinion. It's only an event to look back."

## 4. Trustworthy Bearers of Knowledge and Information

The first part of this paper established that the youth have inconclusive conceptions of the martial law and received conflicting descriptions of the period from social actors such as family members, teachers, mass media personalities, etc. The second part then summarized the existing mechanisms through which these knowledge and information are passed on to the youth by social institutions such as the family, education system, religion. This next part identifies the bearers of knowledge and information about the martial law that the Filipino youth acknowledge as trustworthy and credible. The basic question here is: do they trust or find credible the social actors or institutions if they talk about the martial law. The specific social actors and institutions identified in the questioning are: mass media, schools, teachers and/or professors, and the religious officials.

### a. Skepticism Towards Television Media Including News Shows and News Anchors

A recurrent theme that emerged was a general skepticism of the youth on how mainstream news channels such as ABS-CBN and GMA-7 portray martial law. One student admitted that, "mainstream television is really the easiest source of information on social issues; the problem is whether the viewers are critical." The same skepticism is expressed by students on news personalities such as news anchors and reporters: "news anchors do not have an effect on me, not even one of them. Reporters perhaps, [I trust], because they are on the field."

For the most part, students acknowledged the essential role of news outlets in society, but many assert that news media's role must be confined to broadcasting current events and not to influence viewers' opinions.

### b. Print media

If the youth are generally skeptical of television news shows, they are more likely to trust print media such as newspapers and books. Print news media identified by the students as trustworthy in presenting the martial law are broadsheets such as Manila Bulletin and Philippine Daily Inquirer as well as local new papers like Sun Star. One student recommended that, "the best way is to read all articles involved,

and see whether they validate each other, though this can be tedious and time consuming."

Many of the students identified "books as the source of information they are more likely to consider as trustworthy in portraying the martial law period. As one student justified: "one of my professors said that books have lesser mistakes because they [have] undergone peer review [before they are published]."

c. Schools/academics/professors

While there were a few students who expressed doubts in the pronouncements of their teachers and professors about the martial law, many still professed trust in the information taught in schools. The students alluded to the credibility of the professors and of their university as well as the discussion seminars organized in the campus.

d. Church

On the credibility of religious institutions, such as the Catholic Church and, in some cases, the Islamic community, the students profess that they find them credible in as far as the humanitarian and social issues but not on political issues such as the Marcos burial and the martial law in general. For those who believe that the Catholic Church must not meddle with political affairs, they describe religious institutions as being "too conservative" in their perspectives, "have no firsthand experience [on the issue]," and not being critical.

e. Firsthand Accounts or People who Experienced the Social or Political Phenomenon

Generally, when asked to name a social institution or a person whom they feel are trustworthy sources of information and knowledge about the martial law, majority of the students responded: those who are victims of the Marcos regime and any person who had firsthand experience of the period.

Some of the students believe that that the martial law victims "will not gain anything if they lie; but [the public also] also need to be critical before believing in their accounts." As what one student says: "[I have more trust] in ordinary people like drivers because what appears on TV is not always credible." Another student claims that he gets more credible accounts from "one on one conversations and interactions with ordinary people in society."

f. Government or Elected Officials

Majority of the students interviewed for this study expressed a general distrust of government officials, including the elected officials, appointed officials, and politicians in general. One student alluded that, "their agenda always depends on

the political spectrum they belong to." To summarize, when it comes to the bearers of truth about the martial law, while there is no resounding or unified response from the youth, but many of them professed trust in the information sourced from the print media, their schools, and their professors.

## IV. CONCLUSION

This study primarily sought to document the collective memories and memory-making mechanism of the Filipino youth on the martial law period. The research aimed to provide insightful descriptions of the martial law period from the perspectives of young Filipinos whose knowledge of the period rely heavily on the social institutions of family, schools, mass media, the religious institutions, and the government.

This research found that how the martial law should be regarded whether it was a shameful violent past that Filipinos must sought to prevent from re-occurring or as an ordinary policy implemented in the 1970's, is not fully settled. While all the students interviewed here confirmed that they are aware of the human rights violations that occurred during the martial law, placing the blame squarely on Marcos himself, there were also significant voices that believed these transgressions were either justified or unavoidable.

While the branches of the Philippine government that oversee the basic education and universities in the country announced the measures to ensure that younger Filipinos are educated adequately on the martial law and human rights, the students in this study revealed that they received little to no education on these two important matters. This might account for the misconceptions of this generation on the issue of martial law and ultimately of human rights. For example, the researcher received the most surprising, but telling, insight from a student early on in the data gathering: "there are [extra-judicial killing] now, but they are good [extra judicial killing]." Moreover, not a few of the students enumerated beneficial consequences which they believed are squarely attributed to the martial law. It is therefore not surprising why Ferdinand Marcos Jr, the dictator's son, is now on the brink of gaining back his family's political stature.

Because the primary respondents of the study are college students, it might account for why they attribute their insights on the martial law to what has been taught to them in schools. In other words, since both martial law and human rights have not been adequately taught in schools, the students in turn do not have adequate and meaningful knowledge about these matters.

However, this research also shows that learning about the martial law and human rights in college is not too late and it does not have to be demanded by a government decree. In the case of Ateneo de Manila, the school effectively integrates these two topics in courses such as English, Sociology, and Theology. The impact of these efforts is evident in a student who described himself as "politically indifferent" due to his Chinese background but was so moved that he

joined the anti-Marcos rallies in 2016, and he was not alone. On the day the Supreme Court of the Philippines released its decision to allow Marcos's burial in the Heroes Cemetery, Ateneo students walked out of their classrooms and practically dragged their teachers to the streets to protest. These actions may be taken as evidence of the impact of human rights and martial law education to the social awareness and participation of the youth.

Other social institutions examined in this study as to their contributions to the construction and transmission of martial law memories to the youth are the family, religious institutions, the government, and the mass media, all of which did not figure prominently in the youth's consciousness in contributing to knowledge and meanings they attribute to the Marcos regime and human rights.

Additionally, the youth profess value in the social institution of education as trustworthy bearers of knowledge and information about the martial law and human rights. This might be taken to mean that the martial law and human rights education has not been adequately given attention in the past and is largely the reason for the Marcoses gaining traction again in Philippine politics. At the same time, it also provides direction on where the Phillipenes can start in correcting misconceptions about the martial law and the meaning of human rights in the classroom.

**Acknowledgement** – This study was conducted through the research grant from Strengthening Human Rights and Peace Research and Education in ASEAN/Southeast Asia (SHAPE-SEA).

## BIBLIOGRAPHY

Aglionby, John. "Philippines: Estrada to stand trial for plunder", (21 January 2001), online: *The Guardian* <https://www.theguardian.com/world/2001/jan/21/philippines>.

Amnesty International. "Philippines: 'Battle of Marawi' leaves trail of death and destruction", (2017), online: Amnesty International <https://www.amnesty.org/en/latest/news/2017/11/philippines-battle-of-marawi-leaves-trail-of-death-and-destruction/>.

Arguelles, Cleve. "Duterte's Other War: The Battle for EDSA People Power's Memory" in *A Duterte Reader: Critical Essays on Rodrigo Duterte's Early Presidency*, ed (2017).

Arguelles, Cleve. "It takes a nation to raise a dictator's son", (4 April 2016), online: New Mandala <http://www.newmandala.org/it-takes-a-nation-to-raise-a-dictators-son/>.

Assmann, Jan & John Czaplicka. "Assmann, J., & Czaplicka, J. (1995). Collective memory and cultural identity" (1995) 65 :1995 New german critique.

Ateneo de Davao University. "APILA: Marcos Burial is Historical Injustice Rewritten", (22 November 2016), online: Ateneo de Davao University - Davao City - Philippines <http://www.addu.edu.ph/blog/2016/11/22/apila-marcos-burial-is-historical-injustice-rewritten/>.

Bantayog. "ALINGAL, Godofredo B. – Bantayog ng mga Bayani", (9 October 2015), online: Bantayog ng mga Bayani <http://www.bantayog.org/alingal-godofredo-b/>.

Beech, Hannah. "Corazon Aquino 1933-2009: The Saint of Democracy", (17 August 2009), online: Time <http://content.time.com/time/magazine/article/0,9171,1914872,00.html>.

Bunch, Kelly, Matthew Canfield & Birte Schöler. "The Responsibility of Knowledge: Developing Holocaust Education for the Third Generation", (2005), online: Humanity In Action <https://www.humanityinaction.org/knowledgebase/226-the-responsibility-of-knowledge-developing-holocaust-education-for-the-third-generation>.

Casiple, Ramon C. "The Duterte presidency as a phenomenon" (2016) 38:2 Contemporary Southeast Asia: A Journal of International and Strategic Affairs.

Ch'oe, Su-hyang, Alexander Leicht & Karel Fracapane. Education about the Holocaust and preventing genocide: a policy guide, ed (Paris: United Nations Educational, Scientific and Cultural Organization, 2017).

Claudio, Lisandro E. "Memories of the Anti-Marcos Movement" (2010) 18:1 South East Asia Research 33.

Curato, Nicole. "Flirting with Authoritarian Fantasies? Rodrigo Duterte and the New Terms of Philippine Populism" (2016) 47:1 Journal of Contemporary Asia 142.

Curato, Nicole. "We Need to Talk About Rody" in Nicole Curato, ed, A Duterte Reader: Critical Essays on Rodrigo Duterte's Early Presidency" (Cornell University Press, 2017) 1.

Edy, Jill. "Communication and Collective Memory", (30 August 2016), online: Oxford Bibliographies <http://www.oxfordbibliographies.com/view/document/obo-9780199756841/obo-9780199756841-0126.xml>.

Gongaware, Timothy B. "Collective Memories and Collective Identities" (2003) 32:5 Journal of Contemporary Ethnography 483.

GOVPH. Republic Act No. 10368.

GOVPH. The 1935 Constitution.

Halbwachs, Maurice & Lewis A Coser. *On collective memory*, ed (Chicago: University of Chicago Press, 1992).

Hayashi, Isao. "Materializing Memories of Disasters: Individual Experiences in Conflict Concerning Disaster Remains in the Affected Regions of the Great East Japan Earthquake and Tsunami" (2017) 41:4 Bulletin of the National Museum of Ethnology.

Heinze, Eric. "Law and Historical Memory: Theorising the Discipline", (2018), online: Verfassungsblog <https://verfassungsblog.de/law-and-historical-memory-theorising-the-discipline>.

Human Rights Watch. "'Never Again'", (23 September 2008), online: Human Rights Watch <https://www.hrw.org/news/2005/01/23/never-again>.

Human Rights Watch. "Philippines: Duterte's 'Drug War' Claims 12,000 Lives", (18 January 2018), online: Human Rights Watch <https://www.hrw.org/news/2018/01/18/philippines-dutertes-drug-war-claims-12000-lives>.

Human Rights Watch. "Philippines: Police Deceit in 'Drug War' Killings", (2 May 2017), online: *Human Rights Watch* <https://www.hrw.org/news/2017/03/02/philippines-police-deceit-drug-war-killings>.

Jelin, Elizabeth. "The Politics of Memory" (1994) 21:2 Latin American Perspectives 38.

Kidron, Carol. "Memory", (28 November 2016), online: Memory - Anthropology - Oxford Bibliographies

<http://www.oxfordbibliographies.com/view/document/obo-9780199766567/obo-9780199766567-0155.xml>.

Kuhn, Annette. "Memory texts and memory work: Performances of memory in and with visual media" (2010) 3:4 Memory Studies 298.

Macas, Trisha. "DepEd vows to educate students on Martial Law period", (3 March 2016), online: GMA News Online <http://www.gmanetwork.com/news/news/nation/557703/deped-vows-to-educate-students-on-martial-law-period/story/>.

McCargo, Duncan. "Duterte's mediated populism" (2016) 47:1 Journal of Contemporary Asia 142.

Mijares, Primitivo. The conjugal dictatorship of Ferdinand and Imelda Marcos, 1st ed (Union Square Publications: San Francisco, California, 1976).

Miralao, Virginia. "The Family, Traditional Values and the Sodocultural Transformation of Philippine Society" (1997) 45:1 Philippine Sociological Review.

Montiel, Cristina Jayme. *Living and dying: in memory of 11 Ateneo de Manila martial law activists*, ed (Quezon City: Ateneo de Manila University Press, 2007).

Philippine Center for Investigative Journalism. "Memory, Martial Law, and Ninoy Aquino", (20 August 2014), online: The PCIJ Blog <http://pcij.org/blog/2014/08/18/memory-martial-law-and-ninoy-aquino>.

Quinsaat, Sharon. "The Marcos Dictatorship, Historical Remembrances, and Collective Memory", (25 February 2016), online: Mobilizing Ideas <https://mobilizingideas.wordpress.com/2016/02/25/the-marcos-dictatorship-historical-remembrances-and-collective-memory/>.

Reiss-Andersen, Berit. "Statement by Ms Berit Reiss-Andersen, Chair of the Norwegian Nobel Committee", (13 July 2017), online: NobelPrizeOrg <https://www.nobelprize.org/prizes/peace/2010/statement/>.

Remoto, Danton. "Martial law memories", (22 September 2017), online: philstarcom <https://www.philstar.com/opinion/2017/09/22/1741731/martial-law-memories>.

Reuters. "Battle over: Philippines declares end of Marawi siege after dozens of militants die in final showdown", (23 October 2017), online: South China Morning Post <https://www.scmp.com/news/asia/southeast-asia/article/2116564/battle-over-philippines-declares-end-marawi-siege-after>.

Roa, Ana. "Regime of Marcoses, cronies, kleptocracy", (29 September 2014), online: Inquirer News Regime of Marcoses cronies kleptocracy Comments <https://newsinfo.inquirer.net/641277/regime-of-marcoses-cronies-kleptocracy>.

Royandoyan, Ramon H. "The Ninoy Aquino legacy: Martial law for millennials", (29 November 2015), online: Inquirer Lifestyle the Ninoy Aquino legacy Martial law for millennials Comments <https://lifestyle.inquirer.net/214579/the-ninoy-aquino-legacy-martial-law-for-millennials/>.

Santos, Krisia & Marie Marchadesch. First Quarter 2017 Social Weather Survey: 48% of Filipino adults attend religious services weekly; 85% said religion is important, tech. (Quezon City: SWS, 2017).

Santos, Rudy. "Duterte: If I win, better put up more funeral parlors", (26 November 2015), online: <https://www.philstar.com/headlines/2015/11/26/1526317/duterte-if-i-win-better-put-more-funeral-parlors>

Schuman, Howard & Jacqueline Scott. "Generations and Collective Memories" (1989) 54:3 American Sociological Review 359.

Schwartz, Barry. "Introduction: The expanding past" (1996) 19:3 Qualitative Sociology.

Shahzad, Farhat. "Collective memories: A complex construction" (2011) 5:4 Memory Studies 378.

Suarez, Patricia. "Pakighinabi: Diversity and Freedom of Religion", (11 July 2017), online: *Ateneo de Davao University - Davao City – Philippines* <http://www.addu.edu.ph/blog/2017/07/11/pakighinabi-diversity-and-freedom-of-religion/>.

Supreme Court of the Philippines. "G.R. No. 152154. July 15, 2003", online: Supreme Court of the Philippines <http://sc.judiciary.gov.ph/jurisprudence/2003/jul2003/152154.htm>.

The Telegraph. "Former Philippines president pleads not guilty to electoral fraud", (23 February 2012), online: *The Telegraph*

<https://www.telegraph.co.uk/news/worldnews/asia/philippines/9099960/Former-Philippines-president-pleads-not-guilty-to-electoral-fraud.html>.

Xavier University Ateneo de Cagayan. "XU STATEMENT: Marcos is not a hero, not now, not ever", (2016), online: Xavier University Ateneo de Cagayan <http://www.xu.edu.ph/xavier-news/55-2016-2017/2244-xu-statement-marcos-is-not-a-hero-not-now-not-ever>.

Xiaobo, Liu. "Remembering June 4th for China's Future" (2005) 4 China Rights Forum.

Zerubavel, Eviatar. *Social mindscapes: an invitation to cognitive sociology*, ed (Cambridge: Harvard University Press, 2009).

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*Journal of Southeast Asian Human Rights, Vol. 3 No. 1 June 2019 pp. 39-58*
*doi: 10.19184/jseahr.v3i1.8406*


# Application of the Cambodian Constitution: An Assessment of the Constitutional Law-Making Process and the Right to Public Participation

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**Abstract**
Studies conducted on the constitutional law-making process have shown that public participation is a key element of the relationship between the government and its citizens beyond legitimating the whole process. This paper discusses the relationship between the people and the government on the basis of the Cambodian Constitution, both *de jure* and *de facto*. In doing so, the 1993 constitutional making process and the public's participation will be assessed. This paper aspires to answer the following questions: firstly, how the constitutional law-making process impacts the exercise of constitutional rights in Cambodia, and, secondly, to what extent does public participation play a role in public affairs, especially in the constitution and law-making processes. This paper further suggests that the concept of meaningful public consultation on constitutional law making should be incorporated in the Cambodian Constitution.

Keywords: *Constitutional Making Process, Right to Participate in Public Affairs, Constitutionalism, Cambodian Constitution, Meaningful Public Consultation*

## I. INTRODUCTION

The constitutional law-making process is not only an indicator allowing to assess the legitimacy of a constitution it can also set the tone for the political atmosphere or influence the application of a constitution ideally adopted to protect the people. If the division of power is viewed as being far more important than the will and benefits of the people during the constitutional drafting period, it will result in poor promotion and protection of constitutional rights.

Public participation in the constitution and law-making process in Cambodia is a concern. Due to the lack of public belief in the importance of participating in the process, an individual might not understand the significance of their right to partake in public affairs. An individuals' participation can address societal issues and eventually conjure a solution from the government and their representatives.

The current Cambodian Constitution was adopted in 1993 during a time of transition after the atrocities of the Democratic Kampuchea (more commonly

known as the Khmer Rouge regime). After the collapse of the Khmer Rouge regime, the Paris Peace Agreements (Paris Agreements) were signed in 1991, authorizing the United Nations to arrange a national election and adopt a new constitution in Cambodia. The 1993 Constitution is the foundation for the legal and political process in current Cambodian society; it restored the monarchy, brought political dialogue, and built the legal system that eventually applied a liberal democracy based on pluralism.[1] From 1993 until March 2018, the Constitution has been amended seven times, and this is in addition to the adoption of Additional Provisions to the Constitution to ensure the regular process of the national institutions.[2] Each amendment was to cope with political crisis rather than to strengthen individual rights.[3]

This paper discusses the association between the people and the government on the basis of the Cambodian Constitution, both in legal text and practice. The assessments, in doing so, are the 1993 constitutional making process and the public's participation. The questions to be addressed in this paper are: firstly, how the constitutional law-making process impacts the exercise of constitutional rights in Cambodia, and, secondly, to what extent does public participation play a role in public affairs, particularly the constitution and law-making processes.

This paper is divided into two sections. First, it discusses the right to public participation in regard to the constitutional law-making process and describes the process which took place in Cambodia in 1993 (Part II). Second, it provides an overview on the existing principle of constitutionalism by studying the relationship between governmental institutions (the Legislative, Executive and Judiciary). Furthermore, the research analyzes the relationship between the government and the people as constitution and law-making processes are concerned (Part III). Lastly, this paper provides a summary with concluding remarks (Part IV).

## II. CONSTITUTIONAL LAW-MAKING PROCESS

### 1. The Study of Constitutional Law-Making Process in General

Drafting a new constitution is different than making constitutional amendments or reforms. The process is needed in situations where a previous constitution is no longer functional and the people plea to have new one drafted, in situations where

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1 Peng Hor, *Introduction to Cambodian Law,* (Cambodia: Konrad-Adenauer-Stiftung, 2012), at 38-9; see also Sok-Kheang Ly, *Reconciliation process in Cambodia: 1979-2007,* (Cambodia: DC-Cam, 2017), at 145.

2 Additional Provisions to the Constitution to Ensure the Regular Process of the National Institutions, Preah Reach Kram NS/RKM/0704/001, 2004.

3 First amendment article 28, dated 14 July 1994; Second amendment article 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93, and chapter 8 to chapter 14, 1999; Third amendment article 19 and 29, 2001; Forth amendment article 88 and 111, 2005; Fifth amendment article 28, 88 new, 90 new, 98, 106 new, 114 new and article 6 of Additional Provision to the Constitution, 2006; and the sixth amendment article 145 new and 146 new, 2008.

the political system changes, or in situations of conflict such as a nation split or merge, a new regime takes over, or a nation emerges from conflict.[4]

There are different approaches for drafting a new constitution that is dependent on the political and legal situation of each country. Each state may need to consider amendments to their existing constitution or create an entirely new constitution to reflect and safeguard the legal and political system.

According to Louis Aucoin, in order to study the constitutional law-making process, particularly in the countries emerging from conflict, eight categories should be formed as research questions: general issues concerning the conflict resolution and constitutional making, the structure of the process, public participation, democratic representation, timing and sequencing of the constitutional law-making process, the role of the international community, the role of international law, and, lastly, the essential issues of substance.[5] In saying this, it is not necessary for all eight categories to be fulfilled in order to study the whole constitutional law-making process; it depends on whether all eight categories apply in one particular country. The study on the 1993 Cambodian constitutional law-making process was completed by Stephan P. Marks which focus on the above four categories. These categories will be discussed in the subsequent parts of this paper.

## 2. The 1993 Constitutional Law-Making Process in Cambodia

There were six constitutions from 1947 to present.[6] The current constitution is the sixth constitution which was adopted in 1993. The sixth constitution was adopted only after the fall of the Khmer Rouge regime and when the Paris Agreements were signed in 1991.

In order to properly understand the constitutional law-making process of 1993 in Cambodia, it is essential to first look back at the historical context. The four factions existing at the end of Khmer Rouge regime saw the need of settlement as they were no longer relying on the outside support. They accepted the authority

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[4] Yubaraj Sangroula, "Non-extension or non-amendment? the supreme court's originalist approach to interpreting the tenure of the constituent assembly", *Participatory Constitution Making in Nepal: Issue of Process and Substance,* (Nepal: Post Peace Agreement Constitution Making in Nepal, 2014), at 125.

[5] Aucion Louis and Laurel E. Miller, *Framing the State in Times of Transition Case Studies in Constitution Making,* (Peace Building and Rule of Law, 2010).

[6] The First Constitution: Constitutional Monarchy (1947 to 1970), The second Constitution: Republic Social Democracy (1970 to 1975 ), The Third Constitution: Communist–Pol Pot (1975 to 1979), The Fourth Constitution: Republic Socialist Democracy (1979 to 1989) The Fifth Constitution: Republic Social Democracy (1989 to 1993) and The Six Constitution: Liberal Democracy with Monarchy (1993 to Present).

of the United Nations, and the Supreme National Council to be an interim government to maintain peace and restore the country.[7]

According to Marks, the constitutional law-making process was an impact of the civil war and influenced by the Paris Agreements.[8] The Paris Agreements were also influenced by the post-cold war tendency to promote democracy and the rule of law.[9] More importantly, the Paris Agreements paved the way for political settlement in Cambodia. A number of tasks were addressed during the transitional period under the supervision of the United Nations (UN) through the establishment of United Nations Transitional Authority in Cambodia (UNTAC).[10] UNTAC was established in order to facilitate a free and fair national election and to ensure a legitimate government in Cambodia.[11] During that time, the Supreme National Council was established with the goal to work with the UN to elect a new government to rebuild state functions.[12]

The national election was held from the 23rd until the 28th of May 1993, which resulted in the election of 120 representatives. These representatives formed the Constituent Assembly. The assembly's role was not only to be an interim legislative body, but also to adopt a new constitution based on pluralism and liberal democracy required by the Paris Agreements.[13]

On 20 June 1993, the Constituent Assembly appointed its 12 members to draft the constitution based on the proportionality of the representatives of the parties that won the seats in the Constituent Assembly. The choice of the constitutional law-making process was mentioned in the Paris Agreements: it required the new constitution to be a liberal democracy on the basis of pluralism[14] and to incorporate the fundamental freedoms and human rights principles.[15]

Between June and September 1993, the drafting committee worked on preparing the new constitution. The 1993 Constitution was not a newly constructed constitution; it was a combination of the 1947 Constitution (Monarchy constitutionalism) and the 1989 Constitution (Republic of Cambodia).[16]

To provide a better understanding before examining the right to participate in public affairs as stipulated in the 1993 Constitution, it is necessary to briefly discuss the 1947 and 1989 constitutions.

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7 David Chandler, *A History of Cambodia,* 7d ed, 2007.

8 Marks, P. Stephen, "The Process of Creating a New Constitution in Cambodia", *Framing the State in Times of Transition Case Studies in Constitution Making,* (Peace Building and Rule of Law, 2010), at 210.

9 Hor, *Supra Note 1 at* 37.

10 Peace Paris Agreement, 1991, Art. 2 & 3.

11 *Ibid,* Art. 12, 13 & 14.

12 *Ibid,* Art. 4, 5, 6 & 7.

13 *Ibid,* Annex 5, Para 4.

14 Marks, *supra* note 7 at 226.

15 Peace Paris Agreement, Art. 23.

16 Marks *supra note 7* at 211.

The 1947 Constitution was the first constitution adopted when Cambodia was a French protectorate, and was significantly influenced by both the late King Sihanouk and the French constitutional model of a parliamentary monarchy.[17] It expressly stated, "powers are from the king,"[18] even though there were other branches of government. The 1947 Constitution protected human rights under Articles 3 to 10: people could exercise their freedoms as prescribed by laws, without violating other people's rights, and freedoms of expression and association were also guaranteed.[19]

The 1989 Constitution was adopted after the victory over the Khmer Rouge regime in January 1979. There was a draft constitution in 1981 (Republic Communist of Kampuchea), and eventually it was amended and promulgated in 1989. The 1989 Constitution that created the Republic of Cambodia provided a comprehensive foundation of human rights and set out the division of state powers. However, neither of these two Constitutions included the people's right to participate in public affairs, which was only incorporated in the 1993 Constitution.

## 3. The Right to Participate in Constitutional Law-Making Process

### a. A Moral Claim or Legal Right?

The legal right to participate in public affairs[20] or government[21] is enshrined in international human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The United Nations Human Rights Council (HRC), the organ in charge of interpreting the ICCPR, further emphasized that, "[c]itizens also participate directly in the conduct of public affairs when [their government] chooses [to] change their constitution."[22]

A debate exists as to whether the meaning of the right to participate in public affairs is extended to the right to participate in the constitutional law-making process and reform. Referring to the norms of democracy, participation in constitutional making process is a moral claim.[23] The claim that the legal right to such participation exists is questioned, and, even if it did, there is the further

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[17] Menzel Jorg, "Cambodia: From Civil War to a Constitution to Constitutionalism?", *Constitutionalism in Southeast Asia,* (Time Edge Publishing, 2008).

[18] Constitution of Cambodia, 1947, Art. 21.

[19] *Ibid,* Article 3 – 10.

[20] Universal Declaration of Human Rights (UDHR), Art. 21.

[21] International Covenant on Civil and Political Rights (ICCPR), Art. 25.

[22] General Comment, Article 25 of the ICCPR.

[23] Hart Vivien, "Democratic Constitution Making" (United States of Institute of Peace, 2003) at 4.

concern that there is no clear practical form for it to be implemented.[24] Hart Vivien claims that a legal right to participate in the constitutional law-making process is a legal justification.[25]

The United Nations High Commissioner for Human Rights (OHCHR) and Human Rights Committee has done tremendous work to find the best practice and challenges of implementing the right to participate in public affairs. Remarkably, in 2016, there was an expert workshop organized by OHCHR under the request of Human Rights Council to discuss the existing guidance on the implementation of the right to participate in public affairs. The workshop confirmed that the right to directly participate in the drafting law process is included in right to participate in public affairs; it is a right not just a matter of political will.[26] Furthermore, the experts identified gaps in the practice of exercising the right to participate directly in drafting law process, such as the lack of awareness of their rights due to poor education or dissemination, lack of regulations to implement these rights in practice, lack of access to information to ensure meaningful participation, and the concern that specific groups such as women and person with disability were not provided with enough support to exercise their participation.[27] The form and means of public participation and the execution of legal rights in order to participate in the constitutional law-making process can be demonstrated in many ways. For instance, public participation can be done directly or indirectly through elected representatives.[28] Public participation includes a range of activities through civic engagement, education, media campaigns (dialogue, platform), consultations on the draft, and academic discourse.[29] It is anticipated that new technology aims to increase participation, but it will not necessarily create an impact on the right of everyone to participate since there is limitation to disadvantage groups and people in lower-income countries and rural areas.[30]

Therefore, the right to participate in constitution and law-making processes is a legal right and it is necessary to create an efficient mechanism or provide a

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[24] Tony Evans, "International Human Rights Law as Power/Knowledge", Human Rights Quarterly Volume 27, 2005, at 1048; Hart Vivien, "Democratic Constitution Making" (United States of Institute of Peace, 2003) at 4.

[25] Hart Vivien, "Constitution Making and the Right to Take Part in a Public Affair", *Framing the State in Times of Transition Case Studies in Constitution Making*, 2010, at 20.

[26] UN Secretary-General "The rule of law and transitional justice in conflict and post-conflict societies" (23 August 2004), online: https://www.un.org/ruleoflaw/what-is-the-rule-of-law/, retrieved on 27 March 2018.

[27] UNHCHR, "Expert Workshop on the Right to Participate in Public Affair" (18 May 2016), online: http://www.ohchr.org/EN/Issues/Pages/RightToParticipate.aspx, accessed on 5th March 2018.

[28] UDHR, Art. 21(1); ICCPR, Art. 25(a).

[29] Brandt, M. "Constitutional Assistance in Post-Conflict Countries the UN Experience: Cambodia, East Timor and Afghanistan (2005).

[30] UNHCHR, *supra note* 27, para 30.

practical form to exercise such participation. It is the time to realize the right and engage the public in directly exercising the given right in an effective way.

b. The Essence of the Right

The essence of the right to participate in the constitutional law-making process is not only to ensure that individual rights are be granted and enforceable under the Constitution but also to uphold the distribution of power and enhance a strong relationship between the government and the people. This has been materialized, for instance, in the practice of the participation in constitutional law-making process in South Africa and Nepal. In South Africa, the process of making a new constitution took seven years to complete, as the Constitutional Assembly needed to motivate their voters to participate in the process directly. The assembly did so by putting forward a slogan saying, "You've made your mark, now have your say." It is estimated that seventy three percent of South Africans were touched by the assembly's campaign, therefore making two million submissions to the assembly.[31] In Nepal, participatory constitutional law-making was adopted as mandatory by Nepal Constituent Assembly's rules. The Nepal constitutional law-making was carried out through a bottom up approach and open for submission directly from its citizens, which took almost five years from 2008 to 2012.[32]

Nepalese people were confident with the constitutional making process, which provided an inclusive environment for everyone to feel ownership over the process and product. Participatory and inclusive constitutional law-making process offered no alternative mean to realize the existence of a democratic constitution in Nepal.[33] It is a significant indicator of the essence of the right to participate in constitutional law-making process.

c. Right to Participation and the 1993 Cambodia Constitution-Making Process

The election and adoption of the 1993 Constitution were regarded by the international community as a remarkable success in bringing peace and stability to Cambodia. It was also viewed as a positive step and foundation towards re-building the country, incorporating a stronger political and legal system. However, the drafting process did not include public participation for a number of reasons. First, there was no measure taken to ensure the public participation. The draft text was not disclosed to the public for consultations. Even though the content of the

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[31] Hart, *supra* note 23 at 7.

[32] Khanal Krishna "The participatory Constitutional Making Process in Nepal: An Assessment of the CA Process (2008-2012)" *Participatory Constitution Making in Nepal: Issues of Process and Substances,* (2014) at 11.

[33] Neeru Shrestha "Spot Light on Inclusion Debate in Nepal with Special Focus on Constituent Assembly Thematic Committee Reports" *Participatory Constitution Making in Nepal: Issues of Process and Substances,* (2014) at 397-398.

draft was leaked, which allowed members of the civil society as well as the media to comment on the draft, it was not taken into consideration by the drafting committee.[34] As mentioned above, the process of drafting the Constitution was entrusted to the committee who was appointed by the Constituent Assembly. However, there were suspicions that the committee was not independent from the political parties who won the majority seats. It was further perceived that the main purpose underpinning the drafting process was to share the benefit and power among the political leaders rather than to represent the will and best interests of the people.[35]

Second, there was insufficient time for the public to engage with the process. The constitutional law-making process was completed in three months, which did not allow for a proper and meaningful consultation. The result of such a short period of time for drafting was also because of the premature withdrawal of the UN forces (UNTAC) from Cambodia while the situation remained fragile.

Third, there was a lack of interest and understanding about the essential of exercising such a right by the public. Only did the civil society and the media observe and follow the situation and process by questioning the transparency of the constitutional law-making process. They subsequently became more engaged after the Constitution was promulgated by being actively involved in the dissemination process and educating the public.[36]

Lastly, there was an immediate need to consolidate peace, a process of which the adoption of the Constitution was an essential part. This justified the need to amend the Constitution later.[37] It is understood that the Constituent Assembly was elected by the people, so the people were indirectly participating by choosing their representatives. However, the concern is the absence of the people's participation directly during the drafting process.

The following part of this paper will discuss the relationship amongst the governmental institutions and the relationship between the government and the people as enshrined in the Constitution *de jure* and further highlight the *de facto* aspect regarding the implementation of the right to participate in public affair, particularly right to participate in the constitution and law-making process.

## III. THE RELATIONSHIP AMONG THE GOVERNMENTAL INSTITUTIONS AND THE PEOPLE IN THE 1993 CONSTITUTION, *DE JURE,* AND *DE FACTO*

The application of a constitution is rested on the constitutional value. This section provides an overview of what constitutional value is and examines whether the

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[34] Marks, *supra* note 8, at 214.
[35] *Ibid* at 215.
[36] *Ibid at* 217.
[37] Ghai Y.P "The Constitution Reform Process: Comparative Perspectives" (Journal of Democracy, 2004).

Cambodian Constitution embraces constitutionalism and to what extent constitutionalism in Cambodia has been developed to protect constitutional rights. In doing so, the relationships among governmental institutions and those between the government and the people are assessed.

## 1. The Constitutional Value

Wolin notes that, "[C]onstitutions are considered to be profound expressions of national commitment, [and] are about the highest of all political stakes." [38] Constitutional value is jeopardized when it is used as a legal instrument to maintain power rather than to protect the rights of the people.[39] Constitutionalism strives for the balance between the division of state powers and the will and interest of the people. After all, a constitution is the supreme law which protects people through the allocation of power to state institutions. It also prevents the misuse and abuse of power.

However, issues may arise when it comes to constitutional enforcement. Constitutional value can be of almost no or limited effect. The *per se* binding provisions of a constitution might be difficult to enforce due to the lack of enforcement mechanisms or lack of intention to enforce.[40] If the constitutional value is undermined, the right of the people will be at risk.

Therefore, it is important to strictly comply with the duty that the constitution imposes on state institutions, to promote and protect human rights, while respecting the will of the people and acting in their best interests. The will and interest of the people can be expressed and protected through legal representatives, namely state institutions (parliament), while civil society can monitor and work closely with the minority group.

## 2. Constitutionalism and Rule of Law

There is no consensus notion of constitutionalism. According to Sweet, constitutionalism refers to the "commitment on the part of any given political community to be governed by constitutional rules and principles."[41] For other scholars such as Jorg Menzel, Carl Friedrich, and Koen Lenaerts, constitutionalism refers to limited government operating in associate with concept of rule of law,

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[38] Wolin Sheldon, *Constitutionalism and the Separation of Power* (1989).

[39] Hassal Graham & Saunders Cheryl "Asia Pacific Constitutional System" (Cambridge University Press) at 244.

[40] *Ibid* at 23.

[41] Alec Stone Sweet "Constitutionalism, Legal Pluralism, and International Regimes" (2009), *Faculty Scholarship Series*, Paper 1295.

separation of powers, protection of fundamental rights, democracy, etc.[42] Hence, it is worth to mention all relevant concepts as mentioned above to assess whether a constitution is embracing constitutionalism and protecting constitutional rights, particularly the right to participate in constitution and law making.

The governmental system consists of three branches, namely the executive, the legislative, and the judiciary. Each has different roles to play in making and enforcing laws. It is simply understood that the legislative adopts the laws, the executive enforces the laws and the judiciary applies the laws. The main concern is whether processes exist to ensure that the law is just and applies to everyone equally. From a law-making process point of view, it is essential that constitution and legislation are properly enacted and assessed carefully.[43] Based on a study on constitutions in the Asia Pacific region, Hassall and Saunders concluded that some states "treat the doctrine of separation of power as a political tool to protect the interest of the state rather than the rights of individuals."[44] Therefore, the law making process needs to be complemented by the concept of checks and balance. Regardless of the independence of each branch, the power of one branch might be checked or challenged by the other branches to ensure that there is no abuse of power.[45] The improper implementation of the checks and balance principles may make the state institutions become the victim of political and economic elites.[46]

In addition, the concept of the rule of law plays a part in limiting the abuse of power by the government or state and increases the respect of human rights.[47] Illustratively, the report of the expert workshop on the right to participate in public affair organized by UNHCHR stated the following: "The Secretary-General of United Nations has described the rule of law a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws, equally enforced and independently adjudicated, and which are consistent with international human right norms and standard."[48] Nevertheless, there is no exact definition of the rule of law. Some scholars argue that the rule of law is subject to court implementation rather than state agencies and that the court has a strong role to uphold the rule of law and state agencies

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[42] Jorg Menzel, *Introduction to Cambodian Constitutional Law* (2010) at 4; Alec Stone Sweet "Constitutionalism, Legal Pluralism, and International Regimes" (2009), *Faculty Scholarship Series*, Paper 1295.

[43] Donnell Guillermo O "Why the rule of law matters: The Quality of Democracy" (Journal of Democracy, 2004) at 35.

[44] *Ibid* at 43.

[45] Hall Daniel J. & Feldmeier John, *Constitutional Law: Governmental Powers and Individual Freedoms, 3d ed* (2016).

[46] Gargarolla "We the People Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances" (2014) at 141.

[47] Grenfell Laura, "Promoting the rule of law in Post-Conflict States" (Cambridge University Press, 2013) at 16.

[48] *Supra note* 27.

consequently submit to the rule of law.[49] Professor Hor Peng further endorses the view that the principle of the rule of law is fulfilled by the creation of judicial review and independence of judicial power.[50] Other scholars argue that the rule of law might be simply understood as "whatever a government does, it should do through laws." However, this notion can be problematic, as some politicians view the existence of laws as a means to serve their power which is not considered limited.[51]

## 3. The Relationship between Cambodian Governmental Institutions under the 1993 Constitution

Upon briefly reviewing constitutional value, constitutionalism, and the rule of law, this part will discuss the constitutionalism which has been incorporated into the current Cambodian Constitution; this is necessary to understand the governmental system and how it works to ensure the protection and promotion of the right to public participation, particularly, the right to participate in the constitutional law-making process and reform.

According to the 1993 Cambodian Constitutional text (*de jure)*, it is demonstrated that the 1993 Constitution embraces constitutionalism. Under the 1993 Constitution, the King is the head of state and is separated to the other three branches of the government; the executive, the legislative and the judiciary.[52] The Cambodian legislative system is bicameral and consists of a senate and a national assembly. The Senate was established in 1999 to resolve political deadlock after the national election in 1998.[53] The legislative branch of government has power to propose and adopt laws [54] and oversee government accountability. [55] The Cambodian executive branch of the government is the head of the machine that runs the country. The Prime Minister is the head of the executive branch and of the Council of Ministers. The position is assisted by deputy ministers, senior ministers, ministers and secretaries of state.[56] According to the Constitution, the judiciary is an independent power. [57] In addition, the Constitutional Council, which was established in 1999, has the power to guarantee the respect and

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[49] Donnell, *supra note* 43 at 36.

[50] Hor, *supra* note 1 at 31.

[51] Tamanha Brain Z. "On the rule of law: History, Politics, Theory" (Cambridge University Press, 2004) at 92; see also Carothers Thomas "The rule of law Revival" (Foreign Affairs, 1998) at 97.

[52] Cambodian Constitution 1993, Art. 51; Cambodian Constitutional Council, Decision No. 004/006/2001.

[53] Preah Reach Kram NS/RKM/0399/01 (Law), Amendment Article 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93, and from Chapter 8 to Chapter 14 of the Constitution, 1999.

[54] Cambodian Constitution 1993, Art. 91-93.

[55] *Ibid.* Art. 89, 94, 96-98.

[56] *Ibid.* Art. 118-127.

[57] *Ibid.* Art. 109.

interpretation of the Constitution.[58] The Constitutional Council is not a court but has court-like functions, dealing with any claim to challenge the constitutionality of laws and electoral disputes. A decision made by the Constitutional Council is final and binding.

The next part examines whether the relationship of the three branches is a response to the concept of constitutionalism that covers the concept of limited government, rule of law, and protection of individual rights (*de facto*).

a. Executive and Legislative Relationship

There are concerns about the relationship between the executive and legislative branch. First, the extensive power is delegated by the legislative to issue decree laws or regulations.[59] This has raised concerns that regulations adopted by the executive branch are not subject to constitutionality checks unless there are complaints or requests made to the Constitutional Council for review.[60] Second, there is lack of legislation in place to regulate the government's conduct,[61] even though some self-regulatory power may be necessary, at times, to ensure that the government can implement its constitutional duties.[62] It is essential to examine these two contradicting aspects in terms of where the line should be drawn in order to impose regulations on government conduct. This is important for the government to implement its functions effectively without being influenced by other powers or abuse its power. Third, the executive branch of government drafts most of the laws and does so with little challenge from the legislative.[63] This can imply that the legislative branch has less influence or is less active, while an active and strong legislative is necessary to ensure the quality of performance of the executive toward the legislative as a whole. Nevertheless, Professor Hor Peng is of the view that if the legislative and executive branches work well together, it is an indication that their overall functions have been well developed.[64] The executive holds the legislative accountable, so there needs to be a strong legislative to monitor the performance of the executive.

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58 *Ibid.* Art. 136.

59 Mehren Arthur Taylor Von & Gordely James Russell (1977), 2d ed at 255.

60 Cambodian Constitution, 1993, Art. 140, 141.

61 Menzel, *supra* note 16 at 21.

62 Hisham Mousar, "The Constitutional Roles and Powers of the Royal Government" *Cambodian Constitutional Law,* (Konrad-Adenauer-Stiftung, 2016) at 161.

63 Menzel, *supra* note 16 at 24.

64 Hor Peng, "The Constitution of the Kingdom of Cambodia: The Evolution of Constitutional Theories and Interpretation" *Cambodian Constitutional Law*, (Konrad-Adenauer-Stiftung, 2016) at 57.

### b. Executive and Judiciary Relationship

There are potential concerns regarding the association between the executive and the judiciary. First, there is concern regarding the role of the executive branch towards the judiciary. This role is materialized through the Ministry of Justice, who has a duty to allocate the court budgets and to facilitate court administration.[65] Referring to the study of international standards and best practices, particularly regarding the opinions of the Consultative Council of European Judges on the Council for the Judiciary, it is suggested that the Supreme Council of Magistracy should have control over the court management, administration and even the court budget to assure the quality of justice and independence of the judiciary.[66] Second, the government, rather than the judiciary, normally requests judicial reform,[67] and that it might be questioned that the executive has influence on the independency of the court. In 2014, three laws were adopted: a law on the organization and functioning of the court, a law on organization and functioning of the supreme council of magistracy, and a law on the status of judges and prosecutors. There was a legal analysis attempt to examine the scope of the legislative and executive bodies as enshrined in these three laws. The analysis addressed the concern of the independence of the judiciary that the laws allowing the executive branch to influence the grade and ranking promotion of judges and prosecutors.[68]

### c. Legislative, Judiciary and Constitutional Council Relationship

The judiciary has a crucial role in enforcing constitutional values and rules. As Ginsburg states, "[during a] Constitutional review, the power of courts is to strike down incompatible legislation and administrative (government) action."[69] It is necessary that each power has the liberty to safely exercise its functions. In the event that the legislature adopts a law that violates the constitution, the constitutional court or council may rule out that law on the basis of unconstitutionality.[70]

The Cambodian Constitutional Council (Council) is the only institution that renders bidding decisions about the constitutionality of any laws.[71] In additional to constitutionality reviews and checks, the Council has power to interpret the

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[65] Law on Establishment of Ministry of Justice of Cambodia, Preah Reach Kram, NS/RKM/0196/04, 1996.

[66] "Legal Analysis on the three draft laws relating to the judiciary" (CCHR, 2014) at 10.

[67] *Ibid at* 1.

[68] *Ibid at* 1.

[69] Maartje De Visser, "We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism" (Asian Journal of Law and Society, 2016) at 106.

[70] Mehren & Gordely, *supra note* 59 at 247.

[71] Law on Organization and the Functioning of the Constitutional Council, 1998.

Constitution and laws by providing advisory opinion.[72] Nevertheless, the Council has limited authority in this regard. The Council has no authority to initiate reviews of the constitutionality or interpretation of a law, except the organization laws (i.e. law on the organization and the functioning of the Council of Ministers), unless there is a request from a competent authority as proscribed by the constitution such as the king, president of senate, president of national assembly, prime minister, one-tenth members of national assembly and one-fourth members of senate.[73] Those can request the Council to review the constitutionality of any laws before and after promulgation and the court can request the Council for a constitutionality review only after the laws are adopted.[74]

The council has extensive powers by law in terms of ruling decision regarding the constitutionality check. Yet, it has self-constraint in exercising its power when dealing with issues related to politics. According to its advisory opinion, the Council has no authority to interpret or deal with political comments, and its interpretation is purely judicial to clarify the legal aspect only.[75] It should be noticed that there has never been a decision of the Council which ruled that a law was unconstitutional.

d. The Relationship between the Government and its Citizens

The Constitution allows citizens, through their representatives, the legislative and executive and the courts to challenge the constitutionality of any laws.[76] This also includes the laws which might restrict or limit their rights which are guaranteed by the Constitution. For instance, there can be the case where a victim files a complaint to check for the constitutionality of the provision under the Cambodian Criminal Code of Procedure regarding the arrest period within 24 hours without allowing access to lawyer. It might be questioned whether it is inconformity with the constitution provisions, as Article 38 stipulates that "any individual shall have the right to his/her own defence through the judicial system." However, there has never been a case referred by the court through individual complaint to challenge the constitutionality of any law.[77]

The importance of participating in constitution and law-making is to provide citizens and the community ownership over the constitution and strengthen the

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[72] *Ibid.* Art. 1.

[73] Cambodian Constitution 1993, Art. 140; Cambodian Constitutional Council, Decision No. 089/016/2006, 13 December 2006, para. 7.

[74] Cambodian Constitution 1993, Art. 141.

[75] "The competence of Constitutional Council", Constitutional Council of Cambodia, Advisory opinion No. 20/2003.

[76] Cambodian Constitution 1993, Art. 140 & 141; Decision No. 089/016/2006 Cambodian Constitutional Council, 13 December 2006, para. 7 and see also the law on organization and functioning of the Constitutional Council, Art. 19.

[77] Teilee Kuong, "Constitutional Council of Cambodia" *Constitutional Courts in Asia: Western Originals and Asian Practice* (2016), at 261.

relationship between the government and its citizens.[78] The Cambodian Constitution does guarantee fundamental rights to all Cambodian citizens. It is understood that exercising certain rights and freedoms is subject to limitations when it is in the interest of public order and national security (state emergency) or when it would adversely affect the rights and freedom of others. According to Article 35 of the Cambodian Constitution, the "citizens of both sexes have the right to participate actively in the political economic, social and cultural life of the nation. All requests from citizens shall be given full consideration and resolution by the State's organizations."[79]

The current human rights situation in Cambodia is still a concern. According to Rhona Smith, special rapporteur on the situation of human rights in Cambodia, in her statement on situation of Cambodia in 2017, democratic space in Cambodia has been reduced, freedom of expression and participation has been restricted, and laws have been adopted or translated into being political projects.[80] Anyhow, she expressed hope and appreciated the willingness of the government to recognize the challenges and concerns in the society. She further called on the Human Rights Council and other states for continuous support for Cambodia to ensure what Cambodian citizens deserve with the peaceful transition of Cambodia from conflict and genocide to democracy in accordance with the constitution and based on the reality of the society.[81]

The lack of public belief on the essence of exercising the right to participate in public affairs, particularly the right to participate in the constitution and law-making process is the main barrier. Furthermore, the voices of those who do participate (for instance, civil societies or non-governmental institutions) are not given due consideration. It can be concluded that the relationship between the government and citizens, from a legal perspective, needs to be closer.

## VI. CONCLUSION

The Constitution can be changed, interpreted, or developed in order to safeguard the rule of law, individual rights, democracy, and, eventually, social welfare. The right to participate in public affairs shall be interpreted to include the right to participate in the constitution and law-making process directly. This significance is not only about exercising the right to participation, but it is also an indicative of power sharing with the citizens and further strengthening the relationship between the government and the people. The aim of the constitutional law-making process should be to put the interests and the will of the people first and the division of powers second. Individuals should be allowed to exercise their rights given under

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78 "Participatory Constitution Making Process", (Centre for Constitutional Dialogue, 2009) at 4.

79 Cambodian Constitution, 1993, Art. 35.

80 Rhona Smith, "Statement by the United Nationals Special Rapporteur on the Situation of Human Rights in Cambodia" (UN Press Statement, 2017).

81 *Ibid.*

Constitution to take part in constitutional law-making either directly, through their elected representatives, court, or through constitutional council. In addition, citizens, civil societies, and the media should be allowed to observe and to provide comments in the drafting process. They should be provided with the opportunity to voice their aspirations through public consultation and this should be guaranteed under the constitution or separate laws. Furthermore, time should be allocated for public consultation on the draft. Any suggestion during public consultation should be taken into consideration. In doing so, the draft shall be shared with the people before it is to be adopted. Dissemination and education should be provided more to the public about the given right and freedoms to ensure the effectiveness of exercising such rights and without making any delay or obstacles to the work or development of the national institutions.

Exercising the right to participate in the constitution or law-making process might be perceived as unnecessary and unpractical. It might be questioned whether public consultation might be regarded, given due consideration, or is just an instrument to legitimate and consolidate the making process. However, it is essential to engage and exercise the right to ensure that voices are heard and can slowly make change. Nowadays technology, through social media, could be a good approach for the inclusion of the new generations to participate in public life.

Furthermore, there should be a clear delineation regarding the engagement among the three branches of the Cambodian government. For instance, there needs to be a clear and transparent delineation of the relationship between the executive and judiciary branches regarding budget and administrative issues. This means that national institutions should be strengthened, and each relevant institution should be more active by being critical and taking initiative to take the ownership of their work. Overall, Cambodia needs a stronger political will to implement the constitutional rights, respect the principle of limited government, and uphold rule of law. More importantly, the public should initiatively exercise their power and right by engage in the constitution and law-making process through meaningful public consultation. This practice will not change overnight. The process needs time and engagement of each individual to progressively strengthen the accountability of the government toward its own people.

## BIBLIOGRAPHY

Alec Stone Sweet “Constitutionalism, Legal Pluralism, and International Regimes” (2009), Faculty Scholarship Series, Paper 1295.

Aucoin, Louis, “Introduction” in Laurel E. Miller ed., *Framing the State in Times of Transition Case Studies in Constitution Making* (2010) Peacebuilding and Rule of Law.

Brandt, M., "Constitutional Assistance in Post-Conflict Countries the UN Experience: Cambodia, East Timor and Afghanistan" (2005).

Bustamante, Thomas & Fernandes, Bernardo Goncalves, "Democratizing Constitutional Law: Perspective on Legal Theory and the Legitimacy of Constitutionalism" (2016) Law and Philosophy Library.

Carothers, Thomas, "The Rule of Law Revival, Foreign Affairs 77 (1998) no. 2.

Cambodia Daily "Judge Says His Removal Was Political" 25 March 2004.

Centre for Constitutional Dialogue "Participatory Constitution Making Process", Booklet Series (2009) No. 10.

Cambodian Constitution 1947.

Cambodian Constitution 1993.

Cambodian Center for Human Rights (CCHR) "Legal Analysis on the three draft laws relating to the judiciary" (2014).

Chandler, David, *A History of Cambodia* (2007) 4th Edition.

Decision No. 004/006/2001, Cambodian Constitutional Council, 2001.

Decision No. 089/016/2006 Constitutional Council, 2006.

Donnell, Guillermo O', "Why the rule of law matters: The Quality of Democracy" (2004) Journal of Democracy.

Ghai, Y.P.,"The Constitution Reform Process: Comparative Perspectives" (2004).

Gargarella, Roberto, "We the People Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances" (2014).

Gargarolla, Roberto, "Scope and Limits of Dialogic Constitutionalism", in Bustamante & Fernandes eds., *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitution* (2016) Springer.

Grenfell, Laura, "Promoting the rule of law in Post-Conflict States" (2013) Cambridge University Press.

General Comment, Article 25 of the ICCPR.

Hor, Peng, "The Constitution of the Kingdom of Cambodia: The Evolution of Constitutional Theories and Interpretation," in Hor Peng, Kong Phallack & Jorg Menzel eds., *Cambodian Constitutional Law* (2016) Konrad-Adenauer-Stiftung.

Hor, Peng, "The Modern Era of Cambodian Constitutionalism: Constitutional Analysis of Historical and Contemporary Development", in Hor Peng, Kong Phallack & Jorg Menzel eds., *Introduction to Cambodian Law* (2012) Konrad-Adenauer-Stiftung.

Hall, Daniel J. & Feldmeier, John, "Constitutional Law: Governmental Powers and Individual Freedoms" (2016) 3rd Edition.

Hart, Vivien, "Democratic Constitution Making" (2003) United States Institute of Peace.

Hart, Vivien, "Constitution Making and the Right to Take Part in a Public Affair", in Laurel E. Miller ed., *Framing the State in Times of Transition Case Studies in Constitution Making* (2010) Peacebuilding and Rule of Law.

Hassal, Graham & Saunders, Cheryl, "Asia Pacific Constitutional System" (2002) Cambridge University Press.

Hisham Mousar, "The Constitutional Roles and Powers of the Royal Government", in Hor Peng, Kong Phallack & Jorg Menzel eds., *Cambodian Constitutional Law* (2016) Konrad-Adenauer-Stiftung.

International Covenant on Civil and Political Rights (ICCPR).

Jennar, Raoul M., "The Cambodian Constitutions (1953-1993) (1997).

Kong, Phallack, "Overview of the Cambodian Legal and Judicial System: And Recent Efforts a Legal and Judicial Reform", in Hor Peng, Kong Phallack & Jorg Menzel eds., *Introduction to Cambodian Law* (2012) Konrad-Adenauer Stiftung.

Khanal, Krishna, "The Participatory Constitutional Making Process in Nepal: An Assessment of the CA Process (2008-2012)", in Budhi Karki & Rahan Edrisinha eds., *Participatory Constitution Making in Nepal: Issues of Process and Substance,* Post Peace Agreement Constitution Making in Nepal, (2014) Volume I.

King, Anthony, "Modes of Executive-Legislative Relations: Great Britain, France, and West Germany" (1976) Legislative Studies Quarterly, 1:1.

Law on organization and functioning of the Cambodian Constitutional Council.

Law on Establishment of Ministry of Justice of Cambodia, 1996.

Larry Cata Backer, "Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering" (2009) Indiana Journal of Global Legal Studies, 85-172.

Lijphart, Arend, "Constitutional Choices for New Democracies" (1991).

Ly, Sok-Kheang, "Reconciliation process in Cambodia: 1979-2007" (2017) DC-Cam.

Marks, P. Stephen, "The Process of Creating a New Constitution in Cambodia", in Laurel E. Miller ed., *Framing the State in Times of Transition Case Studies in Constitution Making* (2010) Peacebuilding and the Rule of Law.

Menzel, Jorg, "Cambodia: From Civil War to a Constitution to Constitutionalism? in Clauseter Hill & Jorg Menzel eds., *Constitutionalism in Southeast Asia* (2008) TimeEdge Publishing Pte Ltd.

Maartje, De Visser, "We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism" (2016) Asian Journal of Law and Society.

Mehren, Arthur Taylor Von & Gordely, James Russell, *The Civil Law System: An Introduction to the Comparative Study of Law* (1977) second edition.

Peace Paris Agreement, 1991.

Preah Reach Kram NS/RKM/0704/001, the Additional Provisions to the Constitution to Ensure the Regular Process of the National Institutions, 2004.

Smith, Rhona, "Statement by the United Nations Special Rapporteur on the Situation of Human Rights in Cambodia" (2017) Press Statement.

Tamanha, Brain Z., "On the rule of Law: History, Politics, Theory" (Cambridge University Press, 2004).

Teilee Kuong, "Constitutional Council of Cambodia" Constitutional Courts in Asia: Western Originals and Asian Practice (2016).

Venter, Francois, "The Rule of Law as Global Norm for Constitutionalism", in *the Legal Doctrines of the Rule of Law and the Legal State* (2014) Comparative Perspectives on Law and Justice.

Universal Declaration of Human Rights (UDHR).

United Nations High Commissioner for Human Rights (UHCHR), A/HRC/33/25, "expert workshop on the right to participate in public affairs" (2016).

UN Secretary-General "The rule of law and transitional justice in conflict and post-conflict societies" (2004) https://www.un.org/ruleoflaw/what-is-the-rule-of-law (accessed 3 March 2018).

Vile, M.J.C, *Constitutionalism and the Separation of Power* (1998).

Wolin, Sheldon, "The presence of the past: Essay on the State and Constitution" (1989).

Yubaraj, Sangroula, "Non-extension or non-amendment? the supreme court's originalist approach to interpreting the tenure of the constituent assembly", in Budhi Karki & Rohan Edrisinha eds, *Participatory Constitution Making in Nepal: Issue of Process and Substance,* Post Peace Agreement Constitution Making in Nepal (2014) Volume I.

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*Journal of Southeast Asian Human Rights, Vol. 3 No. 1 June 2019 pp. 59-80*
*doi: 10.19184/jseahr.v3i1.10142*


# Detention of Refugee Children in Malaysia and Thailand: Are Alternatives to Detention (ATD) Workable?

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**Abstract**
The refugee issue in Malaysia and Thailand is one of the most protracted human rights issues that both countries face. Regardless of abundant requests and advocacies by non-state actors, both locally and internationally, to persuade the governments of Thailand and Malaysia to provide protection to refugees, the fate of these refugees remains uncertain. One of the key limitations for the human rights protection of the refugees is that both countries did not sign the 1951 Refugee Convention or its 1967 Protocol; moreover, both Thailand and Malaysia do not treat the refugee issue as a domestic problem. This paper examines the detention of refugee children in Malaysia and Thailand with the main intention to advocate for the method of Alternatives to Detention (ATD) as a solution to the shortcomings from a legal method. Based on this advocacy, this paper first explores the human rights situation of refugee children in detentions by looking into the current detention practices of both countries. Secondly, this paper examines the strategies and tactics of how the local non-governmental organizations (NGOs) advocate and convince their governments to adopt the approach of ATD.

Keywords: *Alternatives to Detention (ATD), Refugee Protection, Refugee Children, Malaysia, Thailand*

## I. INTRODUCTION

According to the latest statistic made available by the United Nations High Commissioner for Refugees (UNHCR), the Asia Pacific region has a total of 7.7 million people of concern. These 7.7 million people of concern refer to 3.5 million refugees, 1.9 million Internally Displaced Persons (IDP), and 1.4 million stateless people. There is a great number of people in the Southeast Asia region who are involuntarily escaping from dispute, oppression or deprivation, particularly from

Myanmar due to the prolong conflict in the country. Myanmar itself has a populace of refugees which comes up to a total of approximately 500, 000 refugees.[1] In the previous few years, when the refugee influx became more apparent, most countries have since then adopted a closed-door approach to the entrance of these refugees. These countries include those of whom were previously preached for human rights approach and refugee-friendly policies, leaving the refugees to an uncertain future. Rather than providing them protection based on a humanitarian ground, these countries increasingly treat the refugee issue as a security threat.

By definition, the refugee populace consists of all ages, including children, adults and senior citizens. Refugee children can easily fall into the category of vulnerability and can be exposed to risks due to their lack of capacity in protecting themselves. Based on the UNHCR Global Trends 2016 report, there 51% of children below the age of 18 are included in the refugee populace,[2] meaning that almost 50% of the refugee populace consists of refugee children. This statistic is extremely alarming, however there are many reasons that can force a child to become a refugee child. For instance, some refugee children escape from their home countries by following their mother or father. At the same time, there are also unaccompanied asylum-seeking children (UASC) whom may have lost their parents or guardians. The 1951 Refugee Convention is a major foundation document for the international security of refugees[3] that provides a mechanism that allows refugees who have fled from conflict, who face maltreatment in their home countries, to seek protection in another country for security and safety purposes. Based on the international laws, the definition of a refugee child is explained by combining the definition of a child in Article 1 of the Convention on the Rights of the Child (CRC), an individual below the age of 18,[4] with the definition of a refugee in the 1951 Refugee Convention:

> "A refugee is someone who owing to a 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 to or owing to such fear, is unwilling to avail himself of the protection of that country."[5]

Consequently, in Southeast Asia, the refugee issue is not new, and it has been made worse when countries that host a great number of refugees are not included

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1 UNHCR. (2018), online: *Asia and the Pacific,* <http://www.unhcr.org/en-my/asia-and-the-pacific.html>.

2 UNHCR. (2016), online: *UNHCR Global trends,* <http://www.unhcr.org/globaltrends2016/>.

3 Çetinkaya Lokman B. *Safe zone: a response to large-scale refugee outflows and human suffering*, ed (Cham, Switzerland: Springer, 2017).

4 UNICEF. (1989), online: *Convention on the Rights of the Child* <https://www.unicef.org/crc/files/Rights_overview.pdf>.

5 UNHCR. (2010), online: *Convention and Protocol Relating to the Status of Refugees* <www.unhcr.org/3b66c2aa10.pdf>.

in the 1951 Refugee Convention. In 2016 alone, Malaysia and Thailand detained more than 2, 290 asylum seekers and refugee children in immigration detention centres (IDCs).[6] The total amount of child asylum seekers and refugee children in the IDCs of Malaysia and Thailand are as listed in Table 1 below. The statistical indication showcases the significance in the amount of child asylum seekers and refugee children kept in the IDCs of Malaysia and Thailand. Looking at this from at human rights-based approach, countries are the main duty-bearers and have a duty to provide assistance to refugees despite having not signed the 1951 Refugee Convention.

**Table 1: Total amount of child asylum seekers and refugee children in IDCs of Malaysia and Thailand from 2014 to 2016.[7]**

| Year / Countries | 2014 | 2015 | 2016 |
|---|---|---|---|
| Malaysia | 1, 334 | 1, 433 | 647 |
| Thailand | DNA | DNA but 49 in December | DNA but 43 in December |
| Total | More than 1, 334 | More than 1, 482 | More than 690 |

DNA = Data Not Available for relevant period.

Regardless of the protracted issue, Malaysia and Thailand in this circumstance opt not to treat the issue of refugee protection as a global problem, ultimately shifting the responsibility to the shoulders of the UNHCR. For instance, one main challenge in persuading the approach to the Malaysian government was that Malaysia fails to treat the refugee issue as a domestic problem but instead prefers to consider it as an UNHCR problem and an international problem.[8] Such an approach to not view the refugee crisis as a domestic issue, although it is transboundary and a major hindrance, not only requires international support but

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6 Button & Lisa (2017). "Unlocking Childhood: Current Immigration Detention Practices and Alternatives for Child Asylum Seekers and Refugees in Asia and the Pacific" Save the Children, online: <https://resourcecentre.savethechildren.net/sites/default/files/documents/unlocking_chiildhood.pdf>.

7 Button & Lisa (2017). "Unlocking Childhood: Current Immigration Detention Practices and Alternatives for Child Asylum Seekers and Refugees in Asia and the Pacific" Save the Children, online: <https://resourcecentre.savethechildren.net/sites/default/files/documents/unlocking_chiildhood.pdf>.

8 Nah, Alice M. "Networks and norm entrepreneurship amongst local civil society actors: advancing refugee protection in the Asia Pacific region" (2016) 20:2 The International Journal of Human Rights 223.

also domestic support to achieve a long-term solution.[9] As widely known, one major hindrance that contributes to the worsening of the situation is that both Malaysia and Thailand did not ratify the 1951 Refugee Convention or its 1967 Protocol.[10] There are inadequate protections given for the children of refugees in the IDCs of Malaysia and Thailand although they are part of the CRC. From the legal perspective, both countries have obligations to be in compliance with the universal human rights standards. However, some reservations from these two countries have become obstacles for them to fulfil their obligations. For instance, Malaysia, as a party of the CRC, made a reservation on Article 37. Article 37 spells out the right of the child, in which a child should not be subject to unpleasant, merciless, humiliating treatment or punishment and deprived of liberty illegally or illogically. Malaysia's reservation on Article 37 has unfortunately inappropriately permitted the Malaysian government to violate the human rights of the refugee children. The lack of legal framework has been justified by Malaysia and Thailand to legitimate their inactions, this directly indicates that refugees are not accepted and not recognized because they do not have any legal standings in both countries.[11]

Qualitative approach is used in this paper based on primary and secondary sources. Three forms of interviews are used as the primary source for this paper, namely direct-interview, Skype-call interview, and email interview. The interviewees consisted of local advocacy groups including NGOs in Malaysia and Thailand, representatives from Malaysia and Thailand governments, UNHCR staff and academicians. Data is then analysed through triangulation method in order to verify the validity and reliability of the collected data. This paper is divided into two main parts. It first discusses the detention of refugee children in Malaysia and Thailand before analyses the challenges of pushing for an Alternatives to Detention (ATD) approach for the governments of Thailand and Malaysia.

## II. THE DETENTION OF REFUGEE CHILDREN IN MALAYSIA

Malaysia has a long history of the presence of refugees in the country. One of the reasons that refugees flee to Malaysia is due to the strategic geographical position of Malaysia, as it is located in the Asia Pacific region.[12] For instance, in 1975, Malaysia experienced the influx of Vietnamese boat people, also known as boat people. These are refugees who fled Vietnam by boats after the Fall of Saigon.

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9 Nah, Alice M. "Networks and norm entrepreneurship amongst local civil society actors: advancing refugee protection in the Asia Pacific region" (2016) 20:2 The International Journal of Human Rights 223.

10 Button & Lisa (2017). "Unlocking Childhood: Current Immigration Detention Practices and Alternatives for Child Asylum Seekers and Refugees in Asia and the Pacific" Save the Children, online: <https://resourcecentre.savethechildren.net/sites/default/files/documents/unlocking_chiildhood.pdf>

11 *Ibid.*

12 Anonymous. *Ministry of Home Affairs Malaysia*, ed (2018).

Vietnamese temporary shelters were established in various areas in the country, for instance in Pulau Bidong.[13] The incident triggered the formation of the UNHCR office at Kuala Lumpur in 1975. One of the aims of the establishment was to provide protection and assistance for refugees (UNHCR Malaysia, 2018).

According to the UNHCR report, dated in July 2018, a total of 159,980 refugees and people who were seeking asylum were based in Malaysia. The composition of this statistic comprises of people from several countries, such as Myanmar, Pakistan, Yemen, Somalia, Sri Lanka, Afghanistan, Iraq and others. Additionally, around 42,400 children below the age of 18 were registered with the UNHCR. There are several ways for these refugees to enter Malaysia. Many of the refugees come through sea routes by boats, and very often with the help of a person from their refugee community or anyone that is already residing in Malaysia. Even today, Malaysia has only signed three international human rights treaties. These three treaties are the CRC, the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD).[14] One of the key reasons for why the Malaysian government has not signed the 1951 Refugee Convention and the 1967 Protocol is because the government deems such action as a pulling factor for the influx of even more refugees to the country due to Malaysia's geographical location in Southeast Asia.[15] If that takes place, the Malaysia government fears it will not able to contain or manage it.[16] However, while Malaysia has not signed the 1951 Refugee Convention and the 1967 Protocol, Malaysia, as a UN Member State, the country is bounded by the universal human rights standards as spelled out in the Universal Declaration of Human Rights (UDHR). In short, it is Malaysia's duty to provide equal treatment to the refugee community.

On the regional scale, Malaysia is part of the Bangkok Principles on Status and Treatment of Refugees, also known as the Bangkok Principles.[17] The Bangkok Principles were founded by the Asian-African Legal Consultative Organization (AALCO) in 1966.[18] One main establishment of the Bangkok Principles is to provide the definitions of the status of refugees, and also to provide a guideline to

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[13] Ahmad, Abdullahi Ayoade, Zulkanain Abdul Rahim & Abdul Majid Hafiz (2016). "The Refugee Crisis in Southeast Asia: The Malaysian Experience" 3:6 International Journal of Novel Research in Humanity and Social Sciences, online: <https://www.researchgate.net/profile/Abdullahi_Ahmad6/publication/318653060_The_Refugee_Crisis_in_Southeast_Asia_The_Malaysian_Experience/links/59758a1eaca2728d02545c9b/The-Refugee-Crisis-in-Southeast-Asia-The-Malaysian-Experience.pdf>.

[14] UNHCR. (2018), online: *United Nations Treaties* <http://www.un.org.my/un_treaties.aspx>.

[15] *Ibid.*

[16] Santiago, Charles. *Refugee Children in Detention*, ed (2018).

[17] Supaat, Dina Imam. "Refugee Children under the Malaysian Legal Framework" Studies, online: <http://repo.uum.edu.my/16031/1/2014_7.pdf>.

[18] Taylor, Savitri (2018). "Refugee Protection in the Asia Pacific Region", online: <http://www.refugeelegalaidinformation.org/refugee-protection-asia-pacific-region>.

the membership states of AALCO as a way to manage the issue of refugees.[19] At the same time, Malaysia is also part of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, also known as the Bali Process. The Bali Process encourages its member states to provide temporary shelters for asylum seekers and refugees.

Currently, due to the limitations of legal framework in refugee protection, refugees in Malaysia are treated in a similar way as other immigrants who enter the country without documentation. This means that the refugees must abide by the same current immigration policy, in which, if any individual does not have lawful documents while entering the border of Malaysia, they are categorised as "illegal" immigrants or undocumented. In consequence, they will be arrested due to their status of illegality. However, for those refugees who manage to reach to the UNHCR for help, they will be given the UNHCR cards, as long as they fulfil certain criteria that have been set by the UNHCR.[20] There are two kinds of cards those who are registered as refugees will be given refugee cards and for asylum seekers, they will be given asylum-seeker card. The UNHCR card is considered the only method for these refugees who fled to Malaysia for protection, as a form of "legitimacy". The loophole is that the UNHCR card is not acknowledged officially by the Malaysian government. But to a certain extent, some refugees have been able to be employed by using the UNHCR cards.[21] For instance, in some cases, some companies or corporations have hired a small number of employees from the refugee community, those who possess the UNHCR cards. Nonetheless, there have been also reports of abuse of such cards.

## 1. Conditions of Refugee Children in the IDCs

As highlighted in the previous section, individuals who are found without lawful documentation to stay in Malaysia are subjected to Section 6(1)(c) of the Immigration Act 1959/93. Furthermore, depending on the circumstances, some are subjected to verdict detention.[22] The situation worsens when, in some cases, after the serving of a jail term under the Immigration Act, the refugee will be moved to the IDCs.[23] As of now, there are no other alternatives in Malaysia for refugee children to be detained together with their parents, or guardians, during raids. Those below the age of 18 are excused from being detained, as they are considered children under the law. However, it is often that when children are detained with

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[19] *Ibid.*

[20] Jalil, Haikal. "Pilot project to allow Rohingya UNHCR card holders work legally to begin from March: Zahid", *The Sun Daily* (2 February 2017), online: <http://www.thesundaily.my/news/2148173>.

[21] *Ibid.*

[22] The Commissioner of Law Revision. "Immigration Act 1959/63", (2006), online: <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act 155.pdf>.

[23] Nambiar, Deepa. *Local Advocacy Groups in Malaysia*, ed (2018).

their family members or guardians, they are also subjected to detention because law enforcement has no option but to detain the entire family in the IDCs.[24] Such practices reflect the problem of a weak legislative framework, leading to the mistreatment of refugee children, resulting in potential human rights violations.

Currently, there is a total of 13 IDCs in Malaysia that hold refugee children.[25] Adult men and women are placed separately in the IDCs, and, children below the age of 12, stay with either parent, most often with their mother in the women's adult facility.[26] Once the children reach the age of 13, they will be separated to adult male or female facilities.[27] Table 2, below, showcases the list of refugee children that are currently in the 13 IDCs in Malaysia.

**Table 2: The list of refugee children in IDCs of Malaysia as of September 2017.[28]**

| Category / IDCs | Child under 18 Years – Boys | Child under 18 Years - Girls | Child under 12 Years - Boys | Child under 12 Years - Girls |
|---|---|---|---|---|
| Ajil, Terengganu | 83 | 7 | 11 | 15 |
| Bekenu, Sarawak | 4 | 3 | 10 | 13 |
| Bukit Jalil, WPKL | 1 | 1 | 7 | 3 |
| Juru, Pulau Pinang | 40 | 2 | 2 | 2 |
| KLIA, Selangor | 0 | 0 | 4 | 2 |
| Langkap, Perak | 14 | 4 | 9 | 11 |
| Pekan Nenas, Johor | 25 | 18 | 3 | 6 |

[24] SUHAKAM. "Annual Report 2014", (2014), online: *Suruhanjaya Hak Asasi Manusia* <https://docs.google.com/file/d/0B6FQ7SONa3PRUG1nc25yRGV3TlU/preview>.

[25] OHCHR. "List of issues and questions in relation to the combined third to fifth periodic reports of Malaysia", (2017), online: *Office of the United Nations High Commissioner for Human Rights* <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared Documents/MYS/INT_CEDAW_ARL_MYS_29497_E.pdf>.

[26] SUHAKAM. "Annual Report 2014", (2014), online: *Suruhanjaya Hak Asasi Manusia* https://docs.google.com/file/d/0B6FQ7SONa3PRUG1nc25yRGV3TlU/preview.

[27] Santiago, Charles. *Refugee Children in Detention*, ed (2018).

[28] OHCHR. "List of issues and questions in relation to the combined third to fifth periodic reports of Malaysia", (2017), online: *Office of the United Nations High Commissioner for Human Rights* <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared Documents/MYS/INT_CEDAW_ARL_MYS_29497_E.pdf>.

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|---|---|---|---|---|
| Lenggeng, Negeri Sembilan | 9 | 1 | 9 | 12 |
| Machap Umboo, Melaka | 42 | 0 | 1 | 2 |
| Semuja, Sarawak | 4 | 1 | 0 | 0 |
| Tanah Merah, Kelantan | 66 | 3 | 0 | 0 |
| Semenyih, Selangor | 25 | 1 | 7 | 10 |
| Belantik, Kedah | 10 | 5 | 3 | 6 |
| **Total** | **323** | **46** | **66** | **82** |

There are numerous problems that the refugee children encounter throughout their detention period in Malaysia. For instance, it is common that these refugee children are found to be liable to physical as well as mental health, problems.[29] They become ill easily due to inadequate nutrition in the IDCs. These refugee children are deprived of their right to have an ordinary life, like other children. For instance, they are denied the right to leisure because they are not allowed to play in an open space area. Moreover, these children are also exposed to various forms of threats and abuses, as they are vulnerable to abuse by adult detainees. They are not allowed to receive formal education because they are not recognised by the Malaysian government due to the ambiguity of nationality and the absence of documentation. However, some are able to attend informal education institutions, such as Muslim religious schools or churches that run refugee schools based on donations from the public or individuals.[30] Apart from that, there are also a number of Malaysian NGOs who works on advocacy for the rights of refugees, providing informal lessons for refugee and asylum-seeking children.

## 2. Advocacy Strategies by the Local NGOs in Malaysia

The Alternatives to Detention (ATD) is a practice which permits for asylum seekers, refugees as well as immigrants to stay in the public with freedom of movement while their movement status is being decided or whereas in anticipation of deportation from a state.[31] In international law, detention of children should be implemented as

[29] Arshad, Amer Hamzah. "Malaysia's forgotten children", (2005), online: <https://aliran.com/archives/monthly/2005a/5b.html>.

[30] Santiago, Charles. *Refugee Children in Detention*, ed (2018).

[31] OHCHR. "There Are Alternatives", (2011), online: <https://www.ohchr.org/Documents/Issues/Migration/Events/IDC.pdf>.

the last option with short period of detention. ATD is considered as one of the solutions that could possibly help to resolve issues of refugee children in detention centres. The UNHCR Guidelines on Detention has clearly highlight that asylum-seeking children should not be detained.[32] Since Malaysia is not a party to the 1951 Refugee Convention and its 1967 Protocol, there have been various initiatives from domestic advocacy groups to explore the possibility of ATD to overcome the human rights abuses of refugee children in detention centres. Local NGOs have been working together with the authorities for this purpose. For instance, the Human Rights Commission of Malaysia (SUHAKAM), SUKA Society, Yayasan Chow Kit and International Detention Coalition (IDC) are working with the Department of Immigration, the Attorney General's Chambers and the Welfare Department to initiate some form of a working group to explore the feasibility to adopt an ATD approach. Learning the best practices as applied in other countries, will help to come up with a model that can be practiced in Malaysia.[33]

As previously highlighted, Malaysia's status as a non-party to the 1951 Refugee Convention and its 1967 Protocol is a major hindrance to refugee protection; however, it is not a justification to the violations of refugee human rights. Recognizing such a hindrance, the local NGOs applied a different approach, based on the argument that Malaysia is a signatory to the CRC, in which the Malaysia government has obligations to respect the rights of children. The process of advocating for the approach of ATD is not easy, particularly in persuading the Malaysian government to obey the compulsions, as indicated in the CRC.[34] Nevertheless, this does not prevent local advocacy groups from promoting the issue based on the sections mentioned in the CRC. In order to do so, the local advocacy NGOs apply the innovative approach in terms of creating awareness, especially among the officials who are responsible. For instance, immigration officers must be well-equipped with knowledge of the CRC[35] in order to establish the human rights-based approach in handling the refugee children. One common problem as highlighted by some respondents is that the detention of refugee children is treated as a security problem, and there are little attempts by the government to manage the issue from the human rights viewpoint. This adds to the difficulty in persuading the government to work with local advocacy groups and the UNHCR to tackle the problem. The reason of doing such approach is mainly because of the mishandling issues that occur due to the lack of understanding in the Malaysian government, as they recognize these children as refugees first, rather than children first.

SUHAKAM, for instance, has been working systematically in advocating for the ATD approach to the Malaysian government to halt the practice of IDCs for

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[32] Field, Ophelia. "Legal and Protection Policy Research Series", (2006), online: <https://www.refworld.org/pdfid/4472e8b84.pdf>.

[33] SUHAKAM. "Annual Report 2014", (2014), online: *Suruhanjaya Hak Asasi Manusia* <https://docs.google.com/file/d/0B6FQ7SONa3PRUG1nc25yRGV3TlU/preview>.

[34] Nambiar, Deepa. Local Advocacy Groups in Malaysia, ed (2018).

[35] *Ibid.*

refugee children. Moreover, the detention of refugee children is against the universal human rights norms, which cite that children rights should be protected. The legitimacy of the detention practice of these refugee children by the Malaysian government should be questioned. In managing such issues, SUHAKAM, with other concerned local NGOs working on refugee issues, have recommended that the Malaysian government, rather than locking children up in the IDCs with poor conditions, the government should place these children in a conducive atmosphere that is favourable to their development.[36]

Apart from the strategies mentioned above, local NGOs also advocate for the strategy of social media and technology to continue to bring the plights of these refugee children to the media's attention so that it can reach the general public. In the long run, this can help to shape public opinion into having a more human rights-based narrative when looking into this issue. One of the methods includes using social chats, such as the creation of a WhatsApp group of NGO leaders who are working in the same field for the purpose of resource accumulation and information sharing. The local NGOs also apply the strategy of resource accumulation, in terms of manpower, through collaboration with other NGOs for coalition and volunteer recruitments. Pragmatically, a resource accumulation strategy is significant to create public awareness to understand the refugee children detention issue from the human rights lens. Volunteer programs, as mentioned above, are crucial in getting more Malaysians to participate in advocacy work.

Engagement is another crucial strategy as employed by the local advocacy groups, particularly with key policymakers, in order to put an appropriate legislative framework in place for the protection of these refugee children.[37] Very often, the government treats the refugee issue as a national security threat, [38] which explains why the government is reluctant to openly discuss this issue with the refugee community and the local NGOs as a whole. In many circumstances, the local NGOs are treated as outsiders on the issue, creating a significant barrier for local NGOs. Having said that, the opportunities for the local NGOs to advance their advocacy is limited especially when consultation is limited; moreover, the opportunities remain restricted when the government is not willing to practice a more open-door approach and to be inclusive when coming up with solutions for the influx of refugees in the country. For instance, there are closed door meetings that are rarely kept private from public, and this type of approach impacts the government-NGO relations in building trust for the same goal.[39]

This form of direct engagement can enhance the effectiveness of persuasive strategy, whereby amplifying the matter into a nationwide discourse might help to increase involvement of parliamentarians to support the causes. For instance, in

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[36] Anonymous. International Detention Coalitions (IDC), ed (2017).
[37] Nambiar, Deepa. Local Advocacy Groups in Malaysia, ed (2018).
[38] *Ibid.*
[39] Lee, Gwen. *Local Advocacy Groups in Malaysia*, ed (2018).

corresponding to the rise of the refugee issue, Amnesty International (AI) has launched its global campaign entitled, "I Welcome" to develop a new narrative of viewing the refugee issue, "From shrinking space to sharing responsibilities". The key aim of the campaign is to call out for more countries to adopt a "sharing responsibilities" approach in managing the influx of refugees into their countries, as this continues to be a global challenge. There are long term and short term goals under the "I Welcome' campaign by AI, and, at the same time, AI also established rapid response mechanisms to provide solutions to emergency issues in order to stop violations, raise awareness and generally, to highlight the refugee issue on a broader scale.[40]

Nevertheless, as Malaysia has not signed the 1951 Refugee Convention, at present, there is no policy about refugee issues in Malaysia. Moreso, there are still no alternatives that have been initiated, in terms of the treatment of refugee children in IDCs in Malaysia.[41] A number of ATD-friendly approaches have been proposed by the local advocacy groups. The government needs to first recognize the rights of children, including refugee children. Second, the government needs to recognize the basic rights of these refugee children such as education, food and shelter. The government suggested the usage of the biometric system to the UNHCR, however, there are some reservations from the UNHCR because the biometric system has the potential to breach the rights of refugees.[42]

## III. THE DETENTION OF REFUGEE CHILDREN IN THAILAND

Similar to Malaysia, Thailand is not a state party to the 1951 Refugee Convention and its 1967 Protocol.[43] Nevertheless, as a member of the AALCO, Thailand is similar to Malaysia in that is has adopted the Bangkok Principle on the Status and Treatment of Refugees.[44] The Prime Minister of Thailand, General Prayut Chan-o-cha pledged that the Thai government views the refugee issue seriously, at the Leaders' Summit on the Global Refugee Crisis in New York in September 2016.[45] In his speech, he highlighted that there is a need for the Thai government to stop refugee children from being kept in the IDCs.

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40 *Ibid.*

41 Santiago, Charles. *Refugee Children in Detention*, ed (2018).

42 Santiago, Charles. *Refugee Children in Detention*, ed (2018).

43 Human Rights Watch. "Thailand: Refugee Policies Ad Hoc and Inadequate Closed Camps, No Work Authorization Lead to Stagnation and Abuse", (2012), online: *Human Rights Watch* <https://www.hrw.org/news/2012/09/13/thailand-refugee-policies-ad-hoc-and-inadequate>.

44 Smith, Merill. "Rights in Exile", (2011), online: <http://rightsinexile.tumblr.com/post/13676403836/the-bangkok-principles-on-the-status-and-treatment>.

45 Human Rights Watch. "Thailand: Implement Commitments to Protect Refugee Rights", (2017), online: <https://www.hrw.org/news/2017/07/06/thailand-implement-commitments-protect-refugee-rights>.

On 10 January 2017, Thailand took the initiative to implement Cabinet Resolution 10/01 and, set up a commission for at screening mechanism for undocumented migrants and refugees. In the same resolution, it also stated that Thai citizens are now allowed to begin to use the word "refugee" in their own Thai Language.[46] This particular resolution is significant because this was the first cabinet resolution that deliberated on the refugee screening mechanism and the evaluation on the law procedures that were linked to the refugee community in Thailand. Most recently, the Thai government collaborated with civil society groups through the signing of a Memorandum of Understanding (MOU) for refugee children, aiming to relieve them from refugee camps.[47] | [48] While the initiative of the Thai government is comparatively stronger than the Malaysian government, Thailand continues the practice of putting refugee children in detention centres,[49] or more popularly known as "refugee camps."[50]

## 1. The Condition in the Refugee Camps and its Challenges

Unlike in Malaysia, which uses the term IDCs, as the place where authorities detain refugees, the term "refugee camp" is used in Thailand to refer to the place where authorities detain refugees. In Thailand, there are two types of refugee camps. The first type of refugee camp is specifically for the Burmese refugee populace, which are located in the sharing boundaries of Myanmar and Thailand. There is no definite period of detention for these refugees, and some refugees have reportedly been residing in the refugee camps for nearly three decades. The second type of refugee camp is specifically for the "urban refugees". In Thailand, the term "urban refugees" refers to refugees who flee mostly from Cambodia, Vietnam and Syria. The term "urban refugee" does not include refugees from Myanmar, North Korea and some groups from Vietnam[51] because the Thai government has a different arrangement for these groups of refugees since they are not registered with the UNHCR.

Currently, Thailand has a total of approximately 99,000 refugees from Myanmar alone, and most of them have fled from the boundaries of Myanmar and

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46 Parinya, Ann. *CRSP Thailand*, ed (2018).

47 *Ibid.*

48 Jones, Evan. "Joint Statement: Thailand Government MOU On Alternatives to Detention for Children", (2019), online: <https://aprrn.info/joint-statement-thailand-government-mou-on-alternatives-to-detention-for-children/>.

49 IDC. "Urgent Need for No Child Detention Policy in Thailand", (2017), online: *International Detention Coalition* <https://idcoalition.org/news/urgent-need-for-no-child-detention-policy-in-thailand/>.

50 Parinya, Ann. *CRSP Thailand*, ed (2018).

51 *Ibid.*

Thailand.[52] The second refugee camp currently has a total of about 7,000 "urban refugees" and people who are seeking asylum from more than 45 countries, including 490,000 that have been recorded as stateless.[53] Similar to Malaysia, the Thai Government remains reluctant to ratify the 1951 Refugee Convention and the 1967 Protocol. This is because of two main reasons. The first reason is to avoid any policy that can potentially create misunderstanding to their neighbors next to the borders.[54] The second reason is because Thailand has a policy to not be labelled as a receiving country, in terms of refugee. As Thailand's politics remain unstable, moreover, it also shares borders with less developed economic neighbors. Despite these challenges, Thailand has, thus far, in 2017 hosted more than 100, 000 refugees and more than three million migrant workers from its neighboring states.[55]; [56]; [57]

Similar to the Malaysian government, the Thai government also signed and ratified the CRC. But in the case of Thailand, it has specifically made reservations in not accepting Article 22 of the CRC, which protect the rights of refugee children. The number of "urban refugees" is relatively small compared to the refugees who have fled from Myanmar. The arrests could happen because of two reasons. The first reason is due to the long process to obtain the UNHCR card. Frequently, refugees are potentially arrested due to their -overstay in Thailand and this is considered "illegal" entry. The second reason is that some refugees enter Thailand with fake passports.[58] Once these refugees are arrested, they will be sent to court for hearings, either to pay fines or to serve jail time, yet it is common that the sentence is to pay a fine. But the plight does not just end there for these refugees, according to Thailand immigration laws, after the penalty, the person will be deported due to the offences of "illegal" entry or overstay. Normally these refugees will be deported back to their home countries. In the case where these refugees are unable to go home due to the status, they will then be detained in the refugee camps based on where they come from. For people from countries, such as Cambodia, Vietnam, Laos and Myanmar, normally the Thai government will send them to the borders, through land connections. What often takes place is that the detention period is indefinite, and their futures remain uncertain in the refugee camps, with conditions that are not in compliance with human rights. These refugees will normally stay in the refugee camps until they decide either to return voluntarily or

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[52] Thailand, UNHCR. (2018), online: *UNHCR Thailand* <https://www.unhcr.or.th/en/about/thailand>.

[53] *Ibid.*

[54] Sooktawee, Siwawong. *Local Advocacy Groups in Thailand*, ed (2018).

[55] *Ibid.*

[56] Lefevre, Amy Sawitta. "Thailand's New Labor Rules Send Thousands of Migrant Workers Fleeing" (2017), online: Reuters <https://www.reuters.com/article/us-thailand-migrants/thailands-new-labor-rules-send-thousands-of-migrant-workers-fleeing-idUSKBN19O0B6>.

[57] FortifyRights."Thailand: Provide Legal Status, Protections for Refugees", (2019), online: <https://www.fortifyrights.org/publication-20170706.html>.

[58] Parinya, Ann. *CRSP Thailand*, ed (2018).

the UNHCR comes in to assist by finding them a resettlement, however this process takes a long time.[59]

Overall, the practice of detention is slightly different in Thailand, compared to Malaysia. In the matter of refugee children, they are mainly detained while following their family members. One reason is when the parents refuse to separate from their children and insist on staying together for the purpose of safety.[60] In Thailand as well, the detention period can be indefinite just like the practice in Malaysia. In such cases, if there is no assistance given to the refugee children, there is potential for them to be in the refugee camps for a long period. There are some cases where refugee children have been forced to stay in the camps for over a decade.[61] For the refugees that are being detained as "urban refugees" in the second category of refugee camp, the refugees are separated based on their gender. Nevertheless, most of the time the refugee children follow their mothers into the female cells. For the boys who reach above the age of eight, they are allowed to move to a male cell with their fathers.[62] However, there is a lack of standard procedures on this rule because the separation also depends on the physical size of the boys and their looks, and such practice could easily become abused and become harmful for the children.

For the Thai government, the decision to detain refugee children together with their parents or family members is a form of protection, so that the children can continue to be together with their parents.[63] What is concerning is that the condition of the Thai refugee camps where it is generally poor, because refugee camps are built for short-term stays and not for long-term purposes. For instance, there are a few refugee camps where the camps were built with limited space for the detainees. The refugee camps in Thailand are also known as "24/7 cells" because the detainees, including the refugee children, spend all their time in the camps. They are only permitted to leave the cell only once in a while for exercise, to meet a visitor, or for a phone call. Such conditions have exposed the refugee children to health and development risks. The inadequate space in the refugee camps are due to the high number of refugees, exposing the children to skin diseases and infections, due to the lack of hygiene. It is also reported that there are only three washrooms available in the refugee camps, and these washrooms are in poor condition in terms of hygiene.[64] The conditions of refugee children in Thailand and Malaysia share

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59 *Ibid.*

60 Human Rights Watch. "Thailand: Implement Commitments to Protect Refugee Rights", (2017), online: <https://www.hrw.org/news/2017/07/06/thailand-implement-commitments-protect-refugee-rights>.

61 Parinya, Ann. *CRSP Thailand*, ed (2018).

62 Mala, Dumrongkiat. "Cell Conditions", online: *Bangkok Post* <https://www.pressreader.com/thailand/bangkok-post/20180708/281526521812907>.

63 Human Rights Watch. "Two Years with No Moon Immigration Detention of Children in Thailand", (2014), online: *Human Rights Watch* <https://www.hrw.org/report/2014/09/01/two-years-no-moon/immigration-detention-children-thailand>.

64 *Ibid.*

similarities, where the process of development for these children are negatively affected due to the bad conditions that they are in,[65] and if it is prolonged, it may cause depression and further psychological issues.[66] In addition, there are also cases where the refugee children in detentions are inclined to self-harm, due to continuous fear and anxiety as well as abuse by the adults.

## 2. Advocacy Strategies by Local NGOs

In Thailand, the Asylum Access Thailand and Coalitions for Refugees and Stateless Person (CRSP) are two key local advocacy groups that actively advocate for refugees, and they specifically focus on the plight of refugee children in detention centres. Both also advocate for the ATD approach in managing the issue of refugee children's detention. Asylum Access Thailand, for instance, offers services for refugees and asylum seekers who are in need of legal assistance for the process of determining refugee status.[67] Broadly, Asylum Access Thailand provides services such as law counselling, and also advice in advocacy-related work.[68] As for CRSP, the organization focuses on advocacy and awareness for the rights of refugees and asylum-seekers.[69] For instance, the CRSP engages with the Thai government directly by sharing information for the purpose of negotiations to advocate for policy reforms related to the protection of refugee rights in Thailand.[70]

Apart from the Asylum Access Thailand and the CRSP, there are also other organizations, such as the International Organization for Migration (IOM), who offers day-care services for refugee children. The IOM also organizes programs that are related to education, such as mathematics and language classes for refugee children.[71] The Bangkok Child Protection program, for instance, is a joint collaboration program organised by the Jesuit Refugee Service (JRS) of Thailand and the UNHCR.[72] At the beginning of the program, as established in 2014, it was initially intended to be a short-term set up of a duration of three-month to help the UASC who are staying in Bangkok, by providing them with emergency assistance,

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65 Parinya, Ann. *CRSP Thailand*, ed (2018).

66 Human Rights Watch. "Thailand: Refugee Policies Ad Hoc and Inadequate Closed Camps, No Work Authorization Lead to Stagnation and Abuse", (2012), online: *Human Rights* <https://www.hrw.org/news/2012/09/13/thailand-refugee-policies-ad-hoc-and-inadequate>.

67 Asylum Access. (2018), online: *Asylum Access Thailand* <http://asylumaccess.org/program/thailand/>.

68 Chawarangkul, Chawaratt. *Asylum Access Thailand*, ed (2017).

69 Sooktawee, Siwawong. *Local Advocacy Groups in Thailand*, ed (2018).

70 Parinya, Ann. *CRSP Thailand*, ed (2018).

71 Human Rights Watch. "Two Years with No Moon Immigration Detention of Children in Thailand", (2014), online: *Human Rights Watch* <https://www.hrw.org/report/2014/09/01/two-years-no-moon/immigration-detention-children-thailand>.

72 Thailand, UNHCR. (2018), online: *UNHCR Thailand* https://www.unhcr.or.th/en/about/thailand.

assessments as well as referrals to service providers. Since the establishment of the program, there are a total of 162 children supported by this joint collaboration program.[73] As a way to identify the security gaps, assessments are conducted by visiting homes and interviewing the children that are registered in the program to find out their basic needs. Once the gaps are identified, assistance such as financial aid, health care services, education and legal assistance are provided to these children through the program. Apart from that, programs related to mind-social, education and exercise for refugee children are also conducted, even though it comes with various challenges, particularly in Thailand because these children are not officially recognized.

Over the years, the working relationship between the Thai government and the local and international NGOs working on refugees has improved. Previously, before the configuration of the CRSP, the NGOs did not advocate actively in terms of policy reforms with the Thai government because most of the NGOs in Thailand worked on "urban refugees." There is also limited collaboration between the international and local NGOs.[74] One of the reasons is the various restrictions imposed by the Thai government. Now, as the CRSP has, to some extent, gained recognition from the Thai government with their engagement approach, it has created close negotiations with some policymakers. CRSP, while engaging with the Thai government, also provides assistance to the local NGOs. For instance, CRSP conducts research to support their advocacy work, as well as collect groundwork information.

However, there remains some form of reluctancy from the Thai government in engaging with international NGOs, such as the AI and Human Rights Watch (HRW), because these NGOs are seen to be more confrontational, holding strong criticisms against government conduct.[75] At the same time, there are also a limited number of local NGOs that advocate on issues related to refugees and asylum seekers in Thailand. Many of the work nature of these NGOs provide support to refugee or government agencies with limited advocacy for policy changes.[76] In short, the advocacy groups in Thailand apply different approaches in pushing for an ATD approach in the Thai government.[77] While there are differences, the different approaches can be summarised as an accumulation of resources to persuade the Thai government to adopt a more human rights-based approach to refugee children and to finally adopt the ATD approach.

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[73] Parinya, Ann. *CRSP Thailand*, ed (2018).
[74] *Ibid.*
[75] Parinya, Ann. *CRSP Thailand*, ed (2018).
[76] Sooktawee, Siwawong. *Local Advocacy Groups in Thailand*, ed (2018).
[77] *Ibid.*

## IV. CHALLENGES IN PUSHING FOR ALTERNATIVES TO DETENTION (ATD)

ATD is defined as a form of procedure or practice which permits asylum seekers, refugees and immigrants to enjoy their freedom of movement while their movement status is being decided.[78] As stipulated in the UNHCR Guidelines on Detention, it highlights that asylum-seeking children should not be detained. The ATD is considered as one of the solutions that could possibly help resolve issues of refugee children in detention centres. In international law, detention of children should be implemented as the last option with a short period of detention.[79] This paper identifies five challenges for the domestic advocacy groups in Malaysia and Thailand in persuading their governments to adopt the ATD approach as an option due to the lack of legislation enforcement mechanisms to protect the rights of refugee children. First is the coordination among the local NGOs working on refugee issues.[80] Most of the local NGOs face similar problems in the shortage of financial and manpower resources. In view of such challenges, the establishment of the Asia Pacific Refugee Rights Network (APRRN) comes in as an advantage for the local NGOs as it provides a network alliance for these local NGOs to strengthen their advocacy by connecting to other local and regional NGOs working on the same goal. This could function as a way to overcome the lack of coordination among the domestic advocacy groups. Moreover, in attempt to increase the effectiveness of protection to refugee children in detention, the advocacy cannot be done within a state boundary as it is a transnational concern. The APRRN, as a coalition of NGOs working for the same cause, advocates for the protection of refugees, helping to further promote the concept of the ATD and popularise it so that governments, whom have not sign and ratify the 1951 Refugee Convention and the 1967 Protocol will consider adopting them.

The second challenge involves the role of the media.[81] Media can work as a double-edged sword. Very often, local media in Thailand and Malaysia portray the issue of refugee children as a world crisis. That approach is similar with both the Thailand and Malaysia governments, where they are more inclined to view the refugee issue as a global issue rather than a domestic issue. Moreover, the common

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78 OHCHR. "There Are Alternatives", (2011), online: <https://www.ohchr.org/Documents/Issues/Migration/Events/IDC.pdf>

79 Field, Ophelia. "Legal and Protection Policy Research Series", (2006), online: <https://www.refworld.org/pdfid/4472e8b84.pdf>.

80 Angus Francis & Rowena Maguire (2016). "Protection of Refugees and Displaced Persons in the Asia Pacific Region" Routledge, online: <https://www.routledge.com/Protection-of-Refugees-and-Displaced-Persons-in-the-Asia-Pacific-Region/Francis-Maguire/p/book/9781409455400>

81 Pascale Allotey, Peter Mares & Daniel D. Reidpath Francis (2016). "The Health of Refugees: Public Health Perspectives from Crisis to Settlement" Oxford University Press, online: <https://books.google.com.my/books?hl=en&lr=&id=1ZSBDwAAQBAJ&oi=fnd&pg=PT236&dq=role+of+media+refugee+issue+malaysia+and+thailand&ots=pXkXqse4E7&sig=kbOP05kH54g0KznaAZP3_9U-1Ks&redir_esc=y#v=onepage&q&f=false >.

narrative that is associated with the refugee crisis is that refugees pose security threats and could potentially bring more social problems to the society. Such narratives lead to the misunderstanding of the public and their perception of refugees.[82] Facing such challenges, it is important for the media to be educated in the proper manner of communicating the issue from a human rights perspective and to transfer it into a domestic problem rather than depicting it as an international problem.[83]

Third, the interest of the government regarding refugee matters is another challenge faced by NGOs advocating for the ATD to be implemented.[84] In Asia, most of the governments did not sign the 1951 Refugee Convention and the 1967 Protocol,[85] and many view refugees as not an internal issue. For instance, from the experience of the APRRN's encounter with the Thai government insisted that the Thai government insisted that refugees are an issue that concerns the UNHCR because the government did not sign the Refugee Convention.[86] ; [87] Thus, the challenge is on ways to persuade these governments to treat refugees as part of their responsibility to ensure the refugees can access healthcare, education and other basic rights and not being detained.

Four, perception is also a challenge for NGOs pushing for ATD.[88] Linking to third challenge on the role of media, at times there are misperceptions and limited understanding about the rights of refugees. While international pressure is crucial, local pressure is equally important, and it means something when the local is aware with the issue. In the context of ASEAN, in which both governments of Malaysia and Thailand are members, the policy of non-interference is the fifth challenge due to its non-interference policy when ASEAN, could not interfere in Myanmar government.[89] For instance, ASEAN did not act on the 2015 Rohingya refugee boat

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[82] Lee, Gwen. *Local Advocacy Groups in Malaysia*, ed (2018).

[83] Nah, Alice M. "Networks and norm entrepreneurship amongst local civil society actors: advancing refugee protection in the Asia Pacific region" (2016) 20:2 The International Journal of Human Rights 223.

[84] Bradley, M. "Unresolved and Unresolvable? Tensions in the Refugee Regime" (2019) 33 Ethics & International Affairs.

[85] Kneebone, S. (2014). The bali process and global refugee policy in the Asia–Pacific region. Journal of Refugee Studies, 27(4), 596-618.

[86] Jones, Evan. *Asia Pacific Refugee Rights Network*, ed (2017).

[87] Nah, Alice M. "Networks and norm entrepreneurship amongst local civil society actors: advancing refugee protection in the Asia Pacific region" (2016) 20:2 The International Journal of Human Rights 223.

[88] Senay Yitmen & Maykel Verkuyten. "Positive and negative behavioural intentions towards refugees in Turkey: The roles of national identification, threat, and humanitarian concern" (2018) 28:4 Journal of Community & Applied Social Psychology 230-243.

[89] Khairi, A. "The Dilemma of Rohingya Refugees "Boat People": The Role of Malaysia, its Neighbors and ASEAN" (2016) 6:12 International Journal of Academic Research in Business and Social Sciences 481-489.

crisis that fled from Myanmar due to ASEAN's non-interference policy as it is seen as an internal problem of the Myanmar government.

## V. CONCLUSION

In the view that both the Malaysia and Thai governments have yet to ratify the 1951 Refugee Convention and its 1967 Protocol, both countries do not currently have specific policies related to the protection of refugees because there is no recognition of the refugee community. While there have been constant initiatives by domestic advocacy groups in persuading the governments of Thailand and Malaysia to implement ATD, there remains to be limited impacts. Based on the collected data, it is acknowledged that both governments should consider the rights of refugee children by approaching the issue from the human rights perspective, where the refugee children should ideally be considered as children first, then refugee after. Furthermore, as both governments of Malaysia and Thailand are state parties to the CRC, it is necessary for both governments to acknowledge the basic rights of the refugee children by drafting human rights-friendly policies for protection purposes. Ideally, the advocacy groups aim to advocate for both countries to finally ratify the 1951 Refugee Convention and its 1967 Protocol. At this point of time, it is still challenging to determine whether both, the governments of Malaysia and Thailand, will adopt the ATD approach, but it is possible with the continuous collaboration between the domestic and global advocacy groups, through the approach of engagement.

## BIBLIOGRAPHY

Allotey, Pascale & Daniel Reidpath. *The Health of Refugees: Public Health Perspectives from Crisis to Settlement* (Oxford University Press, 2019).

Anonymous. (2017, 2 November) *International Detention Coalitions (IDC)*.

Anonymous. (2018, 7 March) *Ministry of Home Affairs Malaysia*.

Arshad, Amer Hamzah. "Refugees in Malaysia: Malaysia's forgotten children" (2005) 25:5 Aliran Monthly, online: <https://aliran.com/archives/monthly/2005a/5b.html>.

Asylum Access. "Our Programs: Thailand", online: *Asylum Access* <https://asylumaccess.org/program/thailand/>.

B Çetinkaya, Lokman. "Application of the Concept of Necessity to Justify the Establishment of Safe Zones to Prevent Large-Scale Refugee Outflows" in (2017) 25.

Bradley, Megan. "Unresolved and Unresolvable? Tensions in the Refugee Regime" (2019) 33:1 Ethics and International Affairs 45.

Button, L. *Unlocking Childhood: Current immigration detention practices and alternatives for child asylum seekers and refugees in Asia and the Pacific* (Save the Children, 2017).

Chawarangkul, C. (2017, 28 November) *Asylum Access Thailand,*.

Evan. "Joint Statement: Thailand Government MoU on Alternatives to Detention for Children | APRRN", (2019), online: <https://aprrn.info/joint-statement-thailand-government-mou-on-alternatives-to-detention-for-children/>.

FortifyRights. "Thailand: Provide Legal Status, Protections for Refugees", (6 July 2017), online: <https://www.fortifyrights.org/publication-20170706.html>.

Francis, Angus & Rowena Maguire. *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Routledge, 2016).

Human Rights Watch. "Thailand: Refugee Policies Ad Hoc and Inadequate", (13 September 2012), online: *Human Rights Watch* <https://www.hrw.org/news/2012/09/13/thailand-refugee-policies-ad-hoc-and-inadequate>.

Human Rights Watch. "Two Years With No Moon | Immigration Detention of Children in Thailand", (1 September 2014), online: *Human Rights Watch* <https://www.hrw.org/report/2014/09/01/two-years-no-moon/immigration-detention-children-thailand>.

Human Rights Watch. "Thailand: Implement Commitments to Protect Refugee Rights", (6 July 2017), online: *Human Rights Watch* <https://www.hrw.org/news/2017/07/06/thailand-implement-commitments-protect-refugee-rights>.

IDC. "Urgent Need for No Child Detention Policy in Thailand", (22 November 2017), online: *International Detention Coalition* <https://idcoalition.org/news/urgent-need-for-no-child-detention-policy-in-thailand/>.

Jalil, H. "Pilot project to allow Rohingya UNHCR card holders work legally to begin from March: Zahid", *The Sun Daily* (2 February 2017), online: <http://www.thesundaily.my/news/2148173>.

Jones, E. (2017, 27 August ).

Kaur, Amarjit & I Metcalfe. "Introduction: Refugees and Refugee Policies in the Asia-Pacific region." (2008) Nos.12-19 UNEAC Asia Papers 1.

Khairi, Aizat. "The Dilemma of Rohingya Refugees âBoat Peopleâ: The Role of Malaysia, its Neighbors and ASEAN" (2016) 6 International Journal of Academic Research in Business and Social Sciences.

Lee, G. (2018, 31 January ) *Local Advocacy Groups in Malaysia*.

Lefevre, A S. "Thailand's new labor rules send thousands of migrant workers fleeing", *Reuters* (3 July 2017), online: <https://www.reuters.com/article/us-thailand-migrants-idUSKBN19O0B6>.

Mala, D. "Cell Conditions", *Bangkok Post* (8 July 2018), online: <https://www.pressreader.com/thailand/bangkok-post/20180708/281526521812907>.

Nah, Alice M. "Networks and norm entrepreneurship amongst local civil society actors: advancing refugee protection in the Asia Pacific region" (2016) 20:2 The International Journal of Human Rights 223.

Nambiar, D. (2018, 16 January) *Local Advocacy Groups in Malaysia*.

OHCHR. *There Are Alternatives* (OHCHR, 2011).

OHCHR. *List of issues and questions in relation to the combined third to fifth periodic reports of Malaysia* (OHCHR, 2017).

Ophelia, Field. *Alternatives to Detention of Asylum Seekers and Refugees*, Legal and Protection Policy Research Series POLAS/2006/03 (UNHCR, 2006).

Parinya, A. (2018, 3 February) *CRSP Thailand*.

Santiago, C. (2017, 28 November) *Refugee Children in Detention*.

Smith, M. "Rights In Exile", (2011), online: <http://rightsinexile.tumblr.com/post/13676403836/the-bangkok-principles-on-the-status-and-treatment>.

Sooktawee, S. (2018, 12 January) *Local Advocacy Groups in Thailand*.

SUHAKAM. "Annual Report 2014", (2014), online: <https://docs.google.com/file/d/0B6FQ7SONa3PRUG1nc25yRGV3TlU/preview>.

Supaat, Dina Imam. "Refugee Children Under the Malaysian Legal Framework" (2014) 5 UUM Journal of Legal Studies 111.

Taylor, S. "Refugee Protection in the Asia Pacific Region | Rights in Exile Programme", (2018), online: <http://www.refugeelegalaidinformation.org/refugee-protection-asia-pacific-region>.

The Commissioner of Law Revision. "Immigration Act 1959/63", (2006), online: <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20155.pdf>.

UNHCR. "Convention and Protocol Relating to the Status of Refugees", (2010), online: <www.unhcr.org/3b66c2aa10.pdf>.

UNHCR. "UNHCR Global Tends", (2016), online: <http://www.unhcr.org/globaltrends2016/>.

UNHCR. "Asia and the Pacific", (2018), online: <http://www.unhcr.org/en-my/asia-and-the-pacific.html>.

UNHCR Thailand. "UNHCR Thailand", (2018), online: UNHCR Thailand <https://www.unhcr.or.th/en/about/thailand>.

UNICEF. *Convention on the Rights of the Child* (UNICEF, 1989).

Yitmen, Şenay & Maykel Verkuyten. "Positive and negative behavioural intentions towards refugees in Turkey: The roles of national identification, threat, and humanitarian concern" (2018) 28:4 J Community Appl Soc Psychol 230.

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*Journal of Southeast Asian Human Rights, Vol. 3 No. 1 June 2019 pp. 81-100*
*doi: 10.19184/jseahr.v3i1.8394*


# Securitization and Desecuritization of Migration in Indonesia: Its Implication to Refugee Rights in the Southeast Asian Region

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**Abstract**
This paper is aimed at understanding the nexus between the securitization of migration and refugee protection by Indonesia within a regional context. By employing an analysis of the securitization of migration, this paper looks closely into a number of regulations, as well as practices by the government and civil society in Indonesia to identify the main rhetoric regarding migration and the migration of refugees. Furthermore, the recent activities of the government and civil society on a regional level is analysed using the same approach. The findings in this work suggest that the securitization of migration remains through utterances in the regulations and discursively within the actions of the government even when the human rights aspects of refugees are included in regulations or practices. The civil society discussed in this work to some extent has de-securitized refugees in Indonesia. On the regional level, nonetheless, the civil society's contribution to humanitarian aid still has not necessarily challenged a securitization of migration. The paper does not identify all civil society organisations based in Indonesia working in this area, so the discussion does not represent the whole. The implication of refugee rights is indicated through the recent situations of refugees in the region. Their remaining vulnerability to detention and poor living conditions indicate that securitization of migration undermines refugee protection in the region.

Keywords: *De-securitization, Migration, Protection, Refugees' Rights, Securitization*

# I. INTRODUCTION

The Southeast Asian region has been the origin of and host for refugees over the past years. At the end of 2017, there were at least 3,2 million refugees in Southeast Asia.[1] September 2014 United Nations High Commissioner for Refugees (UNHCR) data shows Myanmar, Afghanistan, Sri Lanka, and Pakistan as the four biggest origin countries.[2] In the past few years, the flux of refugees was dominated by those fleeing from Myanmar as the conflict in Rakhine increased. As many as 87.000 refugees crossed the border between October 2016 and July 2017. This number jumped to 600.000 in the aftermath of the August 2017 attacks, most of them crossed the border into the neighbouring state of Bangladesh.[3] At the time, there are at least 900.000 refugees in Bangladesh[4] and 500.000 in Thailand.[5] Other countries who has been receiving refugees include Malaysia and Indonesia, with refugees mainly coming from Myanmar, the Philippines, and countries in the Middle East such as Afghanistan and Syria.[6]

These numbers reflect how Southeast Asia has become a transit region for refugees before their settlement to target countries, like Australia and United States. Even so, there are only three countries, two among ASEAN member-states, that signed the 1951 Convention related to the Status of Refugees.[7] As such, there are no specific laws governing the protection of refugees. In these transit countries, refugees face several options. First, they could be accommodated inside shelters or camps whilst their status and settlement are being processed. This, however, does not guarantee good living conditions since these shelters and camps have been said to be insufficient.[8] In turn, secondly, many refugees choose to live outside of these camps for better living conditions. This, however, could result in these refugees being classified as illegal migrants, thus they risk facing detention. For those with no proper legal framework, immediate detainment upon arrival inside immigration centres is the third option before they could be granted refugee status. Even with refugee status, these people find themselves deprived of

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1 UNHCR Global Focus, "South East Asia | Global Focus", (22 July 2018), online: http://reporting.unhcr.org/node/39.

2 UNHCR Regional Office for Southeast Asia, "South-East Asia Fact Sheet", (21 July 2018), online: *UNHCR* https://www.unhcr.org/protection/operations/519f67fc9/south-east-asia-fact-sheet.html.

3 UNHCR Global Focus, "2018 Planning Summary: Subregion South East Asia" (2018) 5.

4 UNHCR Global Focus, "2018 Planning Summary - Operation: Bangladesh" (2017) 3.

5 UNHCR Global Focus, "2018 Planning Summary - Operation: Thailand" (2018), online: http://reporting.unhcr.org/sites/default/files/pdfsummaries/GA2018-Thailand-eng.pdf.

6 UNHCR Global Focus, "Indonesia | Global Focus", (22 July 2018), online: http://reporting.unhcr.org/node/10335?y=2018#year.

7 Penelope Mathew, "Whither Regional Cooperation in Southeast Asia's Refugee Crisis?", (23 July 2018), online: *The Diplomat* https://thediplomat.com/2015/08/whither-regional-cooperation-in-southeast-asias-refugee-crisis/.

8 Penelope Mathew & Tristan Harley, "Refugee Protection and Regional Cooperation in Southeast Asia", (2014), online: https://core.ac.uk/download/pdf/156623449.pdf.

their living capabilities by their inability to find work and other basic necessities such as education.[9] Depending on the transit country's policy, these refugees could either face years of detainment or eviction after a certain amount of time.

It thus falls upon external involvement, such as UNHCR, to protect the rights of refugees within transit countries in Southeast Asia, especially in Indonesia, Malaysia, Bangladesh, and Thailand where the refugees mainly rally. Governmental cooperation is deeply encouraged as well as training in concerned countries such as Myanmar, Vietnam, and the Philippines to decrease cases of statelessness.[10] However, these efforts are often hindered by financial issues, since these developing, transit countries seldom possess a large enough budget to ensure the wellbeing of the refugees.

As for Indonesia, reported by UNHCR, in June 2017 there were 5,274 asylum-seekers and 8,819 refugees under the protection of UNHCR in the country.[11] Indonesia did not sign the 1951 Refugee Convention or the 1967 Protocol; therefore, some of the protection of asylum seekers and refugees in Indonesia are being helped by UNHCR. Despite being a non-signatory country, Indonesia has actively contributed to refugee protection issues. As a transit country, Indonesia accommodates refugees and asylum seekers on their way to target countries such as Australia. However, with Australia's refugee gate closing,[12] these refugees become stuck in Indonesia. Consequently, Indonesia is then trapped with an ongoing refugee flow with no certain destination. It becomes imperative for Indonesia to take a more active role in refugee issues with the rising number of people forced to move by conflict or state's instability, which was reflected in 2016 policy.

The intensity of Indonesia's initiatives in refugee assistance in the region, amidst its own refusal to sign the Refugee Convention and exercise of Immigration Act to manage refugees, has provided the urgency to analyze the nexus of migration policy and refugee protection. This paper attempts to review the situation not in a realist security perspective but more of a constructivist one; hence, this is a securitization study. Securitization of migration has been an important development in securitization studies, aimed to disclose how national security dangers of migration are not necessarily real and in large account fabricated and signified by policy or language. In Indonesia, securitization of migration has remained under-scrutinised in terms of the application of the theory

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9 European External Action Service, "The Invisible Refugees of Indonesia, Malaysia and Thailand", (10 July 2018), online: *EEAS - Eur Extern Action Serv - Eur Comm* https://eeas.europa.eu/delegations/association-southeast-asian-nations-asean/48201/invisible-refugees-indonesia-malaysia-and-thailand_en.

10 UNHCR Global Focus, *supra* note 3.

11 UNHCR, "Refugee Status Determination", (22 July 2018), online: *UNHCR* https://www.unhcr.org/id/en/refugee-status-determination.

12 Refugee Council of Australia, "Australia closes door on persecuted Rohingya", (21 May 2015), online: https://www.refugeecouncil.org.au/latest/australia-closes-door-on-persecuted-rohingya/.

of securitization in understanding the notion of security. Previous work by Zayzda has made the initial step toward analysing securitization of forced migration, arguing that the Immigration Act, the Government Regulation on Surveillance on Foreign Citizens, and the past Directorate General of Immigration Regulation on Management of Illegal Migrants contain utterances of security threats. This past study needed an intensified discussion.[13]

Unlike previous work, this paper aruges further on the implication of such a securitization process to the protection of rights of refugees, and the discussion is placed in a Southeast Asian context. This paper is arranged into two further parts: the theoretical account of securitization and the discussion which is then derived into three sub parts. These sub-parts are: the securitization, the de-securitization of migration in Indonesia and their consequences in regional protection of refugees.

## II. SECURITIZATION AND DE-SECURITIZATION OF MIGRATION

It is useful to start our concept discussion from Wæver's statement that, "something is a security problem when the elites declare it to be so."[14] Securitization, as theory or concept, encourages researchers and readers to depart from the accepted understanding of security and existential threats. Wæver further uses language theory to regard security as a speech act, referring to the 'utterance' of security by the State or its representatives that make security problems exist.[15] Securitization can be referred to as the construction of an issue as a security issue[16], commonly comprising of a securitizing actor and a referent object or the elements in the community that is believed to be threatened by a certain threat.[17]

With such an understanding of security and securitization, Wæver then coined the notion of de-securitization, highlighting that the very core of security studies should indeed be disclosing the process of both securitization and de-securitization. As Wæver puts it:

> "When, why and how elites label issues and developments as "security" problems; when, why and how they succeed and fail in such endeavors; what attempts are made by other groups to put securitization on the agenda; and whether we we can point to efforts to keep issues off the

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[13] Nurul Azizah Zayzda, "Sekuritisasi Migrasi Paksa Pengungsi Lintas- Batas di Indonesia" (2017) 3:1 Semin Nas Huk Univ Negeri Semarang 43.

[14] Ole Wæver, *Securitization and Desecuritization* (Centre for Peace and Conflict Research, 1993).

[15] *Ibid.*

[16] Holger Stritzel, "Towards a Theory of Securitization: Copenhagen and Beyond" (2007) 13:3 Eur J Int Relat 357.

[17] Michael C Williams, "Words, Images, Enemies: Securitization and International Politics" (2003) 47:4 Int Stud Q 511.

> security agenda, or even to de-securitize issues that have become securitized?"[18]

Huymans explains that the process taking place in de-securitization is "the unmaking of the fabrication of insecurity[19]", deriving from Wæver's argument that it is possible to de-securitize a phenomenon due to the previous securitization's ethico-political issues. This is to say that when securitization influences the social and the politics, the analysts are required to apply a different approach of security rather than taking its claims for granted. Huymans warned that to de-securitize should not simply mean to shift from security to human rights focus. Instead, it is necessary to maintain the security discussionsl; only in this case, the work to be done is the "de-dramatizing" of the security concerns by placing it in everyday context or pluralist politics. This means that the life of immigrants should be taken into account in eliminating the rhetoric of them as posing danger to society.[20]

The next question on our analytical work is who are the actors that are involved in the de-securitization process, or the *de-securitizing actors*? Wæver's emphasis was on elites while Huymans connotes the daily process of politics or the pluralist understanding on politics.[21] The work of McDonald and Balzacq, Leonard, and Ruzicka is useful to shed some light on the methodology here. Balzacq, Leonard, and Ruzicka, on their examination of securitization theory, suggest that securitization is to be found in speech acts as well as practices and processes in the government.[22] McDonald's work criticized Wæver's narrow focus on speech acts and the elites, which sets limitations to what should be considered as securitization and marginalized various actors in international politics. Therefore, McDonald recommends an analysis of securitization to take into accounts the audiences and to investigate more actors including the non-state actors.[23]

Securitization of migration has been a branch of securitization studies, defined loosely as a construction of the migration of foreigners into one's own country as a threat to local socio-economic, security, identity and politics.[24] Huysman explained that in securitizing migrants these processes take place: a) spreading fear and trust; b) management of inclusion and exclusion; and c)

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18 *Ibid.*

19 "Insecurity" is a notion that Huysmans use to explain a condition where a perception of threat is presented to challenge the security. Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (London, UK: Routledge, 2006).

20 *Ibid.*

21 *Ibid.*

22 Thierry Balzacq, Sarah Léonard & Jan Ruzicka, "'Securitization' revisited: theory and cases" (2016) 30:4 Int Relat 494.

23 Matt McDonald, "Securitization and the Construction of Security" (2008) 14:4 Eur J Int Relat 563.

24 Ayse Ceyhan & Anastassia Tsoukala, "The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies" (2002) 27:1 Altern Spec Issue 21.

institutionalization of alienation and predisposition towards violence. Aside from the securitizing actor and the method of securitization, another aspect of securitization is the referent object. What is assumed to be threatened by certain subjects, in the minds of the securitizing actor? Ceyhan and Tsoukala summarise the referent objects into: social-economy (resources, employment, social policy, urban environment); security (sovereignty, state borders, internal and external security), identity (identity threats, demographical challenges) and politics (racism, anti-migrants movement, xenophobia).[25]

A relatively large number of previous researches on securitization of migration and particularly, securitization of forced migrations has been made. For example, Herta's work on the securitization of refugees in Hungary during the recent refugee crisis,[26] Jakešević and Tatalović's description of a micro-level securitization as well as desecuritization in Republic of Croatia,[27] and Ibrahim's and Tkaczyk's work that provides examples of the analysis on the securitization by media.[28] The securitization of migration studies in these previous studies provide analytical guidelines for this paper. First, they analyse securitization through the analysis of speech act or utterance of security in public statements, media coverage and policy practices which exemplify the securitization through speech act. Secondly, some of the work highlights the danger posed by securitization to the objects deemed to be threats, namely the immigrants or more specifically, the asylum seekers and refugees. The discussion in this paper resonates the previous studies by looking into the securitization of immigrants arriving to Indonesia through speech acts, found in the language of regulations and public statements. The discussion sets itself apart from the previous studies by looking into the securitization through the practices of policy and even further to the acts of non-state actors.

This paper employs a critical analysis on regulations related to migration in Indonesia as well as government and non-state actors' practices around it. The discussion is structured in two level discussions: firstly, dynamics of securitization of migration in Indonesia as found in the legal frameworks, policy practices and civil society- narrowed down to the issue of forced migrants or the refugees; and, secondly, the securitization of refugee in the Southeast Asian region.

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[25] *Ibid.*

[26] Laura Herţa, "Security as Speech Act: Discourse Construction on the Syrian Refugee Crisis" (2017) Int Conf Redefining Community Intercult Context 283.

[27] Ruzica Jakesevic & S Tatalović, "Securitization (and de-securitization) of the European refugee crisis: Croatia in the regional context" (2016) 53:5 Teor Praksa 1246.

[28] Michal Tkaczyk, "Between Politicization and Securitization: Coverage of the European Migration Crisis in Czech Online News Media" (2017) 8:2 Commun Today; Maggie Ibrahim, "The Securitization of Migration: A Racial Discourse1" (2005) 43:5 Int Migr 163.

## III. DYNAMICS OF SECURITIZATION OF MIGRATION IN INDONESIAN LEGAL FRAMEWORK

What are the shapes of securitization of migration in Indonesia? In previous work by Zayzda[29], it had been argued that a certain degree of securitization is found in Indonesian migration policy. Zayzda (2017) argues that the securitization process is reflected in the Immigration Act No. 6 of the year 2011, the Directorate General of Immigration Regulation No. IMI-1489-UM-08-05 of the year 2010 on Management of Illegal Immigrants. Provided in a historical context, the Immigration Act No. 6 in the year 2011 replaced the Immigration Act No. 9 in the year 1992. Prior to 1992, there was no Immigration Act in place. The new 2011 Immigration Act amended a number of rules, including the extension of the perspective of Immigration authority, now to include data and information-based surveillance, field surveillance and immigration intelligence. A coordinated group called the Foreigners Surveillance Team (Timpora) was established by this act.[30] The act was also influenced by the intensity of the Bali Process which was concerned with transnational crime of people smuggling and human trafficking, therefore authorising Immigration to employ detention houses to keep the victims.[31] The Immigration Act regulates immigration, particularly 'illegal immigration' in Article 119 where it states and puts into detail the employment of immigration detention. The utterance of security was found in the repeated use of 'illegal' migrants in the document, which then justifies the immigration measures including the employment of immigration detention houses. The immigration detention themselves signifies what Huysmans posits as exclusionary practice.

The Directorate General of Immigration Regulation No. IMI-1489-UM-08-05 in the year 2010 on Management of Illegal Immigrants was issued earlier in 2010. The considerations of the regulation as stated at the first page is:

> "That in its development, the increasing arrival and presence of foreigners as illegal immigrants who then state themselves as asylum seekers and refugees in Indonesian territory has impacted in ideological, political, economy, social-cultural, national security and immigration vulnerability aspect."[32]

Although this document uses the terminology of refugees and asylum seekers in its introduction, the rest of the document utilises only 'illegal immigrants.' That is to say, the 2011 Immigration Act, as well as the Directorate General Regulation

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[29] Zayzda, *supra* note 13.

[30] See Article 68-70 of the 2011 Immigration Act.

[31] See Article 83-87 of the 2011 Immigration Act.

[32] See Consideration part of the Directorate General of Immigration Regulation No. IMI-0352-GR-02-07 year 2016 on Management of Illegal Immigrant.

on Management of Illegal Immigrants year 2010, securitizes incoming migration to Indonesia and, consequently, also securitizes the refugees coming and staying in Indonesia due to their illegal migratory aspect.

The following part discusses further the securitization process in the following: The Presidential Regulation No. 125 year 2016, the Directorate General of Immigration Regulation No. IMI-0352-GR-02-07 year 2016 on Management of Illegal Immigrants and Immigration Circulate No. IMI-GR-0-03-1194 year 2017. Presidential Regulation No. 125 year 2016 gives an important intersection of de-securitization of migration with the implication of refugees. It was written as implementation of Act No. 37 year 1999 on Foreign Relations, particularly the Article 27 (2). In terms of a speech act, it is not as strong as the previous documents. If any, the securitization of migration included in the regulation concerns two important aspects. Firstly, the regulation entails a security measure aimed to avoid 'criminal cases' which is done by 'keeping refugees within watch,' 'providing security for the surroundings,' and 'establishing rules entailing the rights and obligations of refugees.' The wording symbolises the construction of refugees as a threat to social stability. Secondly, this regulation affirms that the surveillance of refugees remains a priority, performed in all stages: temporary sheltering, resettlement, voluntary returns, and deportation. The procedure of surveillance includes the re-examination of identity, documents, and collection of fingerprints. The procedure also includes producing data documents or special identity cards for refugees issued by the Head of Detention Immigration which is extendable every year.[33]

Along with the securitization of refugees is a degree of de-dramatization when the Indonesian military, Indonesian police and other bodies, are demanded to carry out 'search and rescue operation on the boats with refugees' or to 'place refugees in shelter, [...] in which local government utilises the local asset as shelter for the refugees, in the form of lending between the local and Minister as central government.' In the Accommodation Chapter of the Presidential Regulation, an alternative to immigration detention houses is outlined as local governments are urged to provide shelters and coordinate with international organizations to meet the 'basic needs' of refugees, including clean water, food, drinks and clothes, health and sanitary services, and worshipping facilities. This regulation represents the shift from a refugee image of merely undocumented illegal to the controlling/securing of refugees to managing/helping with refugees. This shift is also a transition from an exclusionary practice: the new initiative of Indonesia in handling refugees from legal-formal approach that put the strangers without document as a breach to immigration law to an approach that puts the safety of refugees into attention.

This Presidential Regulation paved the way for the Directorate General of Immigration Regulation No. IMI 0352 GR 02 07 in the year 2016 on the

[33] See Article 31-39 of the Presidential Regulation No. 125 of 2016 on Immigration.

Management of Illegal Immigrants and Immigration Circulate No. IMI-GR-0-03-1194 in the year 2017. The Immigration Regulation on Management of Illegal Immigrants was made to implement the Presidential Regulation and replace the previous regulation. The utterance of security aspects of refugees is still apparent and almost similar to its preceding regulation in the year 2010 discussed above. The regulation was commenced with the following consideration stating that:

> "Management of foreigners stating themselves as asylum seekers or refugees in Indonesian territory needs to be done in a comprehensive and sustainable manner to anticipate the vulnerability in aspects of ideology, politics, law, economy, social culture, and national security."[34]

On the other side, this new regulation uses the terminology refugees and asylum seekers more consistently than the 2010 Regulation on Management of Illegal Immigrants. Furthermore, it extends the approach to refugees' rights. The regulations re-emphasise the rights aspects by mentioning in Article 15 that the co-operation with the International Organization for Migration (IOM) or other international organizations help with the supply of facilities in immigration detention houses. In contrast, in the previous regulation, it was stated that the needs of 'illegal immigrants' during their status determination process with UNHCR is not the responsibility of the Immigration Office or the higher offices.

In addition to these legal documents, which provide only the framework for securitization, some discursive practices of securitization of migration are commonly reviewed for border security protection, employment of immigration detention, and the process of surveillance over foreigners. Border security is a major concern of every state in exercising their sovereignty. In the migration aspect, border security matters to make sure that every entrance or exit takes place in legal manner and is well-documented. A breach to this would be regarded as undermining sovereignty. The immigrants and the migratory process are securitized when irregularity is considered as a threat regardless of the background situation of the migrants. This is the case for the practice of capturing and arresting refugees arriving without documents, in unauthorized vehicles, or with the help of smugglers. Secondly, and related to the first practice, immigration detention houses securitize migration by providing penalites for an irregular entry. The Directorate General of Immigration currently runs 13 detention centers. Numerous past works have elucidated the poor conditions of the detention houses: overcapacity, the lack of freedom of movement, and poor facility has been common problems.[35] Thirdly, there is the surveillance of citizens from

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[34] See Consideration part of the Directorate General of Immigration Regulation No. IMI-0352-GR-02-07 year 2016 on Management of Illegal Immigrant.

[35] See Antje Missbach, "Accommodating Asylum Seekers and Refugees in Indonesia: From Immigration Detention to Containment in 'Alternatives to Detention'" (2017) 33:2 Refuge Can J Refug 32; Antje Missbach et al, "Stalemate: Refugees in Indonesia- Presidential Regulation

foreign countries. As mentioned earlier, Timpora, or the Foreigner Surveillance team, was set up for this purpose. In addition to these, the surveillance has been improved with an application for reporting foreigners (APOA), where a sponsor or accommodation owner (hotel, hostel, motel, boarding house, etc) reports the presence of foreigner at their place.

The category of speech act of de-securitization shall commonly 'de-legitimize security knowledge or de-dramatize the security concerns attached on certain issues.' In the instances above, the security knowledge of migration remains existing following the new Presidential Regulation as well as the Directorate General of Immigration Regulation of the year 2016, through the utterances of states vulnerability in social and political aspects as well as the provisions of surveillance and security measures over the refugees, implying the assumption on their existential threat. The change here is with the entry of refugees and asylum seeker terminology in the Regulation on Illegal Immigrants and the new rhetoric on refugees' rights, especially regarding the provisions on assistance for the refugees that need to be pursued by the government as well.

## IV. CIVIL SOCIETY AND DE-SECURITIZATION OF REFUGEES IN INDONESIA

In addition to the state practices, the activities of civil societies in rising awareness and de-dramatizing the 'alien' aspect of the refugees is highlighted here. There are a number of civil society organizations based in Indonesia that are concerned with refugee issues within the country. SUAKA is a network of volunteers with the main members currently consisting of Jakarta Legal Aid Institute (LBH Jakarta) and the Human Rights Working Group (HRWG). The network's main aim is to advocate, provide consultation, and disseminate information required by refugees in Indonesia. SUAKA holds public discussions with other organization and has also worked together with UNHCR in holding public events like Refugee Day.[36] Aside from SUAKA, a number of other civil society organizations have been working on protecting refugees, for example the Jesuit Refugee Service Indonesia. This organisation has been working on refugee assistance in Indonesia since 1980.[37] Dompet Dhuafa is another organisation that has been increasingly involved in refugee issues in the past few years. One of its programs is the School

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No 125 of 2016" CILIS Policy Pap, online: https://law.unimelb.edu.au/__data/assets/file/0006/2777667/CILIS-Paper-14_Missbach-et-al_final.pdf.

[36] SUAKA, "Indonesia Civil Network for Refugee Protection", online: https://suaka.or.id/category/news/events/.

[37] Anak Agung Istri Diah Triceseria, Nurul Azizah Zayda & Rizka Fiani Prabaningtyas, "A New Approach to Refugee's Welfare through the Role of Community: Case Study of Refugee's Community Centre in Sewon" (2017) 2:1 Glob South Rev 1.

for Refugees, a non-formal education program for refugee children. This organisation also works closely with other stakeholders to improve awareness of refugee issues.[38]

Lastly, it is imperative to learn about the growing activities in refugee learning centers run by the refugee community in Indonesia. Their active efforts in improving their life delivers a clear message that they are not a threat to society, and they are only trying to survive. Roshan Learning Center (RLC) is located in Jakarta and was established in 2014 by two Australian citizens, Heather Tomlinson and Ashley Berryhill. As a learning center, refugee children, teens, and adults are welcomed to study in addition to having access to counseling, health clinics, and the ability to use computers. Another refugee learning center named Cisarua Refugee Learning Center (CRLC) was founded and is managed by refugees. Like RLC, its community involvement was made possible through visits to the community.[39] An important activity, which may be an important construct for de-securitization, is the engagement with local activities. Kurniasari, in her report, explained that a group of Roshan refugee community students recently volunteered in an American Women's Association (AWA) program to distribute hygienic supplies and small gifts to local Indonesian children in Fatmawati Hospital.[40] Other engagements with local Indonesians were done through visitations to the learning centres or involvement in various events.[41]

These activities can be explained as part of de-securitization using Huysman's definition which includes the pluralist politics- an analysis into daily life practices. The activities of SUAKA and its networks help with de-legitimazing the security language of refugees. They are portrayed not as 'foreigners' or 'illegal migrants' as the Act or Regulations would but as people in need of global community protection. The RLC and CRLC adds to the picture what it is to 'not merely replacing security language with human rights language,' by softening their image as a security threat to society through increasing interactions with the local community. Critically analysed, the civil society provides a steppingstone for de-securitization; however, without a reception from the community, the security image attached to them will remain strong. Indonesia will still not perceive the Refugee Convention as an urgent international law and norm, and, in a regional context, it is unlikely that Indonesia will create a more open-border refugee policy.

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[38] Dompet Dhuafa, "Dompet Dhuafa dan PAHAM Indonesia Dorong Penguatan Mekanisme Penanganan Pengungsi", (September 2017), online: https://www.dompetdhuafa.org/post/detail/8544/dompet-dhuafa-dan-paham-indonesia-dorong-penguatan-mekanisme-penanganan-pengungsi.

[39] Cisarua Refugee Learning Center, *Annual Report 2015-2016* (2018).

[40] Triwik Kurniasari, "Roshan Learning Center empowers, brings hope to refugees - UNHCR Indonesia", (18 July 2017), online: *UNHCR* https://www.unhcr.org/id/en/11072-roshan-learning-center-empowers-brings-hope-refugees.html.

[41] Roshan Learning Center, *The Year in Review - Annual Report 2017* (2018).

## 1. Are Refugees De-securitized in Southeast Asia with the Humanitarian Aids?

Findings on the character of securitization and de-securitization of migration in Indonesia can be summarised as follows:

a. Securitization has been taking place through the utterance of security threat imposed by the migrants in the following texts or practices: Immigration Law, Immigration Regulation on Management of Illegal Immigrants (2010), border security, immigration detention and surveillance on foreigners.
b. Securitization of migration has been taking place in the following legal documents; however, a language of human rights of refugees have been added: Presidential Regulation No. 125 Year 2016, Immigration Regulation on Management of Illegal Immigrants (2016).
c. Civil society or non-state actors make a part of de-securitization, but it still lacks reception from the audience namely the Indonesian population.

To speak about the impact of securitization and de-securitization trends of refugee's rights in Southeast Asia, more information is required, i.e. Indonesian policy and civil society activities related to refugee issues in regional level. By drawing upon this parallel trend, it is possible to provide the discussion on the refugees' rights. An important development in refugee protection has indeed been taking place in the region. Nevertheless, it is important to note that it was not until the mass displacement of the refugees fleeing from the conflict in Myanmar that the human rights approach toward refugees began to take place. Zayzda and Wijayanti (2017) analysed the Bali Process on People Smuggling, Trafficking in Persons, and other Transnational Crimes co-chaired by Indonesia and Australia since 2002, arguing that the meetings and documents issued undermined refugee protection by emphasizing the illegal aspects of their migration. For example, in Co-Chairs statement in 2002, it was mentioned that the flow of irregular migration has challenged the countries in aspects of security, politics, social and economy because the activities did not respect sovereignty and national borders. As the discussions continued, the Bali Declaration on People Smuggling, Trafficking in Persons and other Transnational Crimes co-chaired by Indonesia and Australia in 2016 was made with more description on protection of refugees. The protection includes temporary shelter, the arrangement of local settlement, the recognition of access for irregular migrants, and alternatives to immigration detention.[42]

In 2015, Indonesia, along with two neighbouring countries, Malaysia and Thailand, signed a joint agreement to help 7000 refugees of Rohingya and

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[42] Nurul Azizah Zayzda & Sri Wijayanti, "Negara Maritim Indonesia, Migrasi Tidak Teratur, dan Hak Pengungsi Lintas Batas" (2016) 3:02 Insign J Int Relat 48.

Bangladeshis. However, those three countries showed different policies instead of commitment to help the refugees. Indonesia provided food, water and fuel but also sent warships and a plane to control its territory. Another two countries also claimed that the refugees' destinations were not their countries. After many criticisms from UNHCR and IOM, the foreign ministers of Indonesia, Thailand, and Malaysia finally agreed to take the refugees into their countries and allow the refugees to be processed but under strict conditions.[43] Another action by the Indonesian government was mediating the refugee crisis in Myanmar. On September 4th, 2017, the Indonesian Minister of Foreign Affairs visited Myanmar and met with Myanmar's high-level officials, including the State Counsellor, Aung San Suu Kyi. That meeting discussed the need of the Myanmar government to attempt de-escalation efforts in Rakhine State and try a multi-prong approach to resolve the conflict involving Rohingya.[44] On September 6th, 2017, Minister Retno also met the Bangladesh Foreign Minister, Mahood Ali, and discussed Indonesia's humanitarian aid plan which arrived in Bangladesh 10 days after the meeting.[45]

Civil society involvement in humanitarian aid has also increased in the wake of rising concerns for Myanmar Rohingya refugees. From Indonesia, the Indonesian Humanitarian Alliance for Myanmar or Aliansi Kemanusiaan Indonesia untuk Myanmar (AKIM) was made in 2017, comprising of 11 humanitarian organizations, including Dompet Dhuafa. The organizations are the Muhammadiyah Disaster Management Centre, Lembaga Penanggulangan Bencana dan Perubahan Iklim – Nahdlatul Ulama, PKPU Human Initiative, Dompet Dhuafa, Rumah Zakat, Dompet Peduli Ummat – Daarut Tauhiid, LAZIS Wahdah, Laznas Lembaga Manajemen Infaq (LMI), Aksi Cepat Tanggap, Lazis Dewan Da'wah Islamiyah Indonesia, Social Trust Fund – UIN Jakarta. This alliance, in collaboration with the Indonesian government, delivers aid programs in health, education, livelihood, and relief.[46]

Humanitarian aid needs to be analysed critically through the understanding of securitization. Given that humanitarian aid is potentially granted to people who move across borders to avoid violence, the question to be answered is whether

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[43] Antje Missbach, "Towards A Real Solution to Southeast Asia's Refugee Crisis", (19 August 2015), online: *The Diplomat* https://thediplomat.com/2015/08/towards-a-real-solution-to-southeast-asias-refugee-crisis/.

[44] Sheany, "Indonesia Ready to Help Bangladesh Address Refugee Crisis: FM Retno", (6 September 2017), online: *Jkt Globe* https://jakartaglobe.id/context/indonesia-ready-help-bangladesh-address-refugee-crisis-fm-retno.

[45] Kementrian Luar Negeri Republik Indonesia, "Indonesian Humanitarian Aid Received by the Government of Bangladesh", (2017), online: https://www.kemlu.go.id/en/berita/Pages/Indonesian-Humanitarian-Aid-Received-by-the-Government-of-Bangladesh.aspx.

[46] Dompet Dhuafa, "Release Penanganan Konflik Kemanusiaan Rohingya dan Rakhine di Myanmar", (September 2017), online: *Dompet Dhuafa* https://www.dompetdhuafa.org/post/detail/8241/release-penanganan-konflik-kemanusiaan-rohingya-dan-rakhine-di-myanmar.

humanitarian aid helps the de-securitization of forced migrants? Or is it a part of securitization as a whole? The previous analysis found new human rights concerns in the immigration regulation in Indonesia, but it does not necessarily change the immigration discourse. It is useful to use Loescher's argument about humanitarian intervention, that humanitarian intervention helps to "reduce the likelihood of massive refugee flows across borders."[47] That is to say, humanitarian intervention needs to be understood as part of state politics to contain refugee flows. Zayzda argues that despite the linkage that can be understood as a solution for refugee crisis, it will be problematic when restrictions to refugee movement is established.[48] Indonesian humanitarian aid in Myanmar is carried out in parallel to the current migration and refugee policy which demonstrates a securitization of migration. The aid helps with the situation in the origin country of the refugees; however, it does not challenge the securitization of migration as discussed above.

From the discussion above it is found that the growing role of Indonesia in refugee protection abroad has gone only so far; it is not strong enough to push the institutionalization of protection, in addition to the fact that most countries have not signed the Refugee Convention. The ASEAN Summit in 2017 failed to bring about the Rohingya crisis into its Chief statement. It was mentioned, only under a category of 'disaster resiliency.'[49] There is no regional control nor universality of policy in each state who either acts as the origin or the target country for refugee.

Refugees and asylum seekers in general still live in dire situations due to the long waiting period or poor living conditions. As of May 2018, there are over 7,600 refugees and asylum seekers in Thailand, over 155,000 in Malaysia, and, in Indonesia, around 18,000. For Rohingya refugees alone, as of September 2018, as many as 921,000 refugees live outside Myanmar, mostly in Bangladesh. There are still limitations in living conditions in refugee camps in Bangladesh with the cramped space, water scarcity, lack of medical service, lack of employment access and threats to exploitation. With the current legal situations in Southeast Asia, the refugees and asylum seekers are always in risk of detention, exploitation, persecution as well as economic issues given the absence of employment access.[50]

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47 Alexander Betts, Gil Loescher & James Milner, "The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the 21st Century" (2008), online: https://www.rsc.ox.ac.uk/publications/the-united-nations-high-commissioner-for-refugees-unhcr-the-politics-and-practice-of-refugee-protection-into-the-21st-century.

48 Nurul Azizah Zayzda, "Sovereignty and Responsibility in Global Refugee Protection and Humanitarian Intervention in the 21st Century" (2015) 2 Insign J Int Relat 82.

49 Gotinga, JC, "ASEAN summit silence on Rohingya 'an absolute travesty'", (15 November 2017), online: https://www.aljazeera.com/news/2017/11/asean-summit-silence-rohingya-absolute-travesty-171114211156144.html.

50 European Commission, "European Civil Protection and Humanitarian Aid Operations: Thailand, Malaysia, and Indonesia" (2018) 2; See also Reliefweb, "Asia Refugee Policy Analysis - Bangladesh", (14 September 2018), online: *ReliefWeb* https://reliefweb.int/report/bangladesh/asia-refugee-policy-analysis.

The situations reflect how the development of refugee rights protection in the region is still far from sufficient.

## V. CONCLUSION

This paper has elaborated on the varying degree of securitization of migration in Indonesia. The migration regulations, policy practices, and civil society activities discussed in this paper illustrate how securitization and de-securitization took place. The language used to describe refugees in regulations in Indonesia is found to have changed and this is parallel to the changes in some practices on the national and regional level. The Presidential Regulation No. 125 year 2016 symbolises the de-securitization as it is the first Regulation to actually make standards for protection of refugees in Indonesia, starting from government responsibility for search and rescue to provision of accommodation. The next analysis was made on the new Immigration Regulation on Management of Illegal Immigrant issued in 2016 which uses the terms 'refugees and asylum seekers' instead of 'illegal immigrant' and they provide the guidelines for assisting the refugees in Indonesia. This change is deemed important given that by solely addressing them as 'illegal immigrants,' the refugees lose their human rights aspect. However, in both the regulations, security languages are maintained through the utterances of states vulnerability in social and political aspects as well as the provisions of surveillance and other security measures over the refugees. All of these imply the assumption of their existential threat, and this consequently forms an institutionalisation of alienation.

The civil society discussed in this paper portrayed a rising concern in refugee issues nationally in Indonesia by creating a counter to the perception of threat and challenging a normalised exclusion as well as alienation. Civil society has mainly worked in provision of aid or assistance, which is aimed to reduce the economic and social constraints faced by refugees. In addition to those, there have been public events held by the non-governmental organizations in collaboration with other stakeholders, which socialises the human rights aspects of refugees to the wider audiences, challenging the exclusion and perception of threat to society normally attached to refugees. An account on the activities of two refugee communities in Indonesia was made, underlining the agency of the refugees themselves. In the given cases, the refugee community is de-securitized through engagement with communities. Nonetheless, the de-securitizing act of the civil society described above still lacks reception from the larger society.

It can be summarised that securitization of migration in Indonesia means that there has been reproduced security rhetoric attached to the forced migrants, i.e. the refugees as aliens and to de-securitize their migration is to weaken that rhetoric. Lastly, an analysis was made on Indonesian humanitarian aid abroad. Critically analysed, the aid helps with the situation in Myanmar, one of the origin countries of the refugees, but it does not necessarily challenge the securitization of

migration. This also means that the activities of the civil society that reached regionally has supported the government's humanitarian aid which does not critically challenge the securitization of refugee's migration in general.

With its limitations on analysing legal documents and practices, especially by that of civil society organisations, this paper still provides a lot of room for further research, by looking separately different specific roles the securitizing and de-securitizing actors play and their strategies. The research on practices is particularly imperative to understand the extent to which civil society makes use of their role to challenge securitization, and how their activities influence the audience and society.

## BIBLIOGRAPHY

Balzacq, Thierry, Sarah Léonard & Jan Ruzicka. "'Securitization' revisited: theory and cases" (2016) 30:4 Int Relat 494.

Betts, Alexander, Gil Loescher & James Milner. "The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the 21st Century" (2008), online: https://www.rsc.ox.ac.uk/publications/the-united-nations-high-commissioner-for-refugees-unhcr-the-politics-and-practice-of-refugee-protection-into-the-21st-century.

Ceyhan, Ayse & Anastassia Tsoukala. "The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies" (2002) 27:1 Altern Spec Issue 21.

Cisarua Refugee Learning Center. *Annual Report 2015-2016* (2018).

Directorate General of Immigration Regulation No. IMI 0352 GR 02 07year 2016 on Management of Illegal Immigrants

Dompet Dhuafa. "Dompet Dhuafa dan PAHAM Indonesia Dorong Penguatan Mekanisme Penanganan Pengungsi", (September 2017), online: https://www.dompetdhuafa.org/post/detail/8544/dompet-dhuafa-dan-paham-indonesia-dorong-penguatan-mekanisme-penanganan-pengungsi.

Dompet Dhuafa. "Release Penanganan Konflik Kemanusiaan Rohingya dan Rakhine di Myanmar", (September 2017), online: *Dompet Dhuafa* https://www.dompetdhuafa.org/post/detail/8241/release-penanganan-konflik-kemanusiaan-rohingya-dan-rakhine-di-myanmar.

European Commission. "European Civil Protection and Humanitarian Aid Operations: Thailand, Malaysia, and Indonesia" (2018) 2.

European External Action Service. "The Invisible Refugees of Indonesia, Malaysia and Thailand", (10 July 2018), online: *EEAS - Eur Extern Action Serv - Eur Comm* https://eeas.europa.eu/delegations/association-southeast-asian-nations-asean/48201/invisible-refugees-indonesia-malaysia-and-thailand_en.

Gotinga, JC. "ASEAN summit silence on Rohingya 'an absolute travesty'", (15 November 2017), online: https://www.aljazeera.com/news/2017/11/asean-summit-silence-rohingya-absolute-travesty-171114211156144.html.

Herţa, Laura. "Security as Speech Act: Discourse Construction on the Syrian Refugee Crisis" (2017) Int Conf Redefining Community Intercult Context 283.

Huysmans, Jef. *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (London, UK: Routledge, 2006).

Ibrahim, Maggie. "The Securitization of Migration: A Racial Discourse1" (2005) 43:5 International Migration 163.

Immigration Circulate No. IMI-GR-0-03-1194 year 2017

Jakesevic, Ruzica & S Tatalović. "Securitization (and de-securitization) of the European refugee crisis: Croatia in the regional context" (2016) 53:5 Teor Praksa 1246.

Kementrian Luar Negeri Republik Indonesia. "Indonesian Humanitarian Aid Received by the Government of Bangladesh", (2017), online: https://www.kemlu.go.id/en/berita/Pages/Indonesian-Humanitarian-Aid-Received-by-the-Government-of-Bangladesh.aspx.

Kurniasari, Triwik. "Roshan Learning Center empowers, brings hope to refugees - UNHCR Indonesia", (18 July 2017), online: *UNHCR* https://www.unhcr.org/id/en/11072-roshan-learning-center-empowers-brings-hope-refugees.html.

Mathew, Penelope. "Whither Regional Cooperation in Southeast Asia's Refugee Crisis?", (23 July 2018), online: *The Diplomat* https://thediplomat.com/2015/08/whither-regional-cooperation-in-southeast-asias-refugee-crisis/.

Mathew, Penelope & Tristan Harley. "Refugee Protection and Regional Cooperation in Southeast Asia", (2014), online: https://core.ac.uk/download/pdf/156623449.pdf.

McDonald, Matt. "Securitization and the Construction of Security" (2008) 14:4 Eur J Int Relat 563.

Missbach, Antje. "Accommodating Asylum Seekers and Refugees in Indonesia: From Immigration Detention to Containment in 'Alternatives to Detention'" (2017) 33:2 Refuge Can J Refug 32.

Missbach, Antje, Yunizar Adiputera, *et al.* "Stalemate: Refugees in Indonesia-Presidential Regulation No 125 of 2016" CILIS Policy Pap, online: https://law.unimelb.edu.au/__data/assets/file/0006/2777667/CILIS-Paper-14_Missbach-et-al_final.pdf.

Missbach, Antje. "Towards A Real Solution to Southeast Asia's Refugee Crisis", (19 August 2015), online: *The Diplomat* https://thediplomat.com/2015/08/towards-a-real-solution-to-southeast-asias-refugee-crisis/.

Presidential Regulation No. 125 year 2016 on Management of Refugees

Refugee Council of Australia. "Australia closes door on persecuted Rohingya", (21 May 2015), online: https://www.refugeecouncil.org.au/latest/australia-closes-door-on-persecuted-rohingya/.

Reliefweb. "Asia Refugee Policy Analysis - Bangladesh", (14 September 2018), online: *ReliefWeb* https://reliefweb.int/report/bangladesh/asia-refugee-policy-analysis.

Roshan Learning Center. *The Year in Review - Annual Report 2017* (2018).

Sheany. "Indonesia Ready to Help Bangladesh Address Refugee Crisis: FM Retno", (6 September 2017), online: *Jkt Globe* https://jakartaglobe.id/context/indonesia-ready-help-bangladesh-address-refugee-crisis-fm-retno.

Stritzel, Holger. "Towards a Theory of Securitization: Copenhagen and Beyond" (2007) 13:3 Eur J Int Relat 357.

SUAKA. "Indonesia Civil Network for Refugee Protection", online: https://suaka.or.id/category/news/events/.

Tkaczyk, Michal. "Between Politicization and Securitization: Coverage of the European Migration Crisis in Czech Online News Media" (2017) 8:2 Commun Today.

Triceseria, Anak Agung Istri Diah, Nurul Azizah Zayda & Rizka Fiani Prabaningtyas. "A New Approach to Refugee's Welfare through the Role of Community: Case Study of Refugee's Community Centre in Sewon" (2017) 2:1 Glob South Rev 1.

UNHCR Global Focus. "2018 Planning Summary - Operation: Bangladesh" (2017) 3.

UNHCR Global Focus. "2018 Planning Summary: Subregion South East Asia" (2018) 5.

UNHCR Global Focus. "2018 Planning Summary - Operation: Thailand" (2018), online: http://reporting.unhcr.org/sites/default/files/pdfsummaries/GA2018-Thailand-eng.pdf.

UNHCR Global Focus. "Indonesia | Global Focus", (22 July 2018), online: http://reporting.unhcr.org/node/10335?y=2018#year.

UNHCR Global Focus. "South East Asia | Global Focus", (22 July 2018), online: http://reporting.unhcr.org/node/39.

UNHCR. "Refugee Status Determination", (22 July 2018), online: *UNHCR* https://www.unhcr.org/id/en/refugee-status-determination.

UNHCR Regional Office for Southeast Asia. "South-East Asia Fact Sheet", (21 July 2018), online: *UNHCR* https://www.unhcr.org/protection/operations/519f67fc9/south-east-asia-fact-sheet.html.

Wæver, Ole. *Securitization and Desecuritization* (Centre for Peace and Conflict Research, 1993).

Williams, Michael C. "Words, Images, Enemies: Securitization and International Politics" (2003) 47:4 Int Stud Q 511.

Zayzda, Nurul Azizah. "Sekuritisasi Migrasi Paksa Pengungsi Lintas- Batas di Indonesia" (2017) 3:1 Semin Nas Huk Univ Negeri Semarang 43.

Zayzda, Nurul Azizah & Sri Wijayanti. "Negara Maritim Indonesia, Migrasi Tidak Teratur, dan Hak Pengungsi Lintas Batas" (2016) 3:02 Insign J Int Relat 48.

Zayzda, Nurul Azizah. "Sovereignty and Responsibility in Global Refugee Protection and Humanitarian Intervention in the 21st Century" (2015) 2 Insign J Int Relat 82.

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*Journal of Southeast Asian Human Rights, Vol. 3 No. 1 June 2019 pp. 101-123*
*doi: 10.19184/jseahr.v3i1.8402*


# Discrimination against Women in Accessing Higher Education in Cambodia

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**Abstract**
Young women in Cambodia face challenges in accessing higher education. Social norms, financial constraints and other problems are the main root causes in the limitation of opportunities for women to pursue higher education. Social norms of the older generation in Cambodia remain from the past and they often think that it is not necessary for women to study in higher education institutions since a women's role is to just be a housewife after marriage. Another restriction on women's access to higher education is that they often have financial problems in supporting their education. Some women have to work in order to support their families, so they have no chance to pursue higher education. Additionally, since most universities are located in cities, parents often feel insecure about their daughters studying far away from home. Currently there is the increased enrollment of young women in higher education due to government action, as it has ratified international conventions and enacted domestic laws. As well, there is government cooperation with NGOs to establish some strategies and action plans to promote and protect gender equality in all sectors, including the education sector, by improving scholarship opportunities or building dormitories for female students to live in while studying at university. However, these supports cannot provide access to higher education for young women in all areas in the Kingdom of Cambodia, and Cambodia has not yet enacted specific laws to promote the participation of women in higher education. This research aims to explore the opportunities that have been provided to young women to pursue higher education, particularly at the university level. After exploring the opportunities, the researcher will analyze data regarding the challenges for women in accessing higher education. Finally, the researcher will provide some possible recommendations to address these challenges. This research utilized multiple methods, including desk review and structured interviews. Interviews were conducted face-to-face and in focus group discussions (FGD). Desk review focuses on all relevant international and national laws, strategic and action plans related to the promotion of women studying at university and the de facto equality of that issue.

Keywords: *Gender Equality, Gender Equity, Higher Education, Gender Discrimination*

## I. INTRODUCTION

Higher education is a crucial element of development and works to improve the quality of life and wellbeing of people around the world.[1] While higher education is valuable, not everyone can complete a university degree.[2] There are two major factors which impact access to higher education: financial problems and discrimination.[3] Southeast Asia is still facing challenges in the higher education sector.[4] At present, all countries in the Southeast Asia region are promoting and reforming their higher education systems, and they cooperate well with each other.[5]

Improving women's capacity to access education, develop skills, and find employment can reduce the rates of poverty, illiteracy, and improve the health of women.[6] When women lack the capacity to access and complete higher education it causes a lack of developed human resources throughout the whole country.[7] Based on the 2016 Human Development Report, more than one hundred and fifty countries have legally discriminated against women. One hundred countries discriminate against women in the work force simply because they are women.[8] Gender inequality is not an isolated or new issue; it exists worldwide.[9] Gender inequality has been an issue for long time. Almost all countries in the world have a gender gap. Inequality in society is a consequence of inequality in education.[10] Therefore, education, gender equality, and women's empowerment are important factors for reducing poverty and improving economic growth in developing countries.[11] If women can have the opportunity to complete higher education they can improve their future careers prospects and earn a higher income. Education is a human right and an important tool to promote equality, development, and peace. Investing in education for women and girls can improve

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1 *The Role of Higher Education in Society: Quality and Pertinence* (Paris, 1991).

2 Patrick Kyllonen, *La importancia de la educación superior y el rol de los atributos no cognitivos en el éxito en dichas instituciones* (2012).

3 Rhona K M Smith, *International human rights law*, eighth edition ed (New York, NY: Oxford University Press, 2018).

4 Thammika Songkaeo & Loke Hoe Yeong, 'Defining Higher Education Issues and Challenges in Southeast Asia/ASEAN within the International Context' (2016) Head Found.

5 *Ibid.*

6 'Program of Action of the 1994 International Conference on Population and Development (Chapters I-VIII)' (1995) 21:1 Popul Dev Rev 187, online: https://www.jstor.org/stable/2137429.

7 USAID, *Gender and Extreme Poverty* (2015).

8 UNDP, *Human Development Report 2016* (New York, 2016).

9 *Progress towards the Sustainable Development Goals: Report of the Secretary-General* (2017).

10 *Ibid.*

11 UNESCO Institute for Statistics, *Global education digest 2010: comparing education statistics across the world.* (Montreal: UNESCO Institute of Statistics, 2010).

sustainable, economic development.[12] Gender disparity in tertiary education mostly exists in developing countries, including the Arab States, Sub-Saharan Africa, and South Asia.[13] Gender parity of education has proven to be a main factor in developing a country's economy because there is a higher skilled workforce.[14]

Due to the improvement of higher education globally and regionally, the Royal Government of Cambodia (RGC) has strived to enhance the higher education system with equitable quality through the strengthening of national policies, legal framework, and institutions for enhancing education quality.[15] Currently, Cambodia is considered a developing country and was ranked 109 out of 145 countries on the Gender Inequality Index in 2015. In terms of gender inequality in enrollment in tertiary education, Cambodia was ranked 127 out of 145 countries.[16] As Cambodia moves towards middle-income status and regional integration, there is a need to promote equitable access to high quality education at all levels of society in order to compete in the free labor market.[17] In Cambodia the poorest people hardly have post-secondary education opportunities.[18] This is evident by examining the gender make-up of positions which require post-secondary education, such as the proportion of female lawmakers in the legislative body, which decreased from 21% in 2008 to 20% in 2013.[19] RGC needs to address these issues in order to fix the gender gap, particularly in secondary and higher education due to the lack of locally available education facilities and traditional values that place lower primacy on girls and women.[20] Cambodian women need greater opportunities for higher education so that they can compete for jobs in competitive markets.[21] Gender inequality in higher education can provide women the right to work and economic.[22]

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[12] Ministry of Women Affairs, *The Implementation of the Beijing Declaration and Platform for Action (1995) and the outcomes of the Twenty-third Special Session of the General Assembly* (Pnom Penh, 2000).

[13] Nich Chea, 'Higher Education in Cambodia Poor Rural Female Students' challenges, motivations, and coping strategies' (2015), online: https://gupea.ub.gu.se/handle/2077/39995.

[14] Peter Fry and Rogéro Utui, *Literature Review on Equity and Access to Tertiary Education in the Africa Region,* ed (Africa, 2009).

[15] *Ibid.*

[16] UNDP, *Human Development Report 2015* (New York, 2015).

[17] Ministry of Women Affairs, *Five Years Strategic Plan for Gender Equality and Empowerment of Women 2014-2018* (Ministry of Women Affairs, 2014).

[18] Unesco, *Global education monitoring report 2017/18: accountability in education : meeting our commitments* (2017).

[19] Ministry of Education Youth & Sport, *National Strategic Development Plan 2014-2018* (Pnom Penh, 2014).

[20] *Ibid.*

[21] UNESCO, *UNESCO National Education Support Strategy* (Pnom Penh, 2010).

[22] Rany Rany, Ahmad Nurulazam Md Zain & Hazri Jamil, 'Establishment of Institutional Policies for Enhancing Education Quality in Cambodian Universities' (2012) 1:1 Int J High Educ 112, online: http://www.sciedu.ca/journal/index.php/ijhe/article/view/1024.

The enrollment rates of female students in Cambodian universities still show a gap because of these outlined obstacles. In response to these problems, international agencies co-operated with representatives from the Ministry of Education, Youth and Sports (MoEYS) in 2009 to address concerns in quality, capacity building, teacher training, and lack of gender equity and equality under the financial support of the Asian Development Bank.[23]

Since gender equality in access to higher education is a crucial factor for developing the human resources of a developing countries economy, this research will explore and analyze the opportunities and the challenges for Cambodian women to access universities based upon both *de facto* and *de jure* practices. This paper will examine, in depth, the current opportunities and issues of women's access to university and how the implementation of national laws and policies developed by state and non-state actors can protect and promote women to improve their access to universities in the future.

The main objectives of this research are to explore the opportunities that female students receive from relevant stakeholders for improving their access to university; analyze the main challenges for women to Access University; and recommend possible solutions to address the challenges for female students in accessing university. The researcher interviewed duty-bearers, including government officials from MoEYS and Ministry of Woman Affairs (MoWA), NGO staff, university lecturers and enrollment staff of each university, parents, university students, and a group of women who lost their chance to attend university.

The significance of this research will go beyond simply identifying the barriers; it will analyze the challenges of girls' access to university and assess the RGC's implementation of the Beijing Platform for Action (BPFA), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Sustainable Development Goals (SDG), and the Cambodia Constitution. This study's results will contribute to Cambodian society by promoting the reduction of the gender gap in access to higher education. This research will be useful in the protection and improvement of human rights and peace in ASEAN countries, specifically in Cambodia.

## II. PROTECTION AND PROMOTION OF WOMEN IN HIGHER EDUCATION UNDER THE CURRENT LEGAL FRAMEWORK

For centuries, women all over the world have been discriminated against. This continues to be true, despite the historical advances in Europe towards individual freedoms and liberty, starting with the French and American Revolutions.[24] For

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[23] Mary N Booth, 'Education and Gender in Contemporary Cambodia' (2014) 4:10 Int J Humanit Soc Sci 9.

[24] Azizur Rahman Chowdhury & Jahid Hossain Bhuiyan, eds, *An introduction to international human rights law* (Leiden ; Boston: Brill, 2010).

the purpose of establishing security and peace in the world after World War II (WWII), the United Nations (UN) adopted the UN Charter in 1945, and immediately thereafter adopted the Universal Declaration of Human Rights (UDHR) in December 1948.[25] The rights of women to access higher education are protected under Article 26 of the UDHR.[26] Another relevant universal instrument is the UN Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education adopted in 1960. The purpose of which is the elimination of discrimination in states' education systems and the promotion of equality of opportunity and treatment.[27] The International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966 and came into force in 1976 in accordance with the provision of Article 49 of ICCPR and Article 27 of the ICESCR.[28] The ICCPR does not have a specific article for the protection of women's access to higher education. However, a women's right to access higher education is explicitly protected under Article 13 (2, c) of ICESCR.[29] However, even though this act incorporates equality, it does not specifically reference women.[30] The specific elimination of discrimination against women was adopted by the General Assembly in CEDAW in 1979. Article 10 of CEDAW states that "State Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure on a basis of equality of men and women..."[31] This article also includes vocational training and continued education, the removal of stereotypes from the education system, equal access to finding education and reducing female drop-out rates at all levels.[32] The Vienna Declaration of the World Conference on Human Rights 1993, Paragraph 33 states that all states that have ratified CEDAW have made a legally binding commitment to protect, respect, and promote women in order to end all forms of discrimination against them.[33] The CEDAW Committee was created to monitor state parties. Each state must submit a report periodically to the Committee and then the Committee is tasked with providing recommendations for future actions for the government.[34] Other aspects of the universality of a human's right to

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25 *Ibid.*

26 'Universal Declaration of Human Rights', (1945), online: http://www.un.org/en/universal-declaration-human-rights/index.html.

27 Daniel Moeckli et al, eds, *International Human Rights Law,* third edition ed (Oxford, New York: Oxford University Press, 2017).

28 Chowdhury & Bhuiyan, *supra* note 24.

29 OHCHR, *International Covenant on Economic, Social and Cultural Rights* (1966).

30 Chowdhury & Bhuiyan, *supra* note 24.

31 *CEDAW*, (entered into forced 3 September 1981), art. 10.

32 *Ibid*, art. 10.

33 Smith, *supra* note 3.

34 *Optional Protocol of Convention on Elimination of all forms of Discrimination against women* (2000).

education were considered during the United Nations endorsement of the BPFA which was adopted by the Forth Conference on Women in 1995. The purpose of this is to advance the ability of women to receive equal rights, responsibilities, and opportunities to be involved in national and international organizations, government decisions, and policy making processes.[35] The action plan of the declaration was to improve the quality of education and provide equal opportunities for women and men in terms of accessing education at all levels.[36]

Education rights are also guaranteed by regional human rights instruments in Southeast Asia.[37] Article 2 of the Protocol of European Convention of Human Rights (ECHR) provides that "no person shall be denied the right to education";[38] Article 10 of the European Social Charter (ESC) sets out that States must "provide or promote... for access to higher technical and university education...";[39] Article 17 (1) of African Charter of Human Rights and People's Rights (ACHPR) specifies that "every individual shall have the rights to education";[40] Article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) states that "everyone has right to education";[41] Article 34 of Arab Charter on Human rights (ACHR) provides that "[t]he eradication of illiteracy is a binding obligation and every citizen has a right to education... free and both secondary and university education shall be made easily accessible to all";[42] and finally, Principle 31 of the non-binding ASEAN Human Rights Declaration has a similar statement to other international and regional conventions:[43] "(1) [e]veryone has the rights to education, (2)...higher education shall be equal accessible to all on the basis of merit."[44]

In Cambodia the progress of implementing CEDAW is continuously improving. Based on the final Fourth and Fifth National Report of the Kingdom of Cambodia, the state provides equal rights for men and women to access

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35 UN Women, *Beijing Declaration and Platform for Action: The Fourth World Conference* (Beijing, 1995).

36 *Ibid, para. 80.*

37 Moeckli et al, *supra* note 27.

38 *Protocol of ECHR*, (entered into forced 1 June 2010).

39 Council of Europe, *European Social Charter (Revised)* (1996).

40 *African Charter on Human Rights and People's Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force 21 October 1986).

41 Organization of American States OAS, 'Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 14 November 1988' (1989) 16 Annu Rev Popul Law 1,234.

42 *Arab Charter on Charter on Human Rights* (entered into forced 16 March 2008).

43 Moeckli et al, *supra* note 27.

44 ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD) (entered into forced February 2013).

education at all levels.[45] The following are achievements that the RGC has made over the years:

- The RGC became a party of CEDAW on 14 November 1992 and signed on the BPFA for the promotion of the status of women has submitted reports since 1995.[46]
- Article 31 of the Constitutional of Kingdom of Cambodia states that, "The Kingdom of Cambodia recognizes and respects human rights as determined in the Universal Declaration on Human Rights..."[47]
- Another aspect of the Constitution states that "Khmer citizens of both sexes have the right to participate actively in the political, economic, social and cultural life of the nation."[48]
- The specific article of the Constitution of the Kingdom of Cambodia that relates to education states, "[t]he State shall protect and promote the right of the citizen to quality education at all..."[49]
- Finally, the Law on Education was adopted in 2004 in compliance with the Constitution of the Kingdom of Cambodia, which required the State to uniform the education system to adhere with the principle of free access to education to all.[50]

The RGC has some related laws on gender equality in education. However, there is no specific article promoting and protecting girls and women in accessing higher education, and certain relevant law enforcement has not been so strong. Cambodian lawmakers are men; thus, it is hard to enforce these specific laws. There is a history of making laws relative to cultural norms. [51] Thus, some relevant laws were passed but lack enforcement.

## III. PROTECTION AND PROMOTION OF WOMEN'S RIGHT TO HIGHER EDUCATION UNDER CAMBODIA'S INSTITUTIONAL MECHANISMS

The Department of Higher Education (DHE) is under MoEYS. The DHE has assured the provision of full staff training and the enhancement of research in science, technology, culture, and society. Additionally, the DHE has built up the policy and planned for developing the academic education system; managed and coordinated public education academic institutions and private institutions; recruited students to study a basic, foundation academic year; selected and

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45 *Ibid.*
46 Ministry of Women Affairs, *Gender: Gender Mainstreaming Institutional, Partnership and Policy Context Cambodia Gender Assessment* (Pnom Penh, 2014).
47 *Constitution of the Kingdom of Cambodia*, 1993, article 31.
48 *Ibid*, article 35.
49 *Ibid*, art. 65.
50 Education Law. art. 1.
51 *Ibid.*

managed students in the country; and submitted activity reports to the Minister in charge according to the deadline.[52] The DHE created the Gender Mainstream Action Group (GMAG) as per Article 18, 12 of Enhancing Education Quality Project (EEQP) and Sub-Decree 84 on Organization and Conducts of MoEYS.[53] Thus, the DHE is the main department for promoting greater access of female students to higher education. Response to Equal Access (EA) has included gender equality policies in the education sector. Since 2008, MoEYS has cooperated with relevant ministries and other stakeholders and has had remarkable results in policies and plans of gender mainstreaming.[54] The GMAG of DHE has also cooperated well with MoWA and other relevant stakeholders in striving to mainstream gender equality to all areas in Cambodia to increase the enrollment in university. The RGC also provides scholarships to female students to study abroad. Since 1990, the Recruitment Commission's rules have been such that if the same score is achieved by a man and a woman, the Commission will recruit the woman.[55] For ensuring gender equality, the RGC has provided many measures with the purpose of enabling young women to obtain an education at all levels by providing scholarships, health services, and preventing drop-outs by building dormitories for female students.[56] MoEYS provides scholarships for outstanding students, poor students, female students, and students from remote areas. The Ministry also provides dormitories to poor female students from provinces to help them pursue their studies. MoEYS provided 10% of all scholarships to female students from 2002 to 2006. After 2006, MoEYS changed its policy so that it provides 15% of scholarships to female students. In the academic year 2008-2009, the number of female students in tertiary education increased to 38.47% from only 32.06% in the academic year of 2004-2005.[57] Cambodia hosted 826 Khmer and foreign scholarship students in dormitories, 72.40% of which were female.[58] The gender disparity in education has been reduced at all levels due to more scholarships for female students; the amount of financial support is USD 1,200,000 from the government budget and development partners (DPs) including Action Aid, UNICEF, UNESCO, Plan International, and The United Nations

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[52] *Organization and Functioning of Ministry of Education Youth and Sport Royal Government of Cambodia,* Sub-decree No. 84 ANKr. BK (9 June 2009), article 23.

[53] Ministry of Education Youth & Sports, *Annual Report 2009 and Annual Plan 2010: Enhancing Education Quality Project", ADB Grant No. 0090 - CAM (SF)* (Pnom Penh, 2010).

[54] Ministry of Women & Affairs, *Education: Gender in Education and Vocational Training Cambodia Gender Assessment* (Pnom Penh, 2014).

[55] Committee on the Elimination of Discrimination against Women, *Consideration of reports submitted by States parties under article 18 of the Convention on Convention on the Elimination of All Forms of Discrimination against Women* (Cambodia, 2006).

[56] Ministry of Education Youth & Sports, *The Education, Youth and Sport Performance in the Academic Year 2015-2016 and Goals for the Academic Year 2016-2017, 21-22-23 March 2017* (Pnom Penh, 2017).

[57] Ministry of Women Affairs, *supra* note 12.

[58] Ministry of Education Youth & Sports, *supra* note 56.

Development Programme (UNDP).[59] The scholarship increase for female students pursuing a Bachelor Degree was 30.93% comparing the year 2015-2016 to the previous year.[60] In 2015-2016, Cambodia sent 527 students (28.60% female) to study in Thailand, the People's Republic of China, Vietnam, Japan, Laos, Russia, Singapore, Cuba and the Philippines.[61] There has been progress in improving scholarships and dormitories for female students pursuing higher education which have been provided by the RGC and other development partners and NGO projects. New visions of education beyond 2015 by the National Education for All Committees has included encouraging female students to participate in education equally with men, reducing gender disparity between female and male students through supporting gender programs and inspiring female students to make their own decisions.[62] In general, the improvement in the enrollment in higher education between 2009 and 2013 increased by 57% from 137,253 to 216,053 students, and the number of scholarship students increased by 2.35%.[63] The number of higher education institutions increased from 10 in 1990[64] to 121 in 2016[65] which then met the minimum standards of Higher Education Institution (HEI) Accreditation System. MoEYS ran a campaign for education and disseminated information about human rights by providing education to communities and students' parents, increasing awareness of human rights and education across the country.[66] The program budget for the gender program for education was allocated by sub-sector. The budget has been allocated by MoEYS since 2007. MoEYS is the main actor in enhancing education quality at all levels and MoWA works with MoEYS and other relevant stakeholders to eliminate gender stereotypes and incorporate human rights courses into school textbooks and teaching methodologies.

MoWA has a duty to protect and promote women's rights in education, health, economic empowerment, and legal protection.[67] This Ministry aims to promote the status of women in Cambodia. MoWA was created to lead, facilitate, and coordinate the effort for gender equality and women's empowerment in the country.[68]

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59 Ministry of Women Affairs, *supra* note 17.
60 Ministry of Education Youth & Sports, *supra* note 56.
61 *Ibid.*
62 *Education for All 2015 National Review Report* (Pnom Penh, 2015).
63 *Education Strategic Plan 2014-2018* (Pnom Penh, 2014).
64 Vicheth Sen, 'Cambodia's Higher Education Structure and the Implications of the 2015 ASEAN Economic Community' (2013) CDRI Annu Dev Rev 24.
65 Ministy of Education, Youth & Sport. *Achievement in School Year 2014-2015 & 2015-2016* (Pnom Penh, 2017).
66 Committee on the Elimination of Discrimination against Women, *supra* note 55.
67 *The Organization and Functioning of the Ministry of Women's Veteran's Affairs*, Sub-Decree No. 88 ANKr. BK (7 October 1999), article 3.
68 *History of MoWA* (2017).

MoWA's mission is to reduce gender gaps and promote access to productive resources for all women. Thus, the Ministry's achievements can be seen through the mainstreaming of gender in law, government reforms, and in national and sectorial policies. This has included: coordinating and monitoring implementation of specific programs and policies for gender equality; implementing measures to remove barriers, discrimination and gender stereotypes that impede full participation of women in public life; undertaking initiatives to encourage men and boys to support gender equality and be involved in housework and the care of children and dependents; and targeting the needs of the most vulnerable women and girls. MoWA has achieved those goals by collaborating with line ministries and civil society organizations, including women's organizations, the private sector, universities, research centers, development partners and individuals themselves. [69]After Cambodia's endorsement of BPFA and in collaboration with line ministries and Civil Society Organizations (CSO), MoWA has increased the enrollment rate of female students in school.[70] The achievement of narrowing the gender gap in literacy within 15 to 25 years old has been improving since 2004 and the proportion of female to male literacy rate was more than 99% in 2011 compared to 91.3 in 2004.[71]

MoWA has had a role both directly and indirectly increasing female enrolment in university. Based on the achievements of national five years of strategic plan (Neary Rattanak III), MoWA, in collaboration with other relevant ministries and stakeholders, has had remarkable results in promoting legal policies and programs. These have been in response to the program of Equitable Access to Higher Education (EAHE) which has successfully seen economic improvements of women, elimination of all forms of discrimination against women in all sectors, improvements of women's health and increased scholarships to female students, as well as promoting social morality, the value of women in Cambodia families, and the promotion of women in all sectors.[72]

The Cambodian National Council for Women (CNCW) is the mechanism for supporting the RGC to promote the status and roles of women and to eliminate all forms of discrimination against women. [73] It also follows up with the implementation of the international conventions relevant to women's rights by giving recommendations to the RGC and compiling periodic reports on the implementation of CEDAW provisions. [74] The Permanent Secretariat General (PSG) is tasked with assisting with the progress of the national report on CEDAW for the CNCW and assisting with approving the submission of the state report

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69 *Vision and Mission of MoWA* (2017).

70 *Ibid.*

71 *Annual Progress Report 2013: Achieving Cambodia's Millennium Development Goals* (Pnom Penh, 2014).

72 Ministry of Women Affairs, *supra* note 17.

73 Cambodian National Council for Women, *Cambodian National Council for Women* (2001).

74 *Ibid.*

before it is sent to the UN. The PSG observes the status of women, gives recommendations to the RGC and the World Conference for Women, and promotes CEDAW to commune levels. The PSG also checks national and international laws relating to women in order to follow up, evaluate and give recommendations. The PSG cooperates with ministries, institutions, national and international organizations, and civil societies in order to provide recommendations to CNCW and make decisions before they are sent to the RGC. Additionally, there is the Cambodian NGO Committee on CEDAW (NGO-CEDAW) which was officially registered in 2009. NGO-CEDAW's duty is to monitor and promote the implementation of CEDAW in Cambodia, as well as advocating for women's rights by submitting an NGO Shadow Report. This is in coalition with more than thirty other NGOs.[75]

## IV. PROTECTION AND PROMOTION OF WOMEN IN HIGHER EDUCATION UNDER CAMBODIA'S NATIONAL POLICIES AND ACTION PLANS

Cambodia's economy has been affected by international and regional integration, so the development of higher education needs to follow international and regional trends. In response to this situation, MoEYS has strived to formulate the Cambodia Higher Education Vision 2030 (CHEV 2030). The CHEV 2030 advocates for comprehensive equity and access for all qualified students to have the opportunity to study at Higher Education Institutes and complete a quality program.[76] Goal Number Four of the SDGs outlines the need for inclusive and equitable quality education and the promotion of lifelong learning opportunities for all.[77] RGC established the National Strategic Development Plan NSDP (2014-2018) which aims to increase scholarships for girls in upper secondary and higher education, raise awareness of parents in order to increase girls' access to education, increase the participation of women in all areas of education service delivery and management and promote gender responsive social behavior.[78]

The NSDP aims at promoting women in higher education. Under Paragraph (4.192), the RGC, during the Fifth Legislature, will continue to implement CEDAW and other relevant international treaties that pertain to gender equality and women's rights, as well as its policy in order to increase educational opportunities for female students by increasing scholarships, access to accommodation and safe transportation and increasing the number of female

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[75] *The Cambodian NGO Committee on CEDAW* (2017).

[76] Ministry of Education Youth & Sports, *Policy on Higher Education Vision 2030* (Pnom Penh, 2014).

[77] Ministry of Education Youth & Sports, *Rapid Integrated Assessment – Cambodia {SDG} Profile Card* (Pnom Penh, 2016).

[78] Ministry of Education Youth & Sport, *supra* note 19.

teachers.[79] Additionally, under Paragraph (4.193) the RGC plans to continue to implement gender equality policies through mainstreaming gender in all programs in order to improve education for women and girls.[80] Furthermore, under Paragraph (4.196) the RGC aims to increase the number of scholarships for girls in upper secondary and higher educations and to increase the participation of women in all areas of education delivery and management.[81]

The Education Strategic Plan (ESP), 2014-2018 was officially launched in 2014. This plan was developed by MoEYS and is relevant to national and sub-national level stakeholders and partners for enhancing capacity in educational planning.[82] The ESP aims to produce lifelong learning with high quality education at all levels and plans to create opportunities for accessing technical and specialized skills for all. In response to its goals, the ESP created a clear relationship between national and educational strategies. MoEYS plans to provide high quality education with equitable access to for all.[83]

The Millennium Development Goals (MDGs) were adopted in September 2000 by all 189 member-states of the UN General Assembly. The RGC committed to achieving the MDGs and they are fundamental to Cambodia's development strategy.[84] The RGC adopted the eight universally agreed upon MDGs in 2003 for improving the country's development.[85] There were nine goals included in the MDGs. The United Nations Country Team (UNCT) committed to work together in support of nations to achieve those nine goals in 2011 until 2015. Goal number three requires governments to promote gender equality and empower women by reducing gender gaps in education.[86] Based on the Achieving Cambodia's Millennium Development Goals: Gap Analysis, there has been much progress as seen by the improved ratio of female to male in tertiary education. However, the ratio remains far below the target.[87]

Beyond 2015, new visions of education by the National Education for All Committees includes: the encouragement of female students to participate in education equally with men; reducing the gender disparity between female and male students through supporting gender programs; and inspiring female students to make their own decision.[88] MoWA and CNCW are responsible for monitoring

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79 *Ibid.*
80 *Ibid.*
81 *Ibid.*
82 Anne Lemaistre, *Remarked by Mrs. Anne Lemaistre, Chair of Education Sector Working Group (ESWG) UNESCO Representative in Cambodia* (2015).
83 Ministry of Education Youth & Sport, *supra* note 19.
84 United Nations, *United Nations Millennium Declaration* (2000).
85 'Our Work-Cambodia MDG', (2017), online: <http://www.kh.undp.org/content/cambodia/en/home/library/mdg.html>.
86 Ministry of Planning, *Achieving Cambodia's Millennium Development Goals* (Pnom Penh, 2010).
87 Sherif Rushdy, *Achieving Cambodia's Millennium Development: goal-gap analysis* (2009).
88 *Supra* note 62.

and evaluating policies and programs to implement the RGC's goals for promoting gender equality and empowerment of women.[89] In collaboration with MoWA, and in line with national and sub-national level analysis, the effectiveness in implementation of five years strategic plans "Neary Rattanak I-III" and "Neary Rattanak IV" was considered an important part of the RGC's NSDP 2014-2018.[90] These plans increase women's access to education and create behavioral change regarding gender equality by gender mainstreaming and women's empowerment in the framework of economic growth and social protection and services. [91] Promotion of gender equality in education is an objective part of Neary Rattanak IV. The Neary Rattanak IV aims to provide education services by raising awareness, having social accountability measures, and providing scholarships and other financial assistance. It is happening is in order to increase the participation of women in all areas of education delivery and management as well as to promote a gender responsive attitude.[92]

## V. OPPORTUNITIES OFFERED TO FEMALE CAMBODIAN STUDENTS TO PURSUE UNIVERSITY

MoEYS initated the project "Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All." According to the report from the Education Congress Year 2015-2016[93],
it was successfully implemented; the amount of higher education institutions increased to 121 by 2016. In addition, the total number of female students to pursue higher education was 219,069 (43.69%). The number of females who studied associate degree was 47.94%. Compared to the previous year, number of associate degree students decreased by 1,224 students (70.50%). Out of the total, 37.71% of female students had a chance to receive a scholarship to pursue an associate degree. There were 47.42% of female students who graduated with an associate degree in 2016. This number increased 51.88% compared to the previous year. The total percentage of female students pursuing a bachelor's degree was 46.05%; this decreased by 44.79% compared to the previous year. The number of female students who received scholarships to pursue bachelor's degrees in 2015-2016 was 45.94%; this was an increase by 30.93% compared to the previous year. There were 20,918 (46.90%) female bachelor's graduate students compared to the previous year it decreased by 1,569 (33.71%). Scholarships for female graduate students accounted to 3,187 (43.04%). Compared to the previous year, this number increased by 371 (70.80%). There were 21.78% of female students pursuing a

[89] Ministry of Women Affairs, *supra* note 17.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] Ministry of Education Youth & Sports, *supra* note 56.

master's degree and 5.13% pursuing a doctoral degree in 2015-2016.[94] Since 2015, the policy of providing scholarships to students has been divided into four categories: merit based (60%), female student based (15%), poor family based (20%), and students from rural or disadvantaged areas based (5%).[95] In 2015-2016, the government organized examinations and selected 59.61% of whom were female to enroll in their bachelor degree, including 54.43% female students among all merit based, 577 female students based, 57.80% female students among all poor family based, and 37.62% female among all from disadvantaged areas based. The scholarship students included 97 Vietnamese students (28.86% female), 49 Laotian students (32.65% female), and 15 students from the People's Republic of China (93.34% female).[96] Female students are a priority if their score or other conditions are equal to men. MoEYS has collaborated with Smart Company since 2015 to support 10 scholarships for merit students every year and give them a stipend of 200 US dollars per month. All scholarships are prioritized to female students.[97]

According to the reports from 105 students, 46.67% of those students have chances to get scholarships to pursue university degrees. Most of those students are female. There are 14.29% scholarships offered by government, 53.06% offered by NGOs, and 32.65% offered by universities. Among all of the scholarship students, 65.30% of the students might not have had a chance to pursue university if they were not offered scholarships.[98] Based on the results, there are noticeable scholarships offered to female students in each university, but the research shows that the scholarships offered by the universities are the highest rank, then NGOs ranked number two, and the last ranked is the government. Most of those students might have not been able to pursue university degrees if they lost their chance to get scholarships. Thus, scholarships are important for them to pursue higher education.

## VI. CHALLENGES FOR GIRLS/WOMEN IN ACCESSING UNIVERSITY

One thesis entitled, "Higher Education in Cambodia: Poor rural female students' challenges, motivations, and coping strategies" details that the challenges of female students in participating in university are due to gender values, lack of financial resources, social problems, and safety concerns.[99] A MoWA report also mentions that a barrier in accessing university for women includes social norms and

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94 *Ibid.*
95 *Ibid*, page 53-54.
96 *Ibid*
97 *Ibid.*
98 Interviewed university students.
99 Chea, *supra* note 13.

financial problems.[100] Additionally, a master thesis student at the Royal University of Phnom Penh found that barriers for women in accessing university include personal factors, financial barriers, family background, and cultural factors.[101]

Based on literature reviews and this research's findings, the three main challenges for young women who lost their opportunities to pursue university were the legal frameworks, institutional mechanisms, and economic, social and cultural issues.

## 1. Legal Frameworks

This research found that many people did not have comprehensive knowledge of some of the laws above; 83.33% of ministry and NGO officers, 60% of university lecturers and staff, 45% of parents in the communities, 45% of women, and 48.57% of university students knew some relevant laws and policies to promote or protect women in higher education. However, 16.67% of all NGO officers said that there are no laws in Cambodia that promote women in higher education and that the government had only policies relevant to the sector.

However, Article 10 of CEDAW, Article 26 of UDHR, and Article 13 (2, c) of ICESCR, protect and promote education to all people. All people can have access to education at all levels without discrimination. The RGC recognizes international laws as mentioned in Article 30 of the Constitution of the Kingdom of Cambodia. Moreover, Article 65 protects and promotes education at all levels to all Cambodian citizens equally to have a better status of living. Furthermore, the RGC also created the Law on Education for enhancing the quality of education at all levels, and it is mandatory for all children to attend school up to grade nine for free. However, there is no specific law to protect and promote women to access higher education without discrimination and as equal to men.

Overall, Cambodia has no specific law to promote and protect women pursuing higher education. In addition, how to disseminate and contribute to relevant laws and policies were limited by some areas and groups of people. After the RGC ratified CEDAW and other relevant international laws, those laws had been limited in its full implementation.

## 2. Institutional Mechanism

For increasing the enrollment of female students in accessing higher education, the government cooperates with NGOs and civil societies. However, the ratio rate of students' enrollment still has a gender gap. Based upon the research's results, most respondents, especially in rural areas, did not know any strategies and

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[100] *Ibid.*

[101] Sopha Penh, *Barriers and Motivation for Female Students at Tertiary Education in Cambodia. A Case study in a University in Phnom Penh* (2014).

activities to promote women accessing higher education. Relevant information to opportunities for women in accessing higher education does not often exist in areas because of limited cooperated relevant institutions.

### 3. Economic, Social and Cultural Issues

According to the findings, currently, most parents are supportive of their daughters pursuing higher education; they want their daughters to have a good future. However, some of these parents cannot send their daughters to university because of financial problems. They also worry about the security of their daughters.[102] Even in primary school, most female students drop out because they need to help their parents do housework and take care of younger siblings while their parents work.[103] The cost of high education is higher than the parents' profit.[104]

It is noticeable that the number of female students in provinces was higher than male students because most male students go to study in the capital city. Most women were not allowed to study in Phnom Penh because their parents worry about security and need them to help with housework.[105] A lack of money to rent a house and a lack of dormitories in Phnom Penh has affect to limitation of women's opportunities to pursue university degrees. Men, on the other hand, can stay anywhere, even at monasteries. Accommodation is a problem mainly for women when leaving home to study at university in the city because men have safer places to stay. It is problematic for women to rent a house in Phnom Penh because many are concerned about security. Even though most of the parents were supportive of their daughters pursing higher education, most respondents still said they prioritize their sons pursing school if there is not an ability to send both children.[106] Therefore, it is clear that some Cambodians still prioritize sons pursing education over daughters if they lack a budget to support their family or a school fee for both their sons and daughters.

Based upon on the perception of duty-bearers through this research, many thinks that there is still gender-based discrimination for women accessing university in Cambodia.[107] However, some people assumed that there is no gender discrimination against women in higher education in Cambodia anymore. Nevertheless, the acts of worrying about security for daughters and not allowing them to study far away from home, encouraging daughters to help with housework, and prioritizing sons rather than daughters in case parents do not

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[102] Interviewed parents and young women in the communities as well as university students.
[103] Booth, *supra* note 23.
[104] Ministry of Women & Affairs, *supra* note 54.
[105] Interviewed parents and young women in the communities as well as university students.
[106] Interviewed parents in the communities.
[107] Interviewed duty-bearers.

have the ability to support all their children are types of gender discrimination. Additionally, parents send sons to school because they think that the man will become the head of the family after they get married, and if a man has a lower education than the women, the wife will look down on the husband. [108] Accordingly, these are all kinds of discrimination that women face in accessing university. Thus, although it has decreased from the past, there is still discrimination for women accessing higher education in Cambodia. Following the Buddhist belief of reincarnation, if a woman in this life has good traditional practice she will become a man in the next life.[109]

So in Cambodian tradition, women are encouraged to apply traditional practices, including the need to serve her husband, take care of infants at home, and only do housework. These reasons seem to discourage women to pursue higher education. The customs and practices in Cambodia have been a severe root cause in discouraging girls to pursue higher education. Time is needed to change this traditional practice, especially in rural areas.[110] According to customs and tradition, daughters are not encouraged to attend schools and sons are provided with more opportunities to study because they have a higher status than girls.[111] Also, it is not easy to send daughters to study far away from home because the parents are afraid for her security and socially it would be bad for the family if their daughter returns home pregnant without being married. [112] Cambodians have followed the Chab Srey theory for a long time, and it may be hard to change their beliefs and practices.[113] Chab Srey requires women to serve their husband and take care of infants and property at home; thus, it does not inspire women to commit to higher education. This theory also views men as being the head of the Cambodian family, so men are inspired to pursue higher education.

There are still issues which remain a major challenge in expanding education and training opportunities for girls and women; illiteracy and low levels of parents' education, particularly in rural areas, continues to be a serious problem in ensuring education for girls. Child marriage is still a continuing practice, especially in rural areas. Violence in the home affects education for all children. Additionally, girls with disabilities', lesbians, and transgender persons have higher school absences and drop-out rates due to personal and family situations. Other school-level issues include: violence in school, no safe transportation to and from school, lack of or low levels of hygiene, low education for people in rural areas which affects the access to education for their children, especially girls and

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[108] Interviewed parents and young women in the communities.
[109] Booth, *supra* note 23.
[110] Committee on the Elimination of Discrimination against Women, *supra* note 55.
[111] *Ibid.*
[112] Kasumi Nakagawa, *More Than White Cloth?: Women's Rights in Cambodia* (Cambodian Defenders Project, 2006).
[113] Booth, *supra* note 23.

women, and a lack of engagement in school activities and children's education from the community and parents remains weak.[114]

## VII. CONCLUSION AND RECOMMENDATIONS

According to the data analysis, female students currently are increasing enrollment at universities. The government and relevant stakeholder have been striving to promote females in the education sector. More people understand the value of education and are reducing their old mindset; they encourage and support their daughters to access higher education. However, the number of female students is still lower than male students in higher education or university. This gap is because of three main factors: institutional mechanisms, the legal framework, and economic, social, and cultural issues. Cambodian people remain in their old, traditional ways when it comes to the concept of women. That is a reason why women cannot pursue higher education. Poverty is also a considerable factor.

As a result, the RGC and relevant stakeholders should improve and continue their good collaborations to expand their support. This support can include scholarships, dormitories, stipend, convenient infrastructure, and other facilities so that young women can study at all levels, especially women from rural areas. The government should enhance strategic plans and activities in order to improve women enrollments in higher education as well as graduate with quality knowledge. Moreover, there ought to be an increase in raising awareness of discrimination against women in all areas. Then, the Cambodia government should strengthen and implement relevant laws to protect and promote women's access to higher education and disseminate country wide. Methods of dissemination could be by social media or education in each of the villages, publications, leaflets, and banners on highways. Economic development for farmers and other community members in rural areas is also important in encouraging parents to persuade their daughter to study at higher education. If familyy conditions are poor, there is less priority for study; the primary need is to work in supporting their families. Thus, the government should find approaches to improve poverty in rural areas. Enforcing laws and policy implementations are also the main tasks of the RGC, and the RGC should monitor and evaluate those projects after completing their actions.

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[114] Ministry of Women Affairs, *Report on Study of emerging gender issues among women, girls and youth in Cambodia* (Pnom Penh, 2011).

## BIBLIOGRAPHY

African Charter on Human Rights and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force 21 October 1986).

*Annual Progress Report 2013: Achieving Cambodia's Millennium Development Goals* (Pnom Penh, 2014).

Arab Charter on Charter on Human Rights (entered into forced 16 March 2008).

ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD) (entered into forced February 2013).

ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD) (entered into forced February 2013).

Booth, Mary N. 'Education and Gender in Contemporary Cambodia' (2014) 4:10 Int J Humanit Soc Sci 9.

Cambodian National Council for Women, *Cambodian National Council for Women* (2001).

CEDAW, (entered into forced 3 September 1981).

Chowdhury, Azizur Rahman & Jahid Hossain Bhuiyan, eds. *An introduction to international human rights law* (Leiden ; Boston: Brill, 2010).

Chea, Nich. 'Higher Education in Cambodia Poor Rural Female Students' challenges, motivations, and coping strategies' (2015), online: https://gupea.ub.gu.se/handle/2077/39995.

Committee on the Elimination of Discrimination against Women. *Consideration of reports submitted by States parties under article 18 of the Convention on Convention on the Elimination of All Forms of Discrimination against Women* (Cambodia, 2006).

Constitution of the Kingdom of Cambodia, 1993.

Council of Europe. *European Social Charter (Revised)* (1996).

Council of Europe. *Protocol of ECHR*, (entered into forced 1 June 2010).

*Education for All 2015 National Review Report* (Pnom Penh, 2015).

Education Law, NS/RKM/1207/032, (21 November 2007).

*Education Strategic Plan 2014-2018* (Pnom Penh, 2014).

Fry, Peter and Rogéro Utui, *Literature Review on Equity and Access to Tertiary Education in the Africa Region,* ed (Africa, 2009).

*History of MoWA* (2017).

Kyllonen, Patrick. *La importancia de la educación superior y el rol de los atributos no cognitivos en el éxito en dichas instituciones* (2012).

Lemaistre, Anne. *Remarked by Mrs. Anne Lemaistre, Chair of Education Sector Working Group (ESWG) UNESCO Representative in Cambodia* (2015).

Ministy of Education, Youth & Sport*. Achievement in School Year 2014-2015 & 2015-2016* (Pnom Penh, 2017).

Ministry of Education Youth & Sports. *Annual Report 2009 and Annual Plan 2010: Enhancing Education Quality Project", ADB Grant No. 0090 - {CAM} ({SF})* (Pnom Penh, 2010).

Ministry of Education Youth & Sports. *National Strategic Development Plan 2014-2018* (Pnom Penh, 2014).

Ministry of Education Youth & Sports. *Policy on Higher Education Vision 2030* (Pnom Penh, 2014).

Ministry of Education Youth & Sports. *The Education, Youth and Sport Performance in the Academic Year 2015-2016 and Goals for the Academic Year 2016-2017, 21-22-23 March 2017* (Pnom Penh, 2017).

Ministry of Planning. *Achieving Cambodia's Millennium Development Goals* (Pnom Penh, 2010).

Ministry of Woman Affairs. *Education: Gender in Education and Vocational Training Cambodia Gender Assessment* (Pnom Penh, 2014).

Ministry of Women Affairs. *Five Years Strategic Plan for Gender Equality and Empowerment of Women 2014-2018* (Ministry of Women Affairs, 2014).

Ministry of Women Affairs. *Report on Study of emerging gender issues among women, girls and youth in Cambodia* (Pnom Penh, 2011)Moeckli, Daniel et al, eds. *International Human Rights Law*, third edition ed (Oxford, New York: Oxford University Press, 2017).

Ministry of Women Affairs. *The Implementation of the Beijing Declaration and*

*Platform for Action (1995) and the outcomes of the Twenty-third Special Session of the General Assembly* (Pnom Penh, 2000).

Nakagawa, Kasumi. *More Than White Cloth?: Women's Rights in Cambodia* (Cambodian Defenders Project, 2006).

OHCHR. *International Covenant on Economic, Social and Cultural Rights* (1966).

*Optional Protocol of Convention on Elimination of all forms of Discrimination against women* (2000).

Organization and Functioning of Ministry of Education Youth and Sport Royal Government of Cambodia, Sub-decree No. 84 ANKr. BK (9 June 2009), article 23. 'Our Work-Cambodia MDG', (2017), online: http://www.kh.undp.org/content/cambodia/en/home/library/mdg.html.

Organization of American States OAS. 'Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 14 November 1988' (1989) 16 Annu Rev Popul Law 1,234.

Penh, Sopha. *Barriers and Motivation for Female Students at Tertiary Education in Cambodia. A Case study in a University in Phnom Penh* (2014).

Program of Action of the 1994 International Conference on Population and Development (Chapters I-VIII) (1995) 21:1 Popul Dev Rev 187, online: https://www.jstor.org/stable/2137429.

*Progress towards the Sustainable Development Goals: Report of the Secretary-General* (2017).

Rany, Rany, Ahmad Nurulazam Md Zain & Hazri Jamil. 'Establishment of Institutional Policies for Enhancing Education Quality in Cambodian Universities' (2012) 1:1 Int J High Educ 112, online: http://www.sciedu.ca/journal/index.php/ijhe/article/view/1024.

Rushdy, Sherif. *Achieving Cambodia's Millennium Development: goal-gap analysis* (2009).

Sen, Vicheth. 'Cambodia's Higher Education Structure and the Implications of the 2015 ASEAN Economic Community' (2013) CDRI Annu Dev Rev 24.

Smith, Rhona K M. *International human rights law*, eighth edition ed (New York, NY: Oxford University Press, 2018).

Songkaeo, Thammika & Loke Hoe Yeong. 'Defining Higher Education Issues and Challenges in Southeast Asia/ASEAN within the International Context' (2016) Head Found.

*The Cambodian NGO Committee on CEDAW* (2017).

The Organization and Functioning of the Ministry of Women's Veteran's Affairs, Sub-Decree No. 88 ANKr. BK (7 October 1999), article 3.

*The Role of Higher Education in Society: Quality and Pertinence* (Paris, 1991).

UNDP. *Gender: Gender Mainstreaming Institutional, Partnership and Policy Context Cambodia Gender Assessment* (Pnom Penh, 2014).UNDP. *Human Development Report 2015* (New York, 2015).

UNDP. *Human Development Report 2016* (New York, 2016).

UNDP. 'Our Work-Cambodia MDG', (2017), online: http://www.kh.undp.org/content/cambodia/en/home/library/mdg.html.

UNESCO. *Global education monitoring report 2017/18: accountability in education : meeting our commitments* (2017).

UNESCO Institute for Statistics. *Global education digest 2010: comparing education statistics across the world.* (Montreal: UNESCO Institute of Statistics, 2010).

UNESCO. *UNESCO National Education Support Strategy* (Pnom Penh, 2010).

United Nations. *Rapid Integrated Assessment – Cambodia SDG Profile Card* (Pnom Penh, 2016).

United Nations. *United Nations Millennium Declaration* (2000).

UN Women. *Beijing Declaration and Platform for Action: The Fourth World Conference* (Beijing, 1995).

USAID. *Gender and Extreme Poverty* (2015).

*Vision and Mission of MoWA* (2017).

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*Journal of Southeast Asian Human Rights, Vol. 3 No. 1 June 2019 pp. 124-154*
*doi: 10.19184/jseahr.v3i1.11497*


# Towards Post-Transitional Justice: The Failures of Transitional Justice and the Roles of Civil Society in Indonesia

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**Abstract**
When democratization took place in 1998 after three decades of authoritarianism in Indonesia, transitional justice became part of the nation's agenda. With the nature of compromised political transitions, transitional justice brought together the interest of those who wished to challenge the repressive regime and those who wished to distant themselves from the old regime in order to return to politics. As the result, transitional justice measures were successfully adopted in the beginning of the political transition but failed to achieve its goals of breaking with the old regime and bringing justice to victims. Today, twenty years after the reformasi, the elements of politics are consolidated, including those elements coming from the old regime. The author refers to this transitional justice period as "post-transitional justice," characterized by the extensive roles of civil society, in particular human rights groups, in setting the agenda since the beginning of the transition up until today when state-centered mechanisms are failing. These civil society groups shift strategies to work with communities and at local levels, which gives a strong character for post-transitional justice in Indonesia.

Keywords: *Civil Society, Human Rights, Post-Transitional Justice, Transitional Justice*

## I. INTRODUCTION

> "It's been twenty years now, how is it that we are still talking about transitional justice? What transition? What justice? Until when is the transition? Why hasn't anyone being punished for their crimes of past abuses until today?" (Sumarsih, mother of Wawan, personal communication, 2018)

Sumarsih, mother of Wawan, a student who was killed by the Indonesian military during a demonstration against Soeharto in 1998, posed these questions. No trial has ever been held on Wawan's case even though the Komnas HAM (Komisi Nasional Hak Asasi Manusia, National Commission on Human Rights) set up an investigative inquiry team which found that a violation of human rights was committed by the state apparatus. Sumarsih decided to take matters into her own hands and worked with other victims of human rights violations from various

other cases that mostly occurred during the Soeharto presidency (1966-1998). Since 18 January 2007, Sumarsih and those she worked with decided to pursue other methods, including peaceful demonstrations that take place in front of the Presidential Palace every Thursday (referred as Kamisan). Their only demand is for the President, as the chief representative of the State, to resolve past cases of human rights abuses and to end impunity.

It is difficult to argue with Sumarsih's insistence that Indonesia is in the right path for transitional justice. This is because transitional justice so far has failed in Indonesia. Immediately after democratization began in 1998, transitional justice became part of the agenda for the country. In Indonesia, the nature of compromised political transition resulted to compromised transitional justice where elements of the reformers and status quo met to pursue each other's interests. The status quo includes the military, who were mainly the perpetrator of past abuses under the repressive regime. Consequently, transitional justice measures were successfully adopted in the beginning of political transition, but these measures failed to achieve their goals to break with the old regime and bring justice to victims.

Until 2004, Indonesia had had most of the transitional justice mechanisms adopted: trials, security reforms, and a Law on Truth and Reconciliation Commission (TRC). However, out of 137 names accused of human rights abuses, none were punished. Moreover, the security sector reform failed to include accountability for past abuses, and the truth and reconciliation commission was formally annulled before its commencement. Transitional justice has been derailed since then.

After two decades, Indonesia's democracy has shown a solid consolidation between of all elements of the politics, including those coming from the old regime. Transitional justice is undergoing a new period the Author refers to as "post-transitional justice," where the attempt to address past human rights violation through state initiatives mechanisms becomes less meaningful especially to the state.

In the search of understanding a post transitional justice, civil society in Indonesia plays the most important role. Studies in transitional justice often look at the roles of civil society in supporting official transitional justice mechanisms. In Indonesia, however, civil society's role is far more beyond official mechanisms. Consisting of various societal elements, often led by human rights NGOs, civil society builds its creative power on justice and accountability, focusing on victims' experience at the local, national, and international level as well as building solidarity with the victims. With and without engaging the State, civil society seeks to present justice at any opportunity they encounter in areas of reconciliation, collective memories, and reparation for victims. Transitional justice, in this sense, shifted from state-centered mechanisms to dynamic forms of justice in transition, leading to the post transitional justice situation.

Civil society, in particular the human rights groups, were in the forefront of setting the agenda for transitional justice from 1998 until today when state-centered mechanisms have failed and led to post-transitional justice situation. However, their roles have been marginal in influencing political decisions. Rather than bringing desired outcomes from transitional justice agenda, their political lobbying and national advocacy resulted in the strengthening of impunity rather than human rights accountability. In a later period, civil society shifted its strategies by strengthening its works at the local level as well as international level. These strategies give strong character for post-transitional justice in Indonesia.

The first part of this paper discusses the conceptual frameworks and practices of transitional justice and the roles of civil society. Around the world, there have been shifts taking place from transitional justice to post-transitional justice in countries with a consolidated democracy. Such shifting requires an analysis of civil society's potential roles to bring justice in different approaches. The second part of this chapter looks at transitional justice in Indonesia, starting from the early adoption of measures to the State's failures and post-transitional justice. The Author argues for the conditions that contribute to the failures of transitional justice. The next part explores the roles of civil society in Indonesia, ranging from their encouragement of the State to adopt a transitional justice agenda to different strategies to achieve truth and justice as alternatives to state-sponsored transitional justice. The last part is the conclusion.

## II. FROM TRANSITIONAL JUSTICE TO POST-TRANSITIONAL JUSTICE: REVISITING THE THEORIES AND RECONSIDERING ROLES OF CIVIL SOCIETY

In its simplest form, transitional justice, according to a 2004 report of the United Nation Secretary-General, is defined as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[1] Attempts to settle cases of past injustices can take place through various measures and mechanisms. The mechanisms most referred to in the literature are those that involve prosecution, truth-seeking, reparations and institutional reform in the form of lustration or vetting, as well as reconciliation.

The field of transitional justice study has taken shape over the last twenty years. Scholars date the emergence of transitional justice differently. Arthur argues that for most activists and practitioners, the emergence of the transitional justice field was a consequence of the development of the broader human rights movement, especially within the context of democratisation in Latin America and

[1] United Nations, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, Report of the Secretary General (New York: Commission on Human Rights, 2004).

Southern European countries in the 1970s and 1980s.[2] Democratic activists and their allies in government sought to find new and creative ways to address past injustices. They began to develop a nascent transitional justice framework to strengthen their new democracies and to comply with the moral and legal obligations that the human rights movement was articulating, both domestically and internationally.[3] Some scholars who focus on transitional justice mechanisms argue that the origins of this approach date much earlier. Elster suggests that some mechanisms of transitional justice, such as purges and trials, were employed as long as 2,000 years ago during political upheavals in Athens.[4] Meanwhile, Teitel states that the Nuremburg Tribunal in 1945 marked the initial 'phase' of transitional justice.[5] In its simplest form, transitional justice, according to a 2004 report of the United Nation Secretary-General, is defined as "The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[6]

Attempts to settle cases of past injustices can take place through various measures and mechanisms. The mechanisms most referred to in the transitional justice literature are those that involve prosecution, truth-seeking, reparations and institutional reform in the form of lustration or vetting. Prosecution can occur on the domestic level, in hybrid-internationalised courts, or in international courts. The goals of prosecution are to redress the suffering of victims and to provide opportunities to establish or strengthen the judicial system and the rule of law in transitional countries. Such efforts also aim at reflecting a new set of social norms based on respect for human rights and can be a starting point for a process of reforming and building trust in government institutions.[7]

Truth mechanisms are efforts to establish the truth about past abuses. They include the creation of truth commissions – bodies that are tasked with uncovering what happened during human rights abuses – or other national and international

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2 Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice" (2009) 31 Hum Rights Q 321.

3 Louis Bickford, Macmillan Encyclopedia of Genocide and Crimes against Humanity, www.ictj.org

4 See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004). According to Elster, the meanings of these practices are understood by historical actors involved and got swept into a universal, homogeneous conception of transitional justice. Transitional justice, according to him, "is made up of the processes of trials, purges and reparations that take place after the transition from one political regime to another" (page 1). It is the aim of his book to present these practices in historical approach and build an analytical framework that can explain the variations among the cases. See also Arthur, *supra* note 2 at 328.

5 Ruti Teitel, "Transitional Justice Genealogy" (2003) 16 Harv Hum Rights J 69 at 69–70.

6 United Nations, *supra* note 1 at 3.

7 Paul Van Zyl, "Promoting Transitional Justice in Post-Conflict Society" in *Secur Gov Post-Confl Peace Build* (Geneva: Center for Democratic Control of Armed Forces, 2005) at 211.

efforts, such as major historical research or documentation of violence and victims of violence, and exhumations. State authorities often use truth-seeking in response to the limited effectiveness of international and domestic courts in dealing with past atrocities.[8] In other words, when authorities lack the political will or ability to prosecute perpetrators—or believe it is too risky to do so—they often pursue truth-seeking as an alternative approach. In many contexts, truth comes together with reconciliation because most experts believe reconciliation can only be achieved if the past suffering of victims is acknowledged.

Reparations policies consider the physical requirements of, or moral obligations to, victims and survivors of abuse. Reparations can include economic compensation and non-material efforts including symbolic recognition such as state apologies to and memorialises victims. Unlike prosecutions, truth, and institutional reform, reparation mechanisms focus more on victims' experiences and needs.

Another mechanism reforms institutions that have histories of abusive behavior, including the security forces and related institutions. This measure is necessary in order to prevent recurrence of patterns of abuses and to establish a state-society relationship based on functioning and fair institutions. One concrete measure is to apply vetting as part of the security sector reform.[9]

Globally, an increasing number of countries have adopted and implemented transitional justice mechanisms. Sikkink and Payne created datasets on various mechanisms of transitional justice around the world.[10] Their data shows a positive worldwide trend in state efforts to enforce accountability for human rights crimes. Prosecution and amnesties are the two mechanisms where use has increased most. Human rights trials have occurred at both domestic and international levels. Their dataset shows that domestic human rights prosecutions have been used widely in Latin America and Central and Eastern Europe.

The third largest numbers of prosecutions occurred in Asia, after Europe and the Americas. From 1970 to 2009, countries in Asia implemented 17 per cent of the total number of domestic human rights prosecutions. In terms of international

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8 Priscilla Hayner, *Responding to a Painful Past: The Role of Civil Society and the International Community*, KOFF Series Working Paper Dealing with the Past: Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy Mô Bleeker and Jonathan Sisson (eds) (Bern: Swiss Peacce, 2005) at 27.

9 The term 'vetting' is often used interchangeably with other words such as 'lustration', 'screening', 'administrative justice, and 'purging'. One important distinction is that 'lustration' usually is the term used to refer to post-communist contexts, while purging is targeting people for their membership or affiliation with a group rather than their individual involvement in human rights violations. See Roger Duthie, "Introduction, in Alexander Mayer-Rieckh and Pablo de Grieff (eds), *Justice as Prevention, Vetting Public Employees in Transitional Societies,* (New York: Social Science Research Council), 2007, p. 17-18.

10 Leigh A Payne & Kathryn Sikkink, *Transitional Justice in the Asia-Pacific: Comparative and Theoretical Perspectives*, Renee Jeffery & Hun Joon Kim, eds. (Cambridge: Cambridge University Press, 2014) at 36–39.

tribunals, Asia, Africa, and Europe are the three regions that dominate; this is in contrast to domestic prosecutions where the Americas are more prominent. Countries in Asia implemented around 32 per cent of international prosecutions around the globe. These international prosecutions included the hybrid international-national tribunals in Cambodia and East Timor.[11] In the Asia Pacific, Jeffrey and Kim also show that increasing numbers of countries have adopted transitional justice mechanisms since 1980.[12] Olsen, Payne, and Reiter show that there is a growing trend for countries in the Asia-Pacific, including Indonesia, to institute more than one mechanism. Out of nineteen countries that adopted transitional justice by 2009, only six countries instituted just one mechanism. Others implemented two or more mechanisms either simultaneously or sequentially. The most commonly used mechanisms in these countries have been trials, truth commissions, and amnesties.

Although transitional justice has mushroomed globally, most scholarly works in the area focus on the mechanisms and their outcomes in emerging democracies. There have been very limited studies which look at post-transitional justice contexts. The term post-transitional justice only emerges in recent years, notably used by transitional justice scholars to explain the development of transitional justice in countries with consolidated political transitions and rule of law such as Latin American and South and Eastern European countries. Collins, for example, looks at post transitional justice in the context of judicial systems in Chile and El Salvador.[13] Skaar similarly looks at the judicial and court systems in Southern Cone which are necessary to ensure the accountability of past human rights abuses.[14] Hajji looks at the case of Spain where after forty years since the political transition started, the country is moving away from its responsibility to acknowledge its dark past.[15] Almost similar to the Indonesian context, the main problem for Spain is how to redress the past abuses into today's politics and society. This is the starting point of this article in expanding the conceptual framework for post transitional justice which is not limited only to formal mechanisms of transitional justice as explained elsewhere.

Collins characterises post-transitional justice as being clearly distinguished from transitional justice.[16] First of all, unlike transitional justice, post-transitional justice focuses on the subsequent questions of the quality, reach, and perfectibility of democracy. Secondly, it questions the comprehensiveness and sufficiency of

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[11] *Ibid* at 40.

[12] Renée Jeffery & Hun Joon Kim, *Transitional justice in the Asia-Pacific* (2013) at 22–27.

[13] Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador* (Pennsylvania: Penn State University Press, 2010).

[14] Elin Skaar, *Explaining Post-Transitional Justice: The Role of Independent Courts* (Place: CMI, 2009).

[15] Nadia Hajji, *Post-Transitional Justice in Spain: Passing the Historical Memory Law* (Columbia: Columbia University Press, 2014).

[16] Collins, *supra* note 13 at 23.

initial transitional justice compromises. Thirdly, initiatives in post-transitional justice are mostly non-state, driven by private actors operating both at the state and community levels. In that sense, fourthly, these initiatives are multi-sited, multi-actors, and multi-referential, depending on resources, expertise, and perception of success. Fifth, because of its multiplications of sites and actors, the initiatives may vary in aims and may well adopt different forms according to these aims. Lastly, post-transitional justice activities are likely to have an 'internationalized' character, encompassing norms and practices beyond domestic sphere.

Civil society plays major roles in both transitional and post-transitional justice. However, civil society's roles are slightly different in the two contexts. In transitional justice, as some scholars emphasise their roles mainly in state-initiative mechanisms.[17] Their roles are ranging from addressing human rights issues in transitional settings to transitional justice processes (Backer, 2003) or from public deliberation to technical roles such as victims' assistance, investigation, mobilization, and so on.[18] Experience from countries with successful transitional justice shows that civil society plays major roles by helping "to initiate, advocate for, and shape some of the strongest and most interesting transitional justice initiatives that have been implemented around the world."[19] Civil society groups include human rights organizations, humanitarian aid organizations, victim and survivor associations, development NGOs, lawyers, academic, mental health and medical associations, religious organizations, and conflict transformation and peacebuilding groups.[20]

One of the main critics of transitional justice studies that heavily focuses on institutions, top-down state interventions and the law tends to consider civil society groups' roles only to fill the gaps, or act as an "intermediary between institutional mechanisms and citizens."[21] Rather than looking at civil society as intermediary groups, Gready proposes to see civil society roles within a context of 'justice in

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[17] Priscilla Hayner, *Responding to a Painful Past: The Role of Civil Society and the International Community* (Bern, 2005); Eric Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact" (2007) 8:1 Int Stud Perspect 16; David Backer, "Civil society and transitional justice: possibilities, patterns and prospects" (2003) 2:3 J Hum Rights 297; David Crocker, "Transitional Justice and International Civil Society: Toward a Normative Framework" (1998) 5:4 Constellations 492; Naomi Roht-Arriaza, "Civil Society in Processes of Accountability" in Ardsley M C Bassiouni, ed, *Post-Confl Justice* (New York: Transnational Publishers, 2002).

[18] Roger Duthie, *Building Trust and Capacity: Civil Society and Transitional Justice from a Development Perspective (Full paper)* (New York: International Center for Transitional Justice, 2009).

[19] Hayner, *supra* note 17 at 45.

[20] Duthie, *supra* note 16 at 12.

[21] Paul Gready & Simon Robins, "Rethinking civil society and transitional justice: lessons from social movements and 'new' civil society" (2017) 21:7 Int J Hum Rights 956.

transition' where both justice and transition are dynamic, diverse and contextual.[22] It is understood not exclusively as it relates to acts of violence that preceded transition, but also in terms of continuities of injustice. In such approach, civil society has different roles in its interaction with transitional justice, where they have more autonomy, independent action and the modelling of alternatives, often choosing not to see the state as a principal reference.

This framework allows us to examine the roles of civil society in modelling alternatives of justice in some countries. Recent studies of transitional justice, for example, acknowledge other ways of 'doing justice,' including bottom-up approaches which incorporate local practices and local initiatives by civil society groups or communities. Launched in 1995, REMHI (*Recuperación de la Memoria Histórica,* Historical Memory Project) is a well-known local bottom-up mechanism in Guatemala. It is a truth mechanism organised through a project led by the Catholic Church that aims to document the atrocities committed during Guatemala's 36-year civil war. Another example is a truth-telling initiative in Northern Ireland called the Ardoyne Commemoration Project (ACP). This initiative is described as grassroots 'single identity truth recovery' project set up in the Ardoyne area of North Belfast, an area that suffered one of the highest casualty rates during the conflict in Northern Ireland.[23]

In post-transitional justice settings, these 'alternative' models of justice mechanisms are more likely to take place. Civil society, in this context, plays major roles in some of the characteristics of post-transitional justice mentioned earlier by Collins: civil society drives non-state initiatives operating both at state level and community level; the sites, forms, and actors involved mostly depend on the resources available in these groups; and they often internationalized the initiatives and encompassing local and domestic norms and practices.

In Indonesia, civil society has also been working on various initiatives to present justice both at the grassroots level[24] as well as the regional and national level.[25] Such initiatives emerged in part as a response to the failures of state-sponsored transitional justice measures. These initiatives have included documentation, exhumation, memorialisation, commemoration and reconciliation. NGOs and victims' groups have been actively involved in documenting

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[22] *Ibid.*

[23] Patricia Lundy & Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up" (2008) 35:2 J Law Soc 265 at 284.

[24] Birgit Braeuchler, *Reconciling Indonesia: Grassroots agency for peace* (New York: Routledge, 2009).

[25] Sri Lestari Wahyuningroem, "Seducing for Truth and Justice: Civil Society Initiatives for the 1965 Mass Violence in Indonesia" (2014) 32:3 J Curr Southeast Asian Aff 115; Sri Lestari Wahyuningroem, *From State to Civil Society: Transitional Justice and Democratization in Indonesia* Australian National University, 2018) [unpublished].

testimonies of victims as well as historical archives.[26] Since 2008, these groups have also engaged in initiatives with regional governments.

## III. THE FAILURE OF TRANSITIONAL JUSTICE IN INDONESIA

Indonesia's political transition started in 1998 with the fall, after 32 years, of the authoritarian regime, often called the New Order, led by General Soeharto. Following a massive economic crisis that hit the country, demonstrations took place in Jakarta and elsewhere in the same year.[27] This change marked the beginning of a transition from an authoritarian regime to democracy and made it possible for past human rights abuses committed during the authoritarian period to be acknowledged by the wider public.

After five successive presidents and four elections, there have been many attempts to bring about mechanisms for ensuring truth and justice with respect to past human rights abuses and with regard to more recent abuses during or after the reform process. Indonesia is one of the many countries that adopted more than one transitional justice mechanism. In the beginning of the transition, truth-seeking was pursued for multiple cases while legal reform also took place. Both processes later led to human rights trials. President Habibie (1998-1999) set up inquiry teams regarding the conflict in Aceh and on the rioting and violence that accompanied the regime change in Jakarta during May 1998. The National Commission on Human Rights (Komnas HAM), as an autonomous state body, also set up a number of fact-finding teams aimed at revealing the truth about human rights abuses, including those that had occurred in East Timor, the 1984 Tanjung Priok massacre, the 1989 Talangsari massacre, and some other cases of recent and past abuses. Trials began under Abdurrahman Wahid's (1999-2001) presidency, including trials on mass violence during East Timor's 1999 referendum for independence. In 2004, Indonesia finally passed a Law on Truth and Reconciliation. But a Truth and Reconciliation Commission (TRC) had not yet been established when the Constitutional Court annulled the Law in 2006. From that time, the central government took no more significant efforts to deal with or resolve cases of past abuses.

Law regulation that relates to the adoption of human rights norms into local policies were mostly chosen by the government during the early period of reform (1998-2004). Within this period, Komnas HAM had a significant role in promoting

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[26] Hilmar Farid, Rikardo Simarmata & M Kelli Muddell, *The struggle for truth and justice: a survey of transitional justice initiatives throughout Indonesia*, Occasional paper series / International Center for Transitional Justice (New York, N.Y: International Center for Transitional Justice, 2004).

[27] Richard Robison & Vedi R Hadiz, "Reorganising power in Indonesia: The politics of Oligarchy in an age of markets" (2005) 41:3 Bull Indones Econ Stud 395; Edward Aspinall, "The Surprising Democratic Behemoth: Indonesia in Comparative Asian Perspective" (2015) 74:4 J Asian Stud 889.

and maintaining the momentum for human rights accountability through inquiries (truth seeking initiatives) including for cases of past abuses under Soeharto's rule.[28] Other than Komnas HAM and its truth-seeking initiatives, state institutions also pursued other options related to transitional justice. The MPR (*Majelis Permusyawaratan Rakyat,* People's Consultative Assembly)– Indonesia's supreme law-making body - passed Resolution No. V in 2000 which later served as the foundation for other measures for transitional justice. The DPR (*Dewan Perwakilan Rakyat,* People's Representative Council)– Indonesia's parliament - also responded to demands for human rights accountability and transitional justice by passing various laws and taking political decisions on some cases of human rights violations. For example, it passed Law No. 39 of 1999 on Human Rights and Law No. 26 of 2000 on Human Rights Courts. The judiciary was also active. The Supreme Court accommodated some demands that it deal with past abuse cases, especially the 1965-66 violence - when hundreds of thousands of leftists were massacred by the army and its allies - by issuing a letter to the president and parliament recommending that they acknowledge and rehabilitate the rights of the victims in 2003.[29] Meanwhile, the security sector, including the military and the police, also took positive moves toward institutional reform and accountability.

Elsewhere, the state and political institutions chose to adopt transitional justice policies and mechanisms in an attempt to distance themselves from the Soeharto regime.[30] Learning from the "tactical concessions" adopted during Soeharto's time[31], these leaders viewed transitional justice as a concession that could offer in order to gain political legitimacy in the new more democratic era, both from the international community and from the domestic public. Tactical concession here refers to Risse and Sikkink understanding of governments' rhetoric response to pressure groups demanding adherence to particular norms, by underestimating the impacts of the changes or concessions they made.[32] Indonesia's transitional justice process was, from the start, politically superficial, as transitional justice was adopted only to respond to domestic and international pressures for accountability of the repressive regime.

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[28] Ken Setiawan, *Promoting human rights: national human rights commissions in Indonesia and Malaysia* Leiden University, 2013) [unpublished]. Cornelis Pratikno, *Komnas HAM 1993-1997: Pergulatan dalam Otoritarianisme* (Yogyakarta: FISIPOL UGM, 2002).

[29] Surat Ketua Mahkamah Agung (Letter of the Chair of Supreme Court), No KMA/403/VI/2003

[30] Sri Lestari Wahyuningroem, "Working from the Margins: Initiatives for Truth and Reconciliation for Victims of the 1965 Mass Violence in Solo and Palu" in *Indones Genocide 1965 Causes Dyn Legacies* (Cham: Palgrave Macmillan, 2018) 335.

[31] Anja Jetschke, "Die Aktuellen Entwicklungen in Indonesien und Osttimor" (1999) 29:10 Antimilitarismus Inf 57.

[32] Thomas Risse & Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction" in Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *Power Hum Rights* (Cambridge: Cambridge University Press, 1999) 1 at 66.

The nature of democratization itself contributed to the adoption and outcomes of transitional justice. Borrowing from Samuel Huntington's typology[33], Indonesia's political transition combined elements of both replacement and transplacement types of transition.[34] Replacement type regime change occurs when an authoritarian regime collapses or is overthrown and replaced by a democratic political order. In Indonesia's case, this element of regime change was obvious in the sudden collapse of the New Order's authority in the early months of 1998 and by the inability of the leading elements in the New Order government to overcome the multiple national crises Indonesia was experiencing and regain their former domestic political legitimacy. Their inability to maneuver politically in the face of this crisis left them with reduced power to resist calls for state accountability in various spheres, including human rights. The adoption of transitional justice measures to deal with the human rights legacy of the New Order was a result. Not only could former generals, Golkar's (New Order's political party) politicians, and other elements of the old regime try to regain public confidence by supporting the adoption of transitional justice measures, doing so helped them to distance themselves from Soeharto's regime. In other words, transitional justice was largely a tactical concession for many important political actors; it did not reflect deep normative transformation or the adoption of a new philosophical outlook on the part of many of the key actors authorising the new transitional justice framework. While this context helped facilitate the adoption of transitional justice measures, it also helped inject weaknesses into them.

If replacement regime changes are sudden, transplacements tend to take place more gradually and involve protracted bargaining between elements of the old regime and the rising elites of the new democratic order. Once Indonesia's new Reformasi (reform) began to settle into place, more or less coinciding with the election of a new parliament and the appointment of Abdurrahman Wahid as president in 1999, Indonesia's transition came more and more to resemble transplacement. A new pro-democracy political elite was gaining influence rapidly and demanding reforms in various sectors of politics and governance, but from the beginning, these reformers shaped the direction of the transition in cooperation with elements of the old regime. Negotiations between new and old elements of the political elite were constantly taking place on all aspects of decision-making, including in the design and implementation of transitional justice measures. The problems that arose in the implementation and outcomes of transitional justice were not merely about a lack of political will on the part of state leaders – an attitude which is common among human rights advocates in Indonesia - but are better viewed as being products of this constant negotiation of

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[33] Samuel P Huntington, *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press, 2012).

[34] Wahyuningroem, *supra* note 30.

power at the elite level. Overall, justice objectives were compromised in the interests of achieving reconciliation among the political elite.

In general, the adoption of transitional justice measures and human rights policies was positive in terms of the promotion of state accountability and human rights protection. However, some assessments suggest that the implementation of these measures was deeply unsatisfactory. Juwana, in his assessment of human rights performance in Indonesia outlines significant improvement in the human rights legal framework and a myriad of new human rights institutions, but he also acknowledges that these contributed little to improving the protection and fulfilment of human rights, resulting in a 'deficit in justice.'[35] Likewise, the Kontras (*Komisi Nasional untuk Orang Hilang dan Korban Kekerasan*, National Commission for Enforced Disappearance and Victims of Violence), an NGO based in Jakarta, and the International Center for Transitional Justice (ICTJ) conducted an assessment in 2011 in which they acknowledged that during the 13 years of political transition to that point, especially in the early years of democratisation, Indonesia had taken positive steps to bring about legal reforms and create institutions for state accountability for past human rights abuses. However, they noted that there was a period after the annulment of the Law on Truth and Reconciliation in 2006, when all these mechanisms stalled or stagnated.[36] Ehito Kimura relates the failure of transitional justice to the many ways by which the political elite contrived to obstruct efforts for justice by civil society groups.[37] He explains that transitional justice in Indonesia "illustrates some of the larger and continued problems of governance in post-Suharto Indonesia where the rules of the game have changed, but many of the players remain the same."[38]

Post the annulment of TRC Law, during the period of 2004 to 2009, the DPR passed some legislation and made recommendations that support transitional justice measures. These included Law No 11 of 2005 on Ratification of the International Covenant on Economic, Social, and Cultural Rights, Law No 12 of 2005 on Ratification of the International Covenant on Civil and Political Rights, Law No. 13 of 2006 on Victims and Witness Protection, and a Recommendation on the Enforced Disappearance of Activists in 1997-98. However, after 2009, transitional justice measures either failed to meet their objectives or were never implemented at all. Some trials took place under both military and civilian

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[35] Hikmahanto Juwana, "Special Report: Assessing Indonesia's Human Rights Practice in the Post-Soeharto Era: 1998-2003" (2003) 7 Singap J Int Comp Law 644.

[36] International Center for Transitional Justice & Komisi Untuk Orang Hilang dan Tindak Kekerasan (Indonesia), eds, *Indonesia derailed: transitional justice in Indonesia since the fall of Soeharto: a joint report* (Jakarta, Indonesia: International Center for Transitional Justice: Komisi untuk orang Hilang dan Korban Tindak Kekerasan, 2011).

[37] Ehito Kimura, "The Struggle for Justice and Reconciliation in Post-Suharto Indonesia" (2015) 4:1 Southeast Asian Stud 73.

[38] *Ibid* at 88.

jurisdiction, but all such trials punished only lower-level officers or offenders and failed to bring the masterminds or higher members of the chain of command to justice. All of these offenders were eventually found not guilty in their appeals. The Law on Truth and Reconciliation was also re-drafted by a team set up under the Ministry of Law and Human Rights and submitted to the parliament, but it has never been on the priority list of the parliament for the legislation agenda.

After Yudhoyono took over the presidency following his victory in the first ever direct presidential election in 2004—a position he regained for a second term in 2009, transitional justice stagnated. Yudhoyono has, as Mietzner argues, a "general disinclination to prosecute past abuses" or to settle cases of human rights abuses.[39] In the end, however, his promises of human rights accountability proved little more than empty rhetoric. Yudhoyono was under little pressure to deliver on human rights; he did not find it necessary to adopt a transitional justice agenda to prove his reformist credentials. His victory in the direct election provided him with strong legitimacy and he also gained success with the Aceh peace process in 2005.[40]

Today, democracy is consolidated, and transitional justice is no longer within the political agenda. Indonesia has now had regular political succession through five democratic elections. The results gave strong legitimacy for political elites, despite the fact that many of the candidates came from the old regime. Human rights issues are used during campaign to delegitimize candidates who were named as perpetrators of past abuses. Eventually, once a candidate wins the election, they break the promises for human rights promotion and accountability. The current president Joko Widodo, for example, won twice against Prabowo Subiyanto, the former general accused of master minding activist kidnappings in 1997-1998 and violence in Mapenduma, Papua. Widodo made a priority of programs for his first leadership term called the Nawa Cita, that include settling cases of past human rights abuses including the 1965 mass violence. However, instead of settling the past abuses, Widodo stroked civil society's initiatives for truth and justice in his attempts to counter the oppositions' accusation of his affiliation to communism. Under his leadership, persecutions and repression against freedom of expression increased. Since January 2015 to July 2016, SafeNet (Southeast Asia Freedom of Expression Network) recorded 42 cases of repression of freedom of expression and association in Indonesia with an average of 4 to 5 incidents every month.[41]

The consolidation among the political elite also disregarded Komnas HAM's investigation on seven cases of past human rights abuses. These cases are the 1965 mass violence, the 1997-1998 activist kidnappings, the 1989 Talangsari massacre,

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[39] Marcus Mietzner, *Military Politics, Islam, and the State in Indonesia: From Turbulent Transition to Democratic Consolidation* (Institute of Southeast Asian Studies, 2009) at 316.

[40] Jiwon Suh, *The {Politics} of {Transitional} {Justice} in {Post}-{Suharto} {Indonesia}* Ohio State University, 2012) [unpublished] at 245.

[41] Sri Lestari Wahyuningroem, *Justice denied?* (2016).

the 1998 May riots, mass killings against thugs in the 1980's, the 1998 and 1999 Trisakti and Semanggi shootings, and the killings in Wamena and Wasior in Papua. The Attorney General's Office insisted that these investigations are lacking evidence and therefore cannot be preceded into *pro justicia* investigation. Using the criminal justice perspective, the office failed to acknowledge elements of human rights violation that involved the state and its apparatus.

Other than the Attorney General's office's official stance against any investigation for cases of past human rights abuses, the government, both the executive and legislatures, are also ignoring the recommendations of various transitional justice mechanisms that took place previously. In 2005, the Indonesian-Timor Leste's Commission of Truth and Friendship (CTF), a commission established on mutual agreement between the two countries to investigate acts of violence that occurred during the referendum in Timor Leste in 1999, released its findings and recommendations. The Ministry of Foreign Affairs is the leading institution for the Indonesian side, and there have been very small achievements in the implementation of recommendation, including the returning of thousands of Timorese children who were taken from their families and brought to Indonesia mostly by the military. Civil society groups, such as Asia Justice and Rights (AJAR), have been working to find and bring home these children, with small support from the Ministry.[42] Other recommendations have been ignored by the government including the Supreme Court's recommendation for rehabilitation for victims of the 1965 mass violence in 2003 and the 2012 parliament's recommendation to establish ad hoc human rights court for enforced disappearance of activists in 1997-1998. In addition to the recommendations, some victims have won individual cases against various state departments under the civil law. However, there has not been any execution from these verdicts.

Out of this stagnation, a permanent TRC was established at provincial level in Aceh by local bylaws in 2013. Mandated in the peace agreement between the Indonesian government and the Aceh Freedom Movement (GAM) in 2005, the drafting of the TRC bylaw (Qanun KKR) was initiated by human rights groups in Aceh. Since the annulment of the national TRC Law by the Constitutional Court in 2006, the idea to have Aceh's TRC resulted in conflicting opinions from NGOs, local government and elite members of GAM, as well as the national government. These conflicting opinions were partly due to its mandate to investigate past conflicts that involve the signing parties of the peace agreement.[43] After several years of delays, the Aceh's legislative and executive government under Governor

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[42] Asia Justice and Rights (AJAR), *Bringing Them Home: Fifteen Stolen Children Reunited with their Families in Timor-Leste*, Press Release (2017).

[43] Edward Aspinall & Fajran Zain, "Transitional Justice Delayed in Aceh, Indonesia" in *Transitional Justice Asia-Pac* (Cambridge University Press, 2013).

Irwandy Yusuf, former GAM commander, passed the local bylaw (*Qanun)*[44] with insignificant resistance from the national government.

## IV. THE ROLES OF CIVIL SOCIETY AND POST-TRANSITIONAL JUSTICE

Civil society groups played a significant role in Indonesia's democratisation. After Habibie opened up the political space and granted basic freedoms of expression and association in 1998, the civil society sector grew in size and scope of its work.[45] Civil society organisations included non-governmental organisations, religious organisations, mass-based membership organisations, unions, professional groups, and so on. The Indonesian Bureau of Statistics (BPS) noted a massive growth in the number of NGOs from 10,000 in 1996 to 70,000 in 2000.[46]

This massive growth of NGOs, however, did not involve major changes in their structure. NGOs maintained their structural independence from the state during the authoritarian period and, because of that, when the old regime collapsed, NGOs were not implicated in its misdeeds. Unlike established political institutions and elites linked to Soeharto, who experienced a legitimacy crisis after the fall of their patron, NGOs expanded their activities and numbers, assisted by new funding from international and private donors. *Reformasi* gave them more space to articulate their criticisms of the old regime and provide inputs to the new regime without necessarily having to confront the state. Accordingly, the scholarly literature is generally positive on the roles played by NGOs during *Reformasi*. Antlöv et al., for example, mention that the transition to democracy would have taken longer and been more difficult had it not been for the voluntarism and commitment among the NGOs.[47] Not surprisingly, NGOs played an important role in negotiating and reformulating the balance of power between state and citizens.

Human rights groups set the democratic agenda by popularising the idea of transitional justice during the early years of political transition and keeping that agenda alive throughout that time. They tried to push for a reform of government practices so thorough that it would have amounted to regime replacement. They did this by advocating for the achievement of what the Soeharto regime had always managed to avoid by way of tactical concessions: human rights accountability. The politics of the human rights movement were effective in

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[44] For more details about *qanun,* see also: Faradilla Fadlia & Ismar Ramadani, "The Qanun Jinayat Discriminates Against Women (Victims of Rape) in Aceh, Indonesia" (2018) 2:2 J Southeast Asian Hum Rights 448.

[45] Hans Antlöv, Rustam Ibrahim & Peter van Tuijl, "NGO governance and accountability in Indonesia: Challenges in a newly democratizing country" (2006) NGO Account Polit Princ Innov 147.

[46] Bonnie Setiawan, "LSM sebagai Kekuatan Sosial Baru", *Kompas* (17 April 2004).

[47] Antlöv, Ibrahim & Tuijl, *supra* note 45 at 4.

injecting into the transition an element of thorough reform bordering on replacement. Human rights groups believed one of the earliest agenda items for the new democracy was to ensure state responsibility for past human rights abuses by way of adoption and implementation of transitional justice. Transitional justice, for these groups, provided the platform for a clean break-up with the old regime and an agenda for thorough reform.

Jiwon Suh argues that human rights NGOs were the main factor that influenced the government to adopt human rights measures and policies, including the ratification of international laws and the drafting of domestic laws related to transitional justice mechanisms.[48] Despite the fact that Indonesia was a latecomer democracy able to benefit from practices of transitional justice pioneered elsewhere and had the support of international organisations and donors, she argues that human rights NGOs play important roles as norm entrepreneurs in driving these changes and in pushing the state to change its behaviour.[49]

Achieving transitional justice seemed possible after Habibie, who replaced Soeharto as President, allowed a referendum in East Timor and established a joint inquiry team on the 1984 Tanjung Priok massacre. The investigation of the mass violence during and after the 1999 East Timor referendum instigated domestic demands for a similar investigation into the 1984 Tanjung Priok massacre. In contrast to the weak public and elite support for the East Timor process, there was wide support for investigations and trials for Tanjung Priok. This support was possible because of a contingent meeting of the interests of human rights groups and elements of the new elite. Even though these elite were fundamentally interested in short-term goals and gaining political legitimacy, their support became a push factor for the government to adopt some transitional justice measures. These included the establishment of the Law on Human Rights and the Law on Human Rights Court, with the latter needed to pave the way for trials in both of these cases and the Law on Truth and Reconciliation.

Human rights group worked independently and voluntarily in pushing for a reform agenda through a 'dual track' strategy—lobbying the upper political elite to influence them to adopt a reform agenda and working independently from any elite group to empower grassroot communities. On the one hand, NGOs actively engaged with the state and articulated their interests to the state openly rather than being estranged from formal political processes, especially at the national level. Aspinall highlights this approach as a main feature of civil society groups in the post-Soeharto period, most of which shared a consensus that the state and social order, after 1998, were fundamentally legitimate and that "the primary aims of

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[48] Jiwon Suh, *The Politics of Transitional Justice in Post-Suharto Indonesia* (PhD Dissertation, Ohio State University, 2012) [unpublished].

[49] Jiwon Suh adopted the concept of normalisation and norm entrepreneurs from International Relation theory, especially by Finnemore and Sikkink (1998).

politics were conceived as pressuring, lobbying, or otherwise influencing the state to achieve desirable policy outcomes."[50] On the other hand, some of these organisations avoided working with government institutions and chose to be watchdog organisations as an expression of their distrust of the new regime. Instead, they preferred to build solidarity and mobilise with victims or the grassroots, ignoring representative political bodies including political parties.[51]

The 'dual-track' strategy characterises civil society's, most specifically the human rights NGOs, approach during the early years of democratisation until 2006 when transitional justice was still on the political agenda. This is in response to both types of political transition, replacement and transplacement, explained earlier. Adopting this strategy, especially in collaboration with local governments, is also part of their aim to 'seduce' the state to adopt measures for truth and justice at the national level.[52]

The majority of human rights groups pursued a strategy of working with government and the new political elite by lobbying for the formal adoption of human rights and transitional justice measures into law and to otherwise take action on past abuses. They actively lobbied both the executive and legislature to seriously deal with cases such as the East Timor abuses, the 1984 Tanjung Priok massacre, the 1998 kidnappings of activists, the 1998 and 1999 Trisakti and Semanggi shootings, and the conflicts in Aceh and Papua, the western most and eastern most provinces. NGOs also contributed directly to the drafting of human rights laws such as the Law on Human Rights and the TRC Law.

In some cases, such as the 1984 Tanjung Priok massacre, such strategy was successful. However, the success mostly depended on the other factor, which was based on political interests of the new political elite. KontraS had had coalition with organisations affiliated with new political elites at the time such as the Asosiasi Pembela Islam (Islamic Defenders Association, or API, led by Hamdan Zoelfa of Crescent Star Party or PBB, a member of parliament) and Aliansi Pengacara untuk Demokrasi Indonesia (Advocate Alliance for Indonesian Democracy or APRODI, an organisation consisting of figures affiliated with Islamic political parties). The coalition succeeded in raising the Tanjung Priok case to the national agenda and even got trials started. It was successful mostly because of the commitment and involvement of political elements of the Muslim groups, most notably the political parties, and involving prominent political figures, such as A.M. Fatwa, among the victims.

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[50] Edward Aspinall, "Indonesia" in *Revolut Dissident Mov World* (Great Britain: John Harper Publishing, 2004) 183 at 75.

[51] A E Priyono, Willy Purna Samadhi & Olle Törnquist, *Making Democracy Meaningful: Problems and Options in Indonesia* (Demos, 2007); Farid, Simarmata & Muddell, *supra* note 26.

[52] Wahyuningroem, *supra* note 25.

Such success did not happen in other cases, for example the Trisakti, Semanggi I and Semanggi II (TSS) shootings.[53] Families of the victims demanded that the state should be held responsible for these deaths and injuries. In June 1998, the military prosecuted six officials from the Indonesian Police for the Trisakti shooting, and they were sentenced to six to ten months in prison a year later. The second prosecution started in June 2001 against eleven members of Brimob (police mobile brigade) for the Semanggi I case, and nine of them were sentenced to three to six years in prison in January 2002. In June 2003, the military court also prosecuted a military soldier of the Army Strategic Command (Kostrad), the Buhari Sastro Tua Putty, for the shooting of Yun Hap.[54] These military court cases did not satisfy the families of victims mainly because they only prosecuted low-ranking officers, without targeting the main perpetrators higher up the chain of command.[55] The families, TRK and KontraS paid visits and lobbied state institutions including Komnas HAM, the Jakarta Military Command, the Ministry of Defense, and Presidents Habibie and Wahid, seeking their support for proper justice processes on behalf of the victims. They also lobbied the DPR through some individual members, a strategy that was also adopted in the Tanjung Priok case.

After a mixed response from parliamentarians during the lobbying, in 2001 the parliament agreed to set up a Special Committee to investigate the three cases and gave a recommendation to the government on how to deal with them. The Special Committee, or Pansus (*panitia khusus),* was headed by Panda Nababan, a senior politician from the PDIP (the Indonesian Democratic Party of Struggle), the party which won the largest vote share in the 1999 election. After experiencing internal deadlock a few times, on 9 July 2001, when the prosecution against the six police officers in the military court was still on-going, the Committee presented its report and recommendations on the cases to a General Meeting of the DPR.

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[53] The TSS affair included three different incidents that took place immediately before and after Soeharto resigned. The Trisakti shooting occurred on 12 May 1998 in front of Trisakti University where protesting students were calling for Soeharto's resignation. Troops shot dead four Trisakti students—Elang Mulia Lesmana, Heri Hertanto, Hafidin Royan, and Hendrawan Sie—and injured dozens of others. The Semanggi shootings were two separate incidents of student protest about Special Sessions of the Parliament, in November 1998 and September 1999. In the Semanggi I incident, which occurred from 11 to 13 November 1998, 17 people, mostly students were killed. In the Semanggi II incident, on 24 September 1999, one student and 11 others were killed, and more than 200 people were injured.

[54] From various sources, there are no information about the process and result of the trial, except in a book written by former Army Strategic Commander (Pangkostrad) Djadja Suparman, who was in charge when the Semanggi II incident took place. In his book, Suparman mentioned that the trial prosecuted an Army soldier, Buhari Sastro Tua Putty, for shooting Yun Hap (2013: 186). Even though it was proven in the Court that the bullet which killed Yun Hap was indeed coming from Putty's weapon, Suparman suggests in his book that the weapon might have been used by an unkown party.

[55] Sri Lestari Wahyuningroem, *From State to Civil Society: Transitional Justice and Democratization in Indonesia* Australian National University, 2018) [unpublished].

The party factions in the *pansus* were divided between factions that support an ad hoc human rights court, factions that recommended reconciliation as a form of non-judicial settlement, and those who concluded that gross human rights violations were not proven, and thus the shootings should be continued to be dealt with through the military courts.[56] During voting in the general session this final group won, and the cases were declared closed.

This outcome showed that the lobbying efforts had not been successful. There were two reasons for this result. The first and most obvious was that members of parliament lacked interest in these cases partly due to ignorance and the lack of a human rights perspective among most members of parliament. The second factor was indeed political. The *pansus* worked between January and July 2001, a period when Wahid's leadership as president was undergoing a crisis as he had lost support in the parliament and opposition to him was mounting. He had to deal with opposition not only in parliament, but also within his own ministries. He was impeached by the parliament, and Megawati of PDIP would replace Wahid as the fifth President of Indonesia.

The political landscape changed significantly after Megawati took over the presidency. Under her leadership, military elements consolidated with the conservative elements of the former semi-opposition. At the same time, Indonesia's new ruling elite, consisting of members of formerly semi-oppositional parties and organisations, were increasingly consolidating its position through the distribution of patronage and power-sharing arrangement in cabinet and elsewhere. Most of its members saw little value in a confrontation with the security forces over abuses that had occurred during the transition that had elevated them to power. Human rights groups failed to recognise or acknowledge this shift.

Unfortunately, there was not much agreement among human rights groups on which issues they should prioritise in their advocacy work. They did not establish a platform for working together to achieve their transitional justice goals, nor did they pause to analyse and evaluate the processes and outcomes of their activities. This is a feature identified by Mikaela Nyman, which reflects the fragmentation of Indonesian civil society.[57] The disunity of the elements within civil society made it difficult to cooperate on day-to-day issues on democratic reform, even though the call to remove Soeharto's regime united them as a movement. When it came to prioritising goals and activities, NGOs set up their expectations separately, and their goals and strategies sometimes clashed. The most notable example was the competing emphases on trials and prosecutions versus truth and reconciliation. On this critical strategic choice, the perspectives of two of Indonesia's most

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[56] P Mutiara Andalas, *Kesucian politik: agama dan politik di tengah krisis kemanusiaan* (BPK Gunung Mulia, 2008).

[57] Mikaela Nyman, *Democratising Indonesia: The Challenges of Civil Society in the Era of Reformasi* (Copenhagen: NIAS Press, 2006).

important human rights NGOs diverged: the first approach was advocated by KontraS (Commission for the Disappeared and Victims of Violence) and the latter was articulated by ELSAM (Institute of Policy Research and Advocacy).[58]

When transitional justice gained its momentum between 1998 to 2000, KontraS was the lead civil society organisation in articulating the position that prosecutions were the best way to settle past human rights abuses, despite their skepticism about the corrupt and inept legal system in Indonesia.[59] When political elite became concerned over the international attention on human rights accountability for the serious crimes that took place in East Timor, KontraS and particularly its chair, Munir, consistently supported the establishment of a human rights court that deals with various cases of past human rights abuses, especially for cases they advocated such as Tanjung Priok, Talangsari, East Timor, Aceh and the activists enforced disappearance case. Munir was also a member of the drafting of the Human Rights Court Bill established by the Minister of Law and Human Rights. For KontraS, a human rights court was not merely to deprive the military court of its authority in terms of human rights accountability, but to put into effect an international standard of criminal justice system that could increase possibilities of punishing high-ranking generals and decision makers by taking the command responsibility and crimes of omission into account.[60] KontraS strongly supported prosecution because there was an opportunity for human rights courts to be effective due to the weakening of the military and the strengthening of demands for human rights accountability .[61]

This stance was debated by other groups, most notably ELSAM (the Institute for Policy Research and Advocacy), which argued that truth-seeking was the first step toward justice, and thus a national truth and reconciliation commission was needed. In addition to its participation in the official drafting team, ELSAM prepared its own draft on TRC, involving international experts on transitional justice and a series of meetings with victims' rights groups.[62] Its former director, Ifdhal Kasim, admitted that the South African model inspired the initial conceptualisation of TRC. However, he added that the Indonesian TRC needed to be adjusted beyond the South African model by learning the best practices

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[58] KontraS was established in 1998 as a transformation of KIP-HAM, the Independent Commission for the Monitoring of Human Rights Violations, a coalition of non-governmental organizations concerned on the increased violence by government during 1997 election where there had been cases of oppositions such as activists, students, and party members, were forcedly disappeared. See their profile at http://www.KontraS.org/eng/index.php?hal=profile. ELSAM was established earlier in 1993 by some prominent lawyers and human rights advocates, aimed at promoting and protecting civil and political rights of Indonesian citizens. See http://www.elsam.or.id/

[59] Farid, Simarmata & Muddell, *supra* note 26.

[60] Suh, *supra* note 48 at 134.

[61] Wahyuningroem, *supra* note 55 at 134.

[62] Suh, *supra* note 48 at 144–145.

from other TRCs.[63] Kasim draws the basic idea of TRC from Huntington, arguing for the adoption of amnesty as a necessary evil during the political transition.[64] He later suggested 'the third way' which refers to the complementarity of different transitional justice measures but acknowledged the strong political influences of the old regime such as Golkar and the military.[65]

Jiwon Suh discusses the different approaches of these two NGOs as an example of how NGOs as norm entrepreneurs could pursue plural models of justice adopted from transitional justice practices in other transitioning countries such as Argentina and South Africa.[66] KontraS strongly believed that they needed to press ahead in order to assert basic principles of justice during the transition and to establish precedents that could be used to prevent future human rights abuses. ELSAM, by contrast, believed that it was essential to take into account the continuing strength of standpatter, conservative elements in the ruling elite, and move more slowly in promoting human rights protection.

Even though human rights groups failed to work out a consensus on their strategies and priorities, they did over time maximise their 'dual-track' approach by intensifying their 'bottom up' work, encouraging initiatives for transitional justice within communities at the local level[67], including strengthening collaboration with and involvement of communities of victims. Human rights groups were blocked from making significant progress at the national level but found they could move forward at the local level. Such opportunities were much greater in the context of the far-reaching decentralisation of political power brought about by Habibie's reforms at the start of the *reformasi* period.

The 'dual-track' strategy of lobbying government officials and engaging the grassroots applied in almost all areas of work organised by human rights groups. An assessment by the International Center for Transitional Justice (ICTJ) in 2005 noted that at least 200 activities related to issues of past injustice in Indonesia were carried out by these groups between 1999 and 2002. Activities ranged from truth-seeking (documenting victim testimonies, exhumation of bodies, publications, and memorialisation) to filing cases for criminal justice to lobbying for reparations for victims and promoting reconciliation.[68]

At the local level, civil society groups used more grassroots or community-based activities, mainly organising around documentation, exhumation, memorialisation, commemoration and reconciliation as well as organising public

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63 Wahyuningroem, *supra* note 55 at 65.

64 Ifdhal Kasim, *Menghadapi Masa lalu: Mengapa Amnesti?*, Komisi Kebenaran dan Rekonsiliasi Briefing Paper (ELSAM, 2000).

65 Ifdhal Kasim & Edie Riyadi Terre, *Kebenaran vs Keadilan: Pertanggungjawaban Pelanggaran HAM di Masa Lalu* (Jakarta: ELSAM, 2003).

66 Suh, *supra* note 48.

67 Patricia Lundy & Mark McGovern, "Whose {Justice}? {Rethinking} {Transitional} {Justice} from the {Bottom} {Up}" (2008) 35:2 J Law Soc 265.

68 Farid, Simarmata & Muddell, *supra* note 26.

seminars. These local organisations worked with victims and grassroots communities. Syarikat in Central Java, for example, successfully organised what they called as "cultural reconciliation" between the 1965 victims and some perpetrators from their communities, including religious leaders from Nahdlatul Ulama (NU). Between 2001 and 2004, Syarikat held gatherings in 18 cities and districts around Central Java and Yogyakarta. Members of Syarikat were mostly *santri* (pupils) and young leaders of the NU. Their main reason for organising these events was the involvement of many NU members and leaders in the 1965 mass violence[69], as participants shared decades of trauma and potential tension within their communities.

Some NGOs also collaborated with the local governments. Palu City, in Central Sulawesi Province, has been documented nationally and internationally as a success story of local government's sponsored transitional justice. Local NGO, SKP HAM Palu (Solidaritas Korban Pelanggaran Hak Asasi Manusia Palu or Solidarity for Victims of Human Rights Violation in Palu) worked with victims of the 1965 violence in documentation and approached local government for a reparation program. The Mayor, Rusdy Mastura, formally delivered an apology to the victims and their families, and launched of the program.[70] Other places are not successful like Palu, however. There are three factors that determined the outcomes of these local initiatives: the nature of violence, leadership of the local government, and the organizational capacity of the initiator NGOs.[71]

The other important element of civil society is the victim groups. NGOs involved victim groups in most of their initiatives. Since 2000, victims' organisations have not only been involved in the human rights groups' initiatives, they have also been very active in documenting their own stories and in organising or getting involved in various truth-seeking and reconciliation initiatives alongside NGOs. After the fall of Soeharto, the opening of political space allowed victims of past human rights abuses, including the 1965-66 mass violence that took place throughout the country in anti-communist purge, to form a variety of associations. Victims' organisations such as Yayasan Penelitian Korban Pembunuhan YPKP 65 (Research Foundation for Victims of the 1965-1966 Killings), Pakorba (Association of Victims of the New Order), LPKP 65 (Research Institute for Victims of the 1965 Tragedy), LPK 65 (Institute for the Defenders of 1965 Victims), LPRKROB (Organization for Rehabilitation Struggle for New Order Victims), KKP HAM 65 (1965 Human Rights Victims Action Committee)[72], IKOHI (Association of Families of the Enforced Disappeared) as

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69 Wahyuningroem, *supra* note 55 at 215.

70 Wahyuningroem, *supra* note 25; Wahyuningroem, *supra* note 25.

71 Wahyuningroem, *supra* note 30.

72 Some of these organisations claim to have hundreds of members and branches throughout the country. Some draw exclusively on the former members of the PKI, but others include non-PKI affiliated figures and/or family members such as PAKORBA or IKOHI. See short profiles of some of these organisations in Farid and Simarmata, 2004: 36-38.

well as individual victims, took initiatives in conjunction with other civil society groups, including human rights activists, researchers, scholars, teachers, and community leaders.

These bottom-up initiatives by civil society groups resulted in positive, yet limited, outcomes. The positive outcomes have been on widening local acknowledgement on cases of past human rights abuses and acknowledgement of victims' experience of injustice. In some cases, the initiative shifted local understanding of how the event took place in their areas in the past. For example, the memorialisation of Rumoh Geudong (grand house) in Pidie, Aceh, in 2016 attracted wide attention from local people in the area as well as the Aceh province. There, attention was paid to the untold stories of torture and sexual violence against women in that house during the conflict in Aceh. The house was burnt down by an unknown party after the peace agreement, but the memory remains. The much greater outcomes of the local initiative of justice apply for the victims' agency and self-healing.

These initiatives from below and from the margin also have the potential to create a 'snowball effect' in other regions and might create pressure on the central government to adopt and implement national measures for truth and justice. However, a challenge arises from the framing of the violence by these NGOs in purely human rights language, which detaches the violence from national politics. In the long term, regional initiatives can localize the collective memory and sustain impunity nationally.[73]

Other than working at the local level with victims, human rights groups also adopted a more comprehensive approach by combining both advocacy and campaigns at national and local levels. A coalition of NGOs called KKPK is an example. Initially the acronym KKPK stood for Working Group for Truth-seeking (Kelompok Kerja Pengungkapan Kebenaran) and was set up by activists and NGOs in 2008 to advocate for, and monitor, processes then taking place in the government in relation to the drafting of Law on Truth and Reconciliation Commission, several transitional justice mechanisms for Timor Leste (the ad hoc tribunal and the establishment of Commission for Truth and Friendship) and related justice policies. At first led by the former National Commission of Human Rights (KOMNAS HAM) member, the late Asmara Nababan, in 2010 the group was transformed into a new KKPK, an acronym for Koalisi Keadilan dan Pengungkapan Kebenaran (Coallition for Justice and Truth-seeking) led by Kamala Chandrakirana, former commissioner of National Commission on Anti-Violence Against Women (Komnas Perempuan). The new name means that the coalition is not limiting its mandate only to truth-seeking but also aimed at promoting various initiatives for justice, both retributive and restorative justice. [74] The coalition consists of more than thirty national and local organisations,

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[73] Wahyuningroem, *supra* note 25.

[74] See http://kkpk.org/tentang-kkpk/, accessed on 5 July 2014.

including NGOs, victims' rights groups, as well as individuals concerned with human rights issues.

In 2012, the coalition launched a truth-seeking and reconciliation project called the Year of Truth. This initiative sought to document 100 cases of past human rights abuses in Indonesia, ranging from civil rights violations to economic and socio-cultural rights violations by the state. One of the activities held during this year was what they called *Dengar Kesaksian* (DK), or testimony hearings, which also intended to promote public education. These hearings were inspired by and modelled on the truth commission philosophy and involved hearings organised in open spaces so the public would have the chance to listen to the personal histories, or testimonies, of victims. They were widely covered by the national and local media. [75] Prominent public figures facilitate the process as 'commissioners' organised in what were called 'People's Council' or Dewan Warga.[76] These testimony hearings were organised in three locations: Palu, Solo, and Kupang. These events, notably victims' testimonies on the 1965 tragedy, gained much attention from local communities. However, as Annie Pohlman outlined, states around the world have been practicing the testimony-based media initiatives created and used by individuals and organizations for political goals attempts to "bring testifiers and witnesses together through an evergrowing range of audio-visual interfaces," refers as the "era of the witness."[77] Similar to the Year of Truth campaign, such practices are produced, disseminated, and circulated rapidly with little knowable or measurable effects.

Even though the effects of the event on the wider supports from the society and government cannot be seen, what has been obvious is that such initiative succeeded in widening its involvement to youth groups and local figures including religious leaders, academics, and even individual from military institution (Agus Widjojo, a retired Army general whose been active in promoting reconciliation among families of main elite involved in the 1965 political conflict, was among the members of the commissioners). Similarly, the regular weekly peaceful protest "*Kamisan"* (Thursday gathering) in front of the Presidential Palace by family of victims of various cases of past human rights abuses, inspired by the Argentinian *Las Madres* movement, has been successful to widen the movement to other places in Indonesia by involving many youth and student organizations.

Based on the initiatives, KKPK launched an approach the called Satya Pilar (six principles) as a framework for settling cases of past human rights abuses; many were adopted from the transitional justice measures. These are rule of law, truth and acknowledgement for the cases and victims, reparation for victims,

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[75] Some videos on this initiative are in YouTube and have been widely distributed worldwide. See their website http://kkpk.org/

[76] The council consists of both national and local figures ranging from religious leaders, academics and teachers, prominent activists, and local community leaders.

[77] Annie Pohlman & University of Queensland, "A Year of Truth and the Possibilities for Reconciliation in Indonesia" (2016) 10:1 Genocide Stud Prev 60 at 74.

public education and dialogue towards reconciliation, policy and institutional reform, and wide participation of victims.[78] Recently, the coalition also launched its initiative to develop a comprehensive measure to settle past injustice by taking into account the economic, social and cultural rights to complement civil society's advocacy on civil and political rights for victims. This new framework includes affirmative policies for victims and their families, advocacy for civil cases that involves individuals of victims, and the fulfilment of cultural rights through cultural expressions and memorialisation.

Meanwhile, another significant movement on settling the 1965 mass violence case took place on an even wider scale, reaching to international communities. Various elements of civil society in Indonesia and other countries organized a civil society human rights tribunal called the International People's Tribunal on Indonesia's 1965 Crimes against Humanity (IPT '65) in the Hague, 10-13 November 2015. The tribunal was set to probe mass violence that took place throughout Indonesia, following the previous investigation by Komnas HAM in 2012 on the issue. This tribunal aimed at encouraging the government to follow up on Komnas HAM's investigation, acknowledge the case, and provide reparation for victims. The tribunal also involved high profile judges from various backgrounds, including the United Nations and well-respected prosecutors. The verdicts from the judges were very political, that the Indonesian state is responsible for crimes against humanity and genocide that took place in Indonesia during the periods. The judge also found the involvement of other countries: the United States, the United Kingdom, and Australia, in facilitating the crimes.[79] Hundreds of researchers, activists, and students from at least seven countries involved voluntarily in the preparation and organization of the tribunal. The event was broadcasted live and was well accessed electronically in five continents. It was also widely covered by national and international media, and successfully got the attention of the political elite in Jakarta.

The IPT 65 was not the only civil society's human rights tribunals. Back in 2000, there was series of tribunals in Tokyo to probe sexual violence against women by the Japanese soldiers during World War II. Indonesia was also included since thousands of young Indonesian girls were victims. One of the prosecutors for the tribunal was Nursyahbani Katjasungkana, the leading figure that initiated the IPT 65. Other than the Tokyo Tribunals, there was also a citizens' tribunal for 1998 Biak Massacre in Sydney, Australia. The tribunal was organized by human rights groups and the Papuans who live in Australia to try the crimes against humanity that took place in Biak, Papua, the easternmost province in Indonesia, at the time when Jakarta was politically heated at the end

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[78] Koalisi Keadilan dan Pengungkapan Kebenaran (KKPK), *Menemukan Kembali Indonesia* (Jakarta: KKPK, 2016).

[79] Saskia E Wieringa, "The International People's Tribunal on 1965 Crimes against Humanity in Indonesia: An Anthropological Perspective" in Andrew Byrnes & Gabrielle Simm, eds, *Peoples Trib Int Law*, 1st ed (Cambridge: Cambridge University Press, 2018) 107.

of the New Order regime in 1998. Unlike these two tribunals, the IPT65 had a larger impact, especially in Jakarta. The Indonesian government's responses to the event had a positive impact to the case itself.[80] The Coordinating Minister for Political, Law, and Security, former general Luhut Panjaitan, was concerned about the 'internationalisation' of the 1965 case. Together with his colleague, Agus Widjojo, a former general who is also director of the National Defence Institute, organized a public discussion in April 2016 on reconciliation for 1965 to compete the success of IPT 65 in getting public attention and at the same time to counter human rights discourse on the 1965 mass violence.[81] However, instead of gaining the attention and sympathies of the public, the event was responded with fury from the extreme, nationalist Army elite who strongly rejected IPT 65 and any efforts to promote truth and justice for the case. Supported by right wing mass organizations, they also organized an event to negate both IPT65 and the event held by the government. Since then, persecutions and repressions against human rights groups and victims increased. The major incident took place in October 2017 when Muslim groups crushed a discussion organized by groups of human rights activists and victims organized in Indonesian Legal Aids' office in Jakarta. Before and during the 2019 election, human rights groups became more cautious of risks that can backlashed their movements, and especially can negatively impacted the victims.

## V. CONCLUSION

This paper argues that transitional justice in Indonesia has stalled as democracy has been consolidated and the elite have gained political legitimacy through mechanisms of liberal democracy. In the early democratic transition, transitional justice was chosen as a reform agenda because it brought together the interest of the elements who wished to challenge the repressive regime and those who wished to distant themselves from the old regime in order to return to politics. Transitional justice measures were successfully adopted but failed to bring justice and accountability. After two decades, elements of the politics are consolidated, including those coming from the old regime, and transitional justice is undergoing a post-transitional justice period.

The post transitional justice period is marked by several characters. One that is most dominant is the role of civil society beyond state's accommodation to reckon with past abuses. The shift of strategy from state-centered mechanisms to local-level and international hearings and activities is partly a consequence of the failure to achieve meaningful results at the national level. The fact that the political

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[80] Saskia E Wieringa, "The {International} {People}'s {Tribunal} on 1965 {Crimes} against {Humanity} in {Indonesia}: {An} {Anthropological} {Perspective}" in Andrew Byrnes & Gabrielle Simm, eds, *Peoples Trib Int Law*, 1st ed (Cambridge: Cambridge University Press, 2018) 107 at 131.

[81] Wahyuningroem, *supra* note 41.

lobbying and national advocacy resulted in the strengthening of impunity rather than human rights accountability shows the powerlessness of the groups in pushing for the desired outcomes of transitional justice agenda. However, their persistence in working for truth and justice to settle cases of past human rights abuses dominates the characters of post-transitional justice in Indonesia.

## BIBLIOGRAPHY

Andalas, P Mutiara. *Kesucian politik: agama dan politik di tengah krisis kemanusiaan* (BPK Gunung Mulia, 2008).

Antlöv, Hans, Rustam Ibrahim & Peter van Tuijl. "NGO governance and accountability in Indonesia: Challenges in a newly democratizing country" (2006) NGO accountability: Politics, principles and innovations 147.

Arthur, Paige. "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice" (2009) 31 Human Rights Quarterly 321. Asia Justice and Rights (AJAR). *Bringing Them Home: Fifteen Stolen Children Reunited with their Families in Timor-Leste*, Press Release (2017).

Aspinall, Edward. "Indonesia" in *Revolutionary and Dissident Movements of the World*, 4th ed (Great Britain: John Harper Publishing, 2004).

Aspinall, Edward & Fajran Zain. "Transitional Justice Delayed in Aceh, Indonesia" in *Transitional Justice in the Asia-Pacific* (Cambridge University Press, 2013).

Aspinall, Edward. *Opposing Suharto: Compromise, Resistance, and Regime Change in Indonesia* (Stanford University Press, 2005).

Aspinall, Edward. "The Surprising Democratic Behemoth: Indonesia in Comparative Asian Perspective" (2015) 74:4 The Journal of Asian Studies 889.

Aspinall, Edward. "Transformation of Civil Society and Democratic Breakthrough" (2004) Civil society and political change in Asia: Expanding and contracting democratic space 61.

Backer, David. "Civil society and transitional justice: possibilities, patterns and prospects" (2003) 2:3 Journal of Human Rights 297.

Braeuchler, Birgit. *Reconciling Indonesia: Grassroots agency for peace* (New York: Routledge, 2009).

Brahm, Eric. "Uncovering the Truth: Examining Truth Commission Success and Impact" (2007) 8:1 International Studies Perspectives 16.

Collins, Cath. *Post-transitional Justice: Human Rights Trials in Chile and El Salvador* (Pennsylvania: Penn State University Press, 2010).

Crocker, David. "Transitional Justice and International Civil Society: Toward a Normative Framework" (1998) 5:4 Constellations 492.

De Greiff, Pablo & Alexander Mayer-Rieckh, eds. *Justice as prevention: vetting public employees in transitional societies* (New York: Social Science Research Council, 2007).

Duthie, Roger. *Building Trust and Capacity: Civil Society and Transitional Justice from a Development Perspective (Full paper)* (New York: International Center for Transitional Justice, 2009).

Elster, Jon. *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004).

Fadlia, F., & Ramadani, I. (2018). The Qanun Jinayat Discriminates Against Women (Victims of Rape) in Aceh, Indonesia. Journal of Southeast Asian Human Rights, 2(2), 448–470.

Farid, Hilmar & Rikardo Simarmata. *The Struggle for Truth and Justice: A Survey of Transitional Justice Initiatives throughout Indonesia*, Briefing Paper (New York: International Center for Transitional Justice, 2011).

Farid, Hilmar, Rikardo Simarmata & M Kelli Muddell. *The struggle for truth and justice: a survey of transitional justice initiatives throughout Indonesia*, Occasional paper series / International Center for Transitional Justice (New York, N.Y: International Center for Transitional Justice, 2004).

Gready, Paul & Simon Robins. "Rethinking civil society and transitional justice: lessons from social movements and 'new' civil society" (2017) 21:7 The International Journal of Human Rights 956.

Hajji, Nadia. *Post-Transitional Justice in Spain: Passing the Historical Memory Law* (Columbia: Columbia University Press, 2014).

Hayner, Priscilla. *Responding to a Painful Past: The Role of Civil Society and the International Community*, KOFF Series Working Paper Dealing with the Past: Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy Mô Bleeker and Jonathan Sisson (eds) (Bern: Swiss Peacce, 2005).

Huntington, Samuel P. *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press, 2012).

International Center for Transitional Justice & KontraS. *Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto* (New York: International Center for Transitional Justice, 2011).

Jeffery, Renée & Hun Joon Kim. *Transitional justice in the Asia-Pacific* (2013).

Jetschke, Anja. "Die Aktuellen Entwicklungen in Indonesien und Osttimor" (1999) 29:10 Antimilitarismus Information 57.

Jetschke, Anja. *Human Rights and State Security: Indonesia and the Philippines* (Philadelphia: University of Pennsylvania Press, 2011).

Juwana, Hikmahanto. "Special Report: Assessing Indonesia's Human Rights Practice in the Post-Soeharto Era: 1998-2003" (2003) 7 Singapore Journal of International & Comparative Law 644.

Kasim, Ifdhal. *Menghadapi Masa lalu: Mengapa Amnesti?*, Komisi Kebenaran dan Rekonsiliasi Briefing Paper (ELSAM, 2000).

Kasim, Ifdhal & Edie Riyadi Terre. *Kebenaran vs Keadilan: Pertanggungjawaban Pelanggaran HAM di Masa Lalu* (Jakarta: ELSAM, 2003).

Kimura, Ehito. "The Struggle for Justice and Reconciliation in Post-Suharto Indonesia" (2015) 4:1 Southeast Asian Studies 73.

Koalisi Keadilan dan Pengungkapan Kebenaran (KKPK). *Menemukan Kembali Indonesia* (Jakarta: KKPK, 2016).

Lundy, Patricia & Mark McGovern. "Whose Justice? Rethinking Transitional Justice from the Bottom Up" (2008) 35:2 Journal of Law and Society 265.

Mietzner, Marcus. *Military Politics, Islam, and the State in Indonesia: From Turbulent Transition to Democratic Consolidation* (Institute of Southeast Asian Studies, 2009).

Nyman, Mikaela. *Democratising Indonesia: The Challenges of Civil Society in the Era of Reformasi* (Copenhagen: NIAS Press, 2006).

Olsen, Tricia D, Leigh A Payne & Andrew G Reiter. *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (U.S. Institute of Peace, 2010).

Payne, Leigh A & Kathryn Sikkink. *Transitional Justice in the Asia-Pacific: Comparative and Theoretical Perspectives*, Renee Jeffery & Hun Joon Kim, eds. (Cambridge: Cambridge University Press, 2014).

Pohlman, Annie & University of Queensland. "A Year of Truth and the Possibilities for Reconciliation in Indonesia" (2016) 10:1 Genocide Studies and Prevention 60.

Pratikno, Cornelis. *Komnas HAM 1993-1997: Pergulatan dalam Otoritarianisme* (Yogyakarta: FISIPOL UGM, 2002).

Priyono, A E, Willy Purna Samadhi & Olle Törnquist. *Making Democracy Meaningful: Problems and Options in Indonesia* (Demos, 2007).

Risse, Thomas & Kathryn Sikkink. "The socialization of international human rights norms into domestic practices: introduction" in Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *The Power of Human Rights* (Cambridge: Cambridge University Press, 1999) 1.

Robison, Richard & Vedi R Hadiz. "Reorganising power in Indonesia: The politics of Oligarchy in an age of markets" (2005) 41:3 Bulletin of Indonesian Economic Studies 395.

Roht-Arriaza, Naomi. "Civil Society in Processes of Accountability" in Ardsley M C Bassiouni, ed, *Post-Conflict Justice* (New York: Transnational Publishers, 2002).

Setiawan, Bonnie. "LSM sebagai Kekuatan Sosial Baru", *Kompas* (17 April 2004).

Setiawan, Ken. *Promoting human rights: national human rights commissions in Indonesia and Malaysia* (PhD Dissertation, Leiden University, 2013) [unpublished].

Skaar, Elin. *Explaining Post-Transitional Justice: The Role of Independent Courts* (Place: CMI, 2009).

Suh, Jiwon. *The Politics of Transitional Justice in Post-Suharto Indonesia* (PhD Dissertation, Ohio State University, 2012) [unpublished].

Surat Ketua Mahkamah Agung (Letter of the Chair of Supreme Court), No KMA/403/VI/2003

Teitel, Ruti. "Transitional Justice Genealogy" (2003) 16 Harvard Human Rights Journal 69.

United Nations. *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, Report of the Secretary General (New York: Commission on Human Rights, 2004).

United Nations. *Updated set of principles for the protection and promotion of human rights through action to combat impunity* (New York: Commission on Human Rights, 2005).

Van Zyl, Paul. "Promoting Transitional Justice in Post-Conflict Society" in *Security Governance in Post-Conflict Peace Building* (Geneva: Center for Democratic Control of Armed Forces, 2005).

Wahyuningroem, Sri Lestari. *From State to Civil Society: Transitional Justice and Democratization in Indonesia* Australian National University, 2018) [unpublished].

Wahyuningroem, Sri Lestari. "Justice denied?", (16 July 2016), online: *Inside Indonesia* https://www.insideindonesia.org/justice-denied.

Wahyuningroem, Sri Lestari. "Seducing for Truth and Justice: Civil Society Initiatives for the 1965 Mass Violence in Indonesia" (2014) 32:3 JSAA 115.

Wahyuningroem, Sri Lestari. "Working from the Margins: Initiatives for Truth and Reconciliation for Victims of the 1965 Mass Violence in Solo and Palu" in *The Indonesian Genocide of 1965: Causes, Dynamics and Legacies* (Cham: Palgrave Macmillan, 2018) 335.

Wieringa, Saskia E. "The International People's Tribunal on 1965 Crimes against Humanity in Indonesia: An Anthropological Perspective" in Andrew Byrnes & Gabrielle Simm, eds, *Peoples' Tribunals and International Law*, 1st ed (Cambridge: Cambridge University Press, 2018) 107.

Zurbuchen, Mary S. "History, Memory, and the '1965 Incident' in Indonesia" (2002) 42:4 Asian Surv 564.

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*Journal of Southeast Asian Human Rights, Vol. 3 No. 1 June 2019 pp. 155-184*
*doi: 10.19184/jseahr.v3i1.9544*


# A Cross-Cultural Comparison of Perceptions Regarding Human Trafficking

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**Abstract**
This study surveyed 135 individuals, of which 68 were native English speakers and 67 were native Thai speakers. Respondents answered questions on issues related to human trafficking, its causes, and potential solutions. Statistical tests showed significant variance in opinions between language and other groups regarding factors associated with trafficking and regarding the potential impacts of the legalization of prostitution. Thai responses reflected collectivist cultural perceptions, while English responses reflected more individualistic views. Males and English speakers were most likely to think legalized prostitution would lead to a reduction in human trafficking while females and Thai speakers were most likely to believe legalized prostitution would increase trafficking. Responses to an open-ended question showed participants felt similarly about potential remedies for human trafficking, including information and awareness campaigns, interactions between civilians and police, increased penalties for offenders, and reduction in macro-environmental variables such as poverty.

Keywords: *Exploitation, Human Rights, Human Trafficking, Slavery*

## I. INTRODUCTION

Human trafficking is a global criminal phenomenon in which trade routes are historical, growing, and continuously adapting. Victims come from and can be found in any country. Networks of traffickers span the globe, operating within legal transportation and commercial supply channels. Buyers tend to be affluent, but aside from access to capital, they are as diverse as victims and traffickers. Estimates vary on the number of trafficking victims around the world, but none, aside from the traffickers and buyers themselves, would suggest human trafficking is not a serious problem.

Victims of trafficking are subjected to unimaginable conditions, treatment, and exploitation that cause severe physical and psychological trauma. Some die during abduction, transit, transfer, harboring, or after a tertiary buyer takes control for the purposes of sexual exploitation, forced marriage, involuntary labor, organ

removal or other abuses. Those who are rescued, escape, or otherwise become emancipated face a complicated process of reintegration into social networks that did not or could not support or protect them before their departure. In the worst cases, victims are blamed for their experiences by morally corrupt communities whose law enforcement officials may be facilitating illicit trades for supplemental income.

Human trafficking is one of the most egregious forms of abuse yet compared to other human rights violations (i.e. war crimes, genocide, ethnic cleansing), relatively little is known about human traffickers or their victims. Police and court statistics provide only a crude glimpse at the global market. Nongovernmental organizations (NGOs), intergovernmental organizations like Interpol and offices of the United Nations, and secular government offices report estimates of the number of trafficking victims, but there is no consensus on what an appropriate approximation is. For the years 2012–2014, the United Nations Office on Drugs and Crime [UNODC] reported 63,251 victims in 106 countries.[1] The United States Department of State's Trafficking in Persons Report reported 100,409 victims in the year 2017, corresponding to 17,880 criminal prosecutions leading to 7,045 convictions.[2] These numbers are likely only a small fraction of the total number of victims as they represent only cases where police and courts were involved.

Crime occurs in relative secrecy, which makes statistical analysis of criminal economies a complicated and imprecise process. Since human trafficking is a global phenomenon, various cultural, legal, and linguistic factors affect aspects of the trade and its study, from defining terminology to enforcement, adjudication, reporting and beyond.

## 1. Research Design and Hypotheses

This study aims to explore potential cultural and linguistic aspects of perceptions on human trafficking. Analysis of opinion data from distinctly different regions, cultures, linguistic heritage, and legal traditions helps qualify and quantify differences and similarities between two survey groups: native speakers of English and native speakers of Thai.

The study aims to confirm or disconfirm two hypotheses:

H1: Thai and English respondents have significantly different opinions regarding aspects of human trafficking.

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1 UNODC (United Nations Office on Drugs and Crime), *Global Report on Trafficking in Persons*, (Vienna: UNODC, 2016) online: UNODC <https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf>

2 United States Department of State, *Trafficking in Persons Report 2018*, (Washington DC: Department of State, 2018) online: <https://www.state.gov/documents/organization/282798.pdf>

H2: English language respondents believe human trafficking is likely to decrease if prostitution is legalized whereas Thai respondents do not believe legalized prostitution would decrease human trafficking.

The study also aims to answer the following questions:

Q1: To what extent, if any, do opinions vary between groups separated by survey language, sex, age, education, and income.

Q2: Why are responses different between groups, or why are responses not different?

Q3: How can the data help stakeholders improve the situation regarding human trafficking?

In the following section, a review of literature provides secondary quantitative and qualitative data. Then, a survey provides primary quantitative data for analysis and interpretation. The discussion section reflects on findings and ties together theory found in literature to form potential courses of future action. Conclusions suggest that we are only in the beginning stages of a thorough remedy for the scourge of the modern-day slave trade which is human trafficking. Most importantly, communication and cooperation among and between police agencies and civilians are paramount in making progress on the overarching goal of abolition of the modern-day slave trade, and thus human trafficking.

## 2. Legal Background and Prior Research

Starting in the late 19th century, nations began condemning slavery and trafficking for the purposes of slavery. Jus cogens, or peremptory norms of international law, emerged just prior to the consensus that slavery violated fundamental rights and freedoms.[3] Shortly after that, the League of Nations Slavery Convention[4] set out to abolish slavery and the slave trade. As human rights gained acceptance as part of customary international law, the UN General Assembly's Universal Declaration of Human Rights[5] [UDHR] recognized freedom from slavery or servitude as a fundamental human right. Nearly three-quarters of a century after the Slavery Convention and more than half a century after the UDHR, states adopted the United Nations Convention against Transnational Organized Crime[6] and its

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[3] Stephan Kirchner & Vanessa Frese, "Slavery under the European Convention on Human Rights and the Jus Cogens Prohibition of Human Trafficking" (2015) 27:1 Denning L J 130–145, online: <http://www.ubplj.org/index.php/dlj/article/view/1105/1018>

[4] League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 1926, 60 LNTS 253, art 4, online: <https://www.refworld.org/docid/3ae6b36fb.html>

[5] UN General Assembly, *Universal Declaration of Human Rights*, 1948, 217 A(III), online: <https://www.refworld.org/docid/3ae6b3712c.html>

[6] UN General Assembly, *United Nations Convention against Transnational Organized Crime,* 2000, A/RES/55/25, online: < https://www.refworld.org/docid/3b00f55b0.html>

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[7] The Protocol defines "trafficking in persons" as,

> "the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs."

UNODC[8] identified four forms of trafficking: forced labor, prostitution, organ removal, and other forms of exploitation. The "other" category includes all forms of trafficking not specifically mentioned in the UN Trafficking in Persons Protocol but identified by government offices and reported to the UNODC; this category may include begging, commission of crimes such as drug trafficking, forced marriage, or adoption. While the terms "human trafficking" and "slavery" are legally distinct, the definition from the Protocol creates an inextricable link in virtually every case of slavery. Prohibition of human trafficking is ipso facto a jus cogens norm.[9] Because slavery is prohibited by customary international law, states are obliged to prohibit the practice, regardless of whether the state is member to a treaty regarding its prohibition.[10] As such, all states are duty bound to prohibit human trafficking as defined by the UN Protocol.

Despite immense effort to thwart the slavery and human trafficking menace, the trades persist. The International Labor Office (ILO)[11] estimated that in the year 2016, as many as 40 million people were victims of slavery, including 15 million in forced marriage. If ILO's estimate is accurate, each of those 40 million victims of slavery would have been victims of trafficking at some point in their lives. The main motivator for offenders appears to be money. Trafficking for the

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7 UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000, art 3(a), online: <https://www.refworld.org/docid/4720706c0.html>

8 UNODC, *supra* note 1.

9 Cornell Legal Information Institute, "Jus Cogens", online: <https://www.law.cornell.edu/wex/jus_cogens>

10 Maria Perez Solla, "Slavery and Human Trafficking: International Law and the Role of the World Bank", SP Discussion Paper 0904, 2009, online: <https://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0904.pdf>

11 ILO, "Global Estimates of Modern Slavery: Forced Labor and Forced Marriage" (Geneva, Switzerland: International Labor Office, 2017), online: <https://www.ilo.org/global/publications/books/WCMS_575479/lang–en/index.htm>

purposes of slavery is a multibillion-dollar industry. The United Nations Office on Drugs and Crime (UNODC) [12] estimated traffickers earn some $32 billion annually. People who force victims into various forms of labor earn an additional $150 billion each year, according to ILO.[13]

According to a UNODC[14] study which compared statistics from nearly every country, females accounted for 71 percent of all victims in the year 2014; 20 percent of them were under age 18. Between 2004 and 2014, the male share of victims increased in each of the five UNODC surveys. UNODC estimated children account for more than one-quarter of all victims, and that girls become victims at more than twice the rate of boys. In 71 countries, UNODC found all but a few sex trafficking victims are female; they earn criminals who exploit them profits of about $100 billion annually according to ILO[15], which is twice the profit from forced labor, whose victims are roughly two-thirds male. The profit margins on sex trafficking victims, and thus females, are several times greater than margins of their male laborer counterparts.

UNODC[16] found victim profiles varied from one region to another though some trends are apparent. Children are more likely to become victims in countries that have an abundance of children. UNODC cited "cultural practices" and access to education as demand drivers of child trafficking. Another factor UNODC cited was institutional strength, or whether a state has sufficient legislation and power to enforce. UNODC found improving legislation among 179 countries between 2003 and 2016, by which time 158 countries or 88 percent had implemented statutes covering most or all forms of trafficking. The number of countries meeting legislative standards experienced sustained growth, from just 33 in the year 2003 to 149 of 179 countries in 2014, but UNODC [17] discovered countries that adopted laws after 2003 prosecuted far fewer cases than those who adopted laws before 2003. While more countries have signed treaties and implemented laws, prosecutions are rare in most countries, and traffickers have found a very profitable growth market.

Human trafficking persists because of opportunity in the political economy; that is, a complex combination of political and economic factors provides opportunity for traffickers to exploit people. Victims flow in all cardinal directions, but flows are generally out of poverty and into relative wealth; from countries with

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[12] UNODC, "Human Trafficking: Organized Crime and the Multibillion Dollar Sale of People", 2012, online: <http://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking_-organized-crime-and-the-multibillion-dollar-sale-of-people.html>

[13] ILO, "Profits and Poverty: The Economics of Forced Labor", (Geneva, Switzerland: International Labor Organization, 2014), online: <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf>

[14] UNODC, *supra* note 1.

[15] ILO, *supra* note 13.

[16] UNODC, *supra* note 1.

[17] *Ibid*, note 1.

lower human development and income per capita and to countries with higher standards of living.[18] Reports separated victims by regions that were not drawn purely on ethnic and cultural lines, but regions also tended to reflect distinct ethnography as compared to other regions (i.e., Eastern/Western Europe, Middle East, North Africa, Sub-Saharan Africa, East Asia & Pacific, South/Central Asia, North American, Latin America). Studies suggested cultural and subcultural views influence how much people tolerated, rationalized, ignored, or reacted to human trafficking.[19] In summary, different regions are populated by different cultures and groups who are likely to think, feel, and behave differently regarding human trafficking perpetrators, victims, laws, and economies.[20] This study was designed considering the apparent relationship between human trafficking and cultural, ethnic, national, linguistic, and other social identities.

## II. METHODOLOGY

A questionnaire survey was deployed to quantify perceptions regarding human trafficking and related topics. To answer research questions and confirm or disconfirm hypotheses, the survey was translated into English and Thai and electronically distributed to speakers of each language.

### 1. Participants

Participants included 68 native speakers of English and 67 native speakers of Thai, all of whom were recruited by researchers via Facebook. Participants were informed of the purpose of the study, that participation was voluntary, and that their identities would remain confidential throughout the research and reporting processes. All participants in both surveys were 20 years of age or older. Aside from confidentiality, there were no outstanding ethical matters to consider. No institutional review board approval was required for this research.

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[18] UNODC, *supra* note 1; United States Department of State, *supra* note 2.

[19] Jill Robinson, "Public perceptions of human trafficking in Moldova" (2011) 20:3 Psychological Intervention, 269–279; Stephanie Mace, "Child trafficking: A case study of the perceptions of child welfare professionals in Colorado", (Fort Collins, CO, USA: Colorado State University School of Education, 2013), online: <https://mountainscholar.org/bitstream/handle/10217/78834/Mace_colostate_0053A_11615.pdf?sequence=1&isAllowed=y>

[20] Kiril Sharapov, "Understanding public knowledge and attitudes towards trafficking in human beings", Research Paper: Part 1, (Budapest, Hungary: Center for Policy Studies, Central European University, 2014), online: <http://lastradainternational.org/lsidocs/3119-Public-knowledge-and-attitudes-towards-thb-2014.pdf>; Melissa Withers, "Pimp Culture Glorification and Sex Trafficking", online (2017) Psych Today <https://www.psychologytoday.com/us/blog/modern-day-slavery/201704/pimp-culture-glorification-and-sex-trafficking>

## 2. Instruments

A 10-question survey assessed attitudes regarding human trafficking among native speakers of English and Thai. Both English and Thai surveys were constructed and delivered via SurveyMonkey. Five questions on the surveys asked for demographic data regarding geographical origin, gender, age, highest level of education, and income. One question asked respondents to quantify the threat level that human trafficking poses to their community, on an integer scale of 0 to 100. One question asked participants to quantify the level of association, on a 5-point Likert scale, between human trafficking and ten factors mentioned in literature (i.e. statelessness, poverty, child abuse, lack of education, religion, community morals, bad parenting, prostitution, drugs and alcohol, war and violent conflict). One question asked respondents if the threat that human trafficking poses would increase, decrease, or stay the same if prostitution were legalized. One question asked respondents to rank the four most common purposes human trafficking given choices of labor, prostitution, household servant, and organ harvesting. Finally, one open-ended question asked participants about how people can prevent human trafficking.

*See Appendix for survey

## 3. Sampling and Analysis

In January 2018, researchers began collecting a convenience sample by distributing the SurveyMonkey instruments via Facebook. Several solicitations for participants were made via researchers' personal Facebook feeds until the final response was collected in May 2018. The sample size was 135 totals, with 68 in the English sample and 67 in the Thai sample.

The surveys were translated into two languages and distributed to samples of native speakers of each language so that the population size can be estimated as the population of native English and native Thai speakers, but the survey is intended to apply to a broader population. The sample size may appear small given the large population size, however, the sample is sufficient under the assumption that response distribution is low; that is, very few people deviate from the norm on questions of human trafficking (i.e. people are unanimous in their disapproval of the trade). Sample size was calculated using the following formula.[21]

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[21] Robert Krejcie & Daryle Morgan, "Determining Sample Size for Research Activities" (1970) 30 Ed & Psych Measure 607–610, online: < https://home.kku.ac.th/sompong/guest_speaker/KrejcieandMorgan_article.pdf>; National Business Research Institute, "Sample Size Calculator" (2018), online: <https://www.nbrii.com/our-process/sample-size-calculator/>

$$s = \frac{X^2 NP(1-P)}{d^2(N-1) + X^2 P(1-P)}$$

$s$ = required sample size
$X^2$ = chi-square value for 1 degree of freedom at 95 percent confidence level
$N$ = population size
$P$ = population proportion, estimated at 10 percent
$d$ = degree of accuracy, or margin of error at 0.05

Researchers took note of the limited or logistical growth of the graph of the formula, which yielded a sample size of 130 for a population of 2,000; that sample size grew to 138 for a population of 20,000 and 139 for all populations above 65,000. Researchers felt 135 responses were adequate considering potential interference of factors such as culture, religion, and language within the context of very large populations. For the purposes of exploratory and preliminary confirmatory study, the relatively small sample size was innocuous to validity.

Survey data were translated into Microsoft Excel 2016 and SPSS v23 for representation and analysis. Demographic data aided researchers' understanding of the composition of participants by age, sex, income group, and education. Excel tables helped researchers represent descriptive statistics (i.e., means, frequencies, standard deviation) using tables, line, and bar graphs. SPSS helped calculate complex parametric and non-parametric tests such as one-way and two-way ANOVA, Chi-Square, Kruskall-Wallis, Shapiro-Wilk, and Levene statistics.

## III. RESULTS

Data were approximately normally distributed as assessed by Q-Q plots; however, Shapiro-Wilk tests showed the data violated the normality assumption with p-scores lower than 0.05. Data also violated the homogeneity of variance assumption as assessed by Levene's statistic ($p > 0.05$). Despite these violations, ANOVA was still considered an appropriate test as ANOVA is considered a robust test that tolerates such violations with small effect on Type 1 errors.[22] To ensure the validity of results, researchers conducted Welch and Kruskal-Wallis tests in response to the violations.

### 1. Demographic Data

Among the 68 participants of the English survey, 32 were male and 36 were female. There were 57 respondents from 22 states across the USA. Among the 11 international respondents on the English survey, there were 2 from Japan, 2 from

[22] Lund Research, "One-way ANOVA" (2018), online: <https://statistics.laerd.com/statistical-guides/one-way-anova-statistical-guide-3.php>

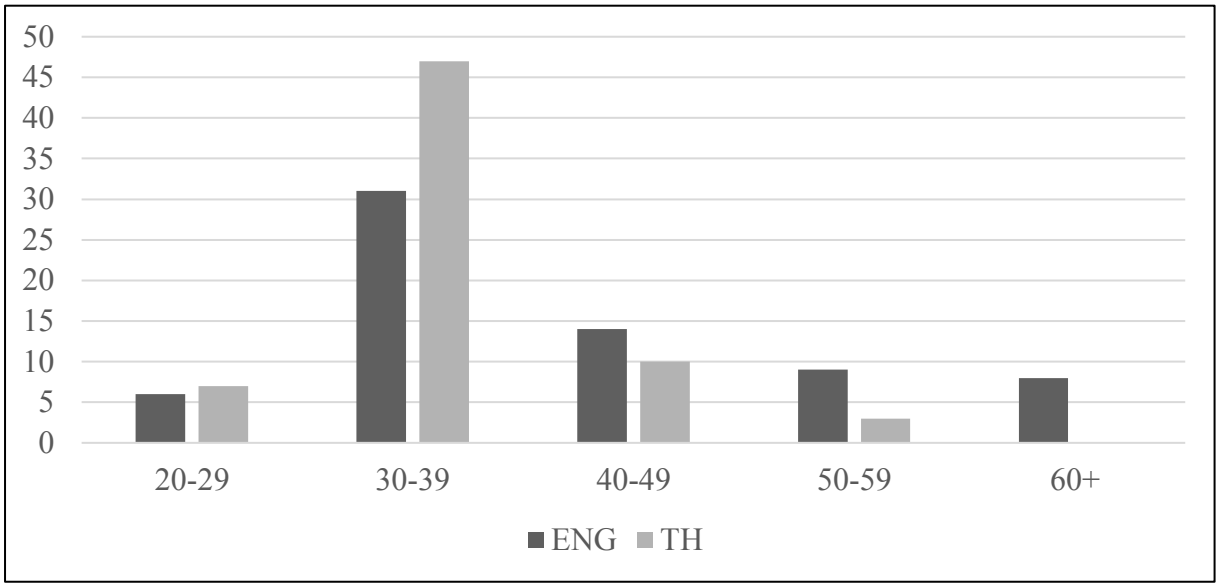
Thailand, 2 from Canada, 2 from Ireland, and 3 from the United Kingdom. All 67 participants in the Thai language survey were from Thailand. Responses were mainly from northern provinces of Chiang Mai and Maehongson, and the capital city area in and around Bangkok. In the Thai group, there were 48 females and 19 males.

**Table 1: Survey participants by gender and language.**

| | ENG | TH | TOT |
|---|---|---|---|
| Male | 32 | 19 | 51 |
| Female | 36 | 48 | 84 |
| Total | 68 | 67 | 135 |

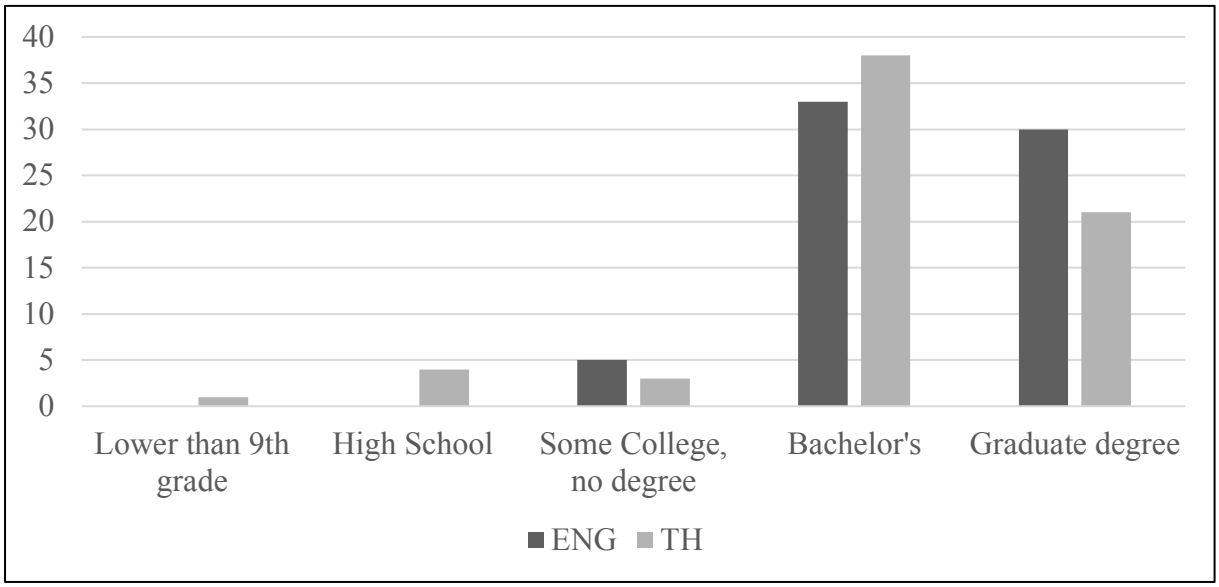
Roughly 70 percent of Thai respondents and 46 percent of English respondents were between the ages of 30 and 39. English survey respondents reported a broader range of ages. Figure 1 shows age distributions.

**Figure 1: Number of participants by age group and language.**



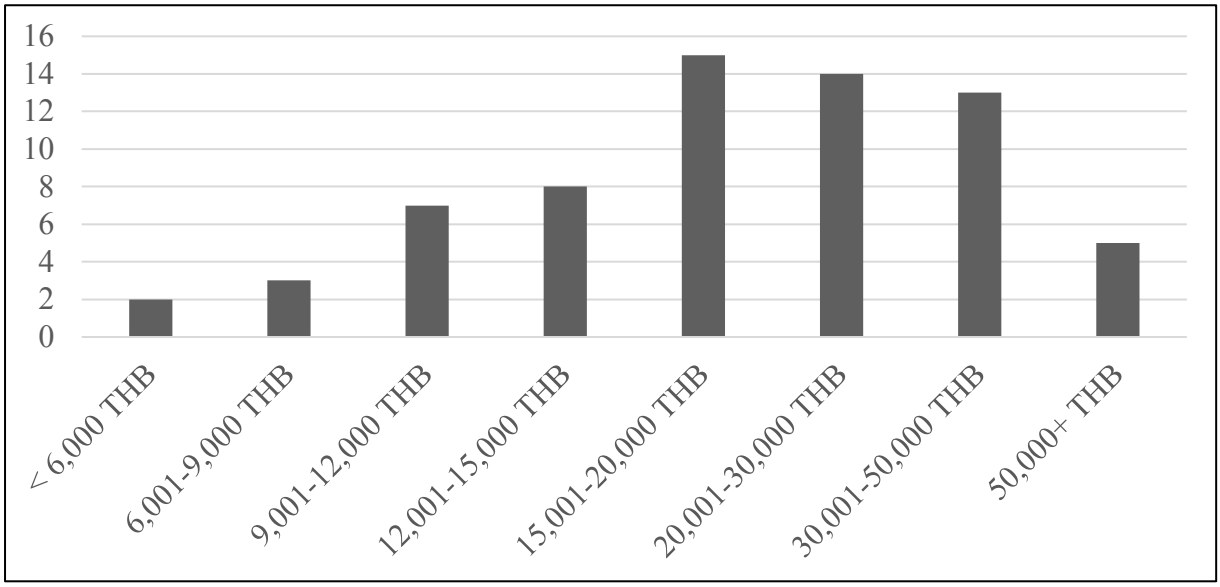

All respondents in the English survey had at least some tertiary education; about 49 percent had a bachelor's degree, and 44 percent had a graduate degree. Thai-language respondents reported slightly lower education overall. English respondents were more likely to have earned a graduate degree, whereas Thai respondents earned more bachelor's degrees. Figure 2 shows a comparison of education distributions.

**Figure 2: Number of participants by highest level of education and language.**



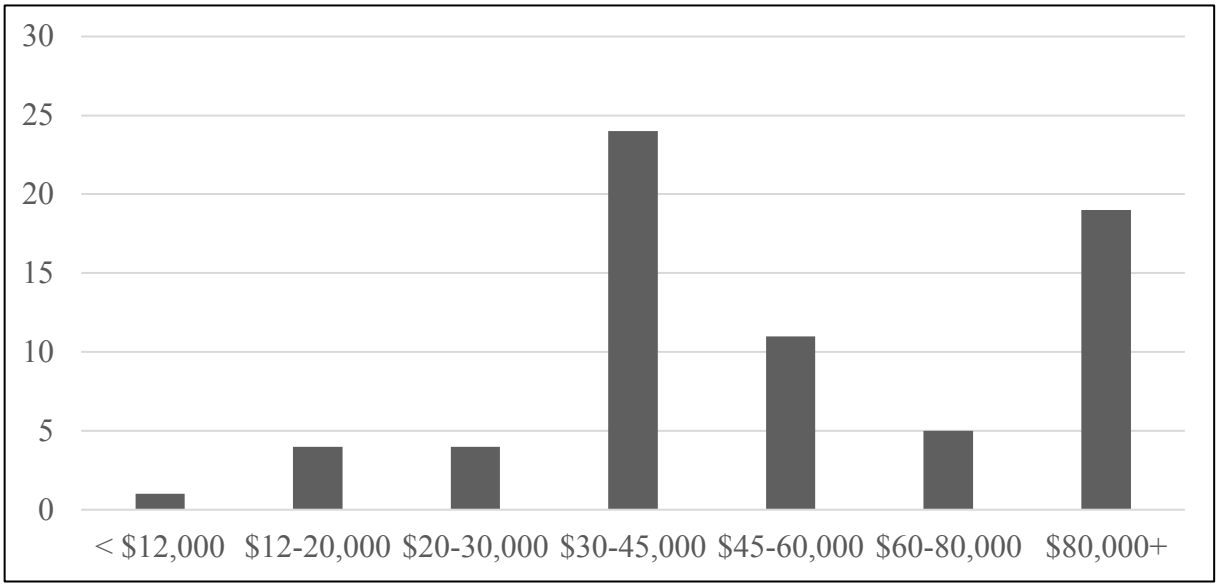

Distribution of incomes in the Thai group resembled a slightly skewed normal curve with roughly 62 percent of respondents earning between 15,001 and 50,000 Thai Baht (THB) per month, or approximately 5,450–18,200 USD per year at 33THB/USD. Figure 3 shows income distribution of Thai participants by income group.

**Figure 3: Number of Thai survey participants separated by income group (Baht per month).**



Nearly all Thai respondents had incomes corresponding to the lowest level in the English survey. In the English group, approximately 63 percent of respondents reported annual household income in two categories: 30,000–45,000 USD and above 80,000 USD. Figure 4 shows distribution of English respondents by income group.

**Figure 4: Number of English respondents by household income group (USD per year)**




Income disparity between Thai and English groups is partially explained by survey language requesting "household income" for English respondents and "income" for Thai respondents. Household income was thought to be a more accurate measure of wealth than personal income, but such a concept is largely foreign in Thailand where income is reported individually. If Thai incomes are doubled to reflect two-earner households, some of the disparity is erased, but it is very doubtful that any Thai respondent's household income exceeds 80,000 USD. The difference is also explained by Thailand's position as an upper-middle income country as compared to the high-income economies[23] represented by English respondents.

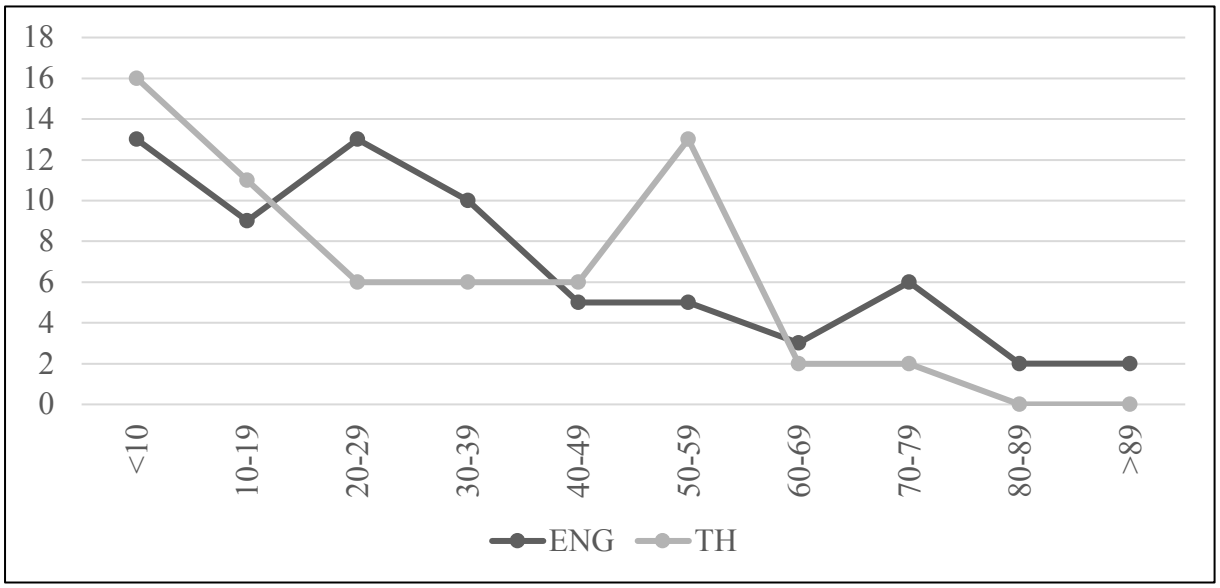
## 2. Opinion Data

Thai and English responses were similar in part and different in part. Survey question six asked participants to quantify the threat that human trafficking posed to their community, using a SurveyMonkey tool where respondents chose a

[23] World Bank, "World Bank Country and Lending Groups" (2018), online: <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>

number between 0 and 100, where 0 was the lowest threat level and 100 was the highest. Responses were very close: Thai respondents (M = 29.99, SD = 23.14) and English respondents (M = 32.71, SD = 25.9) considered trafficking a low or moderate threat in their communities. The most remarkable difference between groups was that 13 Thai respondents perceived threat levels in the 50–59 range whereas only five English participants reported perceived threat level in the same range. Figure 5 contains a graphical representation of question six data.

**Figure 5: Survey question six response frequencies by language**




Several trials of one-way ANOVA were run to assess the presence of significant differences between groups with regards to question six. There were no significant differences of opinion between languages, sexes, income groups, or education groups. ANOVA found a statistically significant difference in opinion among age groups ($F(4,130) = 2.711$, $p = 0.033$). A Tukey post-hoc test revealed participants aged 60 and older perceived the overall threat of human trafficking ($M = 54.63$, $SD = 25.35$) as higher than respondents in both the 30–39 age group ($M = 29.22$, $SD = 21.92$, $p = 0.039$) and 40–49 age group ($M = 25.50$, $SD = 25.76$, $p = 0.028$). However, Kruskal-Wallis and Welch tests failed to verify the presence of significant differences between groups ($p > 0.05$).

Question seven asked participants to estimate the level of association between human trafficking and several factors. Descriptive statistics showed Thai respondents generally perceived lower association on all factors. A one-way ANOVA found several statistically significant differences between English and Thai language respondents. English language participants ($M = 4.16$, $SD = 1.09$, $p = 0.000$) felt statelessness was more highly associated with trafficking than Thais ($M = 3.20$, $SD = 1.23$, $p = 0.000$). Thai-language respondents ($M = 2.11$, $SD = 1.09$, $p = 0.043$) were less likely to think religion was associated with trafficking than

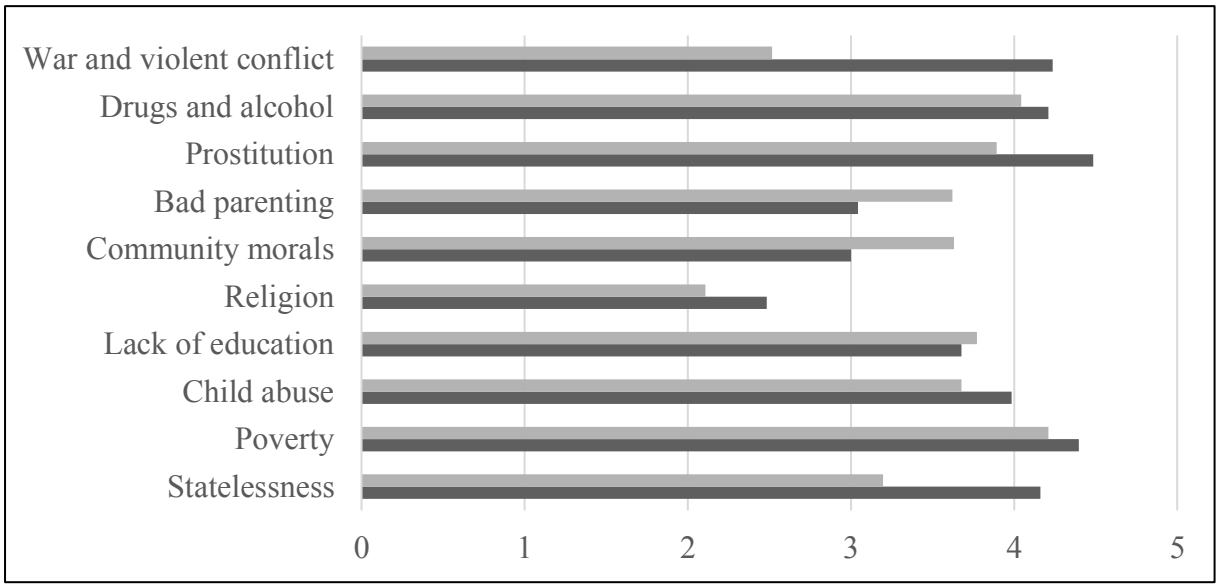
native speakers of English (M = 2.49, SD = 1.029, p = 0.043). Native speakers of Thai (M = 3.63, SD = 1.02, p = 0.002) were more likely to associate community morals with trafficking than English-language respondents (M = 3.00, SD = 1.25, p = 0.002). Bad parenting was thought to share a higher association by Thais (M = 3.62, SD = 1.11, p = 0.005) as compared to English speakers (M = 3.04, SD = 1.20, p = 0.005). Prostitution was more highly associated by English speakers (M = 4.49, SD = 1.03, p = 0.003) than by Thais (M = 3.89, SD = 1.20, p = 0.003). Finally, war and violent conflict were thought to be more strongly associated with trafficking by English participants (M = 4.24, SD = 1.05, p = 0.000) than by Thai respondents (M = 2.52, SD = 1.28, p = 0.000). Kruskal-Wallis and Welch tests showed statistically significant differences between the same groups as the ANOVA ($p < 0.05$).

**Table 2: One-way ANOVA, associated factors and language**

| | | Sum of squares | df | Mean squares | F | Sig |
|---|---|---|---|---|---|---|
| Statelessness | Between groups | 31.176 | 1 | 31.176 | 23.163 | .000 |
| | Within groups | 177.660 | 132 | 1.346 | | |
| | Total | 208.836 | 133 | | | |
| Religion | Between groups | 4.659 | 1 | 4.659 | 4.171 | .043 |
| | Within groups | 145.220 | 130 | 1.117 | | |
| | Total | 149.879 | 131 | | | |
| Community morals | Between groups | 13.222 | 1 | 13.222 | 10.121 | .002 |
| | Within groups | 171.138 | 131 | 1.306 | | |
| | Total | 184.361 | 132 | | | |
| Bad parenting | Between groups | 11.154 | 1 | 11.154 | 8.347 | .005 |
| | Within groups | 176.398 | 132 | 1.336 | | |
| | Total | 187.552 | 133 | | | |
| Prostitution | Between groups | 11.712 | 1 | 11.712 | 9.356 | .003 |
| | Within groups | 165.243 | 132 | 1.252 | | |
| | Total | 176.955 | 133 | | | |
| War and violent conflict | Between groups | 99.101 | 1 | 99.101 | 72.384 | .000 |
| | Within groups | 180.720 | 132 | 1.369 | | |
| | Total | 279.821 | 133 | | | |

Possible explanations for differences between groups include culture and religion. As a primarily Buddhist eastern culture, Thailand tends to be more collectivist than its primarily Christian, western, English-speaking counterparts[24]. A collectivist culture would more likely hold the group responsible for wellbeing or ills in the community. Thais may also be more likely to hold a positive or neutral view of religion considering the prominent role Buddhism plays in most aspects of life in Thailand; whereas the second most common religious belief in North America and Europe is atheism or no religious affiliation[25], thereby suggesting pervasive acrimony toward religion among English speakers. Unfortunately, this study could not provide more data on religious or collectivist/individualist beliefs. Figure 6 shows responses on question seven.

**Figure 6: Survey question seven regarding association between factors and trafficking.**




A one-way ANOVA also found statistically significant differences between participants with a high school education as compared to those with a graduate degree, on the relationship between poverty and trafficking ($F(3,130) = 3.972$, $p = 0.01$). Respondents with a graduate degree ($M = 4.47$, $SD = 0.90$) perceived a very strong association between poverty and trafficking as compared to those with a high school education ($M = 3.25$, $SD = 1.26$). A Kruskal-Wallis test confirmed this

[24] David Robson, "How East and West Think in Profoundly Different Ways" *BBC* (19 January 2017), online: The BBC <http://www.bbc.com/future/story/20170118-how-east-and-west-think-in-profoundly-different-ways>; Hofstede Insights, "Country Comparison" (2019), online: <https://www.hofstede-insights.com/country-comparison/>

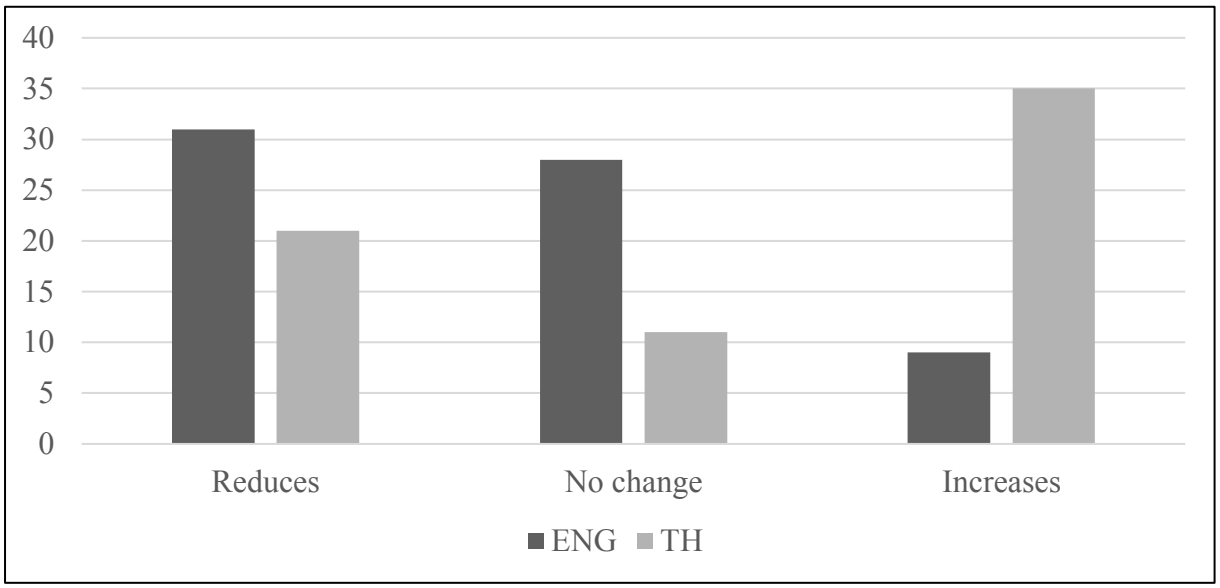
[25] Gabe Bullard, "The World's Newest Major Religion: No Religion" *Nat Geo* (22 April 2016), online: National Geographic <https://news.nationalgeographic.com/2016/04/160422-atheism-agnostic-secular-nones-rising-religion/>

difference ($X^2(1) = 8.234$, $p = 0.041$). A two-way ANOVA was used to assess the possibility that language was an interfering variable due to absence of English participants in the high school education category. Results of the two-way ANOVA showed no significant relationship between language and education ($X^2(2,127) = 2.841$, $p = 0.062$), thereby further validating results of the one-way ANOVA.

An additional one-way ANOVA found significant differences between male and female opinions regarding association between community morals and trafficking ($F(1,131) = 4.230$, $p = 0.042$). Females ($M = 3.47$, $SD = 1.04$) tended to believe community morals shared a higher association with trafficking than males ($M = 3.04$, $SD = 1.36$). A Kruskal-Wallis test confirmed this the difference ($X^2(1) = 4.020$, $p = 0.045$). In order to assess potential interrelationships between gender and language, a two-way ANOVA was performed whose results showed no significant interaction between language and sex ($F(1,129) = 1.450$, $p = 0.231$), indicating the disproportionately high number of Thai female respondents did not affect the outcome of the one-way ANOVA.

Question eight asked participants what effect, if any, legalized prostitution would have on human trafficking. On question eight, responses were remarkably different on the basis of language and gender. Figure 7 shows question eight data in bar graphs.

**Figure 7: Survey question eight by respondent language.**

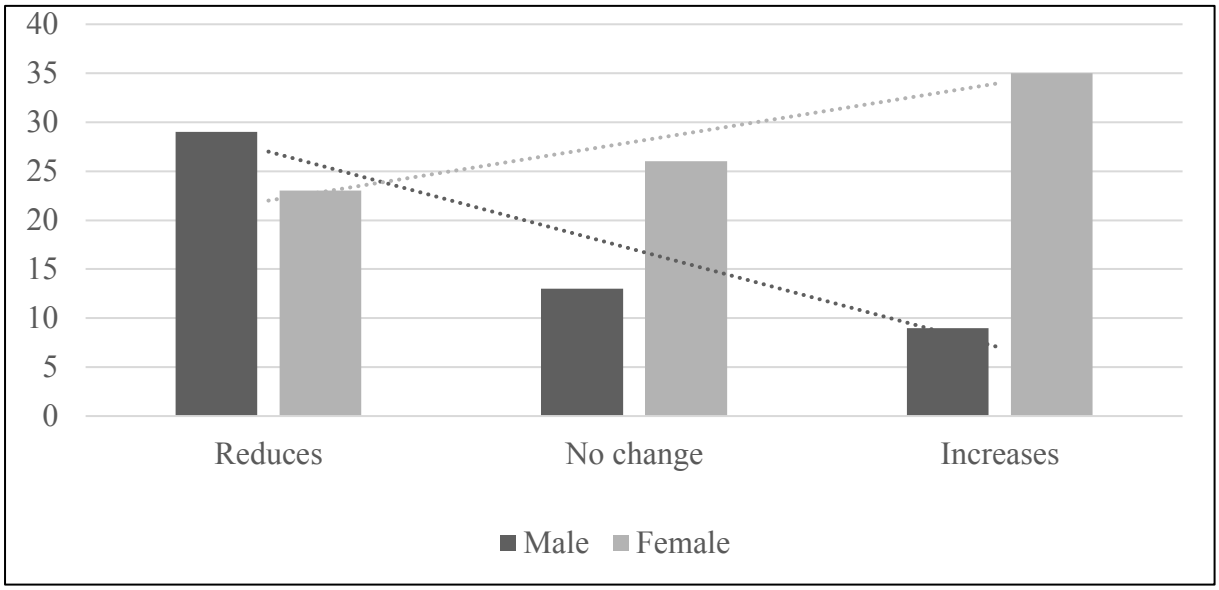



A Chi-Square test showed highly statistically significant association between beliefs regarding potential effects of legalized prostitution and survey language ($X^2(2, N = 135) = 24.69$, $p < 0.005$). Phi and Cramer's V tests showed very strong relationships between survey language and attitudes toward question eight ($p < 0.0005$). English respondents most often believed legalized prostitution would

decrease trafficking, followed by a null effect, and increased threat, respectively. In contrast, Thai respondents were more polarized with most believing legalization would increase trafficking, followed by decrease, and lastly a null effect.

A Chi-Square test also showed significant association between gender and question eight ($p = 0.001$). The most common response among males was that legalization of prostitution would reduce threat of trafficking, followed by a null effect, and increased threat, respectively. Female responses followed the opposite pattern: they most often felt legalization of prostitution would increase the threat of trafficking, followed by a null effect, and decreased threat, respectively. Figure eight shows overall male and female responses follow opposing trend lines.

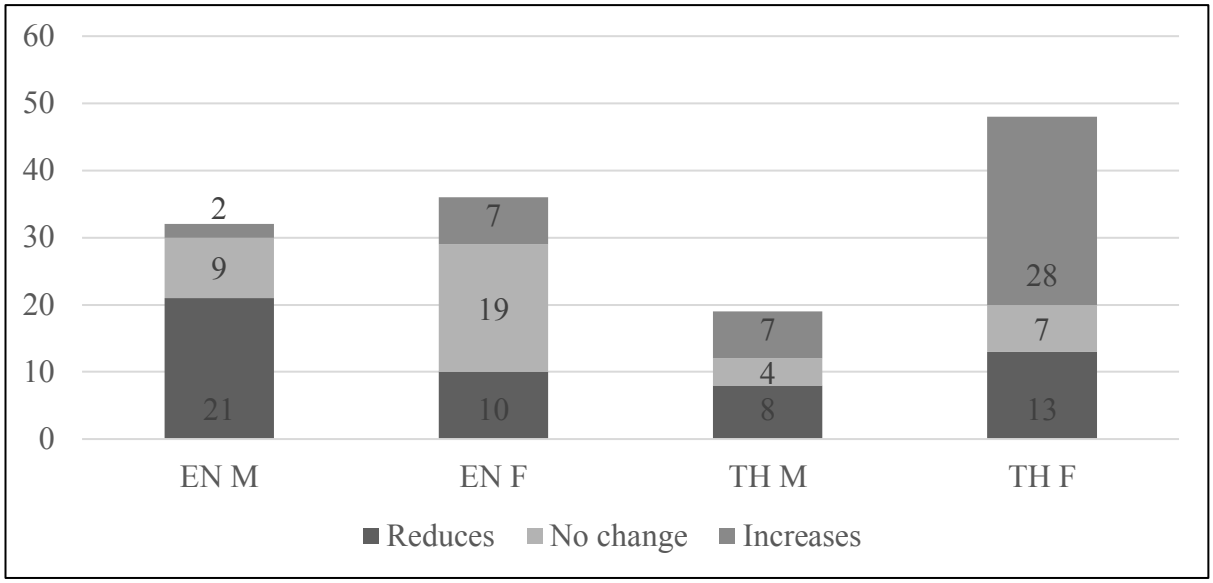
**Figure 8: Survey question eight by respondent gender**




Worthy of note was the likely impact Thai-language female respondents had on data distribution in this question. Among the four respondent groups of English and Thai males and females, only English males followed the overall trends for both their gender and language. Thai female responses reflected the data trend among Thai respondents, but not among female respondents together. Thai and English females strongly disagreed on the issue, with just under 20 percent of English females thinking trafficking threats would increase under legal prostitution versus over 58 percent of Thai females. Moreover, Thai females were more divided on the issue, with the larger two groups reporting at the poles and only 14 percent in the middle compared to 52 percent of English females who responded, "no change." Thai males and females showed similar aversion to the "no change" category. Like Thai females, the most frequent response among Thai males was "increase," but nearly as many responded "decrease." The most decisive group – and the group whose responses were most unlike any other

group – was English males, of whom just over 6 percent responded "increase" as compared to over 65 percent for "decrease." Figure nine shows distribution of responses separated into language and sex groups.

**Figure 9: Survey question eight response frequency by gender and language**




No other significant associations between question eight and participant groupings were discovered.

Question nine asked participants to rank four reasons why people are trafficked, from 1 to 4 where 1 was the most common reason and 4 was the least common reason. Almost one-third of Thai language respondents did not complete this question. The remaining data showed similar attitudes between Thai and English surveys. Both groups believed the most common reason for trafficking was prostitution, followed by labor, household servanthood, and organ harvesting. Table 3 contains the distribution of data where cells are highlighted with darker color to indicate higher numbers of responses.

**Table 3: Survey question nine regarding ranking most common reasons for trafficking.**

| | | 1st | 2nd | 3rd | 4th |
|---|---|---|---|---|---|
| Labor | ENG | 10 | 34 | 15 | 9 |
| | TH | 15 | 20 | 6 | 9 |
| Prostitution | ENG | 46 | 12 | 9 | 1 |
| | TH | 29 | 10 | 3 | 5 |
| Household servant | ENG | 7 | 13 | 33 | 15 |
| | TH | 4 | 7 | 24 | 10 |
| Organ harvesting | ENG | 5 | 9 | 11 | 43 |
| | TH | 6 | 11 | 16 | 19 |

## VI. DISCUSSION

Literature suggests as many as 40 million people are trapped in slavery, indicating they have been victims of human traffickers whose aggregate profits are greater than the entire gross domestic product of more than 100 countries.[26] Despite these alarmingly high numbers, attitudes regarding the direct threat were fairly cool among participants. On question six, hypothesis 1 was rejected in part as a battery of statistical tests failed to find any reliable difference between groups on the question of how great a threat human trafficking posed. Thai and English respondents ranked forms of trafficking identically on question nine, again rejecting hypothesis 1 in part. Hypothesis 1 was confirmed in part by results on questions seven and eight. Data also showed some difference of opinion among participants on the basis of gender and education, but the most significant and robust differences were found between languages.

Language and culture are inseparable[27]; one influences and is influenced by the other. Thai language respondents, as representatives of a more collectivist culture[28], were significantly more likely than their English counterparts to believe trafficking is affected by family and community behavior or morals. English respondents may have showed preference for individualism when they perceived higher association of religion with trafficking. A study has found non-religious

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[26] Data was retrieved using the tool at World Bank, "GDP Ranking" (2018), online: <https://datacatalog.worldbank.org/dataset/gdp-ranking>

[27] Wenying Jiang, "The Relationship between Culture and Language", 54:4 ELT J 328–334, online: < http://www.linguisticsnetwork.com/wp-content/uploads/The-relationship-between-culture-and-language.pdf>; Tengku Mahadi & Sepideh Jafari, "Language and Culture", 2:17 Int J of Hum & Soc Sci 230–235, online: <https://www.ijhssnet.com/journals/Vol_2_No_17_September_2012/24.pdf>

[28] Hofstede, *supra* note 24.

people rate lower on the collectivism scale compared to religious people.[29] The largest differences between English and Thai respondents were regarding statelessness and war and violent conflict; a complex mix of sociocultural, socioeconomic, educational, institutional, and linguistic factors are likely to explain these findings.

Results from survey question eight regarding legalization of prostitution confirmed hypothesis 2 and illustrated how two distinct cultures perceive the same issue very differently. Thai language respondents tended to believe human trafficking would increase with legal prostitution while English respondents believed the opposite. Additionally, male and female opinions opposed one another. Results reflected classic dichotomies of East and West, male and female.

On the question of "why" groups held different opinions, there are varied possibilities. To some, it may seem intuitive to consider participants' responses as having been affected by their own political perspectives, and that they responded based on their feelings about the morality of prostitution. The Western world, and Europe in particular, tends to be more liberal on questions of morality than the Eastern world.[30] With this view, we could assume Easterners felt both human trafficking and prostitution were immoral acts, so legalization of a malum in se act was both inappropriate and unlikely to lead to a reduction in another such act. Westerners' political beliefs, in contrast, would tend to lead them to conclude that while human trafficking is malum in se, the act of prostitution itself is but malum in jure, and by relieving the legal pressure on the relatively benign sexual services industry, human trafficking could be reduced via government oversight and regulation. The logic is that the practice of buying and selling sex is historically prevalent, and that supply and demand are sustainable in perpetuity, so the best course is to integrate participants into formal economies where customers and workers can enjoy rights, contribute taxes, and receive protections against violence, exploitation, or disease. The Dutch model, for example, legalizes licensed sex work and criminalizes unlicensed sex work; licenses are not granted to trafficking victims, so traffickers are pushed out of the market due to availability of licensed, legal prostitutes.[31] In this legalization scenario, governments gain revenues through taxation of sex markets whose participants are no longer marginalized, stigmatized, or left vulnerable to abuse.[32]

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[29] Taylor Stark, "Does God Matter? Religion in Individualistic and Collectivistic Personalities", (Hillsboro, OR, USA: Graduate School of Professional Psychology, Pacific University, 2009)

[30] Pew Research Center, "Global Views on Morality" (2014), online: <http://www.pewglobal.org/2014/04/15/global-morality/table/homosexuality/>

[31] Samuel Lee & Petra Persson, "Human Trafficking and Regulating Prostitution" (2018), online: <https://web.stanford.edu/~perssonp/Prostitution.pdf>

[32] Erin Albright & Kate D'Adamo, "Decreasing Human Trafficking through Sex Work Decriminalization" (Jan 2017) AMA J of Eth, online: <https://journalofethics.ama-assn.org/article/decreasing-human-trafficking-through-sex-work-decriminalization/2017-01>

Theoretically, the legalization argument seems to stand up, but studies suggest it is more fantasy than reality. A study analyzed data from 150 countries and found higher trafficking inflows in countries with legal prostitution.[33] Researchers have argued that no current systems effectively prevent and suppress trafficking but criminalizing the purchase of sex has greater potential to eradicate trafficking because supply decreases alongside demand.[34] Thai survey responses may have reflected the conservative Eastern political view that prostitution is illegal because it is inherently immoral and harmful to society, and a change in its legal status would only increase associated immoral and harmful practices such as human trafficking; in this case, that conservative ideal is supported by empirical evidence. Somewhat counterintuitively, English respondents associated prostitution with trafficking more than Thais in question eight and believed legalizing prostitution would decrease trafficking in question eight; this combination of answers is either logically inconsistent, or it suggests English respondents believed the law itself was somehow a cause of trafficking. Proponents of the Dutch model would likely agree that criminalization of prostitution creates more opportunity for traffickers and thereby raises the level of association between trafficking and prostitution in a market where all suppliers are criminals.

Survey results also showed significant differences in opinions between males and females. Male responses tended to reflect English response patterns while the female responses more resembled Thai language responses. Coincidentally, Thai culture exhibits much lower masculinity than Western countries like the United States, United Kingdom, Ireland, France, Germany, and Canada.[35] Thai culture is also distinctly more feminine than any other country in Asia, according to Hofstede's cultural dimensions. Like language, gender influences beliefs. The survey data reflected another study's discovery that men and liberals support prostitution more than women and conservatives[36], implying that, on the question of prostitution, females and feminists break from liberal ranks. Therefore, there was more influencing survey data than mere political affiliation.

Feminist philosophers have at numerous occasions commented on how prostitution harms women; how it reinforces pernicious stereotypes of women as the sexual servants of men; how it exploits social vulnerabilities and unreasonably threatens the health and wellbeing of women.[37] That is not to say there are not

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[33] Seo-Young Cho, Axel Dreher, & Eric Neumayer, "Does Legalized Prostitution Increase Human Trafficking?" (2013) 41 J World Dev 67–82, online: <https://www.sciencedirect.com/science/article/pii/S0305750X12001453?via%3Dihub>

[34] Lee & Persson, *supra* note 31.

[35] Hofstede, *supra* note 24.

[36] Niklas Jakobsson & Andreas Kotsadam, "Gender Equity and Prostitution: An Investigation of Attitudes in Norway and Sweden" (2011) 17:1 J Fem Econ 31–58, online: <https://www.tandfonline.com/doi/full/10.1080/13545701.2010.541863>

[37] Laurie Shrage, "Feminist Perspectives on Sex Markets" (2016) Stanford Encyclopedia of Philosophy, online: <https://plato.stanford.edu/entries/feminist-sex-markets/#Pros>

feminists who believe in legalized and regulated prostitution, but it is a myth that more than a minority of radical feminists support legalization as a means toward greater gender equity.[38] Data from the survey reflected a relative ignorance of feminist philosophy on the part of English males, and a possible reluctance among English females to align with conservative politics, which usually threaten feminist values. English-speaking females, most of whom perceived the legal status of prostitution as having no impact on trafficking, may have also gained exposure to literature regarding the ineffectiveness of any current reduction strategy, which left them feeling ambivalent about effects of law on trafficking.

While cultural perceptions may have significant bearing on how individuals responded to survey questions, there are probably other, more prominent factors influencing governments. Countries around the world have nearly universally adopted anti-trafficking treaties and drafted legislation to criminalize trafficking and exploitation, but literature showed broad international disparities in enforcement, prosecution, and conviction. By the letter of the law, human trafficking is a criminal act virtually everywhere on earth, but the economics of enforcement leave many laws without significant effect. Victims of human trafficking tend to come from impoverished communities, and unfortunately, those communities simply do not have the capital and manpower to prevent and suppress the trade.

Supporters of legalization of prostitution probably recognize that sex trafficking is the most common form, and that if their theory were correct, a change in laws could result in a reduction in aggregate levels of human trafficking by up to half or more.[39] Nevertheless, it remains unlikely that more than a handful of countries would ever seriously consider legalizing prostitution as moral, ethical, and religious traditions adamantly oppose the practice. Furthermore, robust empirical data has shown trafficking and prostitution are positively correlated.[40] For more reasons than mere culture, feminism, political ideology, or even economics, prostitution is likely to remain a crime in the vast majority of the world.

Aside from the question of prostitution, participants reported perceptions that numerous other factors relate to trafficking, and unlike the issue of prostitution, the other associated factors cannot be nullified by promulgation, amendment, or repeal of law. Factors such as poverty, child abuse and neglect, lack of access to quality education, statelessness, war, and violent conflict have limited personal freedoms and self-actualization of individuals since time immemorial. Progress has been made on alleviating the strain of these macroenvironmental variables, but there is no indication that such factors shall ever cease to exist.

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[38] Lara Gerassi, "A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work" (2016) 42:4 J Sociol Soc Welf 79–100, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4730391/>

[39] UNODC, *supra* note 1.

[40] Cho, Dreher, & Neumayer, *supra* note 33.

Regarding research question three on what stakeholders can do to reduce human trafficking, survey respondents made suggestions in question 10 that reflected literature sources. Question ten responses addressed four main ways to combat trafficking. First, governments and NGOs should utilize communication and awareness campaigns to spread the word about what human trafficking is, its related factors, potential at-risk groups, and how to contact law enforcement if individuals see something suspicious. Second, individuals need to interact with police and government agencies to exchange information. "If you see something, say something," one respondent remarked. Third, governments need to have harsh penalties for traffickers, actively investigate cases, enforce the law, prosecute and sentence offenders, and protect victims. Fourth, people need to work toward eliminating the underlying causes of trafficking such as poverty, lack of education, and other factors mentioned in survey question seven. The first three types of recommendations are actionable – people can communicate and interact with police or government agencies that enforce a strict and severe law – but eradicating causal factors is a feat that no mass of people nor ambition can achieve within current social, political, and economic systems.

## VII. CONCLUSION

A bilingual survey was administered to collect opinion data regarding human trafficking, associated factors, and potential remedies to the scourge of the modern-day slave trade. Results showed Thai and English language respondents felt about the same on the overall threat of human trafficking in their communities, and they perceived that threat level as relatively low. Different groups of respondents felt differently about what factors are associated with human trafficking. Thai respondents appeared to support a collectivist worldview as compared to English respondents who tended to support more individualistic values.

Both male/female and English/Thai groups disagreed on the question of whether legalized prostitution would produce a positive, negative, or null effect on human trafficking. Male responses trended away from mainstream feminist ideals which generally oppose prostitution. Thai responses, and especially those of Thai females, tended to reflect feminist philosophy and empirical findings which indicate human trafficking is likely to increase under legal prostitution. English female responses were mainly ambivalent on the legalization question, perhaps due to knowledge of the ineffectiveness of both legalization and criminalization around the world. The legalization question is an impressive finding in the study as it exposed flawed, inconsistent logic, or erroneous thinking among English-speaking males who believed prostitution is associated with human trafficking and that legalization of prostitution would result in decreased human trafficking. In other words, English-speaking males believed that there presently exists a positive

correlation between human trafficking and prostitution, but if the law were changed, that correlation would turn negative.

Language was a stronger predictor of opinions regarding human trafficking than sex, age, education, or income. Results supported the theory that language is a corollary of culture, or vice versa, such that a change in either implies a change in the other. Findings did not produce any panacea; rather, this study explored, discovered, and communicated about concomitant matters relevant to the pursuit of eradication of human trafficking. In its 2009 report on trafficking, UNODC[41] commented on the need for improved legislation and enforcement, but more importantly, for dialog and communication. Indeed, the process of change requires engagement with the public via awareness campaigns, and a destigmatizing of discussion of human trafficking, prostitution, and related harms.

Human trafficking has existed throughout history, and thus if eradication is our ultimate destination, we are still in the first stages. Government agencies should certainly continue strategizing new, comprehensive and holistic approaches to enforcement and adjudication; yet perhaps the most important action required is extensive communication on the issue. Through continued research and reporting, by working together within and between communities, and by cooperating with and between governments, each individual can add momentum to larger-order transformations of their culture and society. If a genuine solution shall emerge, it will undoubtedly materialize as a consequence of overwhelming concern, of robust discussion, and of exhaustive study of this unwelcome plague.

## BIBLIOGRAPHY

Albright, Erin & D'Adamo, Kate, "Decreasing Human Trafficking through Sex Work Decriminalization" (Jan 2017) AMA J of Eth, online: <https://journalofethics.ama-assn.org/article/decreasing-human-trafficking-through-sex-work-decriminalization/2017-01>

Bullard, G. (2016). *The world's newest major religion: No religion*, online: <https://news.nationalgeographic.com/2016/04/160422-atheism-agnostic-secular-nones-rising-religion/>

Cho, Seo-Young, Dreher, Alex, & Neumayer, Eric, "Does Legalized Prostitution Increase Human Trafficking?" (2013) 41 J World Dev 67–82, online: <https://www.sciencedirect.com/science/article/pii/S0305750X12001453?via%3Dihub>

[41] UNODC, "Global Report on Trafficking in Persons" (Vienna, Austria: UNODC, 2009), online: <http://www.unodc.org/documents/Global_Report_on_TIP.pdf>

Hofstede Insights, "Country Comparison" (2019), online: <https://www.hofstede-insights.com/country-comparison/>

ILO, "Profits and Poverty: The Economics of Forced Labor", (Geneva, Switzerland: International Labor Organization, 2014), online: <https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_243391.pdf>

ILO, "Global Estimates of Modern Slavery: Forced Labor and Forced Marriage" (Geneva, Switzerland: International Labor Office, 2017), online: <https://www.ilo.org/global/publications/books/WCMS_575479/lang–en/index.htm>

Jakobsson, Niklas & Kotsadam, Andreas, "Gender Equity and Prostitution: An Investigation of Attitudes in Norway and Sweden" (2011) 17:1 J Fem Econ 31—58, online: <https://www.tandfonline.com/doi/full/10.1080/13545701.2010.541863>

Jiang, Wenying, "The Relationship between Culture and Language", 54:4 ELT J 328—334, online: <http://www.linguisticsnetwork.com/wp-content/uploads/The-relationship-between-culture-and-language.pdf>

Kirchner, Stephan & Frese, Vanessa, "Slavery under the European Convention on Human Rights and the Jus Cogens Prohibition of Human Trafficking" (2015) 27:1 Denning L J 130—145, online: <http://www.ubplj.org/index.php/dlj/article/view/1105/1018>

Krejcie, Robert & Morgan, Daryle, "Determining Sample Size for Research Activities" (1970) 30 Ed & Psych Meas 607—610, online: <https://home.kku.ac.th/sompong/guest_speaker/KrejcieandMorgan_article.p>

Lara Gerassi, "A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work" (2016) 42:4 J Sociol Soc Welf 79—100, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4730391/>

League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 1926, 60 LNTS 253, art 4, online: <https://www.refworld.org/docid/3ae6b36fb.html>

Lee, Samuel & Persson, Petra, "Human Trafficking and Regulating Prostitution" (2018), online: <https://web.stanford.edu/~perssonp/Prostitution.pdf>

Lund Research, "One-way ANOVA" (2018), online: <https://statistics.laerd.com/statistical-guides/one-way-anova-statistical-guide-3.php>

Mace, Stephanie, "Child trafficking: A case study of the perceptions of child welfare professionals in Colorado", (Fort Collins, CO, USA: Colorado State University School of Education, 2013), online: <https://mountainscholar.org/bitstream/handle/10217/78834/Mace_colostate_0053A_11615.pdf?sequence=1&isAllowed=y>

Mahadi, Tengku & Jafari, Sepideh, "Language and Culture", 2:17 Int J of Hum & Soc Sci 230–235, online: <https://www.ijhssnet.com/journals/Vol_2_No_17_September_2012/24.pdf>

National Business Research Institute, "Sample Size Calculator" (2018), online: <https://www.nbrii.com/our-process/sample-size-calculator/>

Perez Solla, Maria, "Slavery and Human Trafficking: International Law and the Role of the World Bank", SP Discussion Paper 0904, 2009, online: <https://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0904.pdf>

Pew Research Center, "Global Views on Morality" (2014), online: <http://www.pewglobal.org/2014/04/15/global-morality/table/homosexuality/>

Robinson, Jill, "Public perceptions of human trafficking in Moldova" (2011) 20:3 Psych Inter., 269–279, online: <https://ac.els-cdn.com/S1132055911700527/1-s2.0-S1132055911700527-main.pdf?_tid=c865aa80-d0c1-4946-a03b-3a21fcdf108e&acdnat=1549021744_b0eda250a7718b6c44b2c4aed315a535>

Robson, David, "How East and West Think in Profoundly Different Ways" *BBC* (19 January 2017), online: The BBC <http://www.bbc.com/future/story/20170118-how-east-and-west-think-in-profoundly-different-ways>

Sharapov, Kiril, "Understanding public knowledge and attitudes towards trafficking in human beings", Research Paper: Part 1, (Budapest, Hungary: Center for Policy Studies, Central European University, 2014), online: <http://lastradainternational.org/lsidocs/3119-Public-knowledge-and-attitudes-towards-thb-2014.pdf>

Shrage, Laurie, "Feminist Perspectives on Sex Markets" (2016) Stanford Encyclopedia of Philosophy, online: <https://plato.stanford.edu/entries/feminist-sex-markets/#Pros>

Stark, Taylor, "Does God Matter? Religion in Individualistic and Collectivistic Personalities", (Hillsboro, OR, USA: Graduate School of Professional Psychology, Pacific University, 2009), online:

<https://commons.pacificu.edu/cgi/viewcontent.cgi?referer=https://adguard.com/referrer.html&httpsredir=1&article=1201&context=spp>

UN General Assembly, *United Nations Convention against Transnational Organized Crime,* 2000, A/RES/55/25, online: <https://www.refworld.org/docid/3b00f55b0.html>

UN General Assembly, *Universal Declaration of Human Rights*, 1948, 217 A(III), online: <https://www.refworld.org/docid/3ae6b3712c.html>

UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000, art 3(a), online: <https://www.refworld.org/docid/4720706c0.html>

United States Department of State, *Trafficking in Persons Report 2018*, (Washington DC: Department of State, 2018) online: <https://www.state.gov/documents/organization/282798.pdf>

UNODC, "Global Report on Trafficking in Persons" (Vienna, Austria: UNODC, 2009), online: <http://www.unodc.org/documents/Global_Report_on_TIP.pdf>

UNODC, "Human Trafficking: Organized Crime and the Multibillion Dollar Sale of People", 2012, online: <http://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking_-organized-crime-and-the-multibillion-dollar-sale-of-people.html>

UNODC (United Nations Office on Drugs and Crime), *Global Report on Trafficking in Persons*, (Vienna: UNODC, 2016) online: UNODC <https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf>

Withers, Melissa, "Pimp Culture Glorification and Sex Trafficking", online (2017) Psych Today <https://www.psychologytoday.com/us/blog/modern-day-slavery/201704/pimp-culture-glorification-and-sex-trafficking>

World Bank, "World Bank Country and Lending Groups" (2018), online: <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>

World Bank, "GDP Ranking" (2018), online: <https://datacatalog.worldbank.org/dataset/gdp-ranking>

## APPENDIX

1. Where are you from? (city, state, country)
   คุณมาจากไหน? (อำเภอ, จังหวัด)
2. Please indicate your sex/gender.
   เพศ
   Male ชาย | Female หญิง | Other อื่นๆ
3. How old are you?
   อายุ
   Under 20 | 20-29 | 30-39 | 40-49 | 50-59 | 60+
4. What is the highest level of education you have attained?
   ระดับการศึกษา
   high school ต่ำกว่ามัธยมต้น (ไม่จบการศึกษา) | some college, but no degree มัธยมปลาย | bachelor's degree ปริญญาตรี | graduate degree ศึกษาระดับมหาวิทยาลัย ปริญญาโท หรือ ปริญญาเอก
5. What is your annual household income?
   รายได้ต่อเดือน
   less than $12,000 | $12,000-$20,000 | $20,000-$30,000 | $30,000-$45,000 | $45,000-$60,000 | $60,000-$80,000 | $80,000+
   รายได้มากกว่า
   ต่ำกว่า 6,000 บาท | 6,000-9,000 | 9,001-12,000 | 12,001-15,000 | 15,001-20,000 | 20,001-30,000 | 30,001-50,000 | 50,000+
6. Use the slider to indicate how much of a threat human trafficking poses to your community. 0 is the lowest threat level, 100 is the highest. If you're not sure, just guess.
   ปัญหาการค้ามนุษย์ได้คุกคามชุมชนของคุณมากน้อยแค่ไหน? (กดปุ่มสไลด์ตามระดับความคิดเห็น, 0 ระดับต่ำสุด, 100ระดับสูงสุด) ถ้าไม่มั่นใจระดับไหน คาดเดา
7. Please indicate the level of association with human trafficking you think each of the following factors has. If you think one of the factors creates a higher risk of an individual becoming victim to human trafficking, select a higher number. If you think a factor poses a lower level threat, select a lower number. If you're not sure, just guess.
   กรุณาช่วยแสดงความคิดเห็น อะไรเป็นปัจจัยทำให้เกิดการค้ามนุษย์ (ถ้าคุณคิดว่าปัจจัยไหน ทำให้ตกเป็นเหยื่อของการค้ามนุษย์ เลือกระดับสูงกว่า, ถ้าคุณคิดว่าปัจจัยไหน ทำให้ตกเป็นเหยื่อน้อยกว่า เลือกระดับต่ำกว่า, ถ้าไม่แน่ใจคาดเดา)
   1 = no significant relationship | 2 = low-level relationship
   3 = moderate relationship | 4 = somewhat strong relationship
   5 = very strong relationship

ไม่มีความสัมพันธ์ (1) มีความสัมพันธ์น้อย (2)
มีความสัมพันธ์ปานกลาง (3) มีความสัมพันธ์สูง (4)
มีความสัมพันธ์สูงมาก (5)

a. statelessness (having no citizenship)
   ผู้ไร้สัญชาติ
b. poverty
   ความยากจน
c. child abuse
   การล่วงละเมิดสิทธิเด็ก
d. lack of education
   ไม่มีการศึกษา
e. religion
   ศาสนา
f. community morals
   มีศีลธรรมในชุมชนต่ำ
g. bad parenting
   การอบรมเลี้ยงดูไม่ดี
h. prostitution
   การค้าประเวณี
i. drugs and alcohol
   ยาเสพติด และ แอลกอฮอล์
j. war and violent conflict
   ปัญหาสงคราม

8. What effect, if any, does legalized prostitution have on human trafficking? If you're sure, just guess.
   ถ้าการค้าประเวณีถูกกฎหมาย จะเกิดการเปลี่ยนแปลงอะไรต่อการค้ามนุษย์ (ถ้าไม่แน่ใจ คาดเดา)
   a. Legalizing prostitution reduces the threat of human trafficking (less human trafficking with legal prostitution)
      ถ้าการค้าประเวณีถูกกฎหมาย ปัญหาการค้ามนุษย์จะน้อยลง
   b. The threat of human trafficking is the same whether prostitution is legal or illegal (no effect)
      ไม่เกิดการเปลี่ยนแปลง
   c. Human trafficking is likely to increase if prostitution is legal (greater threat with legal prostitution)
      ถ้าการค้าประเวณีถูกกฎหมาย ปัญหาการค้ามนุษย์จะสูงกว่า
9. Why are people around the world trafficked? Rank the following. #1 is the most common reason, #2 is the second most common reason, #3 is the third most common reason, #4 is the least common among those listed.
   อะไรที่เป็นสาเหตุทำให้เกิดการค้ามนุษย์?
   a. labor แรงงาน (โรงงาน, การประมง, เกษตรกรรม, อื่นๆ)

b. prostitution โสเภณี
c. household servant คนรับใช้ในบ้าน (กักขัง)
d. organ harvesting การค้าอวัยวะมนุษย์ (ตับ, ไต, อื่นๆ)

10. How can people prevent human trafficking? (optional, please provide comment)
เราจะสามารถป้องกันไม่ให้เกิดการค้ามนุษย์ได้อย่างไร? (เขียนแสดงความคิดเห็น)
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.....
.....
.....

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ISSN Online / Printed : 2599-2147

# JSEAHR

## JOURNAL OF SOUTHEAST ASIAN HUMAN RIGHTS

The Journal of Southeast Asian Human Rights (JSEAHR) explores human rights realities in South East Asian region from various perspectives. The JSEAHR is a peer-reviewed journal co-organized by the Indonesian Consortium for Human Rights Lecturers (SEPA-HAM Indonesia) and the Centre for Human Rights, Multiculturalism, and Migration (CHRM2) University of Jember. The Journal welcomes empirical, multi-disciplinary, and doctrinal approaches to explore historical and recent situation of human rights in South East Asia. The combination of editorial board members from South East Asia, Europe, and Japan creates a unique forum for South East Asian and other scholars to exchange ideas of interest about human rights issues in the region.

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