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Migration in Southeast Asia

IMISCOE Regional Reader

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Foreword

"Migration should be a choice and not a necessity."

Those seminal words inspire—from the international Declaration which had preceded the Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees adopted not-so-long-ago.

That premise permeates this book which acts as an optical lens for various and varied academic discourses, testing and contesting the variegated experiences of people's movements in the Southeast Asian region. It projects progression—at times progressive, at times regressive—through the prism of boundaries, status validation, and documentation. It is imbued with a sense of the past and is replete with the immediacy of the present. There is a key awakening through the advent of COVID-19 which is concurrently invasive and pervasive. Interfacing with the fate of individuals and groups in the region, the pandemic proffers also a gargantuan challenge: is it to be a calamity or an opportunity, at least through lessons learned of what to do and what not to do?

Rightly, the discourses in this book have multi-dimensional implications traversing history, political-economy, sociology, and normativity. How to expose and address the etiology of movements, especially if they are coerced or forced through push-pull factors? What are the ontology of choices and the deontology of rights and duties which could be invoked in this region not only as imagined aspirations but also as political expectations? How to do so when confronted with the vagaries of the Nation-State and the variability of the State-of-the Nation?

One thing is for sure. Whether the outlook is steeped in historicism, actualism, modernism, and or futurism, this region will not be sedentary but ambulatory—both intra-regional and inter-regional. As one of the chapters of this book poses, as a bridge between paradigms and paradoxes—are we to opt for "universalism" which tries to care for "all" OR "selectivism" which cares for the "deserving"? Or is there a hybridised version of what Southeast Asia should seek to be, especially if it is not too State-centric?

There is then the preferred path of migration, with the testament of "the good, the bad and the wobbly," perhaps even "criminality" such as violence and violations

along the way which should be shunned and never be repeated. Ultimately, what has to be remembered and to resonate is the call for humanism which tests the geo-socio-politico credibility of this region to its seams, the better part of which embodies a tapestry of hospitality in great lands of diversity.

In sum, perhaps the region should be very humble, deservingly offering to the world a simple but not simplistic "caveat," infusing the contention and tension of regional fluidity with a sense of humanity.

"To move in safety and with dignity." Please.

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Preface

Southeast Asia has seen major socio-economic and political transition in recent decades and is historically known for its trade routes which come with people movements. Whilst the majority of descendants of indentured labourers from India and China (brought during the colonial times) have integrated within the local societies and became part of the demographic landscape in Southeast Asia, recent population movements have been seen as a 'threat' by States in the region. One result is that States have become more rigid in controlling borders based on the concept of 'migration and border management'.

Economic development successes enjoyed by a number of countries in the region, as well as opportunities for employment, relative security and safety, attracts migrants both intra-and cross regional. The last 20 years have seen unprecedent movements of people through Southeast Asia as millions have migrated for better livelihoods and a growing number have been fleeing persecution. Whilst such patterns of migration are nothing new to the region, what does seem to be changing—apart from the increasing scale of the phenomenon—is that States are increasing their efforts to block or criminalise undocumented or irregular migration, reducing the opportunities for people to legally move around. However, more restrictive migration policies in the region are not stemming the flow of migrants but instead are forcing individuals to cross borders illegally, increasing their vulnerability to a whole range of human rights abuses. Restrictive migration policies applied by some States in the region not only affects those crossing the borders but is also impacting the inclusion of those living and moving within national borders.

Traditionally, research on migration in the region has tended to focus on the contexts of migration that are dangerous, abusive and exploitative. Irregular migrants and trafficked victims have been well documented, as is how they are vulnerable to mistreatment and discrimination (as they are rarely protected by national laws). However, studies pertaining stateless individuals living in States that do not recognise them as citizens as well as refugees and asylum seekers seem to be lacking. Whilst their individual situations may be different, they are often interlinked and, in some cases, indistinguishable, as in Southeast Asia, when individuals cannot move

and live freely, they can move between categories of vulnerability and victimhood. The current situation of migrant workers facing a high risk from the COVID 19 pandemic is evidence of their vulnerabilities.

The academic literature on these migrant groups in Southeast Asia has rightly focused on the challenges of getting States to recognise the human rights of these non-citizens. As governments in the region increasingly take a more conservative and hard-line approach, the relevant regional mechanisms under ASEAN favour the 'ASEAN Way' of non-interference and State sovereignty, leaving irregular foreign migrants labelled as either 'illegals' or victims of exploitation or conflict. In addition, what seems to be lacking from migration study in the region is how to explain not only agency and resilience but also how political concepts such as borders, nation-state, citizenship and political community are intertwined with migration not only from regional perspective but also nationally. Concepts of borders, visible or invisible, perpetuate protection, provision and participation of migrants in the region. This book is an attempt to fill such gaps.

Conceptual Framework and New Paradigm

Through three main sections, this book attempts to apply a few distinctive concepts and paradigms: (i) Citizenship and the Exclusive State; (ii) Borders, Migration and Access to Membership Goods; and (iii) Forced Migration in Southeast Asia. "Borders define geographical boundaries of political entities or legal jurisdictions, such as governments, states or sub-national administrative divisions." A nation-state, therefore, "defines its geographical limits by territory and its demographic limits by nationality" (Wetherall, 2006, p. 11). A national of a given state is considered as member of that particular political community. Those who are not nationals are "aliens" or "foreigners" who are not usually entitled to the same membership goods or the same treatment. Division between nationals and non-nationals is, often times, so clear that it creates the sense of "us" and "them" and it perpetuates the sense of an "exclusive state" through which there are borders that no one can pass without control and restrictions.

Yet borders are important as Coleman and Harding (1995, p. 35) state that "political borders, even if arbitrarily or conventionally set, have moral significance because they define the boundaries within which principles of distributive justice are to apply." However, political (and economic) borders are arbitrary and imperfect and in terms of national citizenship are no longer feasible to regulate membership in light of today's global economy, communication technology, internationalisation and trans-nationalisation of networks and cultures, etc. (Benhabib, 2004). Borders also have been created within cultural and social spheres and within our own communities that sees individuals (such as the Rohingyas in Myanmar or the hill-tribes and ethnic minorities in Thailand) similarly being perceived as "not part of us" and therefore also "foreign" suggesting more a "self-constructed psychological border" that we generate within ourselves.

Whilst migrants face challenges due to borders and the sense of 'exclusive citizenship', some are able to navigate and negotiate their agency, therefore building their resiliency. The different categories of migrants need to get on with their lives, eking out livelihoods, navigating (or avoiding) authorities for fear of deportation or discrimination whilst providing basic needs and protection for themselves and their families. As such, contemporary scholarly critiques of migrants' experiences are turning their attention to the recognition of migrants' agency and their active participation in the construction and construal of their own lives and the communities within which they live.

This book therefore aims to examine the topic of migration from a range of concepts and new perspectives including borders (visible or invisible), protection, provision, participation and resilience of migrants, in the region. The different chapters critically analyse how political concepts such as borders, nation-state, citizenship and political community are intertwined with migration in modern day Southeast Asia.

Overview of the Book

The book starts by reviewing the updated literature available on different types of migration in Southeast Asia, by providing an academic critique of the complex and creative negotiations that migrants face in their daily lives. In the introductory Chap. 1, Mark P. Capaldi documents how the proportion of people's movement within Southeast Asia continues with the causes of migration being varied due to economic inequalities, environmental degradation, violent conflicts and other forms of human rights violations. Forced, irregular and mixed migratory flows are all key trends in Southeast Asia. Many of the richer countries in the region (where 96% of the region's migrants are found) depend on human mobility to fill low-wage jobs in agriculture, tourism, construction, and domestic help, and their plight has been thrust into the spotlight by the COVID-19 pandemic. The author explores the dynamics of these mixed migration flows by taking a theoretical approach to analysing migration in the region.

The remaining chapters are all grouped under three main sections. The first section has a number of chapters related to 'Citizenship and the Exclusive State'. Building on the work of what the late political scientist and historian Benedict Anderson called the 'imagined community': "A Nation-state is an imagined political community. It is imagined as both inherently limited and sovereign. Because of this imagination that a nation(-state) is inherently exclusive" (Anderson, 2000, p. 6). This implies that certain categories of people are included within its self-construction based on particular and narrowly defined criteria, and many other are excluded as explored in the chapters in this section. Chapter 2 by Sriprapha Petcharamesree illustrates how this imagination of a nation(−state) is 'inherently exclusive' manifests in Southeast Asian States who imagine their communities as exclusive, with certain categories of people being excluded, especially those who are considered

different and those who cross (inter)national borders. This chapter unpacks the notion of borders, not only from territorial and geographical perspectives, but also the borders created within cultural, social and economic spheres. Through the concept of citizenship, the paper argues conceptually and empirically that borders created through 'imagined community' can easily discriminate against populations who are not considered as members of a political community or not 'one of us'.

The issue of citizenship and how it can prevent social and political integration of so many people is explored in further chapters. Starting with the consequences of the high rates of low birth registration found in the region. Sriprapha Petcharamesree demonstrates in Chap. 3 that although all member states of ASEAN recognise the right to legal identity and birth registration, millions of people remain unregistered and are thus not able access their fundamental rights, including nationality. She assesses why States in the region, which are supposed to be inclusive, still exclude certain groups from obtaining legal identity, and therefore sentencing them to 'civil death'. This legal invisibility exacerbates 'irregular migration' in that it deprives people without legal status and legal identity from access to other rights essential for a decent standard of living. Due to the denial of basic human rights, many decide to take the uncertain journey of migration.

In Chap. 4 written by Bongkot Napaumporn, she describes the difficulties faced by Vietnamese refugees who came to Thailand decades ago and are fully integrated into the Thai society, yet are still excluded from the nationality system. Their existence and issues surrounding them, including their belonging, have always been politicised. National security was used as an excuse to legitimise restrictions on the group. Their children, although born and brought up in Thailand, were unable to acquire Thai nationality. Although policies regarding this population have significantly improved since 1992, it took years to resolve the problems which they faced. While many remain in Thailand, some tried to migrate irregularly to seek a better life in other countries such as Japan, where they would end up living in limbo because of their illegal entry and unresolved statelessness status.

Susan Kneebone examines in Chap. 5 a transnational case of female marriage migration to South Korea from Vietnam. She explains the discriminatory consequences of South Korea's laws and policies on nationality which frame such migration as 'a critical project for the nation-state'. Through a socio-legal study, she demonstrates how notions of gender, race, culture and identity shape the internal border for marriage migrants from Vietnam, through laws and policies in South Korea. She argues that responses to female marriage migration from Vietnam have created vulnerabilities, through nationality laws, which are reinforced through instrumental policies on labour migration and commercial regulation of marriage. These laws and policies entrench the unequal position of Vietnamese marriage migrants in the transnational marriage migration 'market' to create 'structural vulnerability' through the power and structures of the State.

As this section is highlighting the need for more 'integrative citizenship', it advocates for a more inclusive approach to citizenship. This is reflected in Chap. 6 prepared by Anderson Villa and Amorisa Wiratri, entitled "Rethinking Local

Citizenship and Integration of Persons of Indonesian Descent in the Southern Philippines". The chapter interrogates the prevalent misconception of host governments that migration disrupts, rather than transforms, their communities. Reflecting upon the works of Takeyuki Tsuda (2006, 2008) in the context of East Asian countries, the chapter attempts to unpack the concept of local citizenship, when local governments in the southern Philippines subtly grant some fundamental socio-political rights and services to Persons of Indonesian Descent (PID) as legitimate members of their local communities. This study argues that the local governments in the southern Philippines have a significant role in performing acts of local citizenship for PID. The study attempts to generate discussions of and alternatives to 'citizenship from below' for migrants and host countries in the region.

The second main section examines 'Borders, Migration and Access to Membership Goods'. Access to health care as a national membership good is discussed in the next two chapters. Chapter 7 prepared by Sharuna Vergis is entitled "Citizenship and Legal Status in Healthcare: Access of Non-citizens in the ASEAN: A Comparative Case Study of Thailand and Malaysia" which appraises the countries' contrasting models of health systems in the way healthcare access of migrant populations is conceptualised. Examining this issue from a comparative foundation and exploring the entitlement of a range of non-citizens to healthcare through the lens of documentation status, citizenship, and moral deservingness, the chapter demonstrates how borders move within national boundaries as neoliberal policies influence the normative frameworks underpinning health systems and the access of non-citizens to healthcare.

Indeed, these groups of migrants have been made even more vulnerable by the global pandemic of Covid-19. Amparita S. Sta. Maria therefore examines, in Chap. 8 ("Labour Migration and Exclusive State amidst the Global Pandemic of COVID-19") the lives and rights of semi-low skilled labour, the challenges posed by the COVID-19 pandemic to countries like Singapore, Malaysia and Thailand as far as the treatment and protection of migrant workers are concerned. It analyses how their policies have been effectively reshaped by the spread of the deadly virus, the underlying and facilitating factors which resulted in recalibrated measures and policy shifts with migrant workers, and how the pandemic has challenged traditional health responses and strategies, which have generally been framed around the protection primarily, if not exclusively, of a State's own citizens.

As migration provides immense opportunity and benefits for host nations, regular migrants should clearly be entitled to a range of membership goods. Proper management of migration requires fair treatment of third-country nationals residing legally in ASEAN Member States. Yet in ASEAN, the majority of migrants are irregular or undocumented, further restricting their ability to access membership goods and putting them in greater danger of risks and harm. These uncertain journeys are also taken voluntarily by children who are searching for a better life. Mark P. Capaldi and Alessia Altamura, in their Chap. 9 on "Accounting for Children's Agency and Resilience in Independent Child Migration in Southeast Asia" looks at independent child migration in the region. Refusing unidimensional

interpretations of what is in fact a complex issue regarding independent child migrants, the authors unveil several conceptual shortcomings in the conflation of child trafficking and independent child migration. In so doing, increasing emphasis has been placed on the notions of children's agency, capacities and "childhood as a social construction". Though only at a nascent state, research has also focused on the often neglected perspective of children's resilience. Through these lenses, adolescent migration for work can often be a constructive aspiration of young people's search for the full realization of their rights.

Not that Chap. 9 is trying to downplay the very real risks of exploitation, abuse and persecution that many migrants in the region face. The third and final section on 'Forced Migration in Southeast Asia' is testament to the millions of forcibly displaced persons in the region. The Rohingya have had a desperate past of persecution and movement spanning two hundred years which whilst illustrating the incredibly long history of refugee flows in the region, also traces their link to what is now modern-day Myanmar. In recent decades, most of the movement of around one million Rohingya from Myanmar has been to Bangladesh although there has been significant movement to other countries in the region, in particular Thailand, Malaysia and Indonesia. As both stateless and as refugees, the Rohingya are among the most marginalised migrant groups in the region. Avyanthi Azis draws attention to this group of stateless persons in Southeast Asia in Chap. 10 "The Refugees Vanish: Rohingya Movement, Emergency's Temporality and Violence of the Indonesian Humanitarian Border". The chapter calls for more sustained attention to Rohingya movement as an ontological activity that has largely been observed in an episodic manner. It focuses on Indonesia's response to Rohingya boat people. It argues that subsumed into the limited temporality of emergency, such a response has led to an emergent humanitarian border, through which refugees are escaping. Drawing on local media reports, the analysis problematises the recurring arrivals/subsequent disappearances of Rohingya refugees from Aceh (2015–2021), and examines the material and ideational configurations of the violent border assemblage as it becomes entrenched in current regulation.

Much of the movement of the Rohingya through the region has been by smuggling and trafficking—often with dire consequences as illustrated by the shocking *Andaman Sea Crisis* when at the start of May 2015, around 32 shallow graves were found on a remote mountain in Thailand at a camp which was used as a 'holding area' for Rohingya and Bangladeshi who were waiting to be smuggled into Malaysia. It was believed that traffickers had been holding boat people for ransom, often starving or torturing them until their relatives paid up. Those whose families were unable to pay were reportedly left to die or sold into forced labour. In Joseph Lelliott and Rebecca Miller's Chap. 11 entitled "The Nexus Between Corruption, Migrant Smuggling, and Human Trafficking in Southeast Asia" explain that the dynamics of strong drivers and demand for migrants in Southeast Asia, combined with often costly and complex channels for regular migration, have led to high levels of irregular migration throughout the region. These dynamics have, in turn, created a substantial market for the services of migrant smugglers, and place many migrants at

risk of human trafficking and other violations of their rights. The chapter sheds light on the ways in which corrupt practices and relationships help smugglers and traffickers subvert immigration controls and prevent investigation and punishment of their illicit activities. It further explores the potential negative impacts of corruption on the protection of smuggled migrants and victims of trafficking. The chapter asserts that stricter migration controls are only likely to increase the markets for smuggling and trafficking and, in turn, amplify corruption risks. Among the three recommendations made, the authors suggest making efforts to increase the scope and accessibility of regular avenues for migration. The regular avenues of migration are only available to those with access to proper documentation.

The way Indonesia deals with the Rohingya is examined by Tri Nuke Pudjiastuti and Steven C.M. Wong Chap. 12 in "The Politics of Forced Migration in Southeast Asia". The chapter analyses forced migration in the region arguing that it has been deeply rooted in the local, national, regional, and global politics of nation states. In Southeast Asia, this remains intensely experiential, and policy actions cannot be understood in abstract or normative terms. Member states differ greatly in economic, social, and political terms, and thus how they perceive their interests. Individually and collectively through ASEAN, they have tended to act defensively with respect to forced migration, but with accommodations and regional responses when called for, as episodes from mainland Southeast Asia and Myanmar, show. The paper argues that for States to be incentivised to raise their levels of protection and welfare, forced migration needs to be framed as a global collective endeavour. It is through the setting of new norms through the international framework and compacts agreed that higher minimum standards will evolve.

Not only does this publication provide an updated overview of migration within Southeast Asia, the innovation of this book is from looking at not only how such concepts as borders, citizenship and exclusion create vulnerabilities, but also examining the interlocking of vulnerabilities, agency and resilience. All chapters are grounded offering empirical perspectives of each issue under study. As editors, we are grateful to all the authors of this book for contributing conceptually, theoretically and programmatically to a deeper understanding of the interlocking principles of protection, provision and participation within the region's migration.

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Contents

Chapter 1
Present-Day Migration in Southeast Asia: Evolution, Flows and Migration Dynamics

Mark P. Capaldi

1.1 Introduction

Although Southeast Asia has a long history of migration—which has been researched and written about extensively—the complex nature of people movement within and from the region has grown significantly in recent years. In 2019 there were an estimated 10.1 million international migrants in the region (UN DESA, 2019), a five-fold rise since the 1990s (ILO, 2020a). Increasingly, Southeast Asian countries are having to deal with compound mixed migration flows of labour migrants crossing national borders (primarily irregular) and forced migration including environmental displacement and asylum and refugee flows. Driven by poverty, economic disparities, persecution and exclusion, the region stands out globally at a time when intra-regional movements in other parts of the world are declining.

Thailand, Malaysia and Singapore remain major destinations with migrants from Cambodia, Indonesia, Lao PDR and Myanmar. The Philippines continues to be one of the world's largest origin countries sending migrants globally and having an economy reliant on remittances. Whilst such movements of people are a symptom of the region's rapid economic growth raising challenging policy dilemmas, the absence of protection mechanisms has never been starker, particularly with the ongoing humanitarian crisis posed by the irregular maritime flows of Rohingya fleeing Myanmar and Bengalis from the Bay of Bengal and the evolving violence in Myanmar following the February 2021 military coup.

However, too simplistic a picture of migration in Southeast Asia perilously masks the complexities and diversity of mobility within the region. Urbanisation, wealth disparities and aging populations could soon create an imbalance between the supply and demand of labour. Continuing humanitarian or environmental crises

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illustrate the urgency for governance, policies and intergovernmental cooperation to address protection, migrant rights and border management. Challenges in managing these disparate migration flows are compounded by escalating vulnerabilities faced by irregular workers, Internally Displaced Persons (IDPs) and stateless populations. For example, in 2017, Southeast Asia reportedly hosted 3.37 million 'persons of concern' (defined by the UNHCR as including asylum seekers, IDPs, refugees and stateless persons). Inexorably linked to this mixed migration is the variation in political and democratic systems found in countries in the region which creates tests bilateral relationships in a region that prides itself in 'non-interference' and the respect of each other's sovereignty.

This chapter is also being written during the COVID-19 pandemic which has closed borders and stopped people movement in all parts of the world. The sudden loss of work is creating serious strains on the livelihoods, health and rights of migrants in the region, many of whom were already vulnerable due to their undocumented legal status. Public attitudes towards migrant workers in several destination countries in Southeast Asia has never been particularly good, but they are now being blamed for bringing in the virus which is exacerbating discrimination and resulting in draconian government responses.

Yet there are also opportunities for policy solutions to better match the region's evolving context. For many of the Southeast Asian countries, migration entails both emigration, immigration and transit migration presenting a significant and integral factor to development in the region. Currently, most agreements and policies within ASEAN deal primarily with movements of skilled labour or in the case of the ASEAN Declaration on Migrant Workers, have limited focus on the rights of migrant workers.

This chapter aims to explore these mixed migration flows within Southeast Asia by reviewing key literature on migration within the region and providing critical insights into the analysis of the available information. As most of the secondary data on migration in Southeast Asia is primarily descriptive in nature, this chapter aims to make a more theoretical contribution to analysing migration in the region. The first section explains how migration has evolved in the region over recent decades by examining the different depictions and mixed migratory flows. Recognising that there are underlying drivers and evolving determinants, the chapter then attempts to theorise what is currently fueling migration and how it significantly contributes to social and economic changes in the region. The section on the impact of the COVID-19 pandemic in Southeast Asia illustrates the health and safety concerns that migrants can face and therefore the importance of effective migration governance. The chapter then analyses the different responses, or lack thereof, of ASEAN to such highly complex situations. It concludes by assessing the usefulness of the current policies and mechanisms as well as the need for a more regional and rights-based approach to migration.

1.2 The Last Two Decades and the Evolution of Migration in the Region

In recent history, migration has played a crucial role in shaping and reacting to the socio-economic context of Southeast Asia. Higher performing economies within the region have long attracted migrants from much poorer countries or those at different stages of their economic development and over the last two decades the number of intraregional migrants has increased by approximately seven million with three million of these going to Thailand (Testaverde et al., 2017). Since 1995, the number of the world's migrants from Southeast Asian countries has increased from 6 to 8% (UN DESA, 2019). The region has also experienced the feminisation of migration. UN DESA (2019) shows that whilst women now account for 46.8% of all intra-ASEAN migrants in 2018, the number of women migrating across borders has significantly grown since 1990 (there were 1,365,512 in 1990 while in 2019 this number rose to 4,772,358). Interestingly, since the 1990s, the number of migrant women registered in Singapore and Thailand has increased whilst for Malaysia and Indonesia it has been decreasing (The ASEAN Secretariat Jakarta, 2017).

In 2019, according to UNESCAP (2020), intraregional migrants made up over 92 per cent of the migrant population of Southeast Asia. Most of the migrants come from Cambodia, Lao PDR and Myanmar and migrate mainly to Thailand. Indonesia, the Philippines, and Vietnam (the region's other lower-middle-income economies) tend to send migrants outside of the region. The majority of the Filipino migrants go to North America or the Middle East whilst for the Vietnamese, North America is the main destination. Malaysia sends migrants both within and outside the region whilst Singapore and Thailand, receiving countries for migrants, send nearly all their migrants outside of the region. Unchanged in the last two decades are the four main migration corridors that exist in the region: the Thailand corridor attracting migrants from the sub-Mekong region countries of Cambodia, Lao PDR and Myanmar; the Singapore corridor leading from Indonesia and Malaysia; a more diverse Malaysian corridor for migration from Indonesia, Myanmar, Singapore, and Vietnam; and the facilitation of Filipino migrants by their government to fill service sector labour gaps within the region, East Asia destinations such as Taiwan and Hong Kong and further afield to North America, Europe and the oil rich countries of the Gulf. Paul (2011) uses the term "stepwise migration," to explain migrant movement on a hierarchical progression across countries as they make their way toward their preferred destination.

Working conditions, workplace benefits and overall treatment of migrants in Southeast Asia has always depended upon whether they travelled through a regular migration channel or if they crossed borders irregularly. In general, regular migrants earn more (albeit not significantly more but at least the minimum wage) and may work less days with a potential range of additional benefits (e.g. paid annual leave, sick leave, public holidays and even maternity leave). Nevertheless, conditions and

work practices in destination workplaces have historically still been highly demanding and the wages low. The term 'the 3D professions' (Dirty, Dangerous and Demeaning) was first coined in Asia in relation to the labour done by migrants (Martin, 1996).

Voluntary migration with regular legal status within the region is primarily to manufacturing jobs which has been the economic powerhouse behind a number of the national economies in Southeast Asia. However, with the higher costs, the complexities of applying and the longer time needed to obtain legal documents versus the similarity in wages paid to regular or irregular migrants, a greater number of migrants (in the Mekong sub-region at least), choose to migrate undocumented. Undocumented migration (often more temporary and low skilled) is a significant feature of Southeast Asia and contributes to the vulnerabilities and dangers that irregular workers and forced migrants face (Testaverde et al., 2017).

Descriptions of migration within the region can be misleading though and the long borders between Thailand and its neighbouring countries betray the darker side of migration. Beyond the traditional economic and non-economic supply and demand factors within Southeast Asia, there is an important distinction between 'choice and no choice migration' and even in choosing the least bad option. Regularized migrant workers mostly migrate by choice. However, for many migrants themselves, determining if their migration resulted from a free choice is open to debate. Generally, migration by choice is considered any regularised migration undertaken by an adult where they have the opportunity to return home at any time without facing punishment or a penalty. Presuming that many migrant workers would prefer to stay in their home towns and near their families than travel for work, it may be questioned if migrant work is voluntary in Southeast Asia if it is due to severe economic hardships in their own country. This is a similar concern raised by de Haas, who is a theorist of the aspirations-capability framework (an analytical tool to understand the multi-dimensional factors that shape outcomes for migrants and their families), who argues that "only if people have a real choice to stay would it be adequate to talk about 'voluntariness' and only those who have aspirations as well as capabilities can be seen as 'voluntarily mobile'. If people could move but do not want to, they are 'voluntarily immobile'…… Whenever people migrate against their intrinsic desire, they can be called 'involuntarily mobile" (de Haas, 2014 cited in Bircan et al., 2020, p. 19). Some researchers are wary about labelling migrations in any distinct categories as decisions to move are always part of larger groupings of socio-political and cultural factors. Such hypotheses show the importance of empirical research on the agency of migration in Southeast Asia.

Regardless, migrant workers travelling under some form of debt bondage, Internally Displaced Persons (IDPs), trafficking victims and refugees are clearly considered non-choice migrants. The most significant number of 'non-choice migrants' in Southeast Asia is that of refugees and IDPs. There is a long history related to this in the region as past data from UNHCR shows that whilst in the 70s and 80s, Vietnam, Cambodia and the Philippines were the main sources of refugees, over more recent decades, the major source country in the region for refugees is Myanmar. Burmese ethnic minorities such as the Chin, Karen, Shan and Mon, have

moved to Thailand across land borders with more than 97,000 so called 'displaced persons' living for decades in camps along the Thai border and an approximate 5000 within Thailand's urban areas (UNHCR, 2021). Whilst the Rohingya have had a difficult past of persecution and movement, it was after the independence of then Burma from the British (1948) that tensions between the government and the Rohingya grew and over subsequent decades, they have been fleeing from the country's policies and practices of discrimination and violence. In May 2015 there was a global outcry following the Bay of Bengal migrant smuggling and trafficking crisis during which mass graves with the bodies of migrants and refugees from Myanmar and Bangladesh were found in Southern Thailand. Thousands more were being abandoned at sea. In mid-2017, 640,000 Rohingya refugees fled violence in Rakhine State in Myanmar and crossed irregularly to Bangladesh, many with the intention of travelling to Southeast Asia (including Malaysia, Thailand and Indonesia) and beyond (ISCG, 2017).

Large populations of IDPs are mainly found in Myanmar and Thailand. In the latter, as of 2019, 41,000 are said to have been moved due to the conflict in the three most southern provinces (The Internal Displacement Monitoring Centre, 2019). IDPs and stateless populations in the region are known to face particular oppression, discrimination and exclusion. Other forced displacement occurring in the region has been as a result of mega projects such as construction of dams, plantations, land grabbing and other large infrastructure projects. An emerging trend is people displaced from areas because of environmental degradation and climate change. For example, in both 2015 and 2016, severe drought affected 50 of the 76 provinces in Thailand which seriously affected farmers' livelihoods. Flooding in Cambodia in recent years has also pushed many farmers to seasonal migration in Thailand (Sun, 2019). The largest displacement in Southeast Asia from disasters was in the Philippines, which saw 3.8 million forced to move at the end of 2018 (the largest number globally) due to volcanic eruptions and flooding caused by monsoons and landslides (IOM, 2020).

Unfortunately, Southeast Asia is infamous for human trafficking as the same geographical, cultural and socio-economic realities that lead to migration can also be risk factors of trafficking. Exploitation in the region occurs in many ways, e.g. prostitution, forced begging, forced marriage and the trafficking of workers in numerous industries and sectors (Kumar, 2016; Yea, 2014). In recent years, 25% of global victims assisted by IOM have come from ASEAN countries (ASEAN Studies Program, 2017). The criminality and hidden nature of human trafficking makes the accuracy of data on the issue infamously inaccurate. Southeast Asian countries are predominantly origin, transit or destinations for trafficked victims whilst the type of exploitation largely determines the trafficking flows. The most extensive flows of human trafficking can be found in the Greater-Mekong Sub-region (GMS: Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam), following the usual labour migratory routes. For example, the large commercial sex sector in Thailand brings women from Myanmar, Lao PDR and Cambodia although across the region men and women are trafficked into the fishing sector, the poultry industry, garment or construction work, agriculture, domestic work or forced begging.

The phenomenon of bride trafficking is also a concern in the region as gender imbalances in countries such as China, Korea, and Taiwan create a demand for brides from ASEAN countries. Fang (2014) estimated that there could be around 30 million bachelors in China by 2020 heightening vulnerabilities of bride trafficking of young women from Cambodia, Lao PDR, Myanmar and Vietnam.

The scale and scope of human trafficking in Southeast Asia is due to the limited safe and legal pathways to migrate as migrants and refugees are often left with no choice but to use smugglers and brokers in crossing international borders. Over the decades, a well organised smuggling and trafficking industry has developed that draws in migrants from across the region driven by the multiple factors mentioned above. Migrants have traditionally relied on smugglers especially as it is often the cheapest and easiest option. Smugglers and traffickers are involved as recruiters, transporters and employment brokers and within Southeast Asia have often depended on corrupt officials when crossing borders or obtaining falsified travel or work documents. As such, many migrants can end up in debt bondage that increases their vulnerability to exploitation.

The different evolving forms of migration that characterise ASEAN countries have historically been influenced by the wider socio-economic and political context. The next section examines what is behind these large movements of people as there is a need to better understand the underlying drivers of migration and mobility within the region.

1.3 From the Past to the Present: Prevailing Dynamics of Migration in Southeast Asia

Economic disparities within the region lead to a predominantly one-way flow of migrants to a select few countries with others experiencing more minor migration in comparison. This neoclassic perspective has long been used in studying international migration. Ravenstein's original 'push and pull' theory states that migration is a "mechanism that establishes regional spatial-economic equilibrium, i.e. migrants move from low income to high-income Areas" (Ravenstein, 1885, cited in Amaral, 2020). The ease of crossing land borders; the presence of existing diaspora networks; shared linguistic, cultural or religious roots; and the lower level of costs of mobility (especially within the Mekong sub-region) illustrate the continuation of the traditional 'push' and 'pull' factors of wage differentials and employment opportunities (Fong & Shibuya, 2020). Sanglaoid et al. (2014) found that the main determinant of migration to Thailand from ASEAN countries are the significant gross domestic product (GDP) differentials between Thailand and its neighbours. Jajri and Ismail (2014) evidenced that migration to Malaysia from Indonesia, Thailand, and the Philippines was supported by migration economics as decisions to move were due to the wage ratio between the countries, exchange rate fluctuations and the unemployment rate in the source countries. As such, decisions to

migrate are usually made as a family livelihood strategy rather than seen as in the best interest of the individual (Fong & Shibuya, 2020). The positive and negative connotations associated with migration are not static and are further influenced by social, cultural political and institutional factors (de Haas, 2007). Kneebone (2012) also posits that beyond economic aspects, the labour market in ASEAN is influenced by a legacy of colonial practices of indentured labour as seen particularly in Malaysia and Indonesia for example. This view is also backed up by 'World Systems Theories' which were prominent in the 1960s and 70s as they identified the historical connections and trading routes with colonial relations (Tomanek, 2011).

Countries with a larger youth population also fuel migration. Like in most of the developing world, in Southeast Asia migration is also a cultural norm viewed as the transition from childhood to adulthood (Punch, 2014). Perceived as important social markers that are related but not defined by chronological age, youth transitions such as migration are fluid and interconnected. Furthermore, they are often rooted in traditional cultural practices and historical notions and linked to cross-border networks of kinship or ethnicity (Basir, 2020).

As in other world regions, young people's migration in Southeast Asia is motivated primarily by family poverty, household economic crises and a lack of job opportunities in their communities of origin (Peou, 2016; Beazley, 2015). The vulnerabilities of child or youth migrants, especially those traveling undocumented, has always placed them at significant risk of exploitation. Child labour has also long been a concern in the region; girls mainly as domestic workers or factory workers, boys as factory or construction workers, fishermen or other daily casual work. Although this scenario is very common, Huijsmans and Baker note that in Southeast Asia 'reducing young people's involvement in migration to absolute poverty or the absolute lack of employment would be an oversimplification which falsely reduces the young people concerned to mere pawns in structurally determined games' (Huijsmans & Baker, 2012, pp. 941–942). In fact, Huijsmans' extensive academic writing on child migration in Southeast Asia highlights the importance of agency, culture and networks as has also been acknowledged by sociological theorists of migration systems and networks theory by analysing the intra-regional socio-economic relationships and bonds within families between sending and destination countries (Tomanek, 2011). Nevertheless, as child migration is rarely seen by policy makers and NGOs as voluntary, it is too often theorised as cause and effect of poor or irresponsible parenting being a prelude to child trafficking (Whitehead et al., 2007).

Whilst youth are filling the supply of migrants in Southeast Asia, it is the aging populations in many of the region's other countries which is causing the demand as shrinking labour forces rely on additional employment needs from migrants from countries with younger populations. This determinant is likely to become even more significant in the future as Singapore and Thailand, for example, have significantly older median ages than their migrant sending countries (Testaverde et al., 2017).

Migration systems and networks theories also highlight the role of immigration policies of both the receiving and sending countries as key determinants (O'Reilly, 2012). Visa waivers, guest worker programmes, bilateral or regional agreements

tend to favour the higher-skilled foreign workers as per the trade integration measures adopted as part of the ASEAN Economic Community (AEC) and the AEC Blueprint 2025. Unfortunately, the AEC ignores low-skilled workers which is the majority of ASEAN migrants who are either undocumented or working in the informal sectors. Although countries such as Malaysia, Singapore, and Thailand need low skilled workers to fill labour gaps, xenophobia can fuel government's reluctance to fully address the migration system and the policies of destination countries can be at odds with the rights and protection needs of migrants. Within Southeast Asia, this significantly hampers the potential benefits that come from better socio-economic integration (Fong & Shibuya, 2020).

In terms of theories, there is increasing attention to gender (there are a number of studies in Southeast Asia looking at women now). This reflects contemporary approaches to migration theory that use feminist and gender approaches to highlight the significant gender dimensions at play within migration in Southeast Asia (Amaral, 2020; O'Reilly, 2012) which can put women and girls at risk of discrimination and exploitation (particularly within the informal sectors). Girls are socialised since birth to fulfil the role of 'dutiful daughters' by prioritising family care and support (Statham et al., 2020; Chan, 2017; Fresnoza-Flot, 2017; Anderson et al., 2017). This expectation may lead them to drop out of school and seek work even far away from home in order to support their parents and younger siblings.

The magnitude of gendered migrant flows can be significant. In the Philippines for example an estimated 100,000 women migrate as domestic helpers or carers every year (Cortes & Pan, 2013) whereas in Singapore, one in eight households reportedly employ a foreign maid (Tuccio, 2017). The likelihood that women leave home for work is also correlated with living in communities with a history or culture of migration. In countries where female out-migration is very common such as the Philippines and Indonesia, studies on children left-behind have shown that one of the effects of parents' migration is that girls 'are socialised to transnational migration from a young age' (IOM, 2020, p. 49).

Gender issues are often rooted in traditional cultural practices and notions surrounding migration. In Indonesia, for example, the practice of *merantau* (wandering) refers to males' involvement in migration, usually for work and to improve social status (Beazley & Ross, 2017). Similarly, in Lao, the expression *pai thiauw* (going around/travelling) is used to describe young men mobility (Huijsmans, 2010) whilst women's independent mobility is viewed less positively over assumptions of socially inappropriate sexual behaviours (Huijsmans, 2010; Kusakabe & Pearson, 2015).

1.4 Old Vulnerabilities, New Threats: COVID-19

As of May 2021, the CSIS (2021) reported 161,288,384 confirmed cases of COVID-19, including 3,347,154 deaths. Southeast Asia has not been spared with 3,659,425 confirmed cases and 72,589 deaths. Three quarters of the new cases of

persons infected by COVID-19 in Singapore in mid-2020 were found among migrant workers (Petcharamesree, 2020) and the third and largest COVID-19 surge at the end of 2020 in Thailand was amongst the large Myanmar migrant population of Samut Sakorn (AP, 2020). Increasingly, narratives are blaming 'outsiders' and foreigners for bringing the virus in which is exacerbating the stigma and discrimination that migrant workers are facing.

As borders have closed, the media coverage has shown migrant workers restricted to live in cramped and ramshackle dormitories or housing with poor hygiene and ventilation. Over populated dormitories and accommodation in Malaysia, Singapore and Thailand became a major vector for spreading the virus (adding to the economic pain they were already experiencing) illustrating the dangers of uncontrollable health related outbreaks among migrants (Newland, 2020). In the densely populated Thai border camps, 90,000 refugees from Myanmar have become even more marginalised as restrictions on movement in and out of the camps have drastically reduced livelihood opportunities (The Border Consortium, 2020). At a time when citizens are being advised to social distance, migrants and refugees are forced together in confined spaces.

Groups of migrant workers have suffered significantly from the COVID-19 lockdown and the loss of employment. Gender based violence levels have been shown to rise during humanitarian crises and hotlines responding to incidences of violence in Singapore and Malaysia have reported increased calls by up to 57 percent, including from women migrant workers (ILO & UN Women, 2020). In Thailand, social security for migrant workers especially those in informal sectors such as domestic work, agriculture, is non-existent and they are not eligible for unemployment benefits (ILO, 2020b). Rural Khmer women working in urban karioki bars and massage parlours were given no government support when these entertainment centres were closed down (Blomberg, 2020). In many destination countries in the region, an ILO rapid assessment found that migrant workers often had contracts terminated suddenly, were required to take sick leave or unpaid leave or for those kept working, reduced pay or uncertainty over when they would get paid (ILO, 2020c). Remittances sent home by migrants to the region was expected to fall by 13% (World Bank, 2020) which is ruinous to their families and communities back home. Since the closure of borders and the loss of mobility, there has been an increase in countries denying entry to drifting boats carrying Rohingya refugees (Nanthini, 2020). Migrants already in detention centres or prisons where infections can easily spread are at particular risk from the virus; in May 2020, Malaysia for example reported its second cluster of coronavirus infections at a detention center for undocumented migrants (Reuters, 2020) whilst in March 2021 Thailand's detention centres saw nearly 300 immigrants test positive for COVID-19 (Carter, 2021).

Global pandemics such as COVID-19 bring health and safety concerns and the differentiation of nationals with non-nationals to the fore in migration governance. Migrants vulnerability to catching the virus and their economic vulnerability are closely aligned. States need to recognize and provide health services, right to freedom of movement and expression, access to proper information, right to adequate housing and right to social security or recompence regardless of citizenship. Migration governance is a further stress test during humanitarian crises. Moving

beyond specific contexts, events or depictions of migration, governance issues evolve with changes in policies and political power, the impact of civil society and increasing regional or international interconnectedness.

1.5 Responses of Duty-Bearers and Stakeholders: Conundrums and Challenges

To a large extent, the migration flows and dynamics discussed in this chapter are a reflection of the migration policies found in the region. The options available to migrants are greatly determined — directly or indirectly — on state regulations developed by policy makers and influenced by tensions between international human rights obligations, economics and border security. However, the regional nature of these issues means that problems cross borders and one country's poor migration management can affect other parts of the region. In these instances, it is thus a regional problem requiring regional solutions.

The way that ASEAN deals with migration in the region is demonstrative of these inherent tensions. ASEAN's policies proactively focus on the freer movement of skilled labour although as a World Bank report in 2017 stated, "overall, migration procedures across ASEAN remain restrictive. Barriers such as costly and lengthy recruitment processes, restrictive quotas on the number of foreign workers allowed in a country and rigid employment policies constrain workers' employment options and impact their welfare" (Testaverde et al., 2017, p. 57). The current system of temporary work permits brings with it a further number of problems and challenges as existing policies such as the Temporary Foreign Worker Programme (TFWP) and work permit actually restrict migrant mobility making it complicated to change jobs or to migrate with family (Basir, 2020). Irregular migration and human trafficking is generally dealt with through the criminal legal framework (more often than not as 'illegal immigrants') and even less attention is given to refugees and asylum seekers who are referred to by a number of ASEAN member states as 'displaced persons'. Partly this is because there is limited ability for asylum seekers to lodge an application for protection in the region as UNHCR and IOM have significantly restricted mandates. Indonesia, Malaysia and Thailand further lack a national legal protection framework with only the Philippines and Cambodia having ratified the 1951 Refugee Convention and the related 1967 Protocol. Furthermore, not many of the countries in the region are parties to ILO or are IOM member states, all suggesting a low commitment to further certain human rights of various groups of migrants.

On the other hand, many more states in the region have signed on to the 2000 anti-trafficking and anti-smuggling protocols which seem to raise fewer policy conundrums and are more aligned with the regions focus on criminality within migration. The Bali Process is a forum of ASEAN Member States Plus 3[1] which

[1] Plus 3: China, Japan and South Korea

deals with issues of migration including those who move irregularly. Established in 2002, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (otherwise called "Bali Process") is a voluntary and non-binding regional consultative process co-chaired by the Governments of Australia and Indonesia. Its' aim is to promote adherence to the UN Convention against Transnational Organised Crime (Organised Crime Convention) and two of its supplementary protocols, the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Due to its political structure, it is not able to directly promote principles under the 1951 Refugee Convention and its Protocol and overall policies and laws are left to the will and whims of national governments (Petcharamesree, 2015).

In reality, the regional responses to humanitarian crises and related forced migration have been limited and dealt with unilaterally by the countries affected (i.e. Thailand, Malaysia, Indonesia and Myanmar). Serious protection needs have been unmet. In 2015 for example, the case of 100 Uighurs and their return to China by Thailand was a high-profile case of likely refoulement (Lefevre & Hariraksapitak, 2015). The Rohingya maritime crisis of recent years has already seen a reduction in the rescue-at-sea obligations and more pushback operations under the guise of countering people smuggling. Responses to the May 2015 Rohingya crisis were mainly from countries outside the region with Turkey, Japan and Australia pledging money to IO and UN agencies, and Qatar and Saudi Arabia (identifying the Rohingya as a Muslim minority group) giving financial assistance to Indonesia and Malaysia to provide support.

All of these challenges and concerns beg the question as to why countries in the region do not officially invoke ASEAN mechanisms in order to improve the region's approach to migration? The ASEAN Intergovernmental Commission on Human Rights, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children as well as the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection of the Rights of Migrant Workers ("Declaration on Migrant Workers"), have not as yet monitored migrants' human rights situation. Although the 2007 ASEAN Declaration on Migrant Workers was a step forward in the recognition of the role of migrant workers in the region, its standards are less than the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), focusing on state obligations more than the rights of migrant workers. The ASEAN declaration is not legally binding so its implementation is left to the discretion of states. Furthermore, whilst 'obligations' or the standards on sending states in the Declaration are more clearly articulated, those of receiving states are much less defined. In 2017, ASEAN adopted the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, an instrument that is supposed to ensure the implementation of the ASEAN Declaration on Migrant Workers. In contrast to the Declaration, the Consensus mentions for the first time "undocumented migrants" recognising that there are circumstances that might render a regular migrant to become irregular without the migrant's knowledge or intention. However, any protections are still

subject to the national laws, regulations and policies of the concerned ASEAN Member States. State sovereignty is generally viewed as the main obstacle in getting the obligations of sending and receiving states shared (Kneebone, 2012). Indeed, ASEAN's respect of state sovereignty, 'non-interference' approach and decisions based on consensus is viewed as hampering any united and coordinated responses although crises in Myanmar and the COVID-19 pandemic are possibly a wake-up call for the region.

With regard to a regional framework to combat human trafficking (in which there seems to be more political synergy), ASEAN did adopt the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) in 2015 (ASEAN, 2015). ACTIP has produced several positive aspects regarding trafficking in persons although in reality it is less advanced than other anti-trafficking regional instruments (e.g. the Council of Europe Convention against Trafficking in Persons). The primary benefit is that it has required all ASEAN members to acknowledge the scale and scope of human trafficking and to respond with a regional legal framework. However, the Convention has significant loopholes as although it is a legally binding mechanism it again prioritises national sovereignty over regional concerns, thus rendering it largely ineffective; somewhat sadly a default position in the region. As such, to a certain extent, the slack is being picked up by collaboration amongst IOs and civil society organisations in the region. Whilst intergovernmental cooperation within the region on migration is selective, the role of civil society organisations remains robust.

The tendency by governments in the region to view all forms of migration as a securitised issue exacerbates the negative connotations of migrants being viewed as a threat to societal identity and security. Growing nationalism, the post 9–11 fight against terrorism, the COVID-19 pandemic and a rise in authoritarianism in the region is triggering political reactions of negative discourse and policy measures based on fears and xenophobia. The 'ASEAN Way' of consensus building, non-interference and diplomacy has become a euphemism for avoiding difficult issues and deferring regional decision making. Many countries in the region put the onus of establishing the lawful status on the actual migrant. The state follows the somewhat default position of 'illegal worker' with the migrant viewed as a menace and in need of criminalisation and a tougher migration regime. However, the reality of the large number of irregular migrants in Southeast Asia is in fact a symptom of the lack of coherent, rights-based and consistent migration policies.

1.6 Conclusion: Questioning the Normative Narrative

Since the start of the millennium, intra-regional migration in Southeast Asia has expanded rapidly. Individual characteristics such as education and gender traditionally influence the supply and demand side of migration. Within the region, the largest proportion of migrants work within the manufacturing, fisheries or construction sectors. Women are more often employed in more informal sectors

such as hospitality, domestic and agriculture work and migrants from ethnic minority groups are more likely found in agriculture work which pays substantially lower than other sectors. Major gaps in working conditions exist between regular and irregular workers and women as well as men migrants in all sectors.

Post the adoption of the ASEAN Economic Community Blueprint in 2015, the freer flow of skilled workers and goods and capital will inevitably have a knock-on effect by accelerating the mobility of both high and low-skilled workers. Indeed, internationalization and cosmopolitanism is resulting in more people identifying themselves as 'global citizens' rather than solely having national ties. For example, in a global survey carried out in 2014, 89% of ASEAN people surveyed (higher in the Philippines and Malaysia) considered themselves global citizens (Inglehart et al., 2014a, b). This growing trend towards multiculturalism and cosmopolitanism is only fueling an increasing desire within the region to migrate. Whilst these intentions do not necessarily sit well with the nationalistic and political boundaries of ASEAN Member States, the different level of economies and wealth in the region dominates and suggests longer term implications. Esipova et al. (2011) developed a Potential Net Migration Index that measured the proportion of those who'd like to migrate. Given this opportunity, only Singapore and Malaysia were likely to have a growth in adult population, Thailand would remain the same whilst for the remaining ASEAN economies, free movement would result in a reduction of the adult population (for example, 31% in Cambodia and 14% in the Philippines).

Thus, the importance and urgency of transnational governance of migration is clear. Whilst calls for more international cooperation have been around for decades, the most recent addition to the global governance toolkit on migration is the Global Compact for Safe, Orderly, and Regular Migration adopted at the end of 2018 which agrees on a broad set of principles and commitments. The specific focus of the GC is strengthening of borders and eliminating irregular migration and smuggling. The Sustainable Development Goals (SDGs) also includes Target 10.2 which aims to "facilitate orderly, safe, regular and responsible migration and mobility of people including through the implementation of planned and well-managed migration policies". The narrative of both is very much on 'safe' and 'orderly and regular' and the links to legal channels of movement. Interestingly, data collected from Cambodian, Burmese, Laotian and Vietnamese labour migrants returning from Thailand questioned this assumption as regular migrants can experience similar or even worse working conditions and financial debt than irregular migrants (Bylander, 2019; Molland, 2012). Similarly, the findings of an ILO and IOM study (Harkins et al., 2017) did not show that regular migration necessarily equated to better migratory outcomes. Considering the roles of non-state actors (e.g. employers, employment agencies, the transport sector and also civil society organisations, international organisations and other formal and informal community and kinship networks), it has been somewhat controversially argued that more de-centralised, less orderly governance may in fact produce better results for migrants in the region (Triandafyllidou, 2020; Bylander, 2019). Indeed, more specific instruments and governance from ASEAN are not likely to help as long as the preferred principles of non-intervening and sovereignty of states remains. The collaboration with non-state

actors to find and promote innovative solutions that are acceptable to states should therefore be promoted in order to lead to more effective regional governance and cooperation.

As this chapter has shown, the significant and diverse movements of people in Southeast Asia and the substantial populations of migrants in all categories suggest governance locally, nationally and regionally needs to begin with a baseline of more inclusive, rights-based policies. More evidence-based data (requiring greater collaboration between researchers and policy makers) should be used to inform decisions, guide policies and build transparency in migration systems in both sending and receiving countries in Southeast Asia. Such evidence-based data needs to be based on in-depth analytical studies that theorize patterns of migration in the region as opposed to simply collating case studies into descriptive reports.

Despite the plethora of research and academic writing on the issue of migration in Southeast Asia, its complex and evolving nature illustrates that further research is always needed. For example, how politics, corruption, civil unrest and migrant smuggling impact on the decision-making processes and policies of a state. The events in Myanmar and the region wide impacts of COVID-19 are a reminder of the dangers that migrants and refugees can suffer as a result of political suppression and a lack of political will to try to solve regional challenges. Governments in the region seem to have limited ability to address complex cross-border economic and social factors yet regional agreements and cooperation could help maximize the benefits of intra-ASEAN migration. The absence of a rights-based approach and a protection infrastructure for migrants in the region is unfortunately indicative of an attempt to maintain the status quo of non-interference. At best, a pragmatic (if not proactive) regional approach to migrants' rights is needed to deal with both the on-going and more sudden movements of people to keep migrants safe and to ensure either mutual benefits and shared responsibilities between both sending and receiving countries in Southeast Asia.

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Part I
Citizenship and the Exclusive State

Chapter 2
Borders, Citizenship, 'Imagined Community' and 'Exclusive State' and Migration in Southeast Asia

Sriprapha Petcharamesree

2.1 Introduction: Borders-Boundaries[1] Defined

"Borders define geographical boundaries of political entities or legal jurisdictions, such as governments, states or sub-national administrative divisions" (Wetherall, 2006, p. 11). A nation-state, therefore, "defines its geographical limits by territory and its demographic limits by nationality" (p.11) which is used to define who is a member and who is not. A national of a given state is considered as member of that particular political community. Those who are not nationals are 'aliens' or 'foreigners' who are, in most cases, not usually entitled to the same membership goods or the same treatment. Division between nationals and non-nationals is, often times, so clear that it creates the sense of 'us' and 'them' and perpetuates the idea of the 'exclusive state' through the borders of which no one can pass without control and restrictions.

For many, borders serve a purpose, despite being arbitrarily designed. Coleman and Harding state (1995, p.35) that "borders and national boundaries serve to mark out administratively convenient unit for overseeing the production and allocation of the world's resources." They further state that:

> political borders, even if arbitrarily or conventionally set, have moral significance because they define the boundaries within which principles of distributive justice are to apply. In this view, principles of distributive justice apply to members of a political community of a certain type loosely defined by territorial borders. Those outside the borders have no claim to

[1] Borders and boundaries have a slightly different meaning. Whilst borders refer to a line separating two political or geographical areas, especially countries, boundaries seem to be a bit more nuance that represent a line that marks the limits of an area or even a dividing line which does not need to be specifically national border line. In this chapter, the two terms are, sometimes, used interchangeably.

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> any of the resources of the territory. The allocation of resources among members of the relevant communities will depend on whether she/he meets whatever additional qualifications the relevant principles impose (p. 35).

This concept has been contested by scholars, including John Rawls, who argue for international distributive justice. However, Coleman and Harding's arguments seem to align with the current concept and practice in Southeast Asia in the sense that justice and resources are mainly distributed among 'members' of a certain polity.

The control of territorial boundaries, "which is coeval with the sovereignty of the modern nation-state, seeks to ensure the purity of the nation *in time* through the policing of its contacts and interaction in *space"* (Benhabib, 2004, p. 38). Having advanced such a statement, Benhabib further argues that "the history of citizenship reveals that the nationalist aspirations are ideologies; they attempt to mold a complex, unruly, and unwieldy reality according to some simple governing principle of reduction, such as national membership. Every nation has its others, within and without" (p. 18). Even though, in practice, borders become more and more arbitrary from political and economic perspectives, still, the political authorities of the modern nation-state system use borders both conceptually and in practice to regulate membership in terms of national citizenship in spite of the fact that the boundaries of political community are not only no longer adequate (p. 1) but borders are also being challenged by the global economy, communication technology, and the internationalization and transnationalisation of networks, cultures, etc. Those who are not considered 'nationals' or 'migrants' do not enjoy the same rights and privileges as nationals.

However, the notion of borders can be understood beyond territorial and geographical perspectives. Borders have also been created within individual societies. Also, can borders easily be created from within oneself. This is evident in the cases of discrimination, such as that against women everywhere, against Rohingya in Myanmar, against hill-tribes and ethnic minorities in Thailand, etc., occurs only because they are considered as 'different'. We cannot understand the notion of discrimination against particular groups of people(s) without understanding the self-constructed socio-political borders that States create or psychological borders that individuals create within themselves.

This phenomenon is particularly pertinent in Southeast Asia. The region is one of the most ethnically diverse in the world. In addition to ethnic diversity across the countries of the region, nearly every single State is a "mosaic of peoples with different religions, languages and identities. In most countries, ethnic divisions are linked to socioeconomic roles, political authority and regional concentration" (Hirschman, 1984). The present-day multi-ethnic societies of Southeast Asia have been created by the expansion of the political boundaries of modern states, which in many ways, is largely the product of the colonial era. Indeed, the international borders of the region resulted from negotiations between colonial powers without the consultation of the national population. Despite their external origin, "national borders acquire highly significant meanings to nation-states, if not in direct relation to myths of national origin, then as an expression of the legitimacy and sovereignty of the State.

In this way, national borders become a specific form, spatially bounded, of collectivity boundaries, dividing the world into 'us' and 'them'" (Yuval-Davis & Stoetzer, 2002). This is the case in Southeast Asia, where both ethnic and national collectivities are constructed around the boundaries that separate the region into 'us' and 'them'. Members of the same collectivity are separate from people outside the boundary lines, despite their shared ethnicity/cultural identities. In fact, "national boundaries were never coterminous with the domains of different ethnic groups in Southeast Asia" (Jones, 2013, p. 7). During the pre-colonial and the colonial periods nation-building was not a concern and the local population was encouraged to think along ethnic/racial lines. Only after achieving political independence has national integration as a state policy been introduced (Suryadinata, 2014). One of the methods adopted to achieve a 'conventional nationhood' and 'national unity' in the process of 'nation building' is to stress citizenship building through granting of nationality.

The concepts and practice of borders serve as a point of departure for this chapter as borders define 'citizenship', make states 'exclusive' and determine the way 'membership goods' are distributed. This chapter aims to unpack concepts of citizenship, though very much contested, by focusing on a nationality — a legal status — which defines the relationships between the State and individuals. This citizenship or nationality is granted by State authorities to those who meet certain criteria, which in many cases are arbitrary. This type of citizenship is politically and socially designed to include some, while excluding others. This legal citizenship is the "formal expression of membership in a polity that has definite territorial boundaries within which citizens enjoy equal rights and exercise their political agency" (Leydet, 2017). The study of this legal concept of citizenship is conducted through the examination of laws and policies of citizenship of Malaysia, Myanmar and Thailand. These three countries have been selected due to the high number of people on the move, the high number of stateless persons, internally diverse societies, and despite historical differences, some common criteria are applied for the inclusion or exclusion of people from accessing nationality.

It is recognised that Southeast Asia has porous borders and witnesses intensification of international migration. As studied in Chap. 1 the proportion of people's movement within the region continues to rise with the UN estimating there are over ten million international migrants in the region. Forced, irregular and mixed migratory flows are all key trends in Southeast Asia. Many of the richer countries in the region (where 96% of the region's migrants are found) depend on human mobility to fill low-wage jobs and their plight has been thrust into the spotlight by the COVID-19 pandemic. The examination of the citizenship practice in the three countries reveals that not only migration creates a 'citizenship dilemma' that affects the access to 'membership goods' that members of a political community are supposed to enjoy but also in most cases, migrants are not perceived as 'citizens', therefore denied fundamental rights by the host States, including a right to a nationality.

The chapter addresses, in the introduction section, the concept of borders used in this article. The second section deals with the construction of an 'exclusive state' through 'legal' citizenship exemplified by the examination of the citizenship laws

and policies of the three countries under the study. The following section discusses further the concepts of borders, imagined communities and exclusive states in the context of migration. The fourth section discusses the making of an exclusive State, membership and membership goods. The last section attempts to conclude by discussing what's wrong with 'imagined communities' from human rights perspectives and if it is time to 're-imagine communities' in order to make states more inclusive.

2.2 The Construction of an 'Exclusive State' in Southeast Asia Through Legal Citizenship

The construction of states in SEA is a rather new phenomenon. After independence and WWII, the leaders of newly established 'nation-states' tried to integrate in order to have 'national unity'. The construction of an exclusive state expressed through the lens of granting citizenship and migration policy moved from the dynamics of inter-ethnic relations before the nationality law was enacted, to the dilemmas of ethnic antagonism after citizenship became a political tool to exclude some groups of people. In the process of 'national integration' some colonial legacies were preserved and even perpetuated by the new elites (Suryadinata, 2014). Even citizenship/nationality was recognised and meant to be universal in the Universal Declaration of Human Rights, it seems that citizenship is less universal in Southeast Asia as exemplified by the cases of citizenship policies and law adopted by Malaysia, Myanmar and Thailand. The three countries are chosen due to the high number of stateless persons in the States. Citizenship in this section refers to 'legal citizenship' which will be presented in a chronological approach from pre-and colonial periods (for Malaysia and Myanmar) to post-independence and the emergence of modern nation states.

2.2.1 Pre-and Colonial Periods

Malaysia is a multi-ethnic country composed of three major ethnic groups, including the Malays, Chinese and Indians. Among the Malaysian citizens, the Malays were the predominant ethnic group in Peninsular Malaysia, making up 63.1% of the population (Department of Statistics Malaysia, 2011). In 2019, the total population of Malaysia was 32.59 million (Trading Economics, n.d.). The demographic composition in the country recorded by the WorldAtlas in 2019 includes 50.1% Malay, 22.6% Chinese, 11.8% indigenous Bumiputra groups other than the Malays, 6.7% Indian, and other groups account for 0.7%. Non-citizens account for 8.2% of Malaysia's resident population (Sawe, 2019).

There was no 'Malayan citizenship' prior to 1946 (Low, 2017b, p. 3). A unified citizenship system does not exist before independence. The state nationality and Federal citizenship were operating in tandem until 1957 when the Federation

achieved independence in August. The "citizenship history of Malaya (now Malaysia) was (and remains) controversial because of communal politics and because of the nature of Malaya as a multi-ethnic nation following the British open-door policy" (p. 7). Note that the Indian and Chinese labourers were brought in by the British to work in rubber plantations and the mining industry. By 1947, the size of the migrant population was almost equal to those of Malays and aborigines (p.5). The liberal citizenship policy based on jus soli introduced by the British was a serious issue as it was perceived as a threat to the traditional citizenship understanding of the Malay States. 'Traditional citizenship' was founded 'on the ethno-cultural notion of Malay citizenry" (p. 5). The policy introduced by the British attempted to "promote a broad-based citizenship which will include, without discrimination of race and creed, all who can establish a claim, by reason of birth or a suitable period of residence, to belong to the country" (p. 5). By that time, the citizenship policy was inclusive based on the principle of jus soli adopted in 1957.

It is not clear if, before colonisation, the concept of nationality was known in the kingdom of Burma which was ruled by 'hero' kings, under which control by the central State (as understood today) steadily decreased at greater distances and elevations from the centre of the Kingdom. As a result, communities of different ethnic groups enjoyed a rather high level of autonomy under the rule of a local prince (Clark et al., 2019, p.15). Following the British annexation of Burma in 1885, "different administrative systems and structures were introduced by the British. A strong centralised state was established in Ministerial Burma, where the power of local leaders was curtailed. By contrast, in the Frontier Areas local leaders and local political systems (at least as understood by the British) were left intact (p.16)." In addition, the coloniser introduced the concept of classifying people according to ethnicity. Like the case of Malaysia, the British also encouraged immigrants from India to migrate, and thousands of Indian troops were relocated to Burma. The policy of ethnic categorisation and the arrival of Indians have had profound consequences for citizenship policy after independence. It is not clear how citizenship was managed (apart from some of those who served the British and became British subjects).

Thailand was not colonised. Before the enactment of the first Nationality Act B.E.2456 (1913), the concept of citizenship/nationality did not exist in what was then Siam. "Nationality was granted regardless of whether or not the alien parents had entered the Kingdom legally or illegally or the alien parents had the right to reside in the Kingdom temporarily or permanently… Over its 39 years of operation, this law united people of different ethnicities and people who came to Thailand from other countries. Thai nationality has promoted unity among these people" (Saisoonthorn, 2006, p.43). This began to change with the replacement of the 1913 Nationality Act by the Nationality Act B.E.2495 (1952). It is clear that historically, the notion of legal citizenship was more inclusive.

Without a rigid citizenship concept based on the modern 'nation state' system, these countries were more inclusive than after independence and the advent of modern States in the region. Migration, both internal and across national borders, was encouraged as the power of the rulers was based on the size of the population. This, however, changed with the advent of increasing migration.

2.2.2 *After Independence*

There is no specific nationality/citizenship law in Malaysia. Provisions pertaining to citizenship are included in the Federal Constitution of Malaysia. After independence, "since 1957, citizenship amendments witnessed three major trends; citizenship is harder to acquire, citizenship is easier to lose, and the government's discretion in matters of citizenship is widened" (Sheridan, 1979, p.13 as cited in Low, 2017b, p.16). Jus soli is no longer applied without condition and it was conditioned by elements of jus sanguinis (Low, 2017b). The change of citizenship policy excludes children born to persons who had no right to reside in the country and 'who had no attachment' from automatic acquisition of citizenship by birth.

There are essentially four different ways a person can acquire citizenship in Malaysia: by operation of law or automatically; by registration; by naturalisation; or by incorporation of territory (Liew, 2019, p.104). The provisions in the Constitution were interpreted so that every stateless person born within Malaysia is entitled to citizenship automatically. Having a parent who is a Malaysian citizen or permanent resident also entitles one to Malaysian citizenship automatically.[2] However, six categories[3] of people remain stateless persons in Malaysia (Liew, 2018, 2019). Out of these six categories, only one can be considered as foreigners or 'illegal migrants'. However, having a genuine and effective link with the country does not entitle them to claim Malaysian citizenship. The cases of the descendants of Indian Tamils who came to Malaysia during the colonial era to work on plantations; populations in Sabah which include the Sama dilaut or Bajau Laut, the traditionally migratory people, people of Indonesian and Filipino descent who have been living in Sabah for generations are the case in point (Razali, 2017). "Contrary to popular belief, many people who are stateless in Malaysia are not foreigners, refugees or 'illegal migrants'; many of them were actually born in the country and have been living in Malaysia most of their lives" (Nortajuddin, 2020).

Myanmar is another country with very diverse ethnicities. The country is the only one in Southeast Asia to have applied an explicitly racially-based nationality law. The 1982 Citizenship Law discriminates on the ground of race. The law establishes 135 national ethnic races which can acquire citizenship in Myanmar, which is further classified into three different categories, namely 'full citizenship', 'associate citizenship', and 'naturalised citizenship'. The law deliberately covers 'othering' minorities, as the Citizenship Scrutiny Card (CSC) denotes each category whilst also denoting 'subordinate forms of citizenship' (Aung, 2019). The exclusion of some ethnic groups from accessing citizenship is further reinforced by religious

[2] Detailed discussions on acquiring citizenship in Malaysia are found in Liew (2019).

[3] These six categories include: (1) persons with long-standing residence since pre-independence and their descendants; (2) people who lack documentation; (3) abandoned children or 'foundlings' and adopted children; (4) children of 'mixed' marriages or alternative families and cases where children are born out of wedlock or before a marriage was registered; (5) Indigenous persons; and (6) refugees or children of migrant workers.

affiliation. The common conflation of 'Burmese' with Bamar and Buddhist identity is one of the causes of the general exclusion of religious and ethnic minorities. "Individuals who do not fit into the rigid ethnic criteria that is prescribed by the citizenship rules also face hurdles — including people of mixed ethnic or religious parentage or those whose parents/grandparents converted to another religion" (Brinham, 2019). The denial of citizenship by Myanmar authorities to Rohingya communities is widely known, researched and publicised. They are the world's largest population of stateless peoples, making up nearly 20% of global statelessness (Committee on Foreign Affairs, European Parliament, 2017).

Under the 1982 Citizenship law of Myanmar, full citizenship is primarily based on membership of the 'national races' who are considered by the State to have settled in Myanmar prior to 1824, the date of first occupation by the British. Despite generations of residence in Myanmar, the Rohingya are not considered to be among these official indigenous races and are thus effectively excluded from full citizenship (Burmese Rohingya Organisation UK, 2014). Naturalised citizenship in Myanmar may be applied for by individuals and their children who can provide 'conclusive evidence' that they entered and resided in Myanmar prior to 4 January 1948, the date of state succession from the British. Due to a lack of documentation and the arbitrary and discriminatory implementation of the law, this effectively excludes most of the Rohingya from naturalised citizenship. This citizenship law excludes certain races and ethnic groups, most notably the Rohingya who have been made stateless in their own country. Nevertheless, it is not only the Rohingya whose citizenship is deliberately denied in Myanmar; other groups share similar experiences, especially among those with Indian origin and Muslim communities. The citizenship rules actually put different groups of peoples into the ethnic identity boxes constructed (by State) for them (Aung, 2019).

In Thailand, various ethnic minorities face the same challenges. According to UNHCR Thailand, (n.d.), at the end of June 2020, there were 479,943 people registered by the Royal Thai Government as stateless. This also includes persons of undetermined nationality. Despite its relatively open nationality law, which recognises both jus soli and jus sanguinis as principles for granting citizenship, Thailand has one of the largest stateless populations in the world (Cheva-Isarakul, 2019).

The replacement of the 1913 Nationality Act by the Nationality Act B.E.2495 (1952) brought about changes in the concept of citizenship. During this period, the new nationality legislation introduced an element of discrimination against aliens, especially Chinese people. There was a concept introduced to the legislation to limit the acquisition of Thai nationality based on 'jus soli' (Saisoonthorn, 2006). The Thai nationality law became more rigid through the implementation of the Nationality Act B.E. 2508 (1965) as more conditions were introduced to limit access to nationality among aliens in Thailand. Legal status was taken into consideration as people from neighbouring countries were arriving in Thailand. Migration from 'poorer' countries, especially from within the region, led to a more exclusive nationality law. Only until 2008, with the amendment of the 2008 Nationality Act, is the nationality law of Thailand becoming more open and addressing statelessness, albeit at a slow pace.

There are various causes of statelessness, including discrimination based on gender, race, ethnicity or other grounds. With discrimination against minorities being one of the key causes of statelessness, as seen from the cases of Malaysia and Myanmar, it is not a coincidence that most stateless persons in Thailand are ethnic minorities, especially in the Northern and Western regions. Specifically, they are members of the nine ethnic groups officially classified as 'hill tribes', other highlanders not classified as 'hill tribes', and children of migrants, who were born in Thailand and do not have ties to their parents' country of origin (Saisoonthorn, 2006). In Thailand, ethnic minority groups usually live on the periphery, and are linked with negative narratives of threats to national security, illicit activities such as drug trafficking and deforestation, as well as a 'communist threat' during some periods of modern Thai history. These derogatory stereotypes were used to both justify their exclusion from citizenship and make them objects of 'development' (Cadchumsang, 2011).

Large communities of persons without citizenship are found in most countries in Southeast Asia. The construction of 'others' and 'otherness' through citizenship laws and policies as demonstrated by the three cases has serious implications on a large number of people without any other legal statuses. In addition to 'othering' those who are considered 'not enough like us', migration, previously encouraged by colonial power (in the case of Malaysia and Myanmar) and the policies, introduced by the Siamese Kings, brought about changes in citizenship policy in Southeast Asia. The changing policies result in rendering millions of people stateless.

These marginalised people become victims of structures which continue to perpetuate discrimination against them. Living without citizenship leads to a wide range of human rights violations which include but not limited to problems of freedom of movement, right to work, right to education, right to accessing health services and other social securities, as well as other political rights. No citizenship also contributes to 'illegal' migration. Millions of them become refugees. Deprived of legal status and access to fundamental rights, many decide to migrate, and some become victims of trafficking in persons. The regular avenues of migration are only available to those with access to proper documentation. The exclusion of certain groups of the population is a real situation based, unfortunately, on an 'imagined exclusive state'.

2.3 Citizenship and 'Imagined Exclusive States'

In his book, 'Imagined Communities' Benedict Anderson states that the nation "is imagined as a community, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship" (Anderson, 1991, p.9; Calhoun, 2016). National identities are invented as in most cases, "the members of even the smallest nation will never know most of their fellow members, meet them, or even hear of them, yet in the minds of each lives the image of their communion" (Anderson, 1991, p. 6). From the

citizenship perspective, a community is imagined through the practice of granting nationality, which serves as another 'national boundary' between citizens and non-citizens. Anderson (1991) demonstrated, in the second edition of 'Imagined Communities', the materials underpinning imagination -culture- when he discussed census, map, and museum.

Each of these three instances, involved institutionalising a bundle of artefacts and practices that shaped how identities, solidarities, boundaries, and relationships were imagined. The lines dividing pink and grey spaces on maps reinforced the idea that the face of the earth was naturally composed of countries; the rendering of internal geographies as at least interconnected if not integral spaces gave each of those countries a solidity. (Anderson, 1991, p.12).

In the same vein "Censuses counted and categorised citizens (and sometimes denizens); they organised them into grids of occupational or religious or property-holding identities. They not only aided the administration of countries; they offered representations of the populations that facilitated imagining nations as 'organic wholes' (Anderson, 1991)".

Whilst the border is defined as a limit-line that separates legal and territorial entities into 'states', this boundary is also a mode of delineating identities. The three cases discussed in the previous section affirm "both ethnic and national collectivities are constructed around boundaries that separate the world into 'us' and 'them'. This division is further reinforced by the system of legal citizenship. As such, they are both the Andersonian 'imagined communities'" (Yuval-Davis & Stoetzer, 2002, p.330). The three countries under this study may have varying ethnic and national projects which involve members of the same collectivity or people outside the national borders, but they seem to draw the citizenship boundary line in a rather similar way. The boundaries drawn through citizenship policy and law intentionally exclude some groups of peoples living within the same boundaries. However, "any construction of boundaries, of a delineated collectivity, that includes some people—concrete or not—and excludes others, involves an act of active imagination (p.331)." Such an active imagination can be easily created by physical state territorial borders that divide the people into those who belong to another nation and those who do not. As we have seen in the previous section, often the 'naturalised' borderlines do not correspond to the boundaries of ethnic and national communities who live near the borders which, in many cases, results in rendering them stateless, one of the root causes of 'forced migration'.

From the three cases discussed and an analysis of citizenship and 'imagined community', it is apparent that in the past, to a certain extent, all of the countries had accommodated a large number of individuals in their territory and made them feel that they share some things in common, building the trust and loyalty necessary for the functioning of a nation-state. By introducing the regime of citizenship, each political community tried to construct a so called 'collective identity', a robust sense of belonging and social cohesion within its borders. The sovereign, territorial state, therefore, became the necessary framework for citizenship and vice versa. Citizenship both as legal status and as activity, is thought to presuppose the existence of a territorially bounded political community, which extends over time and is

the focus of a common identity (Leydet, 2017). Although this premise is being contested because globalisation has rendered the borders so porous, a large number of states are still tied to the "formal expression of membership and the formal institutionalised political community and assume that it has both legal and moral rights to choose its members and to close or open its borders and "monopoly over territory is exercised through immigration and citizenship policies" (Benhabib, 2004, p.5).

This monopoly over territory and citizenship policy is further exercised by the distribution of 'membership goods'. Seyla Benhabib (2004, p.1) pointed out that "political boundaries define some as members, other as aliens. Membership, in turn, is meaningful only when accompanied by rituals of entry, access, belonging, and privilege. The modern nation-state system has regulated membership in terms of one principle category: national citizenship." She further commented that "citizenship in the modern world has meant membership in a bounded political community which was either a nation-state, a multinational state, or a commonwealth structure. The political regime of territorially bounded sovereignty…could only function by defining, circumscribing, and controlling citizenship. The citizen is the individual who has membership rights to reside within a territory, who is subject to the state's administrative jurisdiction…" (p. 144). As previously demonstrated, this model which began in the western European countries was copied by all States in Southeast Asia, including Malaysia, Myanmar and Thailand. In this model the national citizen is considered as full political member of a particular political community. Members are eligible for 'membership goods'.

2.4 Borders, Exclusive State, Membership and Membership Goods

Eligibility for membership of a given political community, as discussed, varied from one country to another. However, there seems to be a "growing convergence among states regarding policies of acquisition of citizenship. Such policies are usually classified in two broad categories: *jus soli*, which confers citizenship based on birth on state territory; and *jus sanguinis*, which confers citizenship based on descents…" (Aleinikoff & Klusmeyer, 2002, p.2). All three States applying *jus sanguinis* are faced with several generations of foreign nationals who have migrated into and reside within their borders. Malaysia and Thailand have adopted policies that grant citizenship to children born to certain classes of immigrants, whilst Myanmar restricted citizenship rules to limit birthright citizenship to children born to settled immigrants. However, millions of individuals are barred from becoming a member of these political communities. Not only can they not enjoy the privileges of citizenship, they could also not access membership goods.

Jules L. Coleman and Sarah K. Harding (1995) have identified different forms of 'membership goods'. Goods include employment, access to emergency services and socio-economic resources, political participation, the right to permanent residence, immunity from expulsion, and the most difficult good to obtain, citizenship.

It does not mean, in any case, that other goods, such as political participation, socio-economic resources and services, and employment, are easy to obtain. Access to the said membership goods, which are basic rights, depends very much on the laws and policies of a particular country, as well as the political will and the level of openness and democracy. In most, if not all cases, "different bundles of goods are provided differently to individuals depending on their different status" (Coleman & Harding, 1995). This 'arbitrary concept of membership goods' seems to be the general practice in Southeast Asian countries.

Membership goods, in states in Southeast Asia, tend to be limited to citizens only. Non-citizens, migrants and refugees do not only receive the benefit of membership goods, but they are also vulnerable to human rights abuses. These marginalised people become victims of structures which continue to perpetuate discrimination against them. Living without citizenship leads to a wide range of human rights violations, which includes, but is not limited to, problems of freedom of movement, right to work, right to education, right to access health services and other social securities, as well as other political rights. These issues are discussed in Chap. 7 prepared by Sharuna Vergis entitled 'Citizenship and legal status in healthcare: Access of non-citizens in the ASEAN: A comparative case study of Thailand and Malaysia' and by Amparita S. Sta. Maria examines, in Chap. 8 'Labour Migration and Exclusive State amidst the Global Pandemic of COVID-19'.

The examination of laws and policies in Malaysia, Myanmar and Thailand, which revealed that millions of people are legally inexistent within the Thai, Myanmar and Malaysian borders, presents some anomalies in membership policies and access to membership goods. It is, in fact, indicative of unfair and unjust societies in which lines between territoriality, sovereignty, and citizenship are totally disconnected to human beings and moral responsibilities of a State. For over a million people born and residing in those states not having documents which show proper legal status is, to borrow the expression used by Seyla Benhabib (2004), 'a form of civil death' which will be discussed in Chap. 3. They are sentenced to civil death only because of chance, not choice; this has placed them within political borders that deny their rights as human being to belong to a community. Finally, political boundaries become so problematic even for those who could have become members.

If political borders render human beings legally invisible and deprive them of necessary membership goods, in these societies, we also witness another kind of constructed border which is hard to understand let alone to accept. Discrimination against women to confer nationality to their child, as seen in the case of Malaysia, is an evident case of 'constructed borders' within oneself. In the case of the Rohingya, socio-racial discrimination has been institutionalised.

> Imagine a group of people who are regularly subject to arbitrary differentiation from the rest, obliged to suffer the worst of working conditions, verbal abuse, sexual molestation, who are excluded from all forms of social benefits and social distribution for the simple reason of being born within a particular group and with no particular distinction from the rest of the population…Victims of discrimination based on descent are single out, not because of the difference in physical appearance or race, but rather by their membership in an endogamous group that has been isolated socially and occupationally from other groups in the societies (Yutzis, 2004, p. 10–11).

The socially (self) constructed borders which result in discrimination against some groups of people within the same society are expanded to different areas including discrimination based on gender and race. While ethnic minorities are clearly discriminated against in Malaysia, Myanmar and Thailand, the migrants in these countries do not escape the same fate.

2.5 Conclusions: Universal Human Rights and 'Re-imagined Community'

The three countries studied in this chapter have in common their nationalist conception of citizenship (Hampton, 1996). Not only is there race or genetic-based exclusion from membership and membership goods, but according to Hampton, "there are value-based exclusions. There is an assumption that the values constituting a polity are fixed. But this assumption is unfounded. Values always change resulting from the generational changes. Children may have different values different from their parents" (p. 72). The predetermined Malay(ness), Barma, or Thainess exclude so many people considered 'different'. In fact, the value-based exclusion serves to hide a race-based as well as gender-based exclusion which many countries do not admit. This exclusion is, in many ways, a by-product of a much deeper form of injustice and inequality within our society and in the region. Hampton further stressed that "if a country continues to deny rights to membership goods to a non-national who has been living a long and productive life within its borders on an equal basis with other nationals, it already allows a system of different classes of people in that society" (p. 72). It is equally serious that even among the same nationals, citizens are treated differently. This politics of differences creates resentment and dissension which may lead to possible conflicts which would be damaging to all groups in the society. The politics of differences already leads to 'forced' migration such as in the case of the Rohingya.

Citizenship is a frontier of sorts, defining political membership in a nation-state. The question of citizenship is 'one of the thorniest issues' that prevents social and political integration of so many people. The empirical approach examined how the State determined who could be a full member of their political community and why a separate 'class' of citizenship was relevant in the mind of authorities remains irrelevant from a human rights perspective. Being barred from membership and membership goods within one's 'borders' because of legal status and the kind of 'beings' we are is absolutely unacceptable. The existing regimes of citizenship which produce social differentiation not only reinforce an 'imagined exclusive state' which leads to discrimination and human rights violations but also ends up exacerbating migration, forced migration and trafficking in particular.

Legal citizenship (or nationality), according to international human rights treaties, is now expanded from being a State right, to being also an individual right. They provide a detailed account of how the advent of international human rights has

slowly but consistently intruded into State discretion such that we can now see that, in many instances, both a denial to grant nationality and a withdrawal of nationality violate norms of international law. Although the International Covenant on Economic, Social and Cultural Rights (ICESCR) allows developing countries to determine to what extent they would guarantee the economic rights recognised by the Covenant to non-nationals, the provision clearly notes that States can do so with due regard to human rights and the national economy. Most, if not all, receiving countries in Southeast Asia are relying on 'migrants', they are sufficiently economically advantageous that resources can be justly distributed in order to make the community more caring and inclusive as envisioned by ASEAN. Unfortuantely, the ASEAN Human Rights Declaration is not conducive to fulfilling such a vision as article 18, although recognising the right to nationality, makes it subject to national legislation.[4]Given that international human rights laws, including refugee law, extend the 'right to have rights' to those living in the same borders, an 'exclusive' community demands a re-imagination.

The debate here is not about calling for opening the borders or contesting the right of States to decide who and how non-citizens can enter its territory, but about how and if 'universal human rights' can be extended to non-members of a 'political community'. As Bosniak (2006) rightly put it, "to resident aliens who live within a specific community of citizens, the border is not something they have left behind, it effectively follows them inside the state, denying them many of the rights enjoyed by full citizens or making their enjoyment less secure." Through a human rights framework which recognises 'social, political and economic agency' of 'migrants' they should enjoy 'membership goods' that they contribute to. This type of citizenship requires a re-imagination of both internal and international distributive justice to create a more inclusive state.

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[4] Article 18 of ASEAN Human Rights Declaration: "Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality" (ASEAN, 2013).

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Chapter 3
Birth Registration, Legal Identity and Impacts on Migration in ASEAN

Sriprapha Petcharamesree

3.1 Introduction: Civil Registration, Birth Registration, Legal Identity and 'Civil Death'

Civil registration is defined by the United Nations as "the continuous, permanent, compulsory, and universal recording of the occurrence and characteristics of vital events (live births, deaths, fetal deaths, marriages, and divorces) and other civil status events pertaining to the population as provided by decree, law or regulation, in accordance with the legal requirements in each country" (United Nations, 2001). Civil registration provides a person with an official record of his/her existence. Civil registration establishes the existence of a person under the law and serves as the fundamental means of conferring legal identity to an individual (Livingston, 2019; United Nations Legal Identity Expert Group, 2020). For individuals, civil registry in general:

> provides individuals with the documentary evidence required to secure recognition of their legal identity, their family relationships, their nationality and their ensuing rights, such as to social protection and inheritance. It can help facilitate access to essential services, such as health, education, and social welfare and can contribute to activities such as gaining formal employment, exercising electoral rights, transferring property, and opening bank accounts. The lack of civil registration during crisis or natural disasters can lead to statelessness (World Bank Group and WHO, 2014).

For the State, "the continuous population data collected through civil registration helps States to keep track of the population in their territory and plan for future service provisions, and typically provides the foundation for identity management systems and national population databases" (The Bali Process, 2018). Whilst civil registration of individuals guarantees their human rights and security, civil registration likewise guarantees the security of States in every dimension, including State

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security, social security and economic security, when States know who, and how many, are living in their territory (Petcharamesree & Napaumporn, 2020).

Indeed, birth registration and the issuing of a birth certificate is essential for conferring legal identity. Legal identity is defined as the basic characteristics of an individual's identity. e.g. name, sex, place and date of birth conferred through registration and the issuance of a certificate by an authorized civil registration authority following the birth (The Bali Process 2018). The birth certificate is the first legal documentation in the life of every single individual. Birth registration establishes a relationship between individuals and a State. Since the legal identity represents the basic characteristics of an individual's identity conferred through registration and issuance of a certificate by an authorized civil registration authority following the occurrence of a vital event such as birth, death, marriage and divorce (The Bali Process, 2018), an absence of legal identity means '*civil death'* (Benhabib, 2004).

The term 'civil death' usually indicates 'the extinction of citizens' civil rights by their State (Seckin & Esra, 2019, p.5). In English and American common law, it refers to an extinction of the civil rights of a person who "is disqualified from being witness, can bring no action, nor perform any legal function; he is in short regarded as dead in law" (p.7). While these earlier forms of civil death functioned as legal categories applicable to convicted felons, more recent forms of civil death have outgrown the traditional penal institution. The unique feature of recent versions of civil death entails groups of people who are considered as being dead to the law without having been convicted of individual crimes (p.8). This mode of 'civil death' is being used by authoritarian regimes against dissidents and opponents without there being any need for conviction of a crime (Seckin & Esra, 2019).

Hannah Arendt's analysis in her book '*The Origins of Totalitarianism'* (1976) allows us to assess some aspects of 'civil death' that are replicated in the situation whereby a person is reduced to a 'living corpse' (Seckin & Esra, 2019) through the extinction of their rights by rendering him/her invisible in the eye of the law. An extreme version of 'civil death' was used in the Third Reich's Denaturalisation Law of 1933 and the Nuremburg Laws of 1935, which deprived Jews and other state targets of citizenship (Seckin & Esra, 2019). Millions of Jews and others were disenfranchised of their legal rights via recourse to the status of 'civil death' which led to the ultimate transformation of citizens into 'living corpses' (Arendt, 1976). It signifies a loss of citizenship and its attendant rights, but also an end to the possibility of living as equals together with other citizens; a loss that entails closing down the possibility of leading a political life in relation to others (Seckin & Esra, 2019, p.9). Although Arendt never used the term 'civil death', this Nazi policy may be defined as such in that it is broadly defined by a loss of civil rights in a process of denaturalisation (p.9).

In this chapter, the notion of 'civil death' is associated with the production of a 'living corpse' in that a person, not legally recognised, is diminished economically, socially, and politically, and therefore, is left to confront an impossible future. Since birth registration and granting of legal identity are enrolled as 'national rights' under the control of government, this allows States to exclude certain groups of people from the public realm. It is the State that decides who can or cannot be registered in

the civil (registration) system. Without being registered at birth and granted legal document(s) the person is deprived of the "right to have right" coined by Hannah Arendt (1976, p.296). The non-recognition of a person by excluding him/her from civil registration and denial of legal identity is the legal destruction of the individual, leaving him/her in the state of 'bare life' with 'no right to have rights'.

This chapter aims to assess why States in the region, which are supposed to be inclusive, still exclude some specific groups from obtaining legal identity, therefore sentencing them to 'civil death'. This chapter argues that whilst national policy and legislation of the ASEAN Member States (AMS) indicate a positive trend towards a more open policy, both on birth registration and civil registration, legal invisibility still deprives some groups from basic fundamental rights. The lack of civil registration exacerbates 'irregular migration' in that it deprives people without legal status and legal identity from access to other rights essential for a minimum acceptable standard of living. Due to this denial of basic human rights, many decide to take the uncertain journey of migration.

This chapter addresses issues regarding birth registration and legal identity in particular, using documentary review as well as research conducted as part of a pilot project on Civil Registration and Vital Statistics (CRVS) in Thailand; data produced by researchers who conducted country reports for ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) which the author was privileged to synthesize in 2019. The chapter begins, in its introduction, by asserting legal identity as a right and its importance for individuals. The second section examines the status of birth registration as the necessary first step to legal identity in the ASEAN Member States (AMS), specifically in both migrant sending and receiving countries. Section three analyses the factors preventing some groups of people from accessing birth registration, and therefore lacking a legal identity. Section four assesses the impacts of legal invisibility on the rights of people and irregular migration. The chapter ends with conclusions about the nexus between 'civil death' and irregular migratory patterns in Southeast Asia.

3.2 The State of Birth Registration and Legal Identity in Southeast Asia

Like citizenship/nationality discussed in Chap. 2, it is important to reiterate that "the very basic purpose of civil registration, birth registration in particular, is to establish a relationship between individuals and a State, and ensure the rights that derive from the legal identity under the law of the country" (Livingston, 2019). In the absence of civil registration, a legal identity may be granted by a legally recognised identification authority, such as an identity paper issued by the United Nations High Commissioner for Refugees (UNHCR) to refugees that the UNHCR recognises. However, such an identity paper may not always be honoured by the national authority where refugees reside.

Due to the importance of birth registration, the international community seeks commitment from States. The World Bank Group and the World Health Organisation (WHO), for example, set the target for universal birth registration for 2030. The Sustainable Development Goals (SDGs 2016–2030), which were adopted in 2015 by all member States of the United Nations, reiterate legal identity and birth registration stating that "By 2030, provide legal identity for all, including birth registration" (2014). Likewise, in 2014, the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) member States, including all ASEAN Members, "declared the Asian and Pacific CRVS Decade 2015–2024 with the slogan of '*Get(ting) Every One in the Picture*'" with three major goals:

Goal 1: Universal civil registration of births, deaths and other vital events;
Goal 2: All individuals are provided with legal documentation of civil registration of birth, death and other vital events, as necessary, in order to claim identity, civil status and ensuing rights;
Goal 3: Accurate, complete and timely vital statistics by 2024′ (the Bali Process 2018).

Within Southeast Asia, the Association of Southeast Asian Nations (ASEAN) adopted, in November 2012, the ASEAN Human Rights Declaration (AHRD) which enshrines "the right of recognition everywhere as a person before the law" in its general principles (AHRD, 2013). The AHRD (2013) further prescribes the right to a nationality.[1] Through its ACWC, ASEAN is also committed to push for all children and women, particularly those in vulnerable conditions and hard-to-reach groups, to have access to civil registration and legal identity (Petcharamesree & Napaumporn, 2020). Despite such a strong commitment at all levels, millions of people in ASEAN/Southeast Asia remain unregistered.

All States in Southeast Asia have committed to realising universal birth registration by 2024 (Asia-Pacific Decade 2015–2024) or 2030 (SDGs Goal 16.9). This section serves as a 'reality check' by examining the status of birth registration and legal identity (or lack thereof) in the AMS, specifically in both migrant sending and receiving countries. Particular attention is paid to Cambodia, Indonesia, Malaysia, Myanmar, the Philippines and Thailand. The emphasis placed on these six countries is based on the fact that four of them (Cambodia, Indonesia, Myanmar, and the Philippines) are the major countries of origin of irregular migrants, whilst Malaysia and Thailand are major destinations of migrants within the region. This section covers the examination of the international human rights treaties and national laws and policies pertaining to civil registration; and the state of birth registration in the six countries which also identifies which groups are missing from 'the picture'.

[1] AHRD, Article 18 reads "Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality."

3.2.1 The International and National Laws and Policies Pertaining to Birth Registration

Rights to civil registration (birth registration in particular) and legal identity are enshrined in the international human rights treaties. Article 6 of the Universal Declaration of Human Rights (UDHR) recognises the right of everyone to recognition everywhere as a person before the law (UDHR, 1948). This right is likewise recognised by the International Covenant on Civil and Political Rights (ICCPR, 1966).[2] This right is closely linked to the right to birth registration. This right "is not only of the child but of all human beings. Birth registration, and more especially a birth certificate, is a life-long passport for the recognition of rights" (UN Human Rights Council, 2014). That is why the right to birth registration is considered as a fundamental right, recognised by Article 24, paragraph 2 of the ICCPR and Article 7 of the Convention on the Rights of the Child (CRC).[3] The right to birth registration is also prescribed by Article 29 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (CRMW)[4] and Article 18 the Convention on the Rights of Persons with Disabilities (CRPD).[5] Realisation of other rights, including economic, social, and cultural rights as well as civil and political rights, especially the right to nationality/legal identity is, often times, conditioned by birth registration and the provision of a birth certificate.

All ten members of ASEAN ratified the CRC, the CRPD and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), whilst six out of ten countries in ASEAN ratified the ICCPR (Petcharamesree & Napaumporn, 2020).[6] These international human rights treaties, as previously stated, recognise the right to legal identity and the right to birth registration. Whilst no ratifying parties within ASEAN made any reservations to Article 24 (2) of the ICCPR, Malaysia is the only ASEAN Member State that made reservations to the provisions which are related to the rights to nationality and civil registration. Indeed, Malaysia entered reservations to Article 7 of CRC, Article 18 of CRPD, and Article 9 of CEDAW (Petcharamesree & Napaumporn, 2020).[7] Malaysia maintains these reservations on the ground that such provisions are incompatible with the provisions

[2] Article 16 – Everyone shall have the right to recognition everywhere as a person before the law.

[3] Article 24(2) of the ICCPR states "Every child shall be registered immediately after birth and shall have a name". Article 7 of the CRC prescribes in paragraph 1 "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and,…"

[4] Article 29 of the CRMW states "Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality".

[5] Article 18(2) of CRPD stipulates "Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents."

[6] Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Vietnam.

[7] CEDAW, Article 9 (2) "State Parties shall grant women equal rights with men with respect to the nationality of their children."

of the Federal Constitution as well as various laws and national policies as well as Islamic Shari'a law as codified in all States of Malaysia (p.8).

The right to identity papers is also recognised by the refugee law.[8] This provision is prescribed largely to facilitate the movement and resettlement of refugees who have been displaced or denationalised. Out of the six countries in this study, only two, namely Cambodia and the Philippines, are parties to the Convention Relating to the Status of Refugees. The latter also ratified the 1954 Convention relating to the Status of Stateless Persons.[9] In this regard, the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR) has consistently raised the issue of birth registration of refugees, asylum-seekers and stateless persons. In October 2013, the Executive Committee adopted a Conclusion on International Protection that specifically focused on civil registration. The Conclusion encouraged States to ensure that every child is registered immediately after birth without discrimination of any kind (UNHCR, 2014). UNHCR has furthermore made birth registration a global strategic priority. The Framework for the Protection of Children, issued by UNHCR in 2012, also includes a specific objective to ensure girls and boys obtain legal documentation, including birth certificates, in a non-discriminatory manner (Goal 4). Ensuring birth registration for the prevention of statelessness is furthermore one of the ten actions of UNHCR's Global Action Plan to End Statelessness 2014–2024 – the #IBelong campaign – that all ASEAN members adopted (2014).

Like granting citizenship/nationality, the registration of vital events of the population in a given State falls under the jurisdiction of the concerned state authority. Each country has its own laws and conditions. "Across ASEAN, civil registration is prescribed by law" (Petcharamesree & Napaumporn, 2020, p.26). All but a few countries in Southeast Asia have specific laws on civil registration. In all ASEAN Member States, birth registration is mandatory by law.[10] In general, birth registration and provision of a birth certificate is free of charge, except in the Philippines and Vietnam where a small fee is charged. However, efforts have been made to facilitate and encourage birth registration through fee exemption, especially for

[8] The Convention Relating to the Status of Refugees, Article 27. – Identity papers: "The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."

[9] The 1954 Convention relating to the Status of Stateless Persons, Article 27 identity papers states "The Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document."

[10] Sub-Decree No.103 in Cambodia; the Law of the Republic of Indonesia No. 24 of 2013 on Amendment to Law of the Republic of Indonesia No. 23 of 2006 on Population Administration in Indonesia; Births and Deaths Registration Act 1957, the Registration of Births and Deaths Ordinance 1948 (Sabah Cap.123), and the Registration of Births and Deaths Ordinance 1951 (Sarawak Cap.10) in Malaysia; Child Rights Law of 2019 in Myanmar; Rule 19 of Implementing Rules and Regulations of Act No.3753 contained in the Administrative Order No.1 Series of 1993 of the Philippines; Thailand's Civil Registration Act (No.2) B.E. 2551(2008); and the Law on Children (Law No. 102/2016/QH13) and the Law on Citizen Identification (Law no. 59/2014/QH13) of Vietnam.

registration prior to the deadline. A fee for late birth registration is applied in a number of countries (pp.29–30).

Nevertheless, registration of birth for non-nationals, although it is possible and may not impose different or special procedures, has different requirements in different countries. Additional documentation must be provided, such as the parents' passports and valid visa or documentation of authorization for their stay in the country in question. In some countries, Malaysia, for instance, documentary evidence may be different for the various nationality statuses of the non-nationals; whist in Thailand the birth registration of non-Thai nationals is identical to children born to Thai nationals. However, in Thailand, the type of documents issued vary from one group to another (Petcharamesree & Napaumporn, 2020, p.32). Vietnam is the only country where legislation has created a special procedure for registering the birth of non-nationals in the country. While the birth registration for children born to nationals is done at the Commune People's Committee, birth registration of non-nationals is to be carried out at the district-level People's Committee (DTLAW, 2017).[11] In all cases except Thailand, the legality of the status and stay of non-nationals is important for the registration of births. In all countries, non-national parents may opt to register the birth of their children at their Consulate or Embassy. This is only possible if the parents are recognised by the country of origin and possess proper documentation.

This implies that while all States require registration of all births within the territory, most country reports submitted to the ACWC and existing national laws are silent on this matter. However, the laws on civil registration of the Philippines, Thailand and Vietnam seem to be more accommodative to stateless children. The Philippines makes efforts to address issues regarding birth registration of children without legal status. The Civil Registration Act of Thailand, amended in 2008, provides that a Registrar shall process civil registration for stateless persons in the same manner as in the case of Thai nationals (Petcharamesree & Napaumporn, 2020, p.34). In Vietnam, a similar process of registration for non-nationals is applied to stateless persons (p.34).

3.2.2 The State of Birth Registration

In December 2019, UNICEF (2019a) issued a report stating that "the number of children whose births are officially registered has increased significantly worldwide, yet 166 million children under five, or 1 in 4, remain unregistered." The same report further highlighted that "in East Asia and Pacific, 14 million children under age 5 have never been registered." The report issued by UNESCAP (2021) recorded some progress but cautioned that "there remain an estimated 64 million children under five without birth registration, representing 18 per cent of children under

[11] Article 35 Law on Civil Status 2014.

five." Birth registration must be accompanied by the issuance of a birth certificate for individuals to claim identity status and to access related rights, including access to education, healthcare, and travel documents. In 2019, in East Asia and Pacific, even among those registered, 33 million, including seven million infants (under the age of 1), do not have a birth certificate (UNICEF, 2019a). In Southeast Asia, 17% or 9.5 million children under five have not been registered at birth (UNESCAP, 2021).

The rates of birth registration vary across the region. In 2015, a study indicated that Cambodia had the lowest rate of birth registration (62%) followed by Indonesia (67%), and Myanmar (72%); whilst the Philippines and Thailand recorded 90% and 99% respectively (Nomura et al., 2018). Malaysia recorded over 90% of children below 5 in 2016 (Mitchell, n.d.). Some improvements were seen in the case of Indonesia. "While steady progress has been made (86 per cent of children now have a birth certificate), a significant proportion of children across the country still do not (over 31 per cent of children under age four in rural areas, and 14 per cent under age 18). This translated to over 11 million children without a birth certificate in 2019" (UNICEF, 2020). The proportion goes up to 25% for children under 5, and 45% for children under 1 (Sari et al., 2021). Inequality and the urban-rural divide is also pertinent; "only 5% of children under 18 living in high-income households don't have a birth certificate. On the other hand, around 23% of children under 18 who live in poor households do not own the certificate" (Sari et al., 2021). It is assumed that these statistics reflect only the registration of Indonesian citizens. The registration of the births of non-national children in most, if not all, countries can be much lower. In Malaysia, for instance, the CRC Committee "notes with concern that non-Malaysian children born in Malaysia, such as asylum-seeking and refugee children as well as children of undocumented migrant workers, children of single mothers and children born in remote areas of the country, are at risk of not being registered at birth" (UNHCR, 2013) and recommends that "the State party improve the birth registration system of non-Malaysian children born in Malaysia, children of single mothers and children born in remote areas of the country" (UNHCR, 2013). In Thailand, according to the latest study on Thailand, using the Bali Process CRVS Toolkit (the Bali Process 2018), approximately 90,000 children enrolled in Thai schools and Learning Centres do not have birth registration. In fact, the prevalence of non-registration is high among hard-to-reach groups, including ethnic minorities, migrant workers, refugees, asylum-seekers, persons of undetermined nationality and stateless persons (Petcharamesree & Napaumporn, 2021). This is despite a rather open civil registration law and efforts made by the Thai authorities.

Even though birth registration is mandatory by law, millions of births remain unregistered. In addition, since some countries make legality of stay a precondition for birth registration, and the fact that the studies/reports referred to earlier do not provide disaggregated data of those without birth registration, the number of children/persons without a birth certificate may be higher, especially among foundlings, people of undetermined nationality, undocumented migrant workers, refugees and asylum-seekers and stateless persons. The lack of birth registration is closely related to deprivation of rights and irregular migration. The next section analyses the challenges and key factors hindering access to birth registration.

3.3 Factors Hindering Access to Birth Registration: An Examination

In a media statement issued by an MP in Kota Kinabalu, Malaysia (King Cheu, 2011), a concern was raised over the fact that Malaysian authorities registered the birth of non-nationals residing in Malaysia.

> We are worry about the many foreigners whether they are legal or illegal immigrants getting our nationality and become citizens through various channels. The population explosion in Sabah is a good indication of such activity. We can see the real threats and implication towards our future generations, and we can easily become the minority in Sabah especially these people are still coming in huge number and multiplying very fast. The action proposed by the government will not be able to counter this problem or eliminate these people from becoming Malaysian. There is already hundred thousand and even millions of them who had become Malaysian all over the country, and now they can vote too. Are we going to have a new Chief Minister of Sabah whose origin was from a foreign country? (King Cheu, 2011)

The said statement was issued in support of the new policy introduced by the then Minister of Home Affairs, Dato' Seri Hishammudin, who announced that "the birth certificates for the new born of the non-Malaysian will be in the form of red colour certificates and not as the previous usual light green color used by all new born irrespective of their nationality" (King Cheu, 2011). This measure was officially implemented by the National Registration Department (JPN) from the 1st of July, 2011 throughout the country. The move was initiated to "discard the misunderstanding that every child born in Malaysia will automatically become Malaysian citizen. This is for the easy recognition and clear status of a child, and to identify the child whether he is a Malaysian citizen or not. This also stops the confusion of the parents to think their child born in Malaysia is automatically a Malaysian citizen" (King Cheu, 2011). Interestingly, the conflating of access to birth registration and conferring nationality is frequently demonstrated among officials around the region.

The attitude taken by Malaysian MPs and officials is not an isolated case. It is also seen in some other countries such as Cambodia and Thailand. In Cambodia, most of the ethnic Vietnamese do not have documentation.

Without recognition of citizenship or supporting documentation, ethnic Vietnamese cannot access identity cards. About 10% of the community studied by MIRO have identity cards, but they were largely secured through bribing officials, an option that is financially out of reach for most. In another study by MIRO, only 5% of 414 ethnic Vietnamese surveyed in Takeo, Kampong Chhnang and Pursat had birth certificates (Minority Rights Group International, 2017). Cambodian law allows children of foreigners or immigrants living legally in the country to be issued a birth certificate, but local officials have conflated issuing birth certificates with conferring nationality; consequently ethnic Vietnamese have been prevented from registering births, thereby perpetuating statelessness for the next generation (Minority Rights Group International, 2017).

In Thailand, despite the non-discriminatory civil registration law, birth registration of children and marriage registration are frequently denied to migrants and

ethnic minorities, especially those without proper documents. During a field study conducted for a CRVS pilot project in Thailand, the team found out that a number of officers/registrars at local level believed that by registering the births, registered children would eventually become Thai nationals (Petcharamesree & Napaumporn, 2021). Whilst it is true that birth registration and a birth certificate are required for acquisition of nationality, the process is not automatic. In most cases, civil registration law is separate from citizenship or nationality law. Out of the six countries under this study, Malaysia and Thailand host the highest number of migrants and ethnic groups, about half of which are in irregular situations. Birth registration is subject to the policy of each country which is linked to political and security considerations; a stumbling block to political will.

There are other challenges faced by populations in accessing birth registration. Two studies, one conducted for the ACWC and another for Thailand, identified some common hindering factors for accessing birth registration (Petcharamesree & Napaumporn, 2020, 2021). Gaps and challenges were found coming from both the population and the authorities.

For the population themselves, many, if not most, hard-to-reach groups, particularly ethnic minorities, stateless persons, refugees, asylum-seekers, and migrant workers, do not have a clear understanding of civil registration and are not aware that birth registration could be performed despite their legal status (in Malaysia, the Philippines and Thailand). Geographical and practical barriers add to the lack of understanding. The remoteness and difficult public transportation links prevent many from getting the birth of their children registered. This is especially challenging for those births which occur outside health facilities. Serious related problems were also identified in Indonesia. Being an archipelago, with a widely spread land mass and many diverse ethnic and sub-ethnic groups, each with own their culture and local language, as well as having many low-income groups, especially homeless people, makes access to birth registration impossible (Petcharamesree & Napaumporn, 2020, 2021). Moreover, language is another barrier for hard-to-reach groups that prevent them from registering the births of their children. In some cases, such as Myanmar and the Philippines, armed conflicts and cultural/religious practices present obstacles to registering births. In the Philippines, access of some groups, especially Moro or Muslim populations in the Autonomous Region in Muslim Mindanao (ARMM) and Lumad and indigenous groups in Davao Occidental, to birth and civil registration is very poor when compared to the national average (Petcharamesree & Napaumporn, 2020).

For officials, on top of attitude, in some countries such as Cambodia, Indonesia and Myanmar, the '(il)legality' of the stay of the persons prevent them from registering the births of their children. In most countries, a long procedure and many required documents cause problems in accessing registration. The lack of resources and capacity, especially at the local level, exacerbate already heavy burdens on local officials. Many local officials are unable to communicate with ethnic minorities/migrants due to language barriers. In some countries such as Thailand, there are also issues of corruption related to registering births and issuing of ID cards (Petcharamesree & Napaumporn, 2020, 2021).

It is important to emphasise that one of the problems, found in different countries, regarding the birth registration of hard-to-reach groups, especially ethnic minorities and migrants, is 'incorrect registration' which often becomes the initial barrier for the correct registration and later documentation of the population. To correct this will require extensive purging of the inconsistent documents and registries. Among the most frequent of these 'incorrect registration' errors are incorrect dates of birth and spelling errors in names due to the difficulty of understanding the names and minority phonetics on the part of the registrars, due to language barriers (Harbitz & Tamargo, 2009).

Without accessing birth registration, many children are left completely invisible and put into the situation of 'civil death', with no proof of their 'legal existence'. This has a serious impact on their enjoyment of rights and the possibility of legal pathways to migration.

3.4 Impacts of Legal Invisibility on the Rights of People and Irregular Migration

As already discussed in previous sections, access to birth registration among hard-to-reach groups in most countries in ASEAN is challenging, even where domestic law is conducive to it. Lack of birth registration among certain sections of the population directly affects their access to legal identity due to the lack of proof of their place of birth and parentage. In some cases, in which naturalization is possible, without a birth certificate it is not possible to prove place of birth and so they may not be eligible for nationality or applying for naturalization. Lack of birth registration is one of the most serious causes of statelessness (Brett, 2017). This section will discuss particularly the impact of lack of birth registration on the right to an identity and irregular migration.

Children without access to birth registration are automatically deprived of the right to an identity which is closely related to the right to a nationality. As previously mentioned, "birth registration is one of the means through which the right to an identity is preserved" (Vales, 2017, p.164). Identity can be identified at both individual and community level as a birth certificate contains name, date and place of birth and the identity of the parents of the child, which provides necessary evidence of the facts that allow the child to assert his/her identity and right to nationality. Not only are these data necessary to prove the link between the child, parents and host/home countries, but they also indicate a legal connection to a community/country. Without a legal document, the legal connection between parents and child is not legally recognised by any State. For some States such as Cambodia, Indonesia, and to certain extent, Malaysia where birth registration is linked to the legal status of parents, a legal barrier is erected to a child's access to registration. Unrecognised children will grow up into unrecognised adults.

Nevertheless, one should not conflate birth registration and legal identity, although related they are distinct. To reiterate, Goal 16.9 of the SDGs states "by 2030 provide legal identity for all including birth registration". Therefore, in terms of new births, registration comprises two essential elements. First, the details of a child's birth and other relevant information are entered into official government records which means the birth of the child was officially registered. Second, a 'birth certificate' is issued to the child's parents or guardians, including the date and place of birth, and other information such as parents' names and nationality (Dunning et al., 2014). "Southeast Asia has the largest number of unregistered children; they currently stand at more than 24 million" (Humanium, n.d.). The data presented in the previous section reveals that although in some countries the rate of birth registration is rather high, this may not be translated into completeness of the registration process, meaning that a birth certificate may not be issued. The cases of Indonesia or students with 'G Code'[12] in Thailand are evident (Petcharamesree & Napaumporn, 2021). Without a birth certificate, children lack a key building block for legal identity, therefore excluding them from other rights and opportunities in life, including access to nationality. The absence of a birth certificate which, in many ways, provides legal proof of his/her existence, a person is sentenced to 'legal death'. This is particularly serious as the registration of birth in the civil registry alone does not in itself guarantee access to education, healthcare, and social protection. Lack of a birth certificate, which would pave the way to a legal identity, places those fundamental rights beyond reach.

Today, "having a legal identity is increasingly important for any person who interacts with the public sector and society in general. Legal identity is understood to be the combination of factors that enable a person to access rights, benefits, and responsibilities; that is, the legal registration and documentation of name, personal data, date of birth, and unique identification, whether in the form of biometric data or a unique identifying number" (Harbitz & Tamargo, 2009). Lack of legal identity can be categorised in two ways (a) absolute, which is when the person's birth has not been registered, and therefore no birth certificate or identity document has been issued in any country; or (b) relative, where the person's birth has been registered, but he or she did not receive a birth certificate, and thus never obtained a national identity document, or has lost the registration document (Harbitz & Tamargo, 2009). In practical terms, the distinction between an undocumented person whose birth was never registered and one whose birth was registered, but who never obtained his or her national identity document, is blurred. All entities, public or private, require the presentation of identity documents to access benefits.

A birth certificate and identity documents are the key evidence to prove the identity of a person and are necessary to acquire a nationality. A large number of stateless persons are living in Cambodia, Indonesia, Malaysia, Myanmar, the Philippines and Thailand. In these countries, children of ethnic minorities, migrants or displaced

[12] G Code is a 'Student ID Number System for Persons Without (Civil) Registration' developed by the Ministry of Education of Thailand. G Code is issued whilst awaiting for entering the students into the civil registration system whereby they will be given a 13- digit ID card according to their respective 'legal status'.

persons are disproportionately represented among those without citizenship. Out of the six countries under this study, Myanmar records the highest number of stateless persons in Southeast Asia. The most renowned among them are the Rohingya who continue to seek refuge in countries across Asia, in particular in Bangladesh, Malaysia, and the Middle East.

The impacts of a lack of identity documents and nationality are well documented by the UN agencies, research and advocacy institutions such as the Institute of Statelessness and Inclusion (ISI), and other academic sources. Children without any official identity documents are unable to prove their real age, and therefore run the risk of being considered as adults and not benefiting from the protection regime for minors, and girls may subsequently be forced into child marriage. These children cannot enjoy the benefits of social services such as schooling, health care, social security, etc. Stateless persons are often barred from employment, deprived of the right to freedom of movement and travel restrictions, and risk arrest, detention, and deportation. Most of the time, rights violations have gone unnoticed because these people are invisible in the society.

The lack of a birth certificate and the resulting legal identity puts millions of people at risk of statelessness. Whilst migration is one of the causes of statelessness, statelessness itself also causes migration, especially forced migration. The socio-economic and political exclusion of stateless persons add to their existing vulnerabilities to exploitation, trafficking in persons and forcible displacement. The following are some examples of how groups of peoples in different countries are deprived of legal identity and then are seen as 'illegal migrants' in the country where they were born or forced to migrate 'illegally'.

In Cambodia, due to historical complexities, the ethnic Vietnamese face discrimination and exclusion. "According to official census data from 2013, there are around 63,000 ethnic-Vietnamese people in Cambodia, but the true number may be much higher (Hutt, 2021). Minority Rights Group International (2017) puts it between 400,000 and 700,000." While some ethnic Vietnamese in Cambodia today are new migrants, many have lived in the country for generations. Yet around 90% of the ethnic Vietnamese in Cambodia do not have birth certificates and/or identity cards (Minority Rights Group International, 2017). This means they are denied the rights of voting, land ownership, and even access to schools, and so are essentially stateless. In the eyes of most Cambodian officials and even Cambodian human rights organisations, the ethnic Vietnamese in Cambodia are seen as 'illegal immigrants'. One may still recall that during the Khmer Rouge regime, the ultra-Maoist regime led its own genocide against Cambodia's ethnic minority groups, mainly Vietnamese, Chams, and Chinese (Hutt, 2021). Today, ethnic Vietnamese are among the poorest, and most vulnerable people in Cambodia, and a major reason why is their lack of legal status and the systematic discrimination enabled by that lack of status (2021). Most of them have neither Vietnamese nor Cambodian citizenship papers. Whilst there is no clear statistical data regarding the proportion of ethnic Vietnamese among Cambodian migrants and asylum-seekers, the study conducted by OECD/CDRI (2017) indicated that most Cambodians emigrate through irregular channels and it is estimated that fewer than 10% of Cambodians emigrate through

recognised and legal channels. In the case of ethnic Vietnamese in Cambodia, irregular migration is the only channel they have to escape from poverty, discrimination and deprivation of rights.

People without a legal identity and stateless persons are often forced to migrate caused by the lack of documents required to remain in a country. Having crossed the borders to another country, they are then seen as 'illegal' immigrants. Stateless 'hill-tribes' in Thailand, Rohingya in Myanmar, people of Indonesian descent in the Philippines, or persons of Filipino descent in Sabah, Malaysia, are all vulnerable to human trafficking operating in different States in Southeast Asia. Faced with extreme forms of discrimination, Rohingya have been forced to leave their country of origin and denied the right to return unless they pass the process of identity verification. Confined in refugee camps in Bangladesh with limited access to education, employment or even being registered at birth, many decide to take on dangerous journeys, by sea or by land, in search of a better life and better opportunities. The most tragic journey happened in 2015. In the first 3 months of the year, it was reported that 25,000 migrants boarded people smugglers' boats from Myanmar and Bangladesh. It said about 300 people died at sea (BBC, 2015). Those who managed to disembark ended up in forced or bonded labour on Thai and Malaysian plantations and deep-sea fishing boats.

In 2019, Southeast Asia recorded 662,000 international migrants, a little over 1/3 of whom were refugees. Most of them are vulnerable due to their undocumented legal status and lack of valid travel documents (Nanthini, 2020).[13] Invisible in the law in their country of origin, irregular migrants are 'hidden populations' in the countries of destination. Lack of legal identity exacerbates the vulnerability of various groups of people, including stateless persons. As indicated in the previous section, "the right to a nationality is a fundamental human right connected to all other human rights, as well as being necessary to access regular migration pathways. Being able to prove nationality affects every aspect of the migration experience and is essential to the orderly administration of migration and prevention of statelessness" (UNESCAP, 2020). Since birth registration remains complicated in some countries, especially for migrants, members of ethnic or religious minorities, stateless persons and persons of undetermined nationality face increased risk of violations of their rights while on the move.

3.5 Conclusions: Nexus Between 'Civil Death' and 'Irregular' Migration in Southeast Asia

As described in previous sections, access to birth registration and issuance of birth certificates contributes to preventing statelessness by establishing a legal record of where a child was born and who his or her parents are. As such it serves as a key

[13] It is to be acknowledged, though, that some may have valid travel documents and distinction should be made between undocumented\irregular migrants and asylum-seekers/refugees.

form of proof of whether a person has acquired nationality by birth or by descent. For most AMS, birth registration of all children born in the country is prescribed by law. However, access to birth registration and civil registration of different groups may vary from one country to another, as well as from one population group to another. In the Philippines and Thailand, some groups of peoples, such as ethnic minorities living in remote areas and migrants, are still left out of the registration scheme. However, except in a few countries, such as Cambodia, Thailand and Vietnam, the legal residence/status of parents is required by most countries for registration of birth. This requirement leaves some groups of people, such as irregular migrant workers, refugees and asylum-seekers, outside the registration system (Petcharamesree & Napaumporn, 2020). Without birth registration, the door to obtaining proper legal status is closed. Unregistered children are sentenced to 'civil death' only because chance, not choice, placed them within political borders that deny their right to birth registration (and nationality). Political borders, therefore, render human beings legally invisible and deprive them of fundamental rights.

The nexus between the lack of identity documents and irregular migration is quite basic. A person without any legal documents cannot travel through the legal channels (Manby, 2016). "Undocumented people are at risk of expulsion by governments as irregular migrants, even if they are entitled to nationality there, or have no meaningful connection or documentation in any other state—including the state to which they are deported" (Manby, 2016). Manby further describes that a lack of identity documentation from both the country of origin and/or the country of residence endangers migrants and refugees (a) during the migration process, (b) once in a new country, and (c) upon return. During migration, in absence of identity documents, it makes regular/legal migration impossible. It is also difficult for migrants to obtain regular migrant status and/or for asylum-seekers to obtain refugee status. Whilst in the host country, a lack of legal identity makes it impossible to access to basic rights. As some countries use legal status as a precondition for birth registration, children of these 'irregular migrants' are unable to be registered — a vicious cycle of irregularity — as they cannot acquire other documents. Refugees and migrants, and their children, who return home will face difficulties re-establishing their legal identity and nationality in the country of origin. In some cases, foreign civil registration documents may not be accepted by the home State, and therefore, establishing citizenship for their children born in foreign land may be denied, and they end up being excluded.

As analysed in Chap. 2, identity and identification are more than a technical or administrative process. The denial and/or removal of the legal birth registration and legal identity of ethnic Vietnamese by Cambodian authorities; colour-coded birth certificates as applied by Malaysia and Myanmar; or different prefix numbers for identity cards issued by the Thai authorities; create a political dividing line between nationals and non-nationals. The distinction provides a clear demarcation of rights recognised for each category of people. Rights to vote and run for elections are usually limited to citizens only, whilst other public services are not always guaranteed to non-citizens. The 'politics of difference' is clearly apparent when human beings are treated differently. The system of difference which renders

human beings legally invisible and deprives them of fundamental rights cuts off a large number of people from any legal pathway to migration. For ASEAN and States in the region to fulfil their commitments and to realise Vision 2025, to become an inclusive, caring and sharing societies; and for the AMS to combat trafficking in persons as well as other forms of irregular migration, the issue of 'civil death' needs to be properly addressed.

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Chapter 4
Forgotten Stateless Vietnamese in Thailand

Bongkot Napaumporn

4.1 Introduction

From around 1990, there have been a significant number of irregular immigrants entering Japan. The Japan's Bureau of Immigration indicated that the six countries from which 73% of these immigrants come are Thailand, Korea, China, the Philippines, Malaysia and Iran (Koshiro, 1998, pp. 155–156). Stateless Vietnamese are one of the groups from Thailand. Though born and brought up in Thailand, they have no Thai nationality as their parents were 'Indochinese refugees' escaping the first Indochina War (Komai & Azukizawa, 2009).

Fong Laywan was one ethnic Vietnamese from Thailand who had a tragic life, living and working illegally in Japan for 23 years. He was only able to return to Thailand at the age of 43 after he was diagnosed with metastatic lung tumors. Originally, Fong was born in Sakhon Nakhon province of Thailand in 1969. His mother was among children of the Vietnamese refugees born in Thailand while his father was born in Laos during the time his parents were fleeing the war in Viet Nam.

(continued)

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According to the 1965 Nationality Act, Fong has Thai nationality by being born on the territory. Due to the fact that his mother had Thai nationality[1] at the time of his birth and is therefore not considered an immigrant, his Thai nationality is therefore never revoked by Revolutionary Decree No.337 (see Sect. 4.3.1). Like others in such vulnerable situations, no one in Fong's family understood this complex nationality system or was aware of amendments to the law and how they affected their lives. Fong suffered from being treated as a stateless person since he was born. As he saw no future, he decided to risk his life by going to Japan where he hoped to find higher-paying jobs to support his family in Thailand. Some illegal brokers in the community sold him passports with false Thai names. He left Thailand in 1990. In Japan, he ended up living in fear, working illegally, and getting low wages. Because of his illegal entry and unresolved statelessness status, he also had no access to welfare.

Lawyers and academia in Thailand and Japan made the case for Fong's eligibility for Thai nationality to both Thai and Japanese publics.[2] They argued that Fong had the right to Thai nationality since the day he was born and should not have been denied the right to return to his own country.[3] After considering the legal opinion and all relevant official documentation, the Thai Ministry of Interior confirmed that Fong had Thai Nationality by birth and authorised his entry to Thailand for immediate medical assistance.[4] Subsequently, the Royal Thai Embassy in Tokyo issued him a Certificate of Identity (C.I.)[5] as a travel document to return to Thailand. He finally arrived Thailand on 27 June 2012 and managed to fulfil his last wish which was to breathe his last at home. He lived with his family for a few more months and died peacefully as a Thai national.

[1] Fong's mother acquired Thai nationality under the *jus soli* principle in accordance with the Nationality Act B.E.2456 (1913). However, she could not pass her Thai nationality to Fong because at the time of his birth, the nationality law (Section 7(2) of the Nationality Act B.E.2508 (1965)) allowed only children born outside Thailand to acquire the nationality from the mother.

[2] A letter to "request protection and assistance for Mr. Fong Layway, a Thai national in Oyama, Japan, to return to Thailand in order to receive an immediate medical" was sent to the Minister of Interior on 18 June 2012 on behalf of a Thailand-Japan ad hoc advocacy group. Its attachment included an interview report, legal analysis on Thai nationality of Mr. Fong Laywan and all relevant documents e.g., his birth certificate and ID card for stateless "Vietnamese Displaced", and his mother's birth certificate and her Thai ID card.

[3] Article 12 of the International Covenant on Civil and Political Rights (ICCPR).

[4] The MOI letter No.0308.4/7680 sent to Permanent Secretary of the Ministry of Foreign Affairs on "request assistance for a Thai person living in a foreign country to return to Thailand (Fong Laywan Case), dated on 20 June 2012.

[5] C.I. No. A 094058 issued by Royal Thai Embassy in Tokyo, dated on 21 June 2012.

Looking back to the statelessness situation in Thailand, this country is currently hosting one of the world's largest populations of stateless people with 480,549 registered with the national civil registration system in 2020 (UNHCR, 2020b). According to the Thai National Security Council (NSC), these stateless people were registered into 18 different categories based on their country of origin and ethnicity and period of arrival.[6] The Vietnamese refugees fleeing the Indochina war and their descendants, like *Fong Laywan*, are one of these groups, being registered under the term 'Displaced Persons from Viet Nam'. The historical records confirmed that Thailand had accommodated several groups of Vietnamese refugees since the mid-seventeenth century. According to Sriphana (2005), those whose families have been in Thailand since before World War II, or so-called "old Vietnamese", were able to be integrated into Thai society. Whereas these Vietnamese refugees fleeing the Indochina war, who was known as "new Vietnamese" and later on registered as stateless persons, struggled for years to settle down in Thailand. The case of *Fong Laywan* exemplified an extreme scenario of the latter group of Vietnamese in Thailand who was denied Thai nationality and socio-economic rights in the past. This group was rendered stateless and a number of them decided to move onward to seek a better life in other countries.

Studying about this group of Vietnamese contributes to better understanding of one of the root causes of ongoing statelessness in Thailand and the nexus between migration and statelessness. Through exploring national legal frameworks, policy measures and geopolitical complexion, the chapter identifies drivers that contribute to the policymaking on this particular population and analyses the extent to which these stateless Vietnamese had been politicised overtime. Based on real-life situations and experiences of some stateless Vietnamese, the chapter also identifies lessons learned and existing challenges.

In the next section, the chapter gives a historical landscape of migration of the Vietnamese into Thailand. The third section of the chapter discusses the politics of belonging of Vietnamese refugees fleeing the Indochina war, the focus of the Chapter, and analyses the way their matters had been politicised. It also discusses the onset of statelessness in Thailand and a shift in policy to address legal status and

[6]The Thai National Security Council divided stateless persons into 18 groups including (1) Displaced Persons from Viet Nam; (2) Former Chinese Nationalist Party or Kuomintang (KMT) soldiers; (3) Thai Lue; (4) Displaced Thais from Kong Island, Cambodia; (5) Mountain persons from Laos; (6) Displaced Persons from Myanmar (arrived before 9 March 1976); (7) Displaced Thais from Myanmar (arrived before 9 March 1976); (8) Displaced Nepalese; (9) Haw or Yunnanese Chinese Displaced Persons; (10) Highlanders or hill tribes (arrived before 3 October 1985); (11) Highlanders or Persons from Highland Communities (arrived before 3 October 1985); (12) Hmong from Thamkrabok, Sara Buri Province; (13) Former Chinese Malaya Communists; (14) Highlanders or Persons from Highland Communities (arrived after 3 October 1985); (15) Illegal Migrants from Myanmar (arrived after 9 March 1976); (16) Displaced Persons from Laos; (17) Illegal Migrants from Cambodia; (18) Displaced Thais from Myanmar (arrived after 9 March 1976). Please note that these are official names (originally in Thai) according to the record in the Cabinet Resolution on National Strategy on Comprehensive Resolution for Irregular Migration, 24 April 2012.

nationality problems of these stateless Vietnamese. Finally, existing gaps and recommendations to provide redress to stateless Vietnamese in Thailand and stateless Vietnamese who moved onward to Japan are identified in the last section.

4.2 Vietnamese Refugees in Thailand: From Accommodation to Restrictions

Thailand has been home to different groups of ethnic Vietnamese. The majority of them fled their country due to various reasons such as religious persecution, civil war, and political violence after the country's reunification, but not all of them had to live their lives as stateless people. Since the mid-seventeenth century, there have been four waves of the migration of the Vietnamese refugees into Thailand: refugees who arrived before World War II (before 1945); refugees who fled the first Indochina War and the aftermath (1946–1954); refugees who came after the reunification of Viet Nam (1975–1995); and today's 'urban' refugees and asylum-seekers from Viet Nam. This section gives an overview of migration of Vietnamese refugees in the chronology to Thailand; however, the main focus of the chapter is on the group of Vietnamese refugees fleeing the Indochina war who was rendered stateless in Thailand.

4.2.1 Vietnamese Refugees Arriving Before World War II (Before 1945)

According to the historical records, Thailand (or Siam at that time) has welcomed many foreigners including refugees from Tonquin and Cochinchina, old terms referring to the northern and southern region of Viet Nam, since the reign of King Narai the Great (1656–1688).[7] Sriphana (2005) explained that these Vietnamese refugees fled anti-Christian persecutions and a civil war between the two ruling families, the Trịnh and the Nguyễn. In the Thonburi period, King Taksin the Great[8] (1767–1782) took in members of the ruling family of the Nguyễn who escaped from the Tây Sơn war[9] to take refuge in Thailand. In the Rattanakosin period, King Phutthayotfa

[7] King Narai's reign was known as the most prosperous during the Ayutthaya period where he valued trade and diplomatic activities with foreign nations. See more from La Loubère (1693, pp. 10–11).

[8] King Taksin the Great founded Thonburi after the downfall of the Ayutthaya Kingdom. He relocated the capital from Ayutthaya to Thonburi.

[9] Tây Sơn war is a civil war in Viet Nam occurred during 1771–1802, followed by a series of military conflicts.

Chulalok Maharaj (King Rama I) accepted another highborn refugee, Nguyễn Phúc Ánh, later known as Emperor Gai Long,[10] who also fled the protracted Tây Sơn war. From 1820–1883, many Vietnamese Catholics fled religious oppression and strict restrictions on Catholicism to seek protection in Thailand (Flood, 1977, p. 32). Under French colonial rule over Viet Nam from 1884–1945,[11] there were additional groups of Vietnamese refugees fleeing through Laos and Cambodia into Thailand, including a significant number of people from Central Viet Nam who rebelled against the French authorities (Voraphas, 1966, p. 234).

Apart from Thailand and Viet Nam's troubled relations from the mid-nineteenth century, this showed that the two countries maintained a supportive relationship in the past. Thai legal frameworks during this period also reflected the openness of Thailand to foreigners including the Vietnamese irrespective of their status as refugees. Those who entered Thailand before 1927 were considered as lawful immigrants and provided with the right to stay permanently in Thailand.[12] Thai immigration laws until 1945 allowed undocumented persons to enter and stay in the country and granted them an identification paper at the point of entry.[13] In addition, discrimination against specific groups of people in the acquisition of Thai nationality did not occur during this period. Thai nationality was automatically granted to every child, including of these Vietnamese, born on the territory (*jus soli*)[14] and to children born to a Thai father who married a foreign or Vietnamese woman (*jus sanguinis*).[15] These Vietnamese who reached the age of majority and been in Thailand for at least 5 years could apply for naturalisation.[16] In addition, the laws provided other pathways to Thai nationality for a Vietnamese woman whose husband had obtained Thai nationality by naturalisation[17] and to a Vietnamese minor whose father had obtained Thai nationality by naturalisation.[18] Thailand managed to unite people of different ethnicities and people who came to Thailand from other countries including this group of Vietnamese through permanent settlement and

[10] After defeating the Tây Sơn, Nguyễn Phúc Ánh became the first Emperor of the Nguyễn Dynasty of Vietnam (1802–1945). He is later known in Thailand as Emperor Gai Long.

[11] The first protectorate treaty was signed on 6 June 1884 to submit the authority of the Vietnamese monarchy to French power. After 60 years under the French rule, Viet Nam declared its independence on 2 September 1945.

[12] This legal standard is set in the Supreme Court Judgement No.153/2505 in 1962. The Court ruled on a case of an undocumented person of ethnic Chinese who entered Thailand in 1920 confirming that this person shall never be considered as having entered the territory in violation of the law since no immigration law was enforced during the time of his arrival.

[13] Section 6 paragraph two of the Immigration Act B.E.2470 (1927) and Section 13 of the Immigration Act B.E.2480 (1937).

[14] Section 3(3) of the Nationality Act B.E.2456 (1913).

[15] Section 3(1) and Section 3(2) of the Nationality Act B.E.2456 (1913).

[16] Section 6 of the Naturalisation Act B.E.2454 (1911).

[17] Section 12 of the Naturalisation Act B.E.2454 (1911).

[18] Section 13 of the Naturalisation Act B.E.2454 (1911).

Thai nationality. Although concrete evidence was lacking, it was presumed that around 10,000 persons of ethnic Vietnamese (with Thai nationality) had remained in Thailand since the Ayutthaya period (Chandavimol, 1998, pp. 39–43).

4.2.2 Vietnamese Refugees Fleeing the First Indochina War and Its Aftermath (1946–1954)

The second wave of Vietnamese refugees occurred during the first Indochina War and following battles after the French reoccupied Indochina. Due to the battle of Thakhek on 21 March 1946, a large number of Vietnamese, who had been living in the Mekong River towns in Laos, crossed the Mekong to safety in Thailand. Other groups in Savannakhet and Vientiane fled after the French retook the cities on 15 March and 25 April 1946 respectively (Sriphana, 2005, pp. 24–26). Burutphat (1978) added that there was an additional migration of Vietnamese refugees to Thailand in 1953 after forces of the North Vietnamese independence coalition, Việt Minh, tried to attack the French in Laos.

The actual number of these Vietnamese was unknown. Although the Ministry of Interior tried to collect their information and statistics, the figure appeared to be unreliable due to different approaches used such as the target province for each survey. In 1956, the first survey showed that there were 46,600 Vietnamese refugees living in five northeastern and eastern provinces. In 1959, after a repatriation agreement was reached between the Thai and North Vietnamese Red Cross Societies, 70,032 Vietnamese refugees from eight northeastern, eastern, and southern provinces were registered for repatriation. After a repatriation programme to North Viet Nam came to a halt, the survey in 1965 indicated that there were 31,818 Vietnamese remained. However, this figure appeared to be lower than reality, given the fact that Vietnamese were also living in other provinces. According to Khachatphai in 1978, the number of the remaining Vietnamese including their children born in the country was more likely closer to 50,000 (Burutphat, 1978, pp. 18–21) (Table 4.1).

In the first years following their arrival, Thailand had showed itself to be very liberal toward these Vietnamese refugees due to the then civil government's foreign policy to support neighbouring countries, particularly Laos and Viet Nam, to regain national sovereignty and independence. Several assistance measures were undertaken such as its facilitation of the admission of these Vietnamese refugees free of charge; their exemption from the alien registration process; cabinet decisions approving provision of humanitarian assistance and a budget to loan them living expense funds and pay wages for those who involved in the highway constructions (Sriphana, 2005, pp. 75–85).

When Thailand adopted an anti-communist stance during the Cold War period these Vietnamese refugees were treated differently and faced difficulties integrating into Thai society particularly under the military regimes. These Vietnamese, although were entitled to Thai nationality, were targeted for nationality stripping.

Table 4.1 Number of Vietnamese refugees based on the three surveys carried out by the Ministry of Interior in 1956, 1959 and 1965

Province	Surveyed in 1956	Surveyed in 1959 before repatriation	Surveyed in 1965 after repatriation
Nakhon Phanom	16,200	22,198	3763
Nong Khai	12,600	16,155	9503
Sakhon Nakhon	9300	12,533	7192
Udonthani	(no survey done)	8550	4874
Ubon Ratchathani	6500	8527	4800
Prachin Buri	2000	1583	1342
Surat Thani	(no survey done)	213	155
Phatthalung	(no survey done)	279	181
Total	46,600	70,032	31,818

Source: Burutphat (1978)

Although there were several policy changes to later remedy their situation, many remain stateless. These Vietnamese refugees were officially recorded in the Thai civil registration system as 'Displaced Persons from Viet Nam'.

4.2.3 Other Vietnamese Refugees Arriving Thailand Subsequently

After the fall of Sài Gòn in 1975, Thailand faced another phenomenon of the mass exodus of refugees from Viet Nam who came by sea and overland. According to UNHCR (2000), the displacement caused by the conflicts in Indochina, which were exacerbated by rivalries between the United States and the Soviet Union as well as China, tested to a breaking point the capacity of states in the region to absorb the refugees. From 1975–1995, Thailand accommodated 160,239 Vietnamese refugees, but was no longer willing to allow Vietnamese to settle in the country. UNHCR, which started operating in Thailand in 1972, assisted in coordinating the extension of aid, shelter and services to these refugees and seeking durable solutions including voluntary repatriation or resettlement in third countries (Chantavanich & Rabe, 1990, p. 72). The majority of this group managed to depart to resettlement countries, with the help of international organizations and the Thai government.

UNHCR Thailand's Fact Sheet (2021) indicated that Thailand is also a destination for a number of refugees and asylum-seekers, currently estimated at 5000 from over 40 countries, residing in Bangkok and surrounding urban areas. Based on the result of UNHCR's assessment of the COVID-19 impact on urban refugees and asylum-seeker in 2020, it is evident that some groups from ethnic minorities from Viet Nam (e.g., Hmong, Kinh, Montagnard) were part of the population (UNHCR, 2020a). As the Thai government provides no official protection for them and

considers them “illegal” in the country, they are at risk of being detained on immigration grounds if they entered illegally or overstayed their visa. However, the Thai Cabinet approved in December 2019 the establishment of a screening mechanism to distinguish people who need international protection from economic migrants, although its implementation has been delayed. The regulation is expected to increase the protection space for these urban refugees including those from Viet Nam.

4.3 The Politicisation of Belonging and Stateless Vietnamese in Thailand

The politics of belonging was defined by John Crowley as ‘the dirty work of boundary maintenance’. He further identified that the boundaries where the politics of belonging is concerned are the boundaries of the political community of belonging, the boundaries that separate the world population into ‘us’ and ‘them’. The politics of belonging encompasses contestations both in relation to the participatory dimension of citizenship as well as in relation to issues of the status and entitlements such membership entails such as the right to enter a state or any other territory of a political community, and, once inside, the right to remain there. (Yuval-Davis, 2011, pp. 26–30) This character of being full membership of the community has become the pivot of the political struggles of excluded groups, who were often marginalised, including these stateless Vietnamese in Thailand.

Besides their struggles to be part of the community, the geopolitical complexion in Southeast Asia that was influenced by the big powers during the Cold War accumulated the problems of stateless Vietnamese in Thailand. Their existence including the issues around their citizenship, legal status and entitlements had been prominently politicised and appeared on the political agenda. The politicisation of stateless Vietnamese in Thailand showed both negative and positive consequences. First, it marked the power of the Thai state against the responsibility to provide protection to these stateless Vietnamese by deploying national security to dominate the political realm. The second and positive aspect of politicising these Vietnamese was the fact that it contributed to the interstate political debates leading to a shift in policy to determine proper solutions to facilitate their permanent settlement in Thailand.

4.3.1 During the Anti-communist Era

From the 1950s until the 1970s, Thailand came under the strong influence of the United States. Its foreign policy with regard to Indochina was based on the belief that it represented the “free world” as against the “communist world” and was

therefore largely hostile during this anti-communist era. At the domestic level, the Thai military became the most powerful group in national policy making and made use of anti-communist rhetoric to maintain a grip on the political system. This further worsened its relationship with the neighbours including Viet Nam (Maisrikrod, 1992, pp. 290–292). Policies towards these Vietnamese changed dramatically from accommodation to restriction. Due to the ideological antagonism characteristic of the Cold War, this group was pictured as "spies", "terrorists" and dangerous "communists" by military-controlled media in Thailand especially during the second Indochina war[19] (Flood, 1977, p. 38).

During this period, the group of Vietnamese refugees fleeing the Indochina war was extensively politicalized and referred to in political debates. National security was deployed in public discourses to impose restrictions on and legitimize some discrimination against this group. From 1949, the Ministry of Interior has restricted the Vietnamese to reside in only designated provinces mainly in the northeast.[20] In 1951, there were special rules governed by the Police Department to administer the movement of these Vietnamese. Among others, one stated that *"the refugee head of family must inform the police sub-village headman every time someone from outside the province wants to contact a member of his family; the headman must verify that the visit concerns the refugee's 'honest living', and if it concerns politics, the fact must be reported to Police Special Branch"* (Poole, 1967, p. 889). In the past, they would be separated from their families and sent to other provinces when they were accused of committing a crime.[21] After 1957, it was estimated that at least an average of 200–300 Vietnamese per year were jailed without charge or trial. In these same years, other Vietnamese in the northeast became the victims of shootings, robberies and other acts of violence, with little or no action taken against their assailants by police (Flood, 1977, p. 38). In 1970, a centre, known as the "Coordination Centre 114",[22] was established under the Communist Suppression

[19] The second Indochina War is widely known as "Viet Nam War". However, it is called "American War" in Viet Nam. The War took place from 1954, when the US provided support to the South Viet Nam, instead of the French who was defeated in the Battle of Dien Bien Phu, until the fall of Saigon in 1975.

[20] Currently, these Vietnamese are restricted to reside in 14 provinces (including Nong Khai, Sakhon Nakhon, Nakhon Phanom, Ubon Ratchathani, Prachin Buri, Udon Thani, Surat Thani, Phatthalung, Yasothon, Mukdahan, Nong Bua Lamphu, Amnat Charoen, Sa Kaeo and Bueng Kan). The permission to travel out of the designated provinces may be granted by the District Chief on a case-by-case basis in accordance with the Cabinet Resolution dated on 21 June 1994 and the Ministry of Interior's Proclamation on "Designated residential provinces for Displaced Vietnamese" dated on 22 August 1994.

[21] Ministry of Interior Letter dated on 26 March 1953 titled "Movement of Viet Minh groups in Thailand" [in Thai].

[22] The operation of the Centre was terminated on 30 September 2000, and the Office of the Permanent Secretary for Interior and the Department of Provincial Administration have taken over the tasks relating to the Vietnamese after that.

Operations Command (CSOC)[23] to supervise the implementation of policies towards Vietnamese by relevant government agencies and to impose stricter policies and measures to control these Vietnamese refugees.

Moreover, the Cabinet adopted decisions on 18 May 1977, 3 February 1981, and 1 May 1984 to prohibit marriage between Thai men, particularly government officials, and Vietnamese women on the account of potential threat to national security (Burutphat, 1978, pp. 50–51). These resolutions were repealed in 2010, but the impact of the policies on the legal status of these couples and their children remains. Vietnamese were also prohibited from engaging in key occupations which happened to be the main areas in which these Vietnamese typically had expertise.[24] According to Flood (1977), their children were not allowed to continue their higher education in general public universities, except ones with open admissions, although they were allowed to study in Thai schools until high school.

The immigration laws were made stricter, and the nationality laws became more exclusive. This period's nationality laws introduced an idea on revocation of Thai nationality on national security grounds. The amendment in 1960 targeted Vietnamese women who married Thai men, by giving the reason that *"some countries involved female agents of their nationality in espionage and sabotage or undermining national security of foreign countries. The acts included arrangement of marriage between their female agents and nationals of the target country. Thus, it is appropriate to stipulate conditions on acquisition of Thai nationality by marriage of an alien woman. Also, the Minister of Interior shall have power to revoke her Thai nationality if the marriage is found fraudulent…."*[25] In addition, Thai nationality on the basis of birth on the territory could be withdrawn, on national security grounds, if either parent did not have permanent residence status.[26] In 1972, a Decree was issued under the then military government to retroactively revoke Thai nationality of children born in the country to parents who did not have permanent residence status as well as to deny Thai nationality of children born in the same circumstance after the Decree was in effect.[27] Due to fear of expansion of communism into Thailand, the Decree aimed to prevent those who came from countries under communist rule to acquire Thai nationality, targeting children born to Vietnamese. The Decree, together with the continuing restriction on *jus soli* acquisition of nationality,[28] adversely affected all ethnic minorities including indigenous hill tribes who are often without any documents to prove their birth and permanent

[23] The Communist Suppression Operations Command (CSOS) was later changed to Internal Security Operations Command (ISOC).

[24] The prohibited jobs were, for example, carpentry, bricklaying, dressmaking, hairdressing, gardening, driving motor vehicles, repairing vehicles and electric devices.

[25] Section 13 *bis* of the Nationality (Amendment) Act No.4 B.E.2503 (1960).

[26] Section 16 *bis* of the Nationality (Amendment) Act No.4 B.E.2503 (1960).

[27] Article 1 and 2 of the Revolutionary Decree No.337 B.E.2515 (1972).

[28] See Section 7 *bis* of the Nationality Act B.E.2508 (1965) as amended by the Act No.2 B.E.2535 (1992).

stay in the country (Saisoonthorn, 2005, pp. 48–50). Consequently, several hundred thousand people were rendered stateless as a result of the Decree (Boonrach, 2017, p. 96). Apparently, discrimination against this group of Vietnamese became an underlying cause of ongoing statelessness nationwide.

4.3.2 After the Normalisation of Thai-Vietnamese Relations

In the early 1970s, there was an immediate reversal of the stand taken by Thailand during the second Indochina war (or Viet Nam War) period, following America's pull-out from Viet Nam. Thai foreign policy was shifted from Thai-US relations being central to Thai security to one of giving more priority to Thailand's neighbours, regardless of differences in political and economic systems. However, a real turning point in policy that shaped Thai-Vietnamese relations, including solutions to stateless Vietnamese in Thailand, was the accession of Chatichai Choonhavan as prime minister (1988–1991) and his successor, Anand Panyarachun (1991–1992) (Maisrikrod, 1992, pp. 293–297). Key factors that enabled the normalisation of the two countries' relations included the Vietnamese withdrawal from Cambodia and Laos in 1989, the end of the Cold War, the dissolution of the Soviet Union, and the more cooperative role of Viet Nam in ASEAN and its political and economic reform (Sriphana, 2005, p. 109).

After Thai-Vietnamese relations was normalised, solutions to legal status and nationality problems of stateless Vietnamese became a focus of interstate political agendas again. It is noteworthy that Viet Nam takes the issues of ethnic Vietnamese residing abroad including ones in Thailand seriously. Although Viet Nam recognises a single nationality, it has directed its policies to "encourage and create favourable conditions for persons of Vietnamese origin residing abroad to maintain close relations with their families and homeland and contribute to the building of their homeland and country."[29] In December 1991, Vietnamese Prime Minister Võ Văn Kiệt visited Bangkok, and in January 1992, on separate trips, Thailand's then Supreme Commander Suchinda Kraprayoon and Prime Minister Anand visited Hanoi. The issue of Vietnamese refugees who have been residing for several decades in the northeastern provinces of Thailand was discussed. Viet Nam requested Thailand to accept these Vietnamese as citizens due to their long residence in the country (Maisrikrod, 1992; Sriphana, 2005). Contrary to the political environment during the anti-communist era, the politicisation of these Vietnamese refugees during this period positively brought their problems into public attention as part of ongoing political debates. By politicising this matter, Viet Nam's diplomacy at that time influenced Thailand to readjust its policies to address legal status and nationality problems not only of stateless Vietnamese but also other groups in Thailand. This led to a shift in policy as follows:

[29] This principle later reflects in article 7 of the Law on Vietnamese Nationality in 2008.

4.3.2.1 Facilitation of Local Settlement Through Permanent Residence

In 1984, the first cabinet decision was issued to allow for the Minister of Interior to set out conditions and requirements for permanent residence status of stateless Vietnamese who were deemed as having "good moral character". The implementation of this policy was not successful because the application process was lengthy and strict. As a result, only 96 Vietnamese were granted permanent residence status. In 1992, the National Security Policy on Displaced Vietnamese (1992–1994) was approved. This introduced a comprehensive policy framework to facilitate permanent settlement of stateless Vietnamese in Thailand based on the fact that they had been in the countries for generations and could no longer return home. The policy detailed required actions to address legal status and rights of Vietnamese including the revision of relevant policies, measures and rules to expedite nationality application process for Vietnamese children born in Thailand and grant permanent residence status to their parents. Accordingly, another cabinet decision was passed in 1997 to revise eligibility criteria and rules for granting permanent residence status to the first generation of the Vietnamese refugees who fled during 1945–1946. Recently, the Cabinet approved on 26 January 2021 a new set of criteria on determination of legal status and rights of people who had migrated to and stayed in Thailand for a long period of time, and repealed previous decisions on facilitated permanent residence of stateless populations including these Vietnamese. This recent policy enhances access of Vietnamese to a wider set of entitlements associated with their legal immigration status and permanent residence which will further facilitate improved access to nationality, and highlights human security as a new security paradigm.

4.3.2.2 Remedy for the Deprivation of Thai Nationality

These Vietnamese refugees were rendered stateless by the 1972 Decree that revoked and denied their Thai nationality. It was impossible for them to (re)acquire Thai nationality unless there was a special measure to help facilitate the application process and remedy their situation. In 1990, the Cabinet passed a resolution to grant Thai nationality to second and third generation Vietnamese. Later in 1992, Decree No.337 was repealed by the Nationality (Amendment) Act No.2 B.E.2535 and the National Security Policy on Displaced Vietnamese (1992–1994) was adopted to cope with legal status problems of the Vietnamese. In 2008, the Thai Government passed an important amendment to the nationality law aiming to completely address the loss or denial of Thai nationality under Decree No.337. The amended provision allowed those who were born in Thailand and affected by the Decree to acquire Thai nationality by registration at the district office where they reside. To be eligible, the applicant has to: (1) provide evidence through civil registration of being born in Thailand and having been domiciled in Thailand for a consecutive period established at the discretion of the civil registration authorities; and (2) demonstrate good

behaviour or acts done to the benefit of the country. Due to this provision, a great number of the Vietnamese whose nationality was revoked or denied got back their Thai nationality.[30]

4.4 Conclusions: Redress for the Stateless Vietnamese

4.4.1 For Remaining Stateless Vietnamese in Thailand

As of December 2020, the Ministry of Interior indicated that there were only 470 stateless Vietnamese (registered as 'Displaced Persons from Viet Nam') left in the civil registration record. However, this may not represent the real situation of remaining stateless Vietnamese because this number includes only the first generation who fled to Thailand and their children who were born before 1989.[31] The figure excludes the remaining children who were born in Thailand after 1989 and the Vietnamese who have already been granted permanent residency status but are still stateless.[32]

To better understand the impact of the previous discriminatory practices on the remaining stateless Vietnamese in Thailand, two brief case studies of Vietnamese in Thailand are examined as follows:

According to Saisoonthorn (2005), Ms. Suda is among ethnic Vietnamese in Thailand who was affected by Decree No.337. She was born in Sakhon Nakhon province in 1949 to the Vietnamese refugees who fled the war during 1945–1946. According to the Nationality Act B.E.2456 (1913) that was in force at the time of her birth, she acquired Thai nationality under the *jus soli* principle regardless of her parents' legal status. Later in 1972, her Thai nationality was revoked by the Decree, and she became stateless at 23 years old. Only when she was 43, Suda was eligible to apply to restore her Thai nationality based on the Cabinet Resolution on 17 March 1992. Worse than that, the process took her seven years to finally obtain Thai nationality.

(continued)

[30] Section 23 of the Nationality (Amendment) Act No.4 B.E.2551 (2008).

[31] In 1989, the Department of Provincial Administration started providing a household registration for temporary residents (Thor Ror 13) to these registered Vietnamese. The Vietnamese children born before this date including their parents were categorized as a group numbered 6 while those born after being granted the household registration were assigned as a group numbered 7 in the civil registration system.

[32] This is because the number of all children born in Thailand to stateless parents and people having permanent residency status, including these Vietnamese, are combined. From the civil registration system, it is difficult to sort out who among them are ethnic Vietnamese.

In the case of Mr.Yutthana Phamvan, a third-generation Vietnamese refugee, his nationality problem was resolved 19 years after he was born although he should have been granted nationality at birth. Yutthana was born in Udon Thani province in 1985. His mother and father were also born in Thailand in 1949 and 1950 respectively, themselves the children of Vietnamese refugees. According to the Nationality Act B.E.2508 (1965), Yutthana has Thai nationality by birth and should not have been affected by Decree No.337 because his parents are not immigrants. Despite this, from 1985–2004, he was treated as a stateless person and missed many opportunities. Yutthana only realised his stateless status (and subsequently fought for his nationality) when he was awarded a place at Chulalongkorn University's faculty of medicine but was denied entry due to the claim that he did not have Thai nationality.[33]

Regardless of the positive developments in Thai laws and policies regarding this issue, there are still problems related to bottlenecks in the application process. Like other stateless groups, Vietnamese encounter lengthy and complicated processes in this area. According to a report by Chiang Mai University and UNICEF Thailand in 2021, the processing time for applications for naturalisation or applying for Thai nationality by marriage can be over 730 days. For stateless people who are over 18, the nationality process involves even more steps (e.g., checking criminal record including drug offences and assessing whether they present a threat to national security). The Thai government should expedite resources to increase processing times as well as simplifying the process. Breaking the cycle of statelessness requires an adequate safeguard in the law to grant Thai nationality to children born stateless in the country.[34] Without this safeguard, stateless parents will continue to pass down statelessness to their children. Due to the delay in eradicating statelessness in Thailand, this status, like a heritage, goes on from one generation to the next.

4.4.2 For Stateless Vietnamese Who Were Forced to Flee Thailand

Apart from *Fong Laywan*, there are still a number of stateless Vietnamese from Thailand who have been living in limbo in Japan. Most of them were once registered as stateless persons in Thailand holding the ID card for 'Displaced Persons

[33] Saisoonthorn, Phunthip K., Letter to Director General of Department of Provincial Administration on "Legal Opinion on Thai Nationality of Yutthana Phamvan", Thammasat University, 14 May 2004.

[34] Although Section 7 *bis* paragraph two allows children born to stateless parents to apply for Thai nationality, it is still challenging since the application process is lengthy and complicated, and the approval depends very much on the discretion of the Minister of Interior.

from Viet Nam'. Some were born in Thailand and are eligible to acquire Thai nationality in accordance with the nationality law that was amended after they left the country. There are also a few cases of persons who have Thai nationality by birth, but were mistakenly registered as stateless.[35] Their tragedy was a consequence of years of terrorizing and degrading treatment and violation of their rights including deprivation of their nationality. In Japan, their lives were worsened due to their illegal entry and unresolved statelessness status. Many were arrested and detained by the Japanese Immigration Bureau in preparation for deportation. However, it was always in vain as they had no state which would accept them back. Many have wasted months or years in detention before there was any possibility of them being temporarily released (Komai & Azukizawa, 2009; Odagawa et al., 2017).

To seek proper solutions to recover their loss, a study of their situations and profiles will first enable classification of their legal status and provision of legal assistance. According to Thai nationality law, those who have Thai nationality by birth can easily be assisted because the process is automatic and not dependent on official discretion. Those Vietnamese who were remedied only after the nationality law was amended in 2008 are in need of an amnesty in order to allow them to return since their granted stay permits in Thailand were terminated on the day they left Thailand illegally.[36] In addition, facilitated nationality procedures should be introduced such as exempting them from fulfilling a requirement for a consecutive period of domicile in Thailand,[37] or providing optional channels to verify their nationality at Thai embassies or consulates in Japan.

In short, lessons learned in the case of these forgotten stateless Vietnamese are twofold. Firstly, it showed that migration, especially forced migration, affects regional and international relations. Internal violence, oppression and violation of human rights force people to leave their home country. Although some may flee to countries outside of the immediate region of the crisis, the majority often migrate to neighbouring countries or within the region. The way in which the Vietnamese refugees fleeing the Indochina war were treated and, consequently, how their issues were brought up as part of regional political debates well exemplified the impacts. Secondly, the situation of stateless Vietnamese from Thailand in Japan demonstrated the nexus between migration and statelessness. The protracted situations of statelessness among these Vietnamese in Thailand drove them to irregularly migrate further to seek a better life in other countries. Due to their illegal entry and links to more than one country on the basis of birth (Thailand), descent (Viet Nam), and habitual residence (Japan), finding solutions to legal status and nationality problems of these stateless Vietnamese becomes more challenging. Meanwhile, this can be an opportunity for Thailand to dialogue and collaborate with the concerned countries, Viet Nam and Japan in this case, to rethink the lessons learned on the issues of

[35] Information was obtained in 2014 from a group of the stateless Vietnamese from Thailand in Kanagawa, Japan.

[36] Please see Section 39 of the Immigration Act B.E.2522 (1979).

[37] Please see Section 23 paragraph one of the Nationality (Amendment) Act No.4 B.E.2551 (2008).

migration and statelessness. Reviewing and learning from past experiences can contribute to guiding the search for protection and solutions for stateless migrants from Thailand or even Thai migrants who are at risk of statelessness abroad to build their secure identity and lives in the long run.

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Chapter 5
Gender, Race, Culture and Identity at the Internal Border of Marriage Migration of Vietnamese Women in South Korea

Susan Kneebone

5.1 Introduction

The 'phenomenon' of transnational or 'cross border' (Lee, 2012) marriage migration to East Asia which followed from the strengthening of economies in the region in the 1980s, and consequent demographic change, including lower birth rates, has driven the demand for 'foreign brides' to countries such as South Korea ('the Republic of Korea' or 'Korea'). Korea is one of the destinations for marriage migrants from Southeast Asia amongst the so-called 'tiger economies' of East Asia, which include Taiwan (the Republic of China), Japan, and China (People's Republic of China). Vietnam (the Socialist Republic of Vietnam) is the main Southeast Asian 'supply' country of marriage migrants to South Korea. In this chapter I take the example of female marriage migration to Korea from Vietnam for a case study of transnational marriage migration to explain the discriminatory consequences of Korea's laws and policies on nationality which frame marriage migration as 'a critical project for the nation-state' (Toyota, 2008, p. 3). At the macro level, the foreign bride relieves national 'demographic anxieties' through her reproductive role; at the level of the extended patriarchal family she performs vital carer roles. '[M]arriage migrants' are vital to the reproduction of the nation' (Kim & Kilkey, 2018, p. 4).

In this chapter I take a socio-legal approach to emphasise the transnational effect of policies on marriage migration of Vietnamese women to Korea. I differentiate my approach from other studies on marriage migration which focus on the sociological aspects of this gendered migration (Bélanger & Wang, 2012; Hoang & Yeoh, 2012). I demonstrate how notions of gender, race, culture and identity shape the internal border for marriage migrants from Vietnam, through laws and policies on nationality, labour migration and regulation of marriages in South Korea.

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Whilst South Korea also has laws on marriage brokerage which attempt to police it's external borders, I argue that the construction of the internal border in Korea through nationality laws and policies is more significant in shaping the experiences of Vietnamese marriage migrants in Korea. I contrast the policy responses to marriage migration in Vietnam with the perceptions and motives of Vietnamese marriage migrants.

Marriage migration is often analysed through a migration-development lens (Piper, 2008; Kim, 2012; Piper & Lee, 2016) to argue for the recognition of women's productive *and* reproductive labour in marriage migration. These studies focus on the individual agency of the migrant and the social effects of marriage migration. Other studies have responded to the implication that such migration from a developing to a developed country is inherently exploitative (Constable, 2005), thus requiring protective responses which fit with a narrative on human trafficking. My approach focuses on the role of the state in producing gendered and discriminatory responses through nationality laws at the internal border. I argue that there is 'structural exploitation' arising from state policy and national laws, which foster individual exploitation.

I chose the Vietnam-South Korea example of transnational marriage migration for several reasons. First, in Korea Vietnamese marriage migrants are the largest group of marriage migrants from Southeast Asia, and the second largest after the Korean-Chinese wives or Chosŏnjok (co-ethnic Koreans). The fact that Vietnamese women are perceived to be similar in appearance to Korean people, and to be imbued with similar Confucian values is often noted as the reason for their high numbers in Korea. That is, gender, race and culture are important factors in shaping the presence of Vietnamese marriage migrants in Korea, and responses to them.

Secondly, marriage migration from Vietnam is often framed as a means of strengthening transnational ties between Vietnam and South Korea; from Vietnam's side at an official level there is an interest in this relationship. However, at the individual level, marriage migration is often seen as a cultural and economic opportunity for Vietnamese women, thus setting the scene for potential clashes in expectations between spouses. This leads to the third reason. The high level of divorce amongst Vietnamese-Korean marriages, results in the return of many Vietnamese brides from Korea (often accompanied by their Korean born children) and has created many ambiguous legal situations (Kneebone et al., 2019) which leave the women and their children in precarious situations.

Korean-Vietnamese bi-lateral relationships and cooperation are well-established. In 1992, after the end of the Cold War, diplomatic ties were established between the two nations. Today, there is substantial Korean investment in Vietnam by large companies and industries, such as Samsung Electronics and Hyundai, which creates considerable employment in Vietnam. It has been claimed that 'Korea is Vietnam's number one FDI investor, number two official development assistance provider, and number two trading partner' (Do, 2020).

I begin by explaining the link between South Korea's early experience of marriage migration of the Chosŏnjok (co-ethnic Koreans) and Korea's national identity. I argue that the strong link between Korean nationality laws *as they apply to*

marriage migrants, and national identity, creates a structural vulnerability for 'foreign' brides from Southeast Asia. This is exacerbated by the exclusion of marriage migrants from the formal system of labour migration, which coupled with their ability to access nationality increases their precarity. I then contrast Vietnam's approach to marriage migration, the status of women in Vietnam in the context of nationality and national identity, and I discuss issues around processes for marriage migration from Vietnam. For that section I draw on the findings of research conducted in Vietnam between 2014 and 2019.

Before turning to the substance of this chapter, I briefly situate Vietnamese marriage migration in the chronology of such migration to Korea.

5.2 Marriage Migration and National Identity in South Korea: Creating a Chosŏn Nation

Following the movement of co-ethnic Korean-Chinese (Chosŏn) marriage migrants from China (the Peoples' Republic of China) in the 1990s, marriage migration from Southeast Asia to Korea increased around 2005. This was due to an increasing number of women from Vietnam, the Philippines and Cambodia entering the 'market' for transnational marriages in the region. Whereas in the 1990s, about one per cent of new marriage migrants were Southeast Asian women, by 2005 this increased to over nine per cent with even higher rates in rural areas (Lee & Klein, 2017; Shin & Prins, 2017). In 2014 Vietnamese women constituted the second largest group of foreign wives in Korea after Chosŏn female marriage migrants (Park & Morash, 2016). The picture was much the same in 2017, with Chosŏn wives representing 31% of the total, and Vietnamese female marriage migrants at 25% (Lee-An, 2020).

The Chosŏn (Korean) nation upon which the Korean Constitution is based dates from the fourteenth century and although it has been disrupted by territorial disputes, wars and invasions, it forms an important part of the collective national imagination. This is evidenced by the popular practice of young people who dress in the traditional attire of the Chosŏnjok (Korean people) to visit national heritage sites in South Korea on weekends and national holidays (personal observation, 2016). It is also very evident in policies concerning foreign brides. Lee (2008a) suggests that negative attitudes to foreign brides also stem from the association of marriage migration with invasion and abuse of Korean 'comfort women' (during the colonial period 1910–1945); the women and their children were treated as 'dirty bodies'. Further, it is suggested that the birth of mixed-race children arising from the US military presences (1945–1948) contributes to negative attitudes to the children of marriage migrants and their mothers (Lee, 2008b; Bélanger et al., 2010; Chi, 2019).

Between 1860 and 1870 many Koreans (Chosŏn) emigrated to Jiandao (or Gando - land between the Yanbian in Korea and Helong in Jilin, Northeast China) in search of fresh rice fields. Further, after the Japanese occupation of Korea in 1910, many Koreans moved to Northeast China to escape Japanese rule. In 1930, the total number of Koreans in Northeast China exceeded 600,000 (Han, 2013). In

1945, when Japan surrendered, there were more than 2.16 million Korean (Chosŏn) emigrants living in Northeast China (Chang, 2004).

The ethnic composition of the Korean (Chosŏn) people and their place in the Constitution is an important factor in South Korea's emergence as a modern state in the second half of the twentieth century, following the Japanese occupation (1910–1945) and period of US administration. In 1948 two separate states were established: North and South Korea, reflecting the ideological divide of the Cold War. The first South Korean republic was formally established on 15 August 1945. The 1950–1953 Korean War saw the continuance of US and other foreign military presence. From 1961–1963 South Korea was under military rule following a coup. This briefly is the history of South Korea in the first part of the twentieth Century. It is unsurprising that following such turmoil, that South Korea should turn to its previous history.

Chulwoo Lee (2015), a leading Korean legal scholar, explains that, 'Korea's current citizenry was legally constructed' through the Constitution. The Preamble to the 1948 Constitution refers to the 'resplendent history' of the people of Korea and to their 'traditions dating from time immemorial'. The Constitution provided that 'the sovereignty of the Republic of Korea shall be reside (sic) in the people and all state authority shall emanate from the people' (Article 1(2)). Four months after the Republic of Korea was established, the 1948 Nationality Act, Article 2(1) provided nationality for: 'A person whose father is a national of the Republic of Korea when the person is born'. It is commonly said that this represents a patriarchal and racialised concept of nationality as passing through the male line (*jus sanguinis*).

From the late 1980s (coinciding with Korea's rise as a 'tiger economy'), many Chosŏnjok returned to South Korea. At first, they came mainly under the guise of visiting relatives, and often overstayed their visas. Later, more came to South Korea as 'cheap and mostly illegal labour'. Further the women came to marry South Korean men. In 1992 a treaty between Korea and China established diplomatic and trade relationships between the two countries and opened the door not only to legal migration for work but also for arranging marriages, which were brokered mainly by local government officials and agricultural associations in rural areas (Chung & Kim, 2012).

This movement coincided with a shortage of marriage partners for rural men and so according to one commentator:

> [I]n order to appease rural voters, the South Korean government started a match-making program to find [Chosŏnjok] women for rural bachelors with the idea that the [Chosŏnjok] are ethnically Korean and thus most suitable as they would cause little linguistic and cultural disruption in South Korean society (Han, 2013).

From 1990 to 2005, an estimated total of 70,000 Chosŏnjok women married South Korean men (Han, 2013). The ethnicity of the Chosŏnjok women was undoubtedly an important reason for their initial acceptability as marriage migrants (Chung & Kim, 2012, p. 209). Their marriages were seen 'almost as an act of nationalism in order to benefit bachelor farmers' in South Korea (Kim, 2010). But after a 'honeymoon' period there were numerous reports of 'fake marriages' of Chosŏnjok women, which led to a decline in the popularity of Chosŏnjok women as marriage

migrants (Kim, 2010; Chung & Kim, 2012, p. 209). In the early 2000s the number of women from Southeast Asian countries began to increase. This trend coincided with an increasing number of Chosŏnjok women (and men) taking up the opportunity for a work permit which became available from the mid-1990s (as explained below).

From this summary it can be seen that the co-ethnic Chosŏnjok women were initially favoured for marriage migration because of their natural ethnic and cultural affinity, but the genuineness of their motives for marriage came to be doubted. Many Chosŏnjok women were suspected of using marriage migration to bypass restrictions on avenues of regular labour migration. This legacy, a distrust of the motives of marriage migrants, and a preference for assimilable wives was to have a lasting influence on the shaping of nationality policies in Korea. But before turning to those policies, it is necessary to explain another factor in the situation of Southeast Asian and Vietnamese marriage migrants.

5.3 Labour Migration: The Default Position of Marriage Migration

The decline in popularity of Chosŏnjok women as marriage migrants coincided with a turning outward of the Korean government as its economy boomed in the 1990s and its labour needs increased. From the 1990s on Korea changed from an exporter to an importer of labour; from the mid-1990s it began regulating labour migration from further afield. Paradoxically, this had the effect of increasing the vulnerability of Southeast Asian marriage migrants who (mostly) *do* migrate in order to work, largely to enable them to send remittances to their families. However, under Korea's highly structured and regulated system of international labour immigration (Oh et al., 2011), there are few opportunities for unskilled female migrant workers.

By the early 2000s South Korea and China had normalised relations, and Chosŏnjok migrants (male and female) were able to obtain work visas. But female migrants from Southeast Asia were\are largely ineligible for labour migration visas, thus marriage migration became the default position for female migrants from Southeast Asia who want to send remittances to their families. As explained below, in 2002 the Korean government created a visa with work rights for marriage migrants. This led to a perception that marriage migrants have 'mostly economic motives, to work in Korea' rather than genuine sentiments for marriage (Lee, 2014). Lee (2010, p. 579) explains:

> Some Koreans openly criticize marriage immigrants in newspapers or portal websites, asserting that marriage immigrants only came to Korea to get money from their husbands in order to support their family in their home countries.

This perception has several consequences which highlights their vulnerability. First, they are framed as opportunistic migrants from underdeveloped countries (Chung &

Kim, 2012). As I explain in the next section, this led to the regulation of marriages as commercial transactions, and conflation of female marriage migrants with trafficked women (Choo, 2013). Secondly, as Nicole Constable observed in 2005, new patterns of marriage migration for development reflected 'broadly gendered patterns' of hypergamy:

> A majority of international marriage migrants are women, and most of these women move from poorer countries to wealthier ones, from the less developed global 'south' to the more industrialized 'north' … (Constable, 2005, p. 4)

As Constable explained, the discourse led to common stereotypes and assumptions about the motives of foreign or 'mail-order brides' and a connection between poverty, opportunism and presumed lack of agency.

Recent scholarship reframes this discourse as advancing social transformation through reproductive work (Piper & Lee, 2016). Kim (2012, pp. 553–4) explains this in relation to Korea:

> The traditional gender roles of Vietnamese brides may be broadly categorized as reproductive labor, which is defined as human reproduction and "maintaining and sustaining human beings throughout their life cycle," including care work.

I argue that each of these framings, namely opportunism and reproductive labour, highlights the vulnerability of marriage migrants by exposing the contrast with migrant workers. Kim (2012, p. 553) explains:

> The fact that Vietnamese brides send remittances back home indeed blurs the distinction between marriage migration and labor migration.

The legacy of these framings is that they lead to discriminatory laws and policies on nationality that perpetuate the image of the marriage migrant as an 'idealised cultural and biological reproducer' for the nation. Further, the creation of work rights for marriage migrants in 2002 led to the consequence that she is envied by comparison with temporary labour migrants (Chung & Kim, 2012) who are not eligible for naturalisation. Korea's immigration policies do not allow low-skilled migrant workers access to citizenship; marriage migrants are the only group of migrants with a path to citizenship (Kim, 2017, p. 6). Female marriage migrants are thus valued for their ability to 'form family units' (Chung & Kim, 2012, p. 202) rather than for their economic inputs. As I explain, the basis on which they claim rights and citizenship status is through the marital relationship, as wives and mothers of citizens.

5.4 Regulation of Marriage Migration Through Nationality Laws

> The patriarchal control of female marriage migrants makes it possible for non-Korean bodies to reproduce and perpetuate Korean ethnic nationhood. However, the discursive construction of desirability of marriage migrant women is fragile in the event that they do not fulfil the nationalist goals of reproducing the patrilineal Korean nation as demonstrated in the case of older and non-childbearing marriage migrants. (Lee-An, 2020, p. 135)

From 1997 marriage migration was regulated through nationality laws which were a response to claims of false marriages by Chosŏnjok and which were framed around suspicion about their motives. In 1997 two important changes were made to the Nationality Act. The first was to weaken the presumption of patrilineal *jus sanguinis* as an amendment provided that a Korean woman could pass on her nationality to her child (Chung & Kim, 2012, p. 214). This meant that a Korean woman married to a foreign man could pass on her nationality to her child but not a foreign wife married to a Korean man (Kim et al., 2014, p. 120). Although the change was made to ensure gender equality (Kim, 2013, p. 10), it clearly discriminated against non-ethnic wives.[1] The second change was to remove the automatic conferment of Korean nationality or 'spousal transfer of citizenship' (Lee, 2017, p. 3) to the foreign wife upon marriage, and to put such wife in the same position as the foreign man married to the Korean woman.

The 1997 Act provided a simplified process of naturalisation for a foreign wife on proof of 2 years of continuing conjugal life in Korea (instead of 5 years in other cases). In practice this led to 'conditional residence' (Lee & Wie, 2020, p. 95) as the marriage migrant's continuing visa was dependent upon the support of her husband and family. The husband was required to guarantee the good character of the wife and the genuineness of the marriage relationship. This could mean that a woman would stay in an abusive situation in order to secure naturalisation. It is claimed that the legislation was introduced to 'protect Korean men from sham marriages' (Lee & Wie, 2020, p. 95).

Further the 1997 legislation also required the foreign wife to relinquish her nationality of origin within 6 months of receiving Korean nationality (Article 3(1)), this was a situation which could and was abused and led to hardships. Under the 1997 Nationality Act a divorced woman lost her right to nationality (Article 12(3)), and was deportable, often leaving children behind, or alternatively taking them illegally to her home country as has happened in so many cases of Vietnamese women (Kneebone et al., 2019; Kim et al., 2017). The 1997 Nationality Act also made a foreign wife vulnerable to statelessness in cases where she had relinquished her original nationality and her country of origin had not established a procedure for restoration of nationality (as was the case in Vietnam at this time) (Kneebone, 2017).

The Nationality Act was revised again in 2004, and 2010 in response to rising incidents of domestic violence and divorce (see Table 5.1). The 2004 revision of the Nationality Act, Article 6 attempted to address these issues. It allowed the foreign wife to apply for naturalisation in her own right if she could prove that she was a victim of domestic violence. Research in Vietnam (Kneebone et al., 2019; Kim et al., 2017) shows that many women return to Vietnam without completing the divorce process, which leaves them and their children in precarious legal positions. In particular, such children may be *de facto* stateless. A study of returned children in two (of five) provinces in Can Tho region in southern Vietnam (from which most

[1] The issue of gender discrimination on the basis of class, race, nationality and ethnicity is a theme that I do not have space to explore in this chapter.

Vietnamese marriage migrants originate) showed that whilst most of the children hold their father's Korean nationality, they face difficulties in obtaining household registration (*hukou*) in Vietnam, and thus are at risk of social and economic exclusion (Kneebone et al., 2019).

Major changes were introduced by amendment to the Nationality Act in 2010, to allow foreign wives and some other categories (such as persons described as 'foreign talent' or skilled migrants), to have dual nationality. In the case of foreign wives, this right is dependent on an existing marriage or 'normal marital relationship', although an exception is provided for those who have the care of a minor child born to the marriage (Article 6 (2.4)). That is, only some foreign wives have privileged status via the nationality laws, namely those who are presently married or caring for minor children, thus leaving childless divorcees in difficult situations.

Despite these changes in the law, there is evidence that the naturalization requirements are administered so that they often discriminate against the older or childless female marriage migrant (Lee 2010).

5.5 Commercial Brokerage Is Regulated: The Korean Perspective

Although Korea has become a country of immigration, it is reluctant to accept this description.[2] This is perhaps because marriage migration, which is the main source of permanent immigration in Korea, is considered to be for the benefit of the nation rather than the individual. Kim and Kilkey (2018, p. 10) suggest:

> Marriage migrants, …. represent a rather atypical position in Korea where anti-settlement is the prevailing goal of migration policy.

Between 2007 and 2015, marriage migrants comprised 56–72% of the total number of naturalized immigrants (Lee, 2008a). The situating of marriage migration in the Ministry for Gender Equality and Multicultural Families which was created in 2008 is said to be an indication that it is less regarded than general migration issues, which are dealt with in the Ministry of Justice, as is the regulation of international marriage migration (under the Consumer Affairs Division).[3] This separation between the social and regulatory aspects of marriage migration is an indication of its framing as a matter of national 'structural' significance.

Between 1999 to 2008 marriage brokerage was allowed and was unregulated. In 1999 there were no Southeast Asian women marriage migrants. After 2002 such migration increased because of the 'flourishing' of commercialized international marriage agencies. Regulation of international marriages was introduced in 2008 in Korea as a response to rising reports of incidents of domestic violence and divorce rates amongst marriage migrants (see Table 5.1), which were a by-product of

[2] Interview with Korean government official, Seoul, April 2016.

[3] Ibid.

Table 5.1 Status of yearly divorces of marriage immigrants (Unit: % of cases)

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012[a]	Total	Difference between last year
Total number of divorces	144.5	166.6	138.9	128.0	124.5	124.1	116.5	124.0	116.9	114.3	114.3	100.0	0.0
Divorce with a foreigner	1.7	2.0	3.3	4.2	6.1	8.3	11.0	11.5	11.1	11.5	10.9	9.5	−5.3
Korean man + foreign woman	0.4	0.5	1.6	2.4	3.9	5.6	7.9	8.2	7.9	8.3	7.9[a]	6.9	5.6
Korean woman + foreign man	1.4	1.5	1.7	1.8	2.2	2.7	3.1	3.2	3.2	3.1	3.0	2.6	−4.4

Source: Republic of Korea, Bureau of Statistics data (2012), translated by Sarah Mercer

[a]Note: In 2014, 7000 divorces from 16,200 marriages between a Korean man and a foreign woman were reported (Kim, 2016, p. 5835)

nationality and naturalization laws and processes created by the Korean government, which led to the wife's dependency upon the husband, as described above. In response to an increase in domestic violence and a high number of divorces in 2014, between a Korean man and a foreign wife, the Ministry for Gender Equality established a 24-h emergency call service and 25 shelters in provinces in Korea (Kim, 2016).

In response to the abuse of marriage migrants, as well as claims by Korean spouses and families of fraud, the Marriage Brokerage law came into force in 2008, with subsequent revisions in 2010 and 2012. According to Lee-An (2020), the legislation arose in part from the activism of feminists and Vietnamese students (who were studying in Korea at that time), who actively and publicly mobilized to criticize the commercialized nature of marriage brokerages which commodified women, and the gendered and racialized stereotyping embedded in the process. As a result, the *Marriage Brokers Business Management Act* was legislated in 2007 to prevent discriminatory practices in international marriage processes (Lee-An, 2020, p. 133).

The legislation required the broker to explain the contract to the clients in their mother language and that all personal information including marriage history, health status, employment, criminal history related to domestic violence, sexual violence and child abuse be provided. International marriage brokers are required to comply with the law of the sending countries where it runs the brokerage business. On the Vietnamese side, the laws of Vietnam require that marriages with foreigners be registered in both Vietnam and Korea, but a 2013 study found that 70% of marriages between Korean men and Vietnamese women were registered only in Korea (Do, 2013, p. 292).

It is widely recognized that the Marriage Brokers Act has limited efficacy. As MacLean (2014, pp. 30–31) explains, the brokers cannot operate without local partners, and it is difficult for the Korean government to police their activities abroad. According to the National Survey on Multicultural Families in 2012, 27.3% of marriage migrants to Korea from all countries and 65.8% of Vietnamese marriage migrants met their spouses through the commercial marriage-brokerage agencies (statistics obtained from the Ministry of Gender Equality and Families). This is interesting as commercial brokerage was banned in Vietnam in 2010, as explained in the next section.

In terms of framings, the Korean laws regulating marriage brokerage are modelled on consumer protection. As commentators agree, this results in marriage migration being commodified, with consequences for how spouses and their families treat the foreign bride. Because Vietnamese marriages with Korean men are often arranged by commercial agencies, the 'foreign brides' are considered as 'commodities' (Park & Morash, 2016, p. 4). Further the correlation of brokerage and vulnerability in the case of Vietnamese marriages is increased by the fact that most brokered brides are destined for conservative rural communities. Yu and Chen (2018, p. 626) explain that those who arrange their marriages with brokers are more likely to experience a patriarchal household structure, in a rural setting, than those who organize marriages without brokers. As Chang (2016) suggests, 'commercial marriages' are typically viewed as behaviour falling somewhere between human

trafficking and arranged marriage. Many Korean husbands consider themselves to be high paying 'consumers' which give them a sense of ownership whereby they can make demands on their foreign brides such as bearing children, doing the domestic work, taking care of the husbands' parents (Chi, 2019, p. 88).

5.6 Marriage Migration from Vietnam: Perspectives and Processes

Since the late 1990s, Vietnamese women have migrated to East Asia through marriage. Until about 2003, Taiwan was the most popular destination for Vietnamese brides, after which it was superseded by South Korea (Bélanger, 2009; Kim, 2012).[4] Although statistics vary according to sources, by 2015, the total number of Vietnamese women who had married Taiwanese or South Korean men and migrated abroad was quoted to be as high as 170,000 (Nguyen, 2018).

In 2014 and 2015 I conducted a number of interviews in Ho Chi Minh City with officials of the Vietnamese government, a member of the Vietnamese Women's Union and academics. In 2017 I entered into a consultancy arrangement with Dr. Tran, Thi Phung Ha from Can Tho University to conduct research in the Can Tho region on families and children of returned marriage migrants from Korea which lead to a report (Tran, 2017). Interviews were conducted in Can Tho in 2017 and 2018 by myself and my team (Dr Brandais York and Sayomi Ariyawansa) with the assistance of Dr. Tran and her team of researchers. This led to the publication of 'Degrees of Statelessness: Children of Returned Marriage Migrants in Can Tho, Vietnam' (Kneebone et al., 2019). This section draws on that research.

Can Tho is the fourth largest city in Vietnam, situated in the heart of the Mekong Delta. The Can Tho region – which consists of Can Tho City and five surrounding provinces – is largely known for tourism. However, the region is also characterised by large-scale poverty and as a result, has a high rate of emigration, including through marriage migration. Can Tho is the region from which the largest number of Vietnamese women who migrate through marriage originate (approximately 100 per month regionally) (Tran, 2017).[5]

The current Constitution (2018) and the 2008 Nationality Law of Vietnam reflect socialist values (see Articles 2 and 4 of the Constitution), an 'ethnic understanding of nationality' (Kneebone, 2016) and emphasise the importance of the diaspora to the Vietnamese national identity (Constitution, Article 18 and 2008 Nationality Law, Article 7). Further Article 26 guarantees equal gender rights and opportunities, and 'strictly' prohibits sex discrimination. It states:

[4] This shift reflected both Taiwan's harsh nationality laws which left thousands of marriage migrants stateless, as well as changes to South Korea's visa system in 2002 (discussed above) which gave work rights to marriage migrants.

[5] This figure derives from interviews conducted by Dr Tran and her team and reflects their estimations.

> The State, society, and family create conditions for the comprehensive development of women and the promotion of their role in society. (Article 26 (2))

The 2008 Nationality Law provides nationality to children of Vietnamese citizens (Article 15), and for a child born to a single Vietnamese mother (Article 16(1)), wherever born.

It has been suggested that Vietnam's flexible approach to nationality offers evidence of the ability to adapt to new challenges, including marriage migration (Kneebone et al., 2019). Further, that marriage migration 'has been written into the narrative of international integration and economic development in Vietnam's emigration policy' (Kneebone 2016, p. 14). At the national policy level, marriage migration is accepted as a valid strategy. The Vietnam Women's Union (VWU) for example which previously regarded marriage migrants as opportunistic and disloyal, now works closely with them on the issue.[6] By contrast, a common theme in the discussion of women's role in marriage migration in Vietnamese media (noting that mass media in Vietnam is state-controlled) is the link to the nation-building project and national identity (Bélanger et al., 2013, p. 83):

> The most salient media content about marriage migration is that involving discussions and criticisms about women's sexuality and roles as wives and mothers, which encapsulate tensions around the search for national identity. According to the media, marriage migrant women's behaviour brings harm and shame to the "nation" and all Vietnamese people…..

Despite popular attitudes to marriage migration, Vietnam's approach at the national level appears to be flexible. This flexibility can be seen through Vietnam's willingness to work with UNHCR in 2008 and 2010 on permitting the restoration of renounced nationality by Vietnamese marriage migrants in Taiwan. In 2008 Article 23(1)(f) was added to the Nationality Law, to enable a person who has renounced Vietnamese nationality but who has failed to acquire foreign nationality, to reacquire foreign nationality. In 2012 UNHCR noted that some 2000 returned marriage migrants had 'successfully reacquired Vietnamese [n]ationality' pursuant to this provision (UNHCR Submission, 2013).

Further, although traditionally, socialist Vietnam grants permission to operate in Vietnam to few non-governmental organisations, it has permitted a Korean organisation, the Korea Centre for United Nations Human Rights Policy (KOCUN) (2016) to work in Vietnam since 2011. KOCUN's work is funded by the Korean government and Hyundai, but since 2017 has been scaled back due to a lack of government funding and other internal issues. In south Vietnam it has offices in the Can Tho region and in Haiphong. Its role is a mixture of cultural, vocational, and legal. It provides Korean language courses for Vietnamese students who intend to study in Korea and hosts Korean students as interns in Vietnam. KOCUN works very closely

[6] This observation reflects a change in response between interviews conducted in 2014 and 2015. Susan Kneebone, Interview with anonymous, consultant with the Vietnam Women's Union (Ho Chi Minh City, Vietnam, 3 October 2014); Susan Kneebone and Brandais York, Interview with anonymous, consultant with the Vietnam Women's Union (Ho Chi Minh City, Vietnam, 24 November 2015).

with the VWU (whose role is described below) on the issue of marriage migration, providing pre-departure and language training to intending brides and legal advice on return. It works with returned marriage migrants and their families, to regularise their legal statuses in cooperation with a legal clinic established at the Can Tho School of Law.

Finally, as I have previously observed, 'the government takes a broad view about the presence of 'biracial' children in the community' (Kneebone, 2016). Some scholars argue that Vietnam's relative tolerance of bi-racial children (in contrast to South Korea for example) reflects earlier French colonisation experience and the later fathering of children by foreign soldiers in the Indochina war (Do, 2013). In a Ministry of Foreign Affairs presentation in Hanoi, June 2011, it was said of children of marriage migration that:

> Vietnamese language and … culture preservation in this group of children, how to raise these children so that they can keep two culture [sic] and can actually become a bridge for the promotion of exchanges and friendship and cooperation between the people and Government of Viet Nam with the people and governments concerned.

Although 'these attitudes may not filter down to the local level' (Kneebone, 2016) Dr. Tran's research and interviews conducted by myself and my team in Can Tho in 2017 and 2018 confirmed that there was little anxiety about mixed race children in Vietnam.

Further, on the Vietnamese side there appeared to be a willingness to work with Korea on the issue of marriage migration. One of our 2017 interviewees, an academic from Can Tho University, explained to us the findings of his research trip to Korea in 2014 (funded by the Korean government) on language and culture, and the situation of seven Vietnamese marriage migrants. In his opinion cultural factors are the key to successful marriage migration by Vietnamese women. He opined that in contrast to the women from North Vietnam, who were largely happy in their marriages in Korea, women from the south were less likely to have successful marriages. He attributed this difference to the (alleged) more docile, Confucian-oriented culture and hierarchical family life of North Vietnam, in contrast to the commercialised South Vietnam. In his opinion, women from South Vietnam are sometime naïve and unrealistic in their expectations of a foreign marriage.

From the Korean perspective, an important study by Park and Morash (2016) of advertisements for marriage migrants, found that marriage brokers suggest to potential Korean spouses that Vietnamese wives will be 'traditional women' with Confucian values (explained as, respect for elders and husbands, hard-working, and family oriented); that the women are depicted as 'gifts' who will meet their husbands' and his parents' need for care, and who are willing to partner with men who might depart from the perception of an ideal husband, for example because they are handicapped, poor, or older men.

By contrast, our observation, based on several interviews and discussions with family members in the Can Tho region, is that the majority of women migrate in search of better opportunities (and some for an adventure). In our view the women were strategic migrants. For example, many of the returned mothers from Korea

were determined to retain their child's Korean nationality to enable the child to study in Korea in the secondary and tertiary years.

On the process side of Vietnam's policies there are gaps which lead to this mismatch between expectations on both sides and the vulnerability of Vietnamese marriage migrants at destination. When commercial brokerage was banned in Vietnam in 2010, the VWU stepped in to provide match-making services. However, this service was not very popular and in 2013 the VWU established Centres for Consultancy and Assistance (Decree 24/2013). Their role was widely criticized and subsequently the VWU reverted to a counselling role, which led to use of brokers by many Vietnamese women. Although brokerage is illegal (and thus unregulated) in Vietnam, this inconvenient fact is widely ignored.[7] Indeed in our interviews in the Can Tho region we found that there was confusion amongst our government employee interviewees as to whether or not brokerage was illegal. There is perhaps a plausible explanation for this uncertainty.

Whilst commercial brokerage is officially banned in Vietnam (and with it the large wedding tours of the past by Korean men), many 'facilitators' have emerged to assist potential marriage migrants to make contact with prospective husbands and to complete the processes. One of our interviewees, for example, equated marriage brokers with migration agents who assist with processes. There is no doubt that commercial marriage brokers do operate illegally in Vietnam (IOM, 2014). On the other hand, it is also clear that many 'services' have emerged which Bélanger (2016) describes as 'local marriage migration industries' and which assist women in rural Vietnam to make connections with Korean men.

The lack of opaque processes creates a vulnerability for Vietnamese women marriage migrants. According to Kim (2016), the vulnerability of marriage migrants stems primarily from lack of information in the marriage process. The VWU attempts to address this situation through education and counselling. It provides information to Vietnamese brides about the risks associated with moving to a different culture and social context and visits South Korea annually to keep in touch with clients. A CEDAW Committee report (2015) noted: 'That women and girls migrating abroad are often victimised by fraudulent recruitment agencies and brokers for international marriage' (para 30(c)). It recommended that the Vietnamese government: 'Ensure the regulation and monitoring of recruitment agencies and marriage brokers' (para 31(e)).

Park and Morash (2016) argue that the marriage broker systems (or lack thereof) in both Vietnam and Korea foster inconsistent expectations in partners to the marriage. The study found first, that Vietnamese women were highly motivated to migrate for marriage to provide financial assistance to their families, and at the same time, to improve their own financial standing. Marriage brokers misled women to expect to be financially well off at destination. Secondly, Korean men and their families had very different expectations than the wives had for their roles in the marriage. Korean men expected women to bring resources in the form of household

[7] Interview with VWU representative Long Xuyen 15 May 2017.

labor and care for other family members. The Korean families did not expect women to provide support to their Vietnamese relatives. Third, Korean husbands and in-laws used abuse as a tactic to enforce their expectations. They found that Korean family members used a variety of tactics to entrap women in their roles as subservient household laborers, caretakers, and sexual partners.

In these situations, it can be concluded that the Korean state is complicit in promoting abuse through nationality laws and naturalisation processes which place the foreign wives in a position of dependency upon the husband and family. Korea's nationality laws and policies at destination create a structural dependency for Vietnamese marriage migrants by reinforcing the position of the marriage migrant in a 'market' context.

5.7 Conclusion

I chose Korea, and the situation of Vietnamese marriage migrants as a case study for this chapter because of the high number of Vietnamese wives in Korea, evidence of their vulnerability both in Korea and on return, and the existence of strong transnational and economic ties and cooperation between the two countries.

I argue that legal and policy responses of Korea to female marriage migration from Vietnam has created vulnerabilities, through nationality laws, which are reinforced through instrumental policies on labour migration and commercial regulation of marriage. These policies entrench the unequal position of Vietnamese marriage migrants in the transnational marriage migration 'market'. This 'structural vulnerability' is created by and through the power of the state and its structures. There is a strong link between Korean nationality laws as they apply to marriage migrants, and national identity. Ethnic, racist and gender discriminatory policies produce the image of the marriage migrant as an 'idealised cultural and biological reproducer' for the nation (Kim, 2011, p. 10), who has challenged 'the proverbial image of Korea as an ethnically homogeneous society' (Kim, 2009; Shipper, 2010, p. 12). I conclude that the control of nationality through the internal border is the most important feature of this narrative.

The position of the Vietnamese marriage migrant in Korea shows a hierarchy or differentiated understanding of gender and nationality within this narrative. Whereas the foreign wife who has produced a child is in a favoured position, the divorced childless wife and older women are vulnerable to being rejected as putative Korean nationals. As I have shown in this chapter, this does not fit well with the aspirations of most Vietnamese marriage migrants who wish to work in Korea in order to send remittances to their families.

Whilst Vietnam has demonstrated more flexibility and willingness to compromise on nationality issues affecting marriage migrants, even though its concept of nationality is also tied to ethnicity and national identity, it bears shared responsibility with Korea for better regulation of marriage emigration. However, Korea as the 'tiger' nation in this transnational situation should look to the structure of its laws and policy on nationality.

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Chapter 6
Rethinking Local Citizenship and Integration of Persons of Indonesian Descent in the Southern Philippines

Anderson V. Villa and Amorisa Wiratri

6.1 Introduction

The prevalence of border crossings by members of some Southeast Asian societies is both a cultural-historical and contemporary phenomenon. Although there is a dearth of literature and related studies about Indonesians in the Philippines, various Filipino communities at the border areas, comprising villages and neighbourhoods close to the Indonesian sea border, have harmoniously settled with the Persons of Indonesian Descent (PID). The term PID refers to the people from northern Sulawesi islands in Indonesia who have settled in Mindanao. Since in terms of ethnicity, they are also commonly called Sangirs, this study will employ PID and Sangirs interchangeably. The PID have already stayed in the southern Philippines for generations and the level of integration can be assessed according to their generational stages of local residence in the region.

The Indonesian diasporic community in the southern Philippines has already existed since the 1400s, while the migration of people from Sangihe started towards the end of the fifteenth century (Racines, 2010). Moreover, Tan-Cullamar (1993) found a new wave of Sangirs migration occurred around the 1930s due to the Great Depression. Harsono (2019) further expounded on a wave of migration to the southern Philippines around the 1960s. These two recent waves of migration created what this study identifies as the Persons of Indonesian Descent in the southern

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Philippines. Therefore, the PID in the southern Philippines can be seen as a product of intergenerational human movement. Today some of them can be found in some areas in the southern Philippines, including General Santos City and Sarangani province, as seen on the map below (Fig. 6.1).

As foreigners in the Philippines, the relationship between Sangirs and the Philippines has been an interesting study space (Talampas, 2015; Tan-Cullamar, 1993). Talampas (2015) found that the penetration of the state could not be easily found in the Indonesian community in the southern Philippines. He argued that the influence of governmentality could be seen on the Indonesian side rather than the Philippines side. Meanwhile, Tan-Cullamar (1993) claimed that the Indonesian diasporic community in the southern Philippines could be a bridge to strengthen the diplomatic relationship between the two countries. Both believe that the

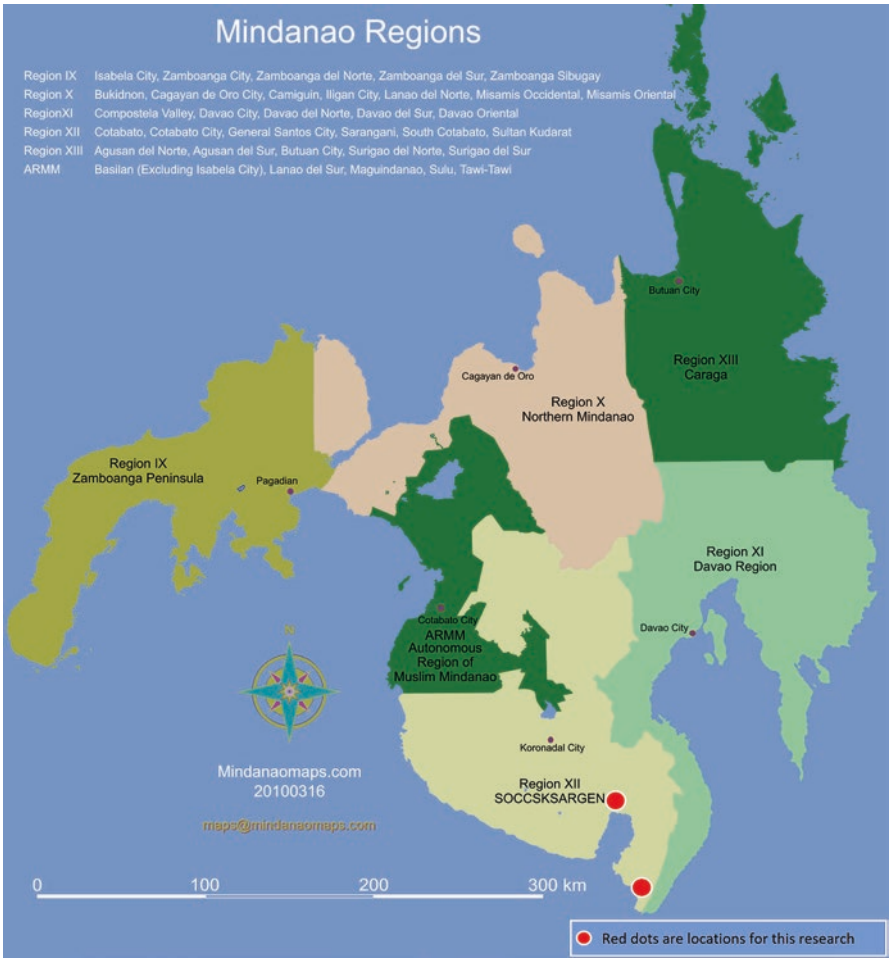

Fig. 6.1 The location of the PID in Southern Mindanao. (Adapted from Free World Maps, 2021; Suggested reference: Dy (2017))

relationship between Sangirs and the host country, the Philippines, has been a largely positive one. However, Racines (2010) found a stigma attached to the Indonesian population on the border of the Philippines as they were perceived of having taken the land and jobs away from the local people. As shown in the previous studies, the relationship between Sangirs at the local level is rather complex, and how it is evaluated depends on the kind of perspectives adopted. For instance, on one hand, the central government in Indonesia and the Philippines may view the matter as national security threat. On the other hand, at the local level, the relationship between PID and the local community appears to be harmonious.

This study does not compare the relationship between PID and the local and central governments in the Philippines. Instead, it examines further how the PID have positioned themselves in the Philippines and how the local government in the Philippines performs local citizenship for PID, topics which have not been explored in the existing literature. The idea of local citizenship proposed in this paper covers the area that is excluded from the legal citizenship approach. It is argued that in the local context, migrants and the local government units negotiate and perform citizenship differently from the traditional citizenship approach.

This study took place in two locations in the Southern Philippines, Sarangani province and General Santos City. Sarangani province is located in the south-eastern part of Mindanao. As a coastal area, coconut farms are commonly found along with coastal resorts. Meanwhile, General Santos city is located in the southern Mindanao and have one of the main international seaports in Mindanao. These sites were chosen given the considerably high number of PID in those locations. Most PID in the Sarangani province are working in the coconut farm, while those in the General Santos City are in the fishing industries.

The informants for this research came from different generations, including the first to the fourth generation of Indonesian descendants. There are twenty (20) representatives in each research location. It included Indonesian citizens, Filipino citizens, and those with undetermined nationality. Based on the confirmation of citizenship, around 70% of the total informants hold Indonesian citizenship, and only approximately 30% are Filipino (Philippine citizens). However, when we asked them to give a proof of their Indonesian national identity cards (*KTP/Kartu Tanda Penduduk*), only some could produce them. Most of them still did not possess citizenship documents, including birth certificates, national ID cards or passports. Most of the informants also came from the third and fourth generations of PID, aged 30–40, comprising about 60% of the total informants. In addition, there is a significant difference between the two locations: informants in Sarangani are predominantly PID born in Indonesia and in General Santos all the informants were born in the Philippines. The diverse backgrounds of the informants reveal a more comprehensive and complex condition of PID in the southern Mindanao.

This research was conducted during the COVID-19 pandemic; therefore, the researchers had to hire local assistants to assist in the interviews and collect information from the local officials because of the travel ban and quarantine restrictions in the Philippines. For Sarangani province, there was one assistant, member of the PID, who helped with the interviews. Meanwhile, three assistants from the

Mindanao State University did the interviews in General Santos City. This research used a semi-structured interview.

The analysis for this chapter adapts the works of Takeyuki Tsuda (2006, 2008) on the idea of local citizenship to interpret its data. His studies found that in the context of East Asian countries, the local governments subtly grant the fundamental socio-political rights and services to migrants as legitimate members of their local communities. His conclusions challenge the traditional approach to citizenship that posits that citizenship lies on the national level government and the role of local government is seen as relatively insignificant.

This chapter is organised as follows: the contextual background of PID in the Philippines and their current citizenship status as introduction. It then moves to the traditional citizenship approach, which predominantly relies on a legal method. This section focuses on the exclusion of some communities based on legal citizenship. The subsequent section discusses the alternative to include all communities through local citizenship. The integration process that has been supported by the local government in the southern Mindanao is examined in the following section. Lastly, in conclusion the final section points to the important role of local government in performing citizenship, a topic that still remains under researched.

6.2 Traditional Citizenship Approach

Citizenship is a complex and complicated term. Tegtmeyer Pak (2006) invokes four conceptions of citizenship: juridical citizenship which comprises the formal, legal status of nationals in a given territory; substantive citizenship refers to the civil, political, and social rights that bind states and societies together; cultural citizenship underpins the sense of social and cultural belonging in a given polity; and participatory citizenships dwells on the normative function of citizen's role in public life and good governance. The traditional citizenship approach is primarily focused on juridical citizenship.

Turner (1997) defines citizenship as a compilation of rights and responsibilities that provide a person with legal status and identity, contending that citizenship is used by the state to control the access of individuals and groups to scarce resources in society. Moreover, he argues that citizenship is predominantly related to rights and responsibilities that are managed by the state. According to Villazor (2010, p. 590), "to be a citizen is to possess the legal status of a citizen." It is argued that the traditional concept of citizenship concerns the legal status of individuals within the nation-state and has implications for associated rights and duties. Also, Staples (2012) contends that the idea of citizenship entails contradictory consequences, including creating a more significant gap in access and protection between citizens and noncitizens.

Bader (1995) believed that citizenship is the equivalent of feudal privilege as a status inherited from the previous generation. This means that citizenship was created to maintain the state legacy. Legal citizenship has positioned citizens as

subordinate objects, while the state always takes its position as an authority. Similar to Sadiq (2017) and Naujoks (2020), legal citizenship always sees citizens as the object to be ruled, while citizens themselves are active subjects who have their own initiatives and demands in relation to the state.

Consequently, persons who cannot conform with the government rules, including undocumented migrants and displaced persons, are considered as noncitizens and are excluded from being state members (Villazor, 2010). Being noncitizens, they could not access the basic rights provided by the state. Moreover, Kapur (2007) and Acciaioli et al. (2017) assert that even if people whose ancestors were migrants have already long inhabited the host country, they might experience 'being other' as result of the traditional approach of citizenship.

In most Southeast Asian countries, the principle of citizenship is based on *jus sanguinis*, meaning "the principle that a person's nationality is determined on the basis of the nationality of his or her parents at the time of the person's birth" (Waldrauch, 2006, p. 121). None of the countries in Southeast Asia applied solely on the *jus soli* principle, "the principle that a person's country of birth determines his or her nationality" (Waldrauch, 2006, p. 128). Unfortunately, the *jus sanguinis* principle has become the main cause of the emergence of statelessness, especially for undocumented migrants because they cannot possess citizenship for themselves and the same condition will be applied for their children.

Costica Dumbrava (2018) argues that *jus sanguinis* is problematic, since it historically tainted, inadequate and normatively unnecessary. Using the case in Europe, he demonstrates how *jus sanguinis* could not include children from a surrogate mother and in the case of migrants, the failure to register their children might lead to statelessness. Dumbrava's study illustrates how *jus sanguinis* has widened the gap between citizens and noncitizens, deepening exclusion among communities within a state.

The emerging inclusion and exclusion agenda among migrants may lead to differentiated and unfair treatment in the host country. The undocumented migrants become the most vulnerable group to be discriminated against by the host country. Some of them have experienced living in an unauthorized status, having no social welfare protections and generally not having health care or disability insurance, and lack job security (Debrah, 2002; ILO, 2002; Koser, 2007; Dauvergne, 2008; Kaye, 2010). The example of the exclusion of migrants in Southeast Asia can be seen from the study of Allerton (2014), who discovered some children of migrant workers in Sabah could not access education because of their legal status.

In addition, Allerton's study (2017) found that most Malaysians see plantation migrant workers in Sabah as opportunists and label them as criminals. A similar situation also can be seen in Japan, where Filipino migrants were also labelled as dangerous aliens (Herbert, 1996; Shipper, 2008). Herbert (1996, p. 245) outlines the "illegality stigma" that migrants suffer from, made worse by Japanese police's "labelling" practices after arrest, lack of legal counsel, and the "pre-definition" of foreign suspects as "violators of the law". Migrants are often seen as the object of public anger and demonised by political elites, which only exacerbates their exclusion and isolation from the local community. However, recognising the high

mobility of people in the region, Anderson Villa and A. Mani (2013) argue that ASEAN countries must consider alternative approaches and not just overly depend on a security/legal approach.

The Philippines is one of the countries in Southeast Asia that also employs *jus sanguinis* as the only basic principle of citizenship. It means that if a person has failed to achieve citizenship in the Philippines, all his/her descendants will remain stateless for the rest of their lives. The Philippines government recognised five groups that are vulnerable or at risk of being stateless, including the unregistered children, foundlings, children of Filipino descent in migration situations (e.g. the Middle East and Sabah), PID residing in southern Mindanao, and the Sama-Bajau population (UNHCR, 2017). Persons of Indonesian descent have become at risk of being a largely stateless community because they arrived in the Philippines before independence, they failed to gain Philippine's citizenship and failed to register their children's birth, rendering them undocumented migrants.

6.3 The Idea of Local Citizenship

The exclusion and stigmatisation of migrants based on traditional legal citizenship has triggered more scholars to rethink alternative citizenship approaches that can be more inclusive for all community members. One of the options to complement the lack of the traditional approach of citizenship is the idea of local citizenship. This study defines local citizenship as part of denizenship (Rosbrook-Thompson, 2014), where the membership is determined by residency (Villazor, 2010,) and the status is based on relationships, custom and memory (Chipato, 2021).

Using the words of Sassen (2006), local citizenship can be seen an assemblage of citizenship at the subnational level. Gargiulo (2017) argues that the concept can be applied through the bestowal of individual rights and statuses of membership at the municipality level, which are formally recognised as an effect of the authority that local governments exercise on behalf of the state. As a result of this assemblage, the local citizen as legal and social subject emerges, and it includes both national and non-national citizens.

Takeyuki Tsuda (2006) studied local citizenship for skilled migrants in Japan. Tsuda (2006, p. 7) defined local citizenship as "the granting, by local governments and organisations, of basic socio-political rights and services to immigrants as legitimate members of these local communities." His study found that the local government and local NGOs (Non-Government Organisations) in Japan initiated program to include migrants as part of the community members and offered some supporting services for their establishment in Japan. Katherine Tegtmeyer Pak (2006) further discussed the importance of local incorporation programs in the context of Japanese society. Local incorporation serves to "articulate and promote a vision of citizenship that includes many persons who do not possess juridical citizenship" (p. 20).

The role of local government in Japan in regard to immigration has also been discussed by Stephen Robert Nagy (2010). Nagy's studies have further clarified that

in order to address an absence of national/state-level immigration policies, local governments have started employing their own localized incorporation and social integration policies for migrants. Nagy also pointed out the major role played by local governments in terms of service provision as the immediate interface between foreign residents and the national government through the local government policies.

Similar studies on the formalisation of local citizenship have also been undertaken in other continental contexts. Villazor (2010) situated his study in San Francisco, highlighting its reputation as the safe haven city for migrants. His study found that the San Francisco local government issued a sanctuary law that initiated membership of the community based on residency. As a result, all residents in the city, including undocumented migrants, are effectively considered citizens. Not only were they entitled to access to their rights, duties and obligations, but they were also granted to participate in the local elections to vote. Indeed, as Rosbrook-Thompson (2014) argued, local citizenship can unite the citizen and noncitizens and create strong solidarity ties that are greater than legal citizenship status.

However, to the best of our knowledge, there is no country in Southeast Asia that has formalised local citizenship for migrants. Consequently, local citizenship can be seen from the performative action between local government and migrants (Chipato, 2021) and the act of belongingness (Rosbrook-Thompson, 2014). Our study found that the local government units in the southern Philippines were performing local citizenship for PID, which will be explored further in the next section.

6.4 PID's Legal Citizenship Status

As mentioned previously, some PID are at the risk of being stateless because they do not have legal documents. This section draws on the history of granting citizenship for PID. It is argued that the legal status of citizenship only serves as a survival tool to gain access to rights (Kapur, 2007), and this phenomenon is aptly illustrated by PID. Many Sangirs have come to live permanently on the Philippines' side of the border with Indonesia. Both countries, Indonesia and the Philippines, have acknowledged the existence of PID after the independence of their nations.

Recognising the long-term connection and the cross-border tradition among Sangirs, in 1961, both sides signed the Repatriation and Border Crossing Agreement. Pristiwanto (2016, p. 43) argues this agreement has categorized many of the Indonesian descendants in the southern Philippines into the following: Indonesian people living on the Philippine side, Filipinos living on the Indonesian side, Filipino people who go back and forth across the border without permission and legal documents, and Indonesian people who go back and forth the border without permission and legal documents. To further improve this measure, high-level negotiations between the two countries continued, which finally led to the signing of the Agreement on the Abolition of Visa Requirements on Certain Cases in 1963.

Manigbas (2016) contends that in the wake of this agreement, around 1000 Indonesians were repatriated using the Indonesian navy ship Halmahera in 1965. They were sent to some areas in Northern Sulawesi islands and Northern Maluku. However, there was no detail on the number and destination location of the PID. One of the informants said that his parents was among the repatriates and they were brought to Northern Maluku. They lived there for around 3 years and then returned to the Philippines thereafter. Thus, we can still find PID in many areas in the southern Philippines until now.

In May 2011, the Philippines became the first country in Southeast Asia which ratified the 1954 UN Convention relating to the Status of Stateless Persons. As a follow-up program, the Philippines government started to map and register all the stateless groups in the Philippines, including the Persons of Indonesian Descent (PID) through the Registration and Confirmation of Nationality program. At the same time, there was a meeting of the Joint Commission for Bilateral Cooperation (JCBC) held in Manila, where both countries agreed to address the problems of Indonesian descent in the Southern Philippines. The Refugees and Stateless Persons Unit of the Philippine Department of Justice (RSPPU-DoJ) took on the leading role in this project, involving the Bureau of Immigration (BI), Public Attorney's Office (PAO), the Indonesian Consulate in Davao (KJRI Davao) and United Nation High Commissioner on Refugees (UNHCR). They assigned a local NGO in General Santos City, PASALI, to help them communicate this project with all PID.

Finally, after working continuously for around 4 years (2012–2016), the data of PID have been completed and both governments worked together to confirm the PID's citizenship. The Bureau of Immigration conducted a final check of PID in Mindanao. The PAO provided free legal assistance, including juridical corrections of entries on the birth certificate. Afterwards, the Indonesian Consulate registered those PID who opted for Indonesian citizenship. Furthermore, Tanggol (2017) claims that out of 8,745 PID 2,399 were granted Indonesian citizenship. Then, in November 2017, the Indonesian Consulate in Davao and the Republic of the Philippines, together with the UNHCR, distributed hundreds of birth certificates to the stateless people of Indonesian descendants in several provinces of Mindanao (Basa, 2018). The data illustrate that only a few of the PID can now be considered Indonesian citizens, and those persons with undetermined nationality were made denizens or noncitizens in the southern Philippines (Fig. 6.2).

6.5 Local Citizenship Among PID

Despite the noncitizenship status of some PID, the relationship among PID, local community and local government units (LGUs) in the southern Philippines is relatively harmonious. The relationship can be seen from the access and rights afforded to the PID from the LGUs in the Sarangani province and General Santos City. Our study found that the LGUs in both those research sites are responsible to provide a database for the National Government in the Philippines, in order to

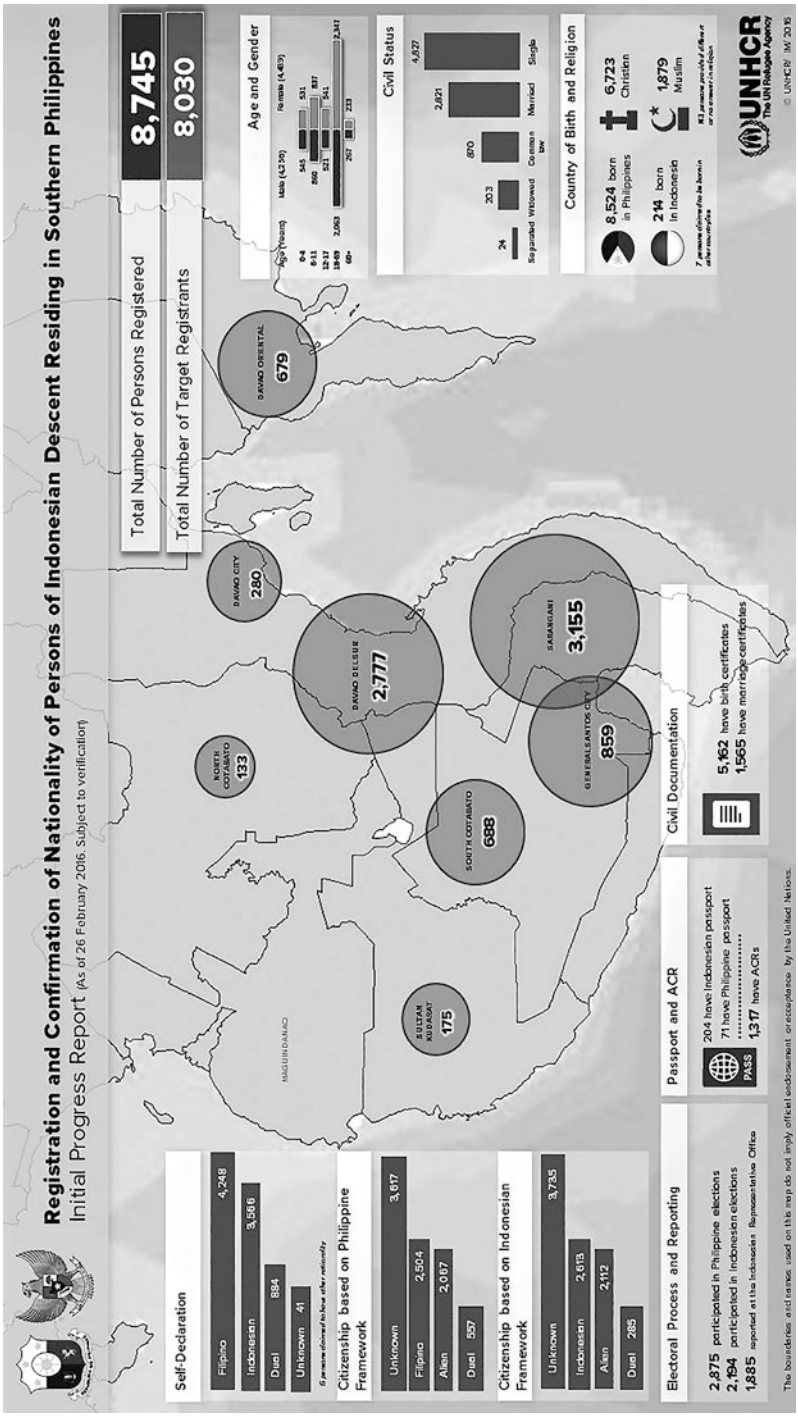

Fig. 6.2 The map of registration and confirmation of nationality of PID. (Source: UNHCR, 2016)

effectively facilitate access to some basic rights and assistances. In both areas, we found that Indonesian citizens and persons with undetermined nationality gained some basic rights because of the LGU's role in providing local database using residence as basis for access.

One of the basic rights that can be attained is education access. The chart below shows that almost all of the children of PID with Indonesian citizenship also benefited from educational assistance. In General Santos City, all the PID obtained their primary education until high school level. Meanwhile, in Sarangani province, only one person in the study claimed not to be able to access educational facilities. Some respondents claimed that the Philippine government provided free public elementary and high school education, as long as they can obtain a recommendation letter and/or residence certificate from their respective LGUs. In the Philippines, access to primary education is free for all residents, and the PID are not deprived of such privileges (Fig. 6.3).

Aside from access to education, the PID are also able to readily access health care services. The Philippine Health Insurance Corporation (2014), known as Philhealth, is a health insurance scheme controlled and managed by the government for Filipinos and foreigners who live in the Philippines as long as they comply with some requirements. In those two areas, more than 70% of the informants who hold Indonesian citizenship benefited from essential health care access from Philhealth. The ownership of a Philhealth card assures the PID assistance for their health problems or when they needed health care provision. One informant in Sarangani province did not have to pay for her caesarean childbirth delivery. These health facilities are indeed advantageous for PID because they can access health care even at the *barangay* level (the smallest administrative district formation in the Philippines) and in advanced-tertiary medical care facilities when needed (Fig. 6.4).

However, the provision of health access did not run as smoothly as education access did. For instance, a father who lived in Sarangani province acquired his Philhealth card, but his son was unable to get it. The reason was that the district

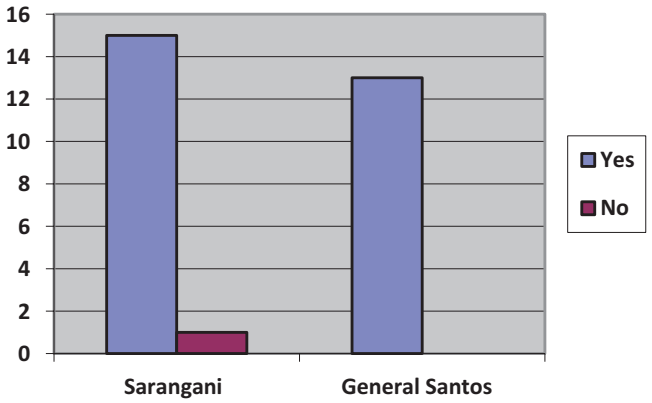

Fig. 6.3 Access to primary education for PID

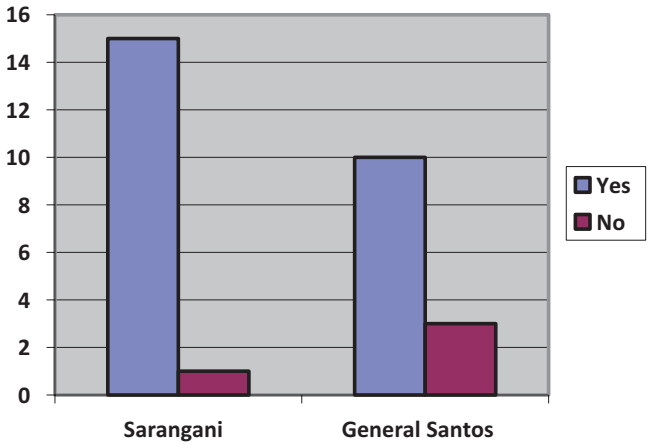

Fig. 6.4 Health access for PID

government required the use of primary documents for validation purposes. He insisted that he and his father have similar documents written with their citizenship as Indonesians, but the local government could not give him a satisfactory answer. Sadly, their unfortunate ordeal continued until the end of 2020. Hence, it can be argued that the main hindrance in providing fundamental rights and quality health care are the inconsistencies in data management and policy implementation by the LGUs.

A similar case can also be observed from the access to the social welfare programs, including the 4Ps. The Presidential Communications Operations Office (2016) explained that the "Pantawid Pamilyang Pilipino Program" or 4Ps is "a human development measure of the national government that provides conditional cash grants to the poorest of the poor, to improve the health, nutrition, and the education of children 0–18 years old." There are two elements of the program, namely health and education grants. The health grant provides 6,000 pesos annually for every household, and the payments are rolled out every month. Meanwhile, the educational assistance of 3,000 pesos is delivered for ten months for every child, and each family is allowed to have a maximum of three children supported by the program.

However, only a small portion of PID in both areas were able to access these programs, that is, less than 25% of the total informants in each site. On their website, the 4Ps program is linked with the Commission of Higher Education (CHED) to ensure deserving students benefit from this grant and connect with Philhealth as national health insurance. Some of the recipients may dispute such claims since education, health and 4Ps program have to be connected using similar data. Inconsistent data do not only lead to confusion among PID but also misunderstanding among themselves.

Another form of welfare access can also be seen in the COVID-19 pandemic response in early 2020. At that time, most PID received assistance from the

Philippine government. Every household received a package of staple foods, including 4 kilos of rice, some cans of sardines and corned beef, and chicken loaves that can be accessed every week during the first two months. The Department of Labor and Employment (DOLE) also prepared financial assistance of 6,000 pesos for each person who lost their job. The Department of Social Welfare and Development (DSWD) allocated 5,000 pesos for each family affected by COVID-19. Perez (2020) explained that the financial assistance from DSWD was called the Social Amelioration Program (SAP) and was based on the Joint Memorandum Circular No. 1 Series of 2020.

All interviewed PID in Sarangani province and General Santos City received assistance from the Philippine government and also from the Indonesian government at the beginning of the COVID-19 pandemic. One of the informants in Sarangani province said that he was glad that he got assistance from the Philippine government, especially after obtaining legal status as an Indonesian citizen. As most PID work in the informal sector, such as farm labour and fishing, they are not spared from the pandemic crisis. Some of them lost their jobs or could not get regular jobs as before. Therefore, assistance from the local government has been meaningful for PID. This chapter confirm with Tsuda's (2006) study that local citizenship exists where local governments recognized migrants as legitimate members of the community, albeit partially through provision of social rights. This research found that the LGUs offered those rights to PID and positioned them as part of the local community.

6.6 Integration of PID

The relationship between migrants (including undocumented or documented migrants) and the host country has been focused on by various migration scholars, among them Olson (2007), Horvatich (2003), and Allerton (2017) in the Southeast Asia context. Horvatich (2003) found that Sama Dilaut people in the southern Philippines have never been integrated into the Filipino community because of the view of other local islanders that they do not practise Islam. Meanwhile, Olson (2007) and Allerton (2017) study the exclusion of undocumented migrants and their children in the national politics of Sabah, Malaysia. Moreover, they argue that the problem of migrants is not only about legal identification but also related to regional belonging.

This study follows Penninx and Garcés-Mascareñas's (2016) definition of integration, which is a process of settlement, interaction with the host society, and social change that follows immigration. According to them, there are three aspects of integration: legal and political dimensions (e.g., legal residence, citizenship, and voting rights); the socio-economic dimension (e.g., immigrants' access to health care, education, housing, and the labour market); and cultural-religious aspects. The involvement of the migrants in their communities along those three dimensions can be interpreted as full integration in the host country.

The first two elements of PID' integration can be seen through the legal and local citizenship mentioned above. The legal and political dimension of PID is represented through their legal status in the southern Philippines. Some of them were granted legal citizenship from Indonesia and the Philippines government, while some are still considered stateless. In the local context, particularly before the confirmation of the nationality program in 2016, that differentiation never existed. Almost none in the local community treated their neighbours based on their nationality. In many cases, PID were actively participating in voting during the local elections. The LGUs assist the election commission to register voters regardless of their legal status. It was only after 2016 that local and regional officials started to be more aware about this issue after series of coordination from the national government, in this case the Bureau of Immigration.

In terms of the socio-economic dimension of integration, as can be seen from the local citizenship section above, the PID experience some basic rights accorded to them by the Philippine government, including education, health and welfare access. The LGUs considers them as part of the community members. This demonstrates the support from the local government in the southern Philippines in the integration process for PID. Consequently, the PID also develop strong attachment with local community in their residency.

A final dimension of integration can be seen from the cultural and religious aspect. Penninx and Garcés-Mascareñas (2016) argue that this aspect is the most problematic for migrants. However, our findings revealed otherwise, as this can be considered the easiest part for PID, as they shared similar culture with their local communities in southern Philippines. The similarity of their culture can be traced back from their language. The northern Sulawesi islanders use Sangirese as their local language, while southern Filipinos use Bisaya language with similar words and patterns. Lobel (2013) reiterated that North Sulawesi, and the southern Philippines have the same language roots, which he called Greater Central Philippine languages. Several words have similarities, such as *Aku* (Sulawesi) and *ako* (Bisaya), *Anak* (Sulawesi) and *anak* (Bisaya), *engkau* (Sulawesi), and *ikaw* (Bisaya). The similarities in the language made it easier for PID to adjust to their locale.

Besides, PID livelihoods are strongly connected with coconuts, as is the case for local people in southern Mindanao. The Sarangani province has its *Lubi-lubi* Festival every year. The Philippine Department of Tourism (2018) published on their website that the local government holds this festival to introduce and promote the utilization of coconut for accessories and home decors and local liquor known as *bahalina*. This festival is also known as a dancing festival, where the dancers have to wear costumes from coconut materials. The North Sulawesi islanders have migrated to follow coconut harvest season, and their primary income previously was from copra production, as part of their traditional temporary migration. Another highlight of cultural similarity is their alcohol drinking habits. The northern Sulawesi islanders used to drink *tuak* or palm wine that is similar to *bahalina*.

In addition, the most distinguishing feature of cultural integration for PID can be observed in the *Tulude* Festival. Every year, PID celebrate Tulude as part of their tradition. Makainas (2018) described *Tulude* as an acronym for *tulung* (help), *lukade*

(protect), and *dendingang* (involvement). In general, *Tulude* involves an apotropaic ritual to ask for support and protection from God from any threats and danger and to pray for blessings of their activities. This ritual was performed annually during the last day of December, but after 1995 the ceremony was moved to the 31st of January, upon the confirmation of Sangihe and Talaud districts. The Consulate General of Indonesia in Davao City also supported the annual ritual performance of *Tulude*, which still runs until today. In the 2019 celebration, the festival was attended by the Indonesian Consul General and his staff members, together with the local Municipal Mayor, LGU officials, staff and community members.

Furthermore, the LGUs also often permitted the PID to celebrate their culture and tradition in the Philippines. Usually, the PID celebrate Indonesian Independence Day at the Indonesian Consulate General Office in Davao City. However, due to restrictions in the wake of the COVID-19 pandemic, the Philippine local government only allowed the PID to celebrate the Indonesian Independence Day in their respective localities, where they held the annual flag-raising ceremony.

With regard to their religious practices, the PID are well incorporated within the local community. Since 1958, there was an exchange program between the Communion of Churches in Indonesia (PGI) and the United Church of Christ in the Philippines (UCCP). The PGI sent a priest to the southern Philippines to teach PID to read and translate Bible in the Sangir language. Most of the PID are Christian, and they share the church with the local community. One of the priests in General Santos City said that he has a mixed congregation of Filipinos and Indonesians. When the church holds religious event, he usually asks permission from the LGUs, and the municipality always supports all their activities. Therefore, in terms of religious practices, the PID do not have any complicated problem.

6.7 Conclusion

This chapter has attempted to revisit the contention that the traditional approach of citizenship is the only solution to include the undocumented migrants, particularly those who have already resided in the host country for some generations. The granting of legal citizenship for PID could be seen as an achievement from the national government perspective, while at the local level, it is only treated as a survival tool to help PID gain accessible basic rights in the Philippines. The traditional approach of citizenship always leaves space for the exclusion of some groups of migrants.

This study has endeavoured to unpack the idea of local citizenship as an alternative solution allowing excluded migrants to be more integrated into the host country. The provision of some basic rights and the support from the local government units in the Philippines based on local residency offers an oasis for PID, some of whom are in the state of having undetermined nationality and being treated as aliens (i.e., Indonesian citizens). Local residency and shared cultural connections have become the basis for local citizenship to be practiced in the southern Philippines.

Tsuda's (2006) conclusions on the critical roles of local governments in the integration of migrants are obviously relevant in analysing these communities, albeit in this context lacking support from NGOs, civil society groups, and activist associations. More apparently, the LGUs provided a population database that can support PID's access to the fundamental rights to education, health and welfare at the individual level. At the organizational level, LGUs demonstrated provision of equal access for PID as member of the community. In this context, the Philippine local government has demonstrated a relatively advance practice of local citizenship in creating an inclusive environment for migrants in their respective jurisdiction.

This chapter points to more productive insights in understanding integration between migrants and the host country. The findings of this study reveal the vital role of LGUs in the integration process including legal, social-economic and cultural dimensions. The study also illustrates that the cultural dimension has become one of the main assets for accelerating the integration process of PID with the local communities, including LGUs. This can be seen through the similarities in culture, language, and religion, which Penninx and Garcés-Mascareñas (2016) argue as the most complex dimension for migrants to be fully integrated. These results also establish why local citizenship can possibly provide solution for the inclusion of PID within the community in southern Philippines since they have strong cultural ties and attachment.

The analysis of the integration and local citizenship should not be plainly reduced to simplistic exclusion and inclusion considerations. Rather, our study shows how to assist more scholars in challenging exclusive reliance on the traditional concept of citizenship, which largely rely on the legal status of migrants. Hence, citizenship should not always be seen from the 'top' but can also be studied from 'below'. The performance of citizenship at the local level is an insightful space in the relationship between migrants and the local community. This act also offers a haven for migrants that moved beyond their complex relationship with the national level government and their immigration laws.

On a final note, the researchers are fully aware that this study could not solely and entirely represent the general situation of PID in the Philippines as the number of informants is relatively small. The limited locale of study for this research might not significantly present a total picture of local citizenship and integration of all PID. Future studies on the integration of diasporic communities at the state level through national policies remain necessary, as this study presents a complementary perspective rather than a replacement for other approaches. It is also valuable to explore the relationship between state and migrants and other stakeholders at the different levels of public policy analysis covering issues related to social protection, social welfare, and human rights.

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Part II
Borders, Migration and Access to Membership Goods

Chapter 7
Citizenship and Legal Status in Healthcare: Access of Non-citizens in the ASEAN: A Comparative Case Study of Thailand and Malaysia

Sharuna Verghis

7.1 Introduction

Malaysia and Thailand are major destination countries for migrant populations in the ASEAN, both labour migrants and refugees. As of December 31, 2020, there are 1.4 million foreign workers in Malaysia with active Temporary Workers Passes (Adam, 2021). Pre-pandemic, the estimated number of migrant workers was 3.43 million (UNDESA, 2019), alongside another 1.23–1.46 million migrant workers of irregular status (ILO, 2020a). Additionally, as of January 2021, about 178,710 refugees and asylum-seekers registered with the United Nations High Commissioner for Refugees (UNHCR) in Malaysia, of whom 154,140 are from Myanmar (UNHCR, 2021b). Refugees lack the formal right to work and education in Malaysia. Low-skilled and semi-skilled migrant workers are prohibited from marrying Malaysians while they work in the country.

Regarding Thailand, as of December 2020, there were some three million registered migrant workers, with about 2.7 million from Myanmar, Laos, Cambodia, and Vietnam (Promchertchoo, 2021). Additionally, populations of concern include 91,818 Myanmar refugees, 5325 urban asylum-seekers and refugees, and 480,549 persons registered by the Royal Thai Government (RTG) as stateless (UNHCR, 2021a). Refugees lack the formal right to work, but migrant children have access to free public education (Dewansyah & Handayani, 2018).

Despite a significant presence of migrant populations in both countries, migrants' access to healthcare has been an ongoing issue of contestation, with healthcare seen as an entitlement of citizens (Chan, 2018). This debate on the entitlement of migrants' access to healthcare based on their (un)deservingness as non-citizens and/or undocumented status unfolds within broader global discourses on human rights,

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migration and citizenship, and regional developments related to expanding access to healthcare.

For example, the United Nations, through a range of international instruments, has emphasized substantive equality in access to healthcare as a fundamental human right without prejudice to migrant populations (Committee on Economic Social and Cultural Rights, 2000; United Nations, 1976). The World Health Organization has posited Universal Health Coverage (UHC) as the organizing principle of health systems to ensure and expand healthcare coverage (World Health Organization, 2021). UHC refers to ensuring that all people have access to preventive, promotive, curative, and rehabilitative health services that they need, when and where they need them**,** without financial hardship (World Health Organization, 2021). Read in tandem with the constitution of the World Health Organization which espouses the right to the highest attainable standard of health (World Health Organization, 1946) and the 2030 Agenda for Sustainable Development which is predicated on the principle of healthcare access as a universal right, the argument that healthcare entitlements must vary per citizenship and legal status, stands out in contrast.

The contending discourses on the (un)deservingness of migrants to healthcare have also simultaneously come to play out in a global/regional context marked by a shift in the framing of healthcare as a public good to a marketable commodity. This development is also evident in the ASEAN States, which are turning to market solutions as stretched health systems struggle to meet escalating healthcare needs. However, market asymmetries skew access to healthcare. The market model subjects players to the neoliberal notion of autonomy which compromises individual responsibility to the collective and social solidarity, both of which underpin the right to healthcare in traditional social protection models. Thus, as migrant healthcare gets relocated to the market, migrants must navigate health systems based on the logic, forces, and politics of markets and concomitantly contend with populist and State-centric discourses of their (un)deservingness to healthcare.

Using case examples of Malaysia and Thailand, this chapter appraises their contrasting health systems models and how healthcare access of migrant populations is conceptualised. The focus is on how Universal Health Coverage, an avowed goal of health systems in both countries and the ASEAN, is interpreted and reconciled differently.

The choice of Malaysia and Thailand is guided by the fact that both countries achieved UHC (Tangcharoensathien et al., 2020; World Health Organization, 2018) as middle-income countries with competing developmental needs and fiscal constraints. Both countries also attribute an instrumental value to health in achieving the broader goals of economic growth by expanding private healthcare and promoting medical tourism. Additionally, Malaysia and Thailand also exemplify the phenomenon of temporary and circular labour migration for semi-skilled and unskilled migrants, which include short, fixed-term employment contracts, return to home country upon expiry of contract/work permit, and prohibition of transfer of work permits to other employment sectors and employers and family reunification. These policies engender and sustain the fragility of status and the flexibilisation of labour (Kaur, 2010). Both Malaysia and Thailand have not ratified the 1951 Convention on

the Status of Refugees or its 1967 Protocol, deeming refugees and asylum seekers as irregular in status.

Concerning health coverage for migrant populations, Thailand and Malaysia provide an interesting contrast in their policy frameworks. Thailand's migrant healthcare policy extends accessibility to non-citizens based on the twin rationale of providing the country with a healthy workforce, including migrants (economic rationale), and of reducing the impact of communicable diseases to citizens (security rationale) (Tharathep, 2011). On the other hand, Malaysia's migrant healthcare policy, also guided by concerns of national security and economic efficiency in healthcare, adopts a deterrent approach that restricts the access of migrant populations to healthcare. While both countries espouse the neoliberal model of migration, they also represent contrasting models of health systems in the way access to healthcare for migrant populations is organized. While the overall health policy approach toward migrants in both countries mirror norms of deservingness, this norm is differently reflected in the two countries. Additionally, the market plays a significantly more substantial role in Malaysia in the distribution of healthcare.

In the following section, migrant healthcare policy is discussed in UHC in Malaysia and Thailand.

7.2 UHC and Healthcare Access for Migrant Populations: Malaysia and Thailand

Both Malaysia and Thailand have a pluralistic health system comprising public and private healthcare providers where UHC is achieved via a healthcare financing system based predominantly on general taxation and covering all citizens.

In Malaysia, the benefits include a comprehensive package of highly subsidised public healthcare services available to all citizens at primary, secondary, and tertiary care levels (Ng, 2015). Private health insurance is usually purchased by individuals for themselves and their families and/or by employers as a fringe benefit for employees. Other social protection schemes, e.g., the Employees Provident Fund (EPF) and the Social Security Organization (SOCSO), make disbursements toward medical expenses for critical illnesses and work-related injury and accidents respectively (Government of Malaysia, 1969; Samy, 2010).

In Thailand, UHC is supported by (i) the Civil Servants' Medical Benefit Scheme under the finance ministry (CSMBS (ii) The Social Security Scheme (SSS) under the labour ministry covering private sector employees; and (iii) the Universal Coverage Scheme (UCS) under the public health ministry. The UCS was established under the National Health Security Act, 2002. It is co-financed through general taxation and a 30-Baht co-payment with exemption from co-payment for several beneficiary groups. The UCS provides a comprehensive benefit package of in-patient and outpatient care, surgery, and drugs (Sakunphanit, 2008) and preventive care (Sakunphanit & Suwanrada, 2011).

Table 7.1 Non-citizen ward charges, deposit and discharge (RM)

	Medical (RM)	Surgery (RM)	Maternity (O&G) (RM)
First class	7000	11,000	7000
Second class	3000	5000	5000
Third class	1400 *(RM20)*	2800 *(RM30)*	2800 *(RM15)*
Outpatient clinic	RM 40 excluding investigations & procedures *(RM1)*		
Specialist clinic	RM 120 excluding investigations and procedures *(RM5 for first visit and RM 30 for first visit if referred by a private doctor)*		

Source: Hospital Kuala Lumpur (2020)
Note: *Charges for Malaysians in italics*

7.2.1 Cost of Healthcare for Citizens and Non-citizens in Public Hospitals

7.2.1.1 Malaysia

In Malaysia, State-subsidised healthcare in public hospitals is a privilege enjoyed by citizens only. All non-citizens, documented or undocumented, must pay fully unsubsidized "foreigners' rates" at government hospitals. Table 7.1 highlights the wide gap in healthcare costs for citizens and non-citizens. Furthermore, prescriptions from public hospitals are restricted to a five-day supply from government hospital pharmacies for non-citizens, limiting access to care for chronic conditions.

Although non-citizens are charged a higher fee in public hospitals, UNHCR-recognised refugees and asylum seekers get a 50% discount off foreigners' rates. Healthcare costs are still unaffordable for them because they lack the formal right to work (Balasundaram, 2011).

7.2.1.2 Thailand

In contrast, in Thailand, citizens and non-citizens pay similar fees in public hospitals. However, as the following sections reveal, migration and legal statuses play a defining role in migrants' access to UHC in the country.

7.2.2 Mandatory Health Insurance for Documented Labour Migrants

In both Malaysia and Thailand, healthcare financing of labour migrants is sourced from health insurance. The difference, however, is that in Thailand, documented labour migrants fall under a comprehensive social health insurance scheme, the Social Security Scheme (SSS) managed by the Social Security Office under the Ministry of Labour, while in Malaysia, the insurance is covered by private insurance

companies. Further, in Thailand, fully documented migrant workers fall under the same health insurance as private sector Thais, namely, the SSS. There is a significant difference in the benefits of documented labour migrants under the labour tax-financed social health insurance in Thailand and the private health insurance in Malaysia. Nevertheless, in both countries the health insurance schemes lack portability.

7.2.2.1 Malaysia

Even documented migrant workers are not eligible for State-subsidised healthcare and must purchase full-cost, unsubsidised healthcare in public hospitals. To finance these healthcare costs, they are required to buy a mandatory private health insurance (the Foreign Worker Hospitalization and Surgical Scheme [2011]), known by the Bahasa Malaysia acronym, SPIKPA.

Under SPIKPA, migrant workers pay an annual premium of RM 127.20 (or USD 30), which provides health insurance protection up to a maximum of RM20,000 (or USD 4751) per year, with the premium for domestic and plantation sector workers being covered by employers. Benefits include hospital fees and surgical fees. It does not cover hospitalization or surgical charges for pre-existing illnesses and specified illnesses during the first 120 days of cover. Outpatient treatment, health promotion and prevention, healthcare costs related to antenatal care, mental health, and attempted suicide or self-harm are excluded. When the hospital bill exceeds the maximum pay-out and is beyond the worker's capacity to settle, the penalty is non-renewal of the work permit. Notably, migrants' work permits are specific to their employers. So, a change of employer would divest them of legal status and entitlements to insured healthcare. The revenues generated by SPIKPA have been envisioned as a "quick-win" strategy under the country's economic transformation programme to achieve high-income, developed country status (PEMANDU, 2010, p. 559).

Significant critiques of the scheme include the workers' low level of knowledge about their entitlements and the withholding of insurance cards by employers, making it impossible for them to seek care when required (Alhadjri & Cheng, 2013). The high cost of healthcare charged to non-citizens also makes coverage under SPIKPA inadequate and raises concerns about delayed healthcare seeking (Loganathan et al., 2020b). Notably, despite purchasing private health insurance, migrant workers in Malaysia are not covered for outpatient care, health promotion, and prevention, leave alone antenatal care and mental healthcare.

7.2.2.2 Thailand

In Thailand, the access of migrants to different health financing schemes depends on their migration status: fully legal, half-legal, and unregistered. Fully legal migrants are those who have entered Thailand legally with a passport and possess

authorisation to work. Half-legal migrants (illegal entry, legal employment) can become fully legal migrants by going through the Nationality Verification process and acquiring legal documents from their country of origin. This program was initiated only for migrant workers from Myanmar, Cambodia, and Laos. Fully legal migrants must make a mandatory contribution to the SSS health insurance like Thai citizens working in the private sector. Domestic workers and seafarers are excluded from the SSS. Registered labour migrants' authorisation to work is specific to their employer. They can request a change of employment only under specific conditions (Hall, 2011). Failure to comply with these terms could change the migration status from fully legal to unregistered, jeopardising their health protection benefits (Olivier, 2018).

SSS benefits cannot be utilised during the first three to five months after the first contribution. Further, old-age benefits and unemployment allowances are not portable and thus impractical for migrants under SSS. Often, employers fail to make the required contributions. Simultaneously, migrant workers are also equally averse to payroll deductions toward SSS contributions (Kunpeuk et al., 2020). Additionally, benefits are only claimable at designated hospitals, and the migrant must remain in formal employment. Further, there are limits on medicines that can be obtained (Chamchan & Apipornchaisakul, 2012). Importantly, migrants themselves are often unclear about their entitlements, deductions, and contributions (Hall, 2011).

7.2.3 Access to Healthcare for Undocumented Migrants

7.2.3.1 Malaysia

All migrants, documented or undocumented, are charged the same non-citizen user fee at public hospitals. However, undocumented migrants have reported barriers to accessing care at public hospitals because of the lack of documentation. Per a Ministry of Health directive, undocumented migrants are eligible for treatment even if they do not have legal status (Ministry of Health, 2001). However, this same directive, although not consistently practiced, mandates hospital staff to report all cases of illegal migration to the police, as per provisions under Section 6 (3) and Section 15 (4) of the Immigration Act 159/63 (Revised 1997) (Ministry of Health, 2001).

To monitor unpaid bills by non-citizens and reduce this component in the government's health budget, a pilot project started in 2014 included establishing an immigration counter in a public hospital in Kuala Lumpur. Under the scheme, hospital staff were required to report undocumented migrants who present for treatment, who were then arrested and detained after obtaining treatment (Hospital Kuala Lumpur, 2014). Undocumented women accessing maternal healthcare were particularly affected by this policy (Verghis, 2014). This policy did not become standard practice across the country. However, there are reported instances of non-citizens being turned away if they are unable to put down deposits for admission or if they are undocumented.

7.2.3.2 Thailand

Among the health financing schemes for half-legal migrants registered and authorised to work by the Thai government and unregistered workers and their children, the most prominent is the Health Insurance Card Scheme (HICS) of the Ministry of Public Health (MOPH). HICS costs 1600 Baht (USD 48) plus 500 Baht (USD 15) for a health check annually for an adult migrant (Pudpong et al., 2019). It is like the UCS for Thais in that it covers those who are excluded from the SSS. Children of migrants below age seven can enrol at the rate of THB 365 (USD 12), which includes a full schedule of immunisation (Pudpong et al., 2019). At least in principle, the HCIS makes it possible for every migrant to be eligible for health insurance, regardless of their registration status (Hall, personal communication, January 03, 2014). By 2015, some 1.3 million migrants were covered by HICS (Tangcharoensathien et al., 2017). However, HICS migrants are excluded from the UCS database for citizens. Notably, the HICS is administered by the Ministry of Public Health and not the National Health Security Office which has oversight of UCS covering citizens.

HICS provides health screening, curative care, health promotion, and disease surveillance and prevention services (IOM, 2009). It covers both in-patient and outpatient care (Tharathep, 2011) but excludes HIV/AIDS treatment, mental health disorders and drug dependence, and chronic dialysis treatment (Pudpong et al., 2019). The problems with this scheme are that the list of excluded conditions is extremely expensive (Chamchan & Apipornchaisakul, 2012) and the insurance premium is unaffordable for migrants who are socio-economically deprived (Pudpong et al., 2019). Moreover, the administrative loopholes allow informal sector migrants to avoid contributing to the HICS (Kunpeuk et al., 2020).

Various studies have shown that although utilization rates of outpatient and in-patient services by migrants increased relative to the uninsured, UCS's in-patient admission rate for citizens was greater than that of HICS (IOM, 2009; Kosiyaporn et al., 2020). However, the HICS has reduced in-patient and out-of-pocket payments for healthcare (Pudpong et al., 2019). Yet, the voluntary character of the scheme saw adverse selection and self-exclusion from healthy migrants, while undocumented status was found to be a barrier to enrolment (Pudpong et al., 2019; Srisai et al., 2020; Tangcharoensathien et al., 2017). Thus, the Thai migrant health insurance scheme is not without its problems due to insufficient enrollees to ensure a sufficient pool of risks (IOM, 2009; Kunpeuk et al., 2020; Pudpong et al., 2019). Yet, the role of the Public Health Ministry to expand health insurance coverage, even for undocumented migrants, is noteworthy. At the same time, the Thai government's efforts to address the precarious legal status and citizenship problems of undocumented migrants by initiating the Nationality Verification exercise (Kunpeuk et al., 2020; Pudpong et al., 2019) is commendable. Unfortunately, the registration process itself did not guarantee the full legalisation of their precarious citizenship status (Suphanchaimat et al., 2017).

7.2.4 Alternative Private Health Insurance

Although there is thin evidence for private health insurance's mediating role in accessing healthcare, it becomes a source of pre-paid healthcare financing for the healthcare needs of population groups that do not fall within the formal system. This phenomenon is evidenced in Malaysia in the case of refugees. In Thailand, on the other hand, private health insurance schemes tend to cover high-income groups (JICA, 2010).

7.2.4.1 Malaysia

REMEDI, a social insurance plan, launched in 2014 by UNHCR for refugees, did not require a pre-enrolment medical examination. A waiting period was not required, except for cancer and cardiac conditions. The scheme including a premium of RM 164.34 (USD 40) per refugee annually, covered in-patient treatment, room, and board for up to 25 days, intensive care for up to 12 days, hospital supplies and services, operating theatre, surgical fees, anaesthetists' fees, in-hospital physician visits, in-hospital specialist consultations, ambulance fee and medical reports (Verghis & Balasundaram, 2019).

REMEDI had enrolment problems initially, but enrolment increased from 5.2% of total refugees registered with UNHCR in 2016 to 20.3% in 2017. In 2018, the enrolment figure dropped to 12.7%, increasing the loss ratio to 142% in 2018. The increased loss ratio could largely be attributed to the increment in public hospitals' fees for non-citizens which escalated the costs of claims, leading the insurer to withdraw from providing insurance coverage to refugees (Verghis & Balasundaram, 2019). The case of REMEDI points to migrants' financial barriers to access because of the high cost of healthcare charged to non-citizens in public hospitals and the unsustainability of market-based solutions for healthcare financing for this population.

7.3 How Universal Is Universal Health Coverage?

The preceding sections highlighted the location of migrant healthcare policy within Universal Health Coverage in Malaysia and Thailand. The case studies of migrant healthcare in Malaysia and Thailand expose fault lines in ongoing global initiatives such as UHC which seeks to ensure that *all people* have access to healthcare without financial risk (World Health Organization, 2021). The inherent contradictions in the exclusion of migrants from initiatives with universal reach is better understood through the lens of the twin concepts of universalism and selectivism which guide social protection policies and access to healthcare.

The concept of universalism in social welfare policy highlights universal standards in the allocation of benefits and social services to the entire population without discrimination (Kildal & Kuhnle, 2002). Universalism and selectivism, two predominant approaches to social policy and welfare provision, are sometimes combined in practice (Mackenbach et al., 2002). They differ in their different approaches to organising the membership of beneficiaries, allocation of benefits, the role of the State, the role of the market, and underlying norms of fairness in the allocation of resources. The distribution of benefits in universalism incorporates the redistributive principle of equity (Kildal & Kuhnle, 2002), where the State plays an essential role in developing broader social solidarity and justice (Stegăroiu, 2013). Within a universalist paradigm, both labour and welfare services are de-commodified, and the State actively regulates the protection of social rights (Stegăroiu, 2013). Selectivism, on the other hand, refers to the distribution of different benefits and services to people with different needs based on individual means-tested selectivity (Mackenbach et al., 2002). Selectivism accords importance to the market through the commodification of labour and welfare benefits. With the price it commands in the labour market, labour as a commodity must purchase welfare while the State plays a limited role in regulating and upholding social and labour rights. This model reinforces norms of self-regulation of the market and self–responsibility of individuals in the distribution of resources and earning of welfare goods and services. It is blind to the structural and contextual determinants of social vulnerability.

An assessment of the healthcare policies covering migrants in Malaysia and Thailand indicates that the intersecting factors of citizenship status (citizen vs. non-citizen), migration status (labour migrant vs. refugee), and documentation status (documented vs. undocumented) impact healthcare access for migrant populations in UHC differently in these two countries.

Thailand's system is a combination of universalism and selectivism. It is stronger bent toward universalism which is seen in the expansion of benefits to all its citizens, is guided by the codification of health as a right in the Thai constitution. Its universalistic approach is also seen in the extension of its UHC to documented labour migrants who received equal treatment with Thai citizens working in the private sector, as the SSS covered both. Thailand's universalistic bent can also be traced to its efforts to include even half-legal and undocumented migrants into a system of health protection. However, it does not escape attention that half-legal and undocumented migrants were excluded from the UCS program which covers citizens. They were included in HICS, the exclusive program for undocumented and half-legal migrants, which provides unequal benefits and lower sustainability than UCS. Such a sequestering of non-citizens based on documentation status alludes to problems of selectivism that must be addressed for the system to become genuinely universalistic.

Unlike Thailand, there is no legislative framework in Malaysia protecting the right to health, even for citizens. Reflecting selectivism, there is an increasing impetus to target poor populations for subsidised public healthcare while creating spaces for the rich to switch to private healthcare by promoting the expansion of the private healthcare sector (Jaafar et al., 2012). Decreasing incentives for the affluent to

participate in cross-subsidization of overall healthcare costs in the country poses the risk of creating differences in healthcare quality in the public and private sectors. While Thailand indicates an increasing role of the government in its UHC, Malaysia reflects a trend toward a retreating role of the State. Thus, within hierarchies of deservingness to State-subsidised public healthcare created, besides healthcare for the affluent, migrant healthcare is also devolved to poorly regulated market forces, reflecting a selectivist approach. Further, the State fails to assume regulatory responsibility to ensure equitable social protection and health insurance schemes for migrants who lack the same economic agency as the affluent in the market. Yet, the salient neoliberal ethic of autonomy and individual responsibility makes it contingent on less-resourced individual migrants to retain status and functioning regardless of weak labour and social protection policies, thereby exacerbating their social vulnerability. Unsurprisingly, despite contributing to a mandatory private health insurance program, migrant health is not substantively protected. They lack access to outpatient care, prevention, and health promotion. Emerging evidence shows that selectivism is associated with "privatisation and corporate profiteering, often at the expense of those least able to bear the impact." (Danson et al., 2013, p. 5). This phenomenon is perhaps exemplified in the Malaysian case study where labour migrant healthcare through mandatory private health insurance was relegated to market forces and entities for whom it was profitable (JICA, 1999; The Sun Daily, 2014). Regarding refugees too, although UNHCR attempted a market-based solution for health insurance, it proved unsustainable.

The two case studies show us two different social protection approaches of the governments of Malaysia and Thailand to migrants. While neither country allowed portability of health insurance benefits even for documented migrants, the universalistic-selectivist approach of Thailand considered documented migrants deserving of treatment on par with Thai workers in the private sector under the SSS. In contrast, half-legal or undocumented migrants were deemed undeserving of equal treatment with citizens. They were assigned to the migrant-exclusive HICS, making the intersection of documentation status with citizenship moot to accessing healthcare. The more selectivist approach in Malaysia considered all non-citizens regardless of their documentation status to be undeserving of equal access to public healthcare with citizens, and UNHCR recognized refugees and asylum seekers given a 50.0% discount off the non-citizens' rates in public hospitals. Undocumented non-citizens, however, are targeted with specific provisions requiring their notification by healthcare providers, although this policy is not widely practiced. These phenomena align with global evidence where discursive representations of migrants focusing on their moral undeservingness to healthcare as non-citizens (Carmel & Sojka, 2020; Castañeda, 2013; Gottlieb & Davidovitch, 2017; Gottlieb & Mocha, 2018; Holmes et al., 2021; Sargent, 2012), and as undocumented persons (Bianchi et al., 2019; Burgoon & Rooduijn, 2021; Quesada, 2012) are used to perpetuate their disenfranchisement and create barriers to healthcare. In such a context, global initiatives like UHC in its current form fail to provide migrants with equality of opportunity to a system of healthcare. But importantly, it highlights the importance of deservingness in discourses related to migrant/non-citizen access to healthcare.

7.4 Citizenship and Undocumented Status and Frames of Deservingness/Undeservingness in Migrants' Access to Healthcare

According to Castañeda (2012, p. 830), *deservingness* discourses refer to "migrants' shifting and historically produced experiences of socio-political exclusion from their countries of residence, often leading them to be portrayed as unwanted, undesirable, and unworthy of services." In contrast to *entitlement* from the human rights discourse or social justice and equity arguments defined by universalism, *deservingness* is a moral assessment which discriminates in the distribution of such an entitlement/service. *Deservingness* is frequently invoked in non-citizens' access to healthcare and is relational and constructed by the appraisal of one's own deservingness and the social connection to the person being assessed (Willen, 2012a). Thus, while human rights and universalism in social protection have universal relevance based on shared humanity, deservingness is contextual and relative (Castañeda, 2012; Willen, 2012a) and defined by the frames (Viladrich, 2012) that are applied to the assessment.

The commonly used public health frames of *deservingness* (Castañeda, 2012; Marrow, 2012; Viladrich, 2012) to justify accessibility to healthcare for migrant populations span a range of perspectives including: (i) a utilitarian outlook on the cost-effectiveness of providing preventive and curative health interventions to migrants with the view that it will reduce higher future costs in the form of emergency care or transmission of disease to the host population; (ii) worthiness of work which appreciates the position of hard-working migrants who make fiscal contributions and contribute to the productivity of the country, yet experience poor work/life conditions and underutilise health services compared to host populations; (iii) humanitarian and professional norms which require that care providers provide care regardless of status; and (iv) imaging of certain migrants as victims and vulnerable toward whom policymakers have a moral obligation to alleviate their ordeals.

Frames for *undeservingness* comprise of perspectives which cast migrants, especially undocumented migrants as freeloaders, criminals, bogus, unhygienic, backward, threats to national stability/security/identity, and a burden on resources (Castañeda, 2012; Grove & Zwi, 2005; Larchanché, 2012; Vas Dev, 2009). Such frames render them unfit to claim entitlements to healthcare (Viladrich, 2012) and participate in the broader social and political community (Horton & Barker, 2010). As such, discourses of undeservingness usually disregard structural inequalities and political, economic, social, and cultural contexts that spawn inequalities, although indeterminate legal status is simultaneously a "juridical status, a socio-political condition, and mode of being in the world" (Willen, 2012b, p. 805). In this context, it is observed that negative perceptions and mistrust of migrants are also significantly associated with a strong sense of national identity and cultural unity in destination countries (Sides & Citrin 2007).

Regarding Thailand, it is possible to infer that the *deservingness* of migrants, even the undocumented to healthcare access, is guided by utilitarian rationales of

economic and political security, although there is a significant negative public perception of migrants as a security threat and a vector of disease which some scholars have attributed to the sense of national pride in native Thais (Sunpuwan & Niyomsilpa, 2012). This was evidenced in the 2014 political crisis leading to a mass exodus of Cambodian migrants causing retrograde effects on the Thai and Cambodian economies. This situation prompted the initiation of the "One Stop Service" (OSS) policy, the Nationality Verification exercise, and the decision to extend access to healthcare to undocumented migrants. These actions met the Ministry of Public Health's twin objectives of contributing to economic security through the supply of high productive labour and promoting political security by preventing communicable diseases and protecting the health of Thai people (Tharathep, 2011). Some experts also attribute pressure from the Trafficking in Persons (TIP) reports and rankings (Suphanchaimat et al., 2019), and Thailand's support to the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, 2017, as motivating factors to support healthcare access even for undocumented migrants. However, problems with legal status persist for many (Suphanchaimat et al., 2019).

Regarding the Malaysian healthcare policy on migrants, it can be argued that the relativity in moral assessments of deservingness may be linked to the perception of citizens, who, as bona fide members of the political community of the country, are entitled to heavily subsidised rates. Refugees and asylum seekers, although also viewed negatively by the public (Daniel, 2020), either on humanitarian grounds as vulnerable individuals or as individuals with credible asylum claims verified by UNHCR, are possibly viewed by the State as deserving of the 50% discount off the non-citizens' rates in public hospitals. Undocumented migrants, on the other hand, as uncredible, bogus freeloaders and a burden on resources (Latiff & Ananthalakshmi, 2020; Mathiaparanam, 2020) are viewed as undeserving of the discount provided to recognized refugees and even deserving of arrest and detention after obtaining treatment.

The above aligns with Larchanché's claim that frames of undeservingness are used to "apprehend undocumented individuals in moral terms, which then underlie therapeutic and administrative interventions" (Larchanché, 2012, p. 863). These include barring them from the "political … [and] moral community" through exclusionary citizenship and migration regimes (Willen, 2012b, p. 806), where discourses of undeservingness reinforce migration strategies of deterrence and punishment, especially in relation to undocumented migrants (Grove & Zwi, 2005; Vas Dev, 2009). Referring to the citizenship-migration nexus, Dauvergne (2008, pp. 119, 123) states that "citizenship law and migration law work together in creating the border of the nation" with the "messy policing of the national boundary by inquiring into debt and disease, criminality and qualifications" being left to migration law and a "rhetorical domain of formal equality and liberal ideals" taken up by citizenship law. Such a situation also creates tensions between citizenship rights and human rights for migrants.

The contemporary practice of citizenship rights and human rights are exercised within the context of a political community. However, citizenship rights derive from

exclusive national identity and exclusionary membership in a political community (Cohen, 1999), whereas human rights are based on personhood and global notions of shared humanity, offering internationally protected rights (Kiwan, 2005). The current praxis of citizenship rights confers on a citizen: (i) political recognition; (ii) legal status; (iii) national identity; (iv) entitlements and freedoms; and (v) the ability to participate in political activities to enjoy their rights (Kingston et al., 2010). Thus, while the discourse on citizenship rights and the deservingness of entitlements concomitant with this status are actively used to address asymmetries in substantive citizenship and push for the rights of disenfranchised citizens, it is also used to create legal and socio-political exclusions for non-citizens who are not members of that political community (Arendt, 1973). These exclusions are mainly implemented through (i) migration governance arrangements which Menjívar (2006, p. 1000) claims "actively irregularises" people by making it impossible to retain legal status over time" and (ii) state-centred discourses on civic deficits and undeservingness of entitlements that accompany it (Latt, 2013; Marciniak, 2013; Pulitano, 2013; Riaño & Wastl-Walter, 2006; Vas Dev, 2009). Irregularity of status or undocumented status, which is further to non-citizen status, exacerbates the exclusions. In that sense, the rhetoric of deservingness-undeservingness straddling the discourses of citizenship rights and migration creates social exclusions for migrants and gnaws at the foundational principles of universalism underpinning universal health coverage and human rights in general.

Equally, the tension between the practice of citizenship rights underpinning the rationale for exclusion and selectivism toward migrants, and human rights and universalism reinforcing social solidarity and equity is rooted in the salience of immigration and nationality laws.

Historically and culturally, Malaysia and Thailand have had porous borders. But as Garcés-Mascareñas (2015, p. 129) says, "no border control does not mean no immigration control." In fact, weak border control is compensated by constricting immigration policies (Frank, 2014) and exclusionary social protection policies covering non-citizens, which effectively prevent their integration into mainstream society.

In Thailand, the 2008 Nationality Act and the 1979 Immigration Act emphasize the salience of citizenship and concomitant imperatives of national identity and legal status respectively (Suphanchaimat et al., 2017). In the context of Malaysia, the Malaysian Immigration Act 1959/63 regulates the entry of foreigners, and the Employment Restriction Act 1968 regulates the employment of foreigners. Along with the provisions for nationality/citizenship in the Federal Constitution (Art.14), these two laws draw the boundary between citizen and non-citizen and who can/cannot work in the country; with all three laws being implemented through a regime that emphasises the salience of documents to validate status/identity. Those lacking such documents cannot engage with legal processes to acquire legal status, the legal right to work, and access to social protection.

Thus, although border control on the frontier may be weak, social protection policies resisting principles of universalism coalesce with punitive immigration regimes to draw borders and obstruct entry and membership into the political/social

community of the nation. Such restrictive policies also constrict and immobilise migrant populations to spaces that evade mainstream life and public scrutiny and accountability. Prominently, it transforms spaces of everyday life like clinics, hospitals, and schools into sites of contestation of legal citizenship (Miklavcic, 2011) by bringing the border to the hinterland. Within this scheme of things, critical issues are sidestepped—that migrants make robust contributions to the economies of Malaysia (World Bank, 2013) and Thailand (ILO, 2020b; Martin, 2007), and that contrary to principles of healthcare financing, although migrant workers pay high taxes vis-à-vis citizens with similar income levels (Loganathan et al., 2020a) reciprocity is not accorded in extending them subsidised public healthcare. While Memoranda of Understanding between countries spell out terms of recruitment and work responsibilities, entitlements to social protection are not substantively included because of the territoriality nature of social protection systems.

7.5 Conclusion

Using Malaysia and Thailand as case examples, this chapter reviewed their migrant healthcare policies in the context of UHC and migration regimes. Although Thailand's migrant healthcare policies lean more toward universalism than Malaysia's predominantly selectivist approach, citizenship, migration, and documentation status intersected in different ways in the two countries to hinder migrants' access to healthcare and UHC on par with citizens. While undocumented migrants in both countries were subject to unstable healthcare financing mechanisms and even the risk of arrest and detention in Malaysia, the insurance schemes covering documented migrants in both countries lacked portability. In Malaysia, even for documented migrants, the coverage under SPIKPA was inadequate because of the high cost of healthcare although humanitarian migrants were given a 50% discount off foreigners' rates. Frames of deservingess mediated the type of access each migrant group experienced.

Against the backdrop of universalism and human rights which premise global initiatives like UHC and 2030 Agenda for Sustainable Development, through the case studies, this paper examined the highly complex terrain of migration, the overarching legal and political contexts within which UHC is implemented, and the significance of citizenship rights and their intersection within migration regimes highlighting labyrinthine contexts that migrants navigate to access healthcare. Such national level policy dynamics in destination countries which obfuscate the realisation of a common regional ASEAN response to social protection for migrants are also evidenced in sending countries where the normative foundation buttressing institutional responses are also fraught with discrepancies (Santoso, 2017). This chapter thus highlighted the need for concerted efforts to include migrant populations in measures which are purportedly universal in nature. In this way, it also showed the need for inter-disciplinary and multi-disciplinary scholarship in examining empirical problems of healthcare accessibility for migrant populations.

The over-representation of migrant workers in COVID-19 positive cases in Singapore and Malaysia (Asadullah, 2020) and the likelihood of pandemics occurring in the future create an urgency to resolve this problem. For this, the mediating role of citizenship and legal status in the ability of migrants to have access to healthcare with financial protection needs to be interpreted more expansively from a human rights perspective to make UHC responsive to one of the most significant global phenomena of our times, namely, migration. On a broader level, the case of migrant populations in Malaysia and Thailand concerning UHC exposes contradictions in normative thought and empirical practice that need to be reconciled for gains from UHC to be genuinely sustainable and fruitful. These are important points to consider and clarify as the ASEAN as a community strives to achieve regional peace and a just and democratic environment with shared prosperity for all.

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Chapter 8
Labour Migration and Exclusive State Amidst the Global Pandemic of COVID-19

Amparita D. Sta. Maria

8.1 Introduction

In Southeast Asia, regional integration has played a role in driving labour mobility. For many years, the Association of Southeast Asian Nations (ASEAN) has approached labour mobility as an extension of open trade and investment, specifically through promotion of services trade (Kikkawa & Suan, 2019). However, intra-regional labour flows are still largely driven by bilateral arrangements between origin and host countries, and the labour and immigration laws of the latter, rather than ASEAN-wide initiatives. As existing ASEAN regional instruments do not bind the countries in the same way that a treaty does, bilateral agreements have been regarded as a more viable option in terms of protecting migrant workers. Both the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers and the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (ASEAN Consensus, 2018) are non-binding treaties. Furthermore, within the ASEAN, only the Philippines and Indonesia are state-parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (OHCHR, 2021).

International labour migration within Southeast Asia is triggered by two main factors: (1) disparities between countries in terms of economic and social development; and (2) demographic differences among the populations of ASEAN nations, such as age and mortality rates in destination countries that affect supply and demand of labour (ILO & IOM, 2017).

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Labour migration in the ASEAN region is also highly gendered. Women account for nearly half of the intra-ASEAN migrant working-age population (UN Women, 2017). The increase in demand for workers in highly feminized sectors, such as health care, domestic work, entertainment, manufacturing, and textiles, in destination countries, particularly Malaysia and Singapore, results in an increased number of women migrant workers. Women labour migrants from Indonesia and the Philippines consist of 44% and 40% of 2015–2016 labour outflows respectively, comprising of domestic workers, caretakers, and housekeepers (ADBI et al., 2018).

Despite the commitment of ASEAN to facilitate the flow of high-skilled workers within the region (Gentile, 2019), low-skilled, labour-intensive jobs employ most migrant workers within the region, working in various sectors such as agriculture and fisheries, domestic work, manufacturing, construction, hospitality, and food services (ILO, 2019). Some of these occupations are often classified as part of the informal economy, excluding such workers from labour protection programs in destination countries (2019). Furthermore, many migrant workers have irregular status because of the "high costs, long duration, and considerable complexity of navigating the existing bilateral channels for migration" (ILO & IOM, 2017).

The intersecting vulnerabilities experienced by migrant workers because of their non-citizen status, gender, work category and skill level have become more pronounced in the advent of the 2019 Coronavirus Disease (COVID-19). As the COVID-19 outbreak ballooned into a pandemic, host states have been forced to implement urgent and aggressive actions to combat its spread. This chapter examines the challenges posed by the COVID-19 pandemic to Singapore, Malaysia, and Thailand as host countries. It argues that it is necessary for host countries not only to maintain the health and social protection measures extended to migrant workers during the pandemic, but to institutionalize them, despite the fact that they were adopted under extraordinary circumstances. It further posits that the traditional concept of citizenship should be abandoned by host states in favour of a universalist concept where migrant workers are regarded as social citizens, thus entitled to health and social protection, even as these states' policies remain primarily focused on their citizens.

This chapter is divided into four parts: part one is a brief introduction of labour migration within the ASEAN; part two discusses the comparative measures adopted by Singapore, Malaysia and Thailand in response to COVID-19 and the impact of these responses on migrant workers; part three uses the concept of citizenship as a framework for analysing the factors that led to the host countries' responses and the rationale behind them, and part four proposes that a paradigm shift in the policy that regards migrant workers as social citizens, and institutionalises the accommodations extended to them during the pandemic, would be propitious for Singapore, Malaysia and Thailand as host states. These host countries were carefully selected for this analysis as they have the highest number of migrant workers in Southeast Asia. In 2017, Malaysia had over 2.23 million migrant workers, while Thailand and Singapore were home to 2.06 million and 1.37 million, respectively (Statista, 2021).

8.2 Covid-19 Pandemic in the ASEAN Region: Effects and Government Response in Malaysia, Singapore, and Thailand

Southeast Asia was one of the first regions affected by the COVID-19 pandemic because of its close geographical proximity, and business and trade links with China (OECD, 2020). As the rate of infection spiked, the pandemic brought immediate interruption in all sectors of economic activity in the ASEAN region, primarily through nationwide lockdown and quarantine measures, temporary closures of businesses and schools, travel restrictions, and other preventive and containment measures. To mitigate the economic and social impacts of the pandemic, Southeast Asian governments have introduced stimulus packages, mobilizing both fiscal and monetary measures. However, providing and reinforcing social support is difficult in developing and emerging economies, which are often characterized by weak social protection systems for the vulnerable sectors and growing inequalities (Lee, 2020a).

8.2.1 Impact on Migrant Workers

8.2.1.1 Termination and Lay-Offs and Work-Related Concerns

An ILO survey on the impact of COVID-19 on migrant workers in the ASEAN found that "97% of respondents in destination countries had not accessed any social security support" (ADBI et al., 2021).

While the closure of businesses brought about by lockdowns and containment measures in Malaysia, Singapore and Thailand, has resulted in the temporary unemployment, reduced employment, termination and mass lay-offs of migrant workers, the support extended by these governments, including stimulus packages to workers who have lost their jobs and income, generally exclude migrant workers (ADBI et al., 2021).

For instance, Malaysia has been criticised for its management of migrant workers during the pandemic (Wahab, 2020). As of July, 4700 migrant workers lost their jobs according to the MHR of Malaysia (Reuters, 2020). Daily-waged migrant workers, both documented and undocumented, were among the hardest hit, with many workers running out of money due to job loss and merely relied on food aid distributed by the Government and Civil Society Organizations (CSOs) (Priya, 2020). The Wage Subsidy Programme implemented during the effectivity of the Movement Control Order (MCO) was available to employers whose revenues have suffered, but it cannot be used for employed migrant workers (Lim, 2020a). Furthermore, the Ministry of Human Resources (MHR) itself has advised that

migrant workers should be terminated first should lay-offs be inevitable (The Star, 2020). According to the Khazanah Research Institute, a senior minister of the Malaysian government also stated that "the workers are the responsibility of their respective embassies" (Lee, 2020b).

In Thailand, workers in retails and entertainment have lost jobs due to closure of these industries, while many domestic workers have been dismissed for fear of bringing COVID-19 (Rogovin, 2020). Although documented migrant workers are covered under the Social Security Contributions Act (SSC), and therefore, they have unemployment insurance benefits, (ADBI et al., 2021) access to these benefits has been plagued with delays and a general lack of information about available coverage (Thubchumpon, 2020). Still, those employed with reduced working hours because of the pandemic are "unable to afford rent, food, and daily household items. Many were not able to send remittances."

Singapore adopted similar responses. It banned the entry of travellers in a progressive manner, starting from those coming from Hubei and the whole of China (Chang et al., 2020). With the spike in new cases, the Singapore Parliament passed the "Circuit Breaker" law, which took effect on April 8, 2020. While it closed all schools and non-essential businesses – the essential services, such as food establishments, hospitals, and transport remained open with strict social distancing measures (Cheong & Lai, 2020).

Singapore extended support to employers to retain and pay their migrant employees, by way of "levy support (rebates and/or waivers), with particular focus on migrant workers in the construction, marine shipyard, and process sectors" (ADBI et al., 2021).

8.2.1.2 Extension of Stay

Malaysia, Singapore and Thailand commonly provided extensions of migrant workers' stay, especially if their working permits have expired during the pandemic. In Thailand, documented migrant workers and their families were allowed to "remain temporarily in the country, without a fine, if their visa expired during the pandemic period" (ADBI et al., 2021). According to the ILO, "Thailand's Department of Employment of the Ministry of Labour estimated that 1.2 million work permits of migrant workers and their families were renewed or approved by 30 June 2020" (ADBI et al., 2021).

All working visas which expired during the lockdown were also renewed by Singapore for two months. This assisted "retrenched migrant workers with income, accommodation, and food support" (Abella, 2020; ADBI et al., 2021). Singapore also set up a "temporary scheme that enables the transfer of migrant workers across sectors." Malaysia, for its part, granted permission for migrant workers to change not only their sectors, but also their employers (ADBI et al., 2021).

8.2.1.3 Health

There is an overrepresentation of migrant workers among the infected in these countries. ILO reports that in Singapore, migrant workers are 38% of the labour force but they comprise more that 90% of COVID-19 cases; while in Malaysia, they comprise 30% of the confirmed cases (ADBI et al., 2021).

Two reasons are given by ILO: first, many migrant workers are classified as "essential" which means that they continued to work despite lockdown measures. In some circumstances, workplaces do not adequately implement health protocols or provide insufficient protective gear to their workers. For instance, concerns were raised about the working conditions and lack of safety protocols in the manufacture of rubber globes in Malaysia, which supplies 67% of the product globally (ADBI et al., 2021).

Second, housing facilities for migrant workers have been identified as a major cause of the COVID-19 outbreak. Particularly in the construction and manufacturing sectors, migrant workers' dormitories are crowded, making social distancing difficult to achieve. Likewise, there is inadequate supply of soap and sanitisers. This has been true for Singapore and Malaysia. In Thailand, although the outbreak in the worksites and dormitories does not appear as serious, an ILO study in 2016 described the living conditions of migrant workers as substandard and "lack[ing] regulatory oversight" (ADBI et al., 2021).

Ensuring access to health services, including those related directly to the COVID-19 pandemic, has been met with mixed responses from the countries in focus. Malaysia initially exempted migrant workers from outpatient fees at government facilities (Wahab, 2020). However, it subsequently announced that all migrant workers should undergo compulsory swab testing, the cost of which shall be borne by their employers (Bedi, 2020). Eventually, though, the government decided that the COVID-19 screening would be covered by the Social Security Organization (SOCSO) and priority would be given to migrant workers in two sectors: construction and security (Bernama, 2020). By November 2020, the government imposed a "mandatory Covid-19 screening for 1.7 million foreign workers in view of the high number of cases involving the group" (The Straits Times, 2020). For this mandatory screening, the SOCSO "would pay RM 60 per employee for the rapid antigen test."

Meanwhile, in Singapore, as the government only subsidized citizens and permanent residents seeking treatment in Public Health Preparedness Clinics (Min, 2020), migrant workers heavily relied on civic groups for health care provisions (Chia & Poh, 2020). However, in May, the government unveiled a plan to provide onsite medical facilities at all migrant worker dormitories s (Heijmans & Chia, 2020).

In Thailand, a government spokesperson said the country would treat all patients for the disease regardless of the migrant workers' legal status on humanitarian grounds (ILO, 2020b). However, those laid off are still struggling to find work after the country hit its worst outbreak in January 2021. Many people have blamed migrant workers from Myanmar – a major source of labour in the seafood industry

in Samut Sakhon – for the COVID-19 outbreak, believed to have originated from the seafood market late last year (Wongsamuth, 2021). While the Thai government has ensured that anyone with COVID-19 symptoms, who has visited known hotspots, or who is suspected to have been infected, can access free coronavirus testing and treatment, some migrant workers were deemed low risk and denied tests at government hospitals. Private hospitals, on the other hand, can charge more than 4000 baht or US$133. These costs serve as a barrier to ensuring that migrants are included in efforts to contain the COVID-19 pandemic. For instance, a migrant worker at a factory in Samut Sakhon, said he was asked to stop working without pay after being unable to afford a COVID-19 test and obtain a negative certificate to show his employer.

Whether migrant workers have access to vaccinations against the COVID-19 virus is a question of central importance. To date, the most important assistance given by the Malaysian government is its offer to vaccinate foreigners for free, including foreign workers, and even undocumented ones (Dzulkifly, 2020). The government assures that the undocumented workers will not be arrested during the vaccination program (Anand, 2021). This assurance is reportedly "due to Malaysia's adequate supply of vaccines, which is more than the number of Malaysians who are eligible to receive it" (Rodzi, 2021). Noting that workplace clusters are hotspots for spreading COVID-19, the government stated its desire to control clusters "in factories, plantations and construction sites," to achieve herd immunity "as 'no one is safe till everyone is safe'."

In February 2021, government spokesperson Dr. Apisamai announced that Thailand has three target objectives for COVID-19 vaccinations, one of which is to "protect the national economy and society." Recipients include "workers in the service, tourism and industrial sectors," and "employers will co-pay for the vaccination of their migrant workers" (Bangkok Post, 2021).

In March 2021, Singapore's MOH announced that it will vaccinate migrant workers, with those in dormitories going first. The Ministry also announced that "vaccination will be provided free to all Work Permit (including FDWs), S Pass, EP, LTVP and Dependant's Pass holders" (MOM, 2021).

8.2.1.4 Social Protection

Since migrant workers were excluded from the host states' stimulus packages, their sudden unemployment and loss of income resulted in a humanitarian crisis (ADBI et al., 2021). Migrant workers had to rely on food reliefs provided jointly by the government, trade unions, and CSOs.

As part of its stimulus package, the Malaysian government introduced a discount on the foreign worker levy by 25% percent for payments due in April until the end of the year (Dzulkifly, 2020). This was to "reduce the financial burden on small-and medium-sized enterprises caused by the [COVID]-19 pandemic and the subsequent movement control order" (Dzulkifly, 2020). Acknowledging the dilemma that employers faced in retaining workers amidst the pandemic, the government also

"agreed to encourage negotiations between employers and workers about existing terms of employment, including the option of pay cuts and the provision of unpaid leave during the MCO period" (Dzulkifly, 2020).

Singapore has been regarded as "successful" in responding to the COVID-19 pandemic (Lim, 2020b). Despite its success, it has been criticised for its handling of migrant workers and their living conditions. For example, it provided some social protection for businesses hiring foreign workers through a foreign worker levy rebate of SGD 750 for each migrant worker holding S Pass or work permits, which could be used to pay their salaries (Ho, 2020). However, as with Malaysia, its Jobs Support Scheme only extends to local employees who are Singapore citizens and Permanent Residents (IRAS, 2020). There are clearly identifiable needs for social protection in Singapore, with migrant construction workers making up 90% of those infected in Singapore (Kaur-Gill, 2020).

In Thailand, although migrant workers have the right to access social security, including health care, in reality many are excluded, particularly those in the informal sectors, domestic work, agriculture, and fishing; regular workers whose employers did not enrol them; and undocumented migrant workers (ILO, 2020b). The financial support package amounting to THB 30,000 offered by Thailand is only available to its citizens (Promchertchoo, 2020). With no social protection, migrant workers have limited access to COVID-19 testing and treatment, and may opt to not seek medical support for fear of deportation for those with irregular status (ILO, 2020b). Further, to apply for COVID-19 social security benefits, such as cash transfers, one requirement is to have 13 national identity digits, effectively excluding migrant workers (2020b).

8.2.1.5 Housing

The issue of housing for migrant workers is a source for major outbreak of COVID-19, deserving a separate discussion within the context of social protection.

Though not as binding as a treaty, the ASEAN Consensus 2018 signifies a commitment among ASEAN countries to implement measures for the realization of the rights of migrant workers recognized therein. Pertinently, the ASEAN Consensus (2018) provides that "The Receiving State will, …, ensure that migrant workers are provided with adequate or reasonable accommodation." Receiving countries also undertake to "provide fair treatment to migrant workers in respect of: (a) Working condition and remuneration; (b) Occupational safety and health protection; (c) Protection from violence and sexual harassment; and (d) Gender and nationality in the workplace.

Before the pandemic, the fact that migrant workers were living in crowded and sub-standard accommodations, was not an issue that garnered the attention of hosts countries. When the pandemic broke out and the mandatory protocol of social distancing was imposed, the inadequacy and danger that the living conditions of migrant workers posed became central to addressing community transmission of the COVID-19 virus.

As of mid-April, the Malaysian Trade Union Congress reported poor living conditions as violations against migrant workers (ILO, 2020a). In May 2020, the health director-general of Malaysia stated that the spread of COVID-19 in the migrant workers' housing was facilitated by "cramped and congested living conditions" and that the employers only focused on the condition of the migrants' workplace and not their housing (ADBI et al., 2021).

In August 2020, the "Employees' Minimum Standards of Housing, Accommodations and Amenities (Accommodation and Centralized Accommodation) Regulations 2020," was published in Malaysia (Malaysia Government, 2020). It provides, among others, that in dormitories, each employee must have a sleeping area of at least three-square meters (s.5.2) and the ratio for toilet and bathroom to workers is 1:15.

The situation of migrant workers in dormitories in Singapore during the pandemic, under total lockdown, has been grim. Some 200,000 migrant workers live in 43 purpose-built dormitories, which are overcrowded and have poor sanitary standards, making them more vulnerable to infection (Chin, 2020). With local transmission being reported in these dormitories, migrant workers were placed under total lockdown (N. Chang, 2020). Workers in essential services were housed separately (Wong & Zhuo, 2020). Meanwhile, an inter-agency task force was set up by the MOM to support migrant workers and dormitory operators during the implementation of the Circuit Breaker, by providing dormitory residents with meals in a timely and orderly fashion, and giving dormitory operators simple care packs consisting of masks, thermometers, and hand sanitizers (Ng, 2020).

According to Huso Yi et al. (2020), lack of inclusive protection systems and communal living in high-density and unhygienic dormitory settings contributed to the increase of COVID-19 cases among low-wage migrants in Singapore. In response, the government authorities have pledged to further improve their working and living conditions by giving each resident a living space of at least six square meters per person (Tan, 2020). However, these efforts, such as hygiene measures, were not implemented in full (Kathiravelu, 2020). Most migrants were strictly trapped in the dormitories while mass testing was implemented, and infected workers were removed, isolated, and treated gradually (Tan, 2020). Singapore's Prime Minister, Lee Hsien Loong, acknowledged that there were missteps taken, as "it is not possible always to make the perfect decisions." In his speech, he acknowledged the vital contributions of foreign workers and the need to protect them during the pandemic:

> [W]e are paying close attention to the welfare of the foreign workers. They came to Singapore to work hard for a living, and provide for their families back home. They have played an important part building our HDB flats, Changi Airport, MRT lines. We have worked with their employers to make sure they will be paid their salaries, and can remit money home. We will provide them with the medical care and treatment that they need (ADBI et al., 2021).

Still, the MOM has received numerous complaints regarding unpaid salaries, as well as denial of other work pass privileges, including threats of termination (Ho, 2020). For the most part, the welfare of migrant workers remained the employers' responsibility.

As in Malaysia and Singapore, migrant workers in Thailand have been living in cramped dormitories and other housing facilities with poor sanitary conditions, making distancing and other preventive measures difficult to implement (Wipatayotin, 2020). There have also been reports of infections within Immigration Detention Centres (HRW, 2020). For women, there may be an additional risk of sexual and other harassment in migrant accommodation (UN Women, 2020). Furthermore, migrant workers in certain occupations face heightened risks. In construction which has remained open, migrant workers were not given masks or hand sanitisers even though they work and live with poor sanitation conditions and limited access to potable water (Chandran, 2020).

8.2.2 Recalibrating Responses: A Matter of Necessity

It is apparent that the Malaysian government has been forced to recalibrate its policies and alleviate the situation of the migrant workers, despite its earlier pronouncement that if there would be lay-offs, the first to go would be migrant workers. This can be attributed to the following: (a) realisation that migrant workers are necessary, if not indispensable, to the survival of their citizens' businesses and the economy of Malaysia; (b) since migrant workers are rendered vulnerable to COVID-19 because of the state of their accommodations and working conditions, there would be higher rates of community transmission unless medical and social support are extended to them; and vaccines are made available to migrant workers because Malaysia has a surplus of supply.

It is clear that Singapore also had to recalibrate its policies towards migrant workers: unless it improved both the living and health conditions of migrant workers, it cannot effectively arrest the pandemic and prevent transmission to the entire population. Hence, the migrant workers' housing facilities were "upgraded" and health benefits relative to COVID-19 were covered. As a matter of fact, Singapore has prioritized workers living in the largest dormitories for vaccination and has also provided for "Vaccine Injury Financial Assistance Programme (VIFAP) to support people who suffer serious adverse events that are assessed to be likely related to COVID-19 vaccines," including "Work Permit (including FDWs), S Pass, EP, LTVP and Dependant's Pass holders" (MOM, 2021).

Thailand, for its part, has announced that it will cover COVID-19 vaccines to foreign workers (The Associated Press, 2021). The Associated press (2021) cites Opas Karnkawinpong, director-general of Thailand's Department of Disease Control, as saying that "70% of Thailand's population has to be inoculated to create

'herd immunity' and that Prime Minister Prayut Chan-ocha 'mentioned clearly that everyone on Thai soil, both Thais and foreigners, can access the vaccines'." Verily, Thailand realises that herd immunity cannot be achieved if citizenship is made a pre-requisite or condition for access to vaccines.

8.3 Citizenship, Labour Migration, and Social Protection During the COVID-19 Pandemic

8.3.1 The Interplay: Citizenship, Social Protection, and Labour Migration

Both the initial and recalibrated responses to the COVID-19 pandemic by host countries like Singapore, Thailand and Malaysia have been framed around the protection primarily, if not exclusively, of their own citizens. Despite the seeming fluidity of territorial borders due to globalization and migration for work, citizenship remains a constant barrier to equitable access to health and social protection, and justifies differentiated treatment of migrant workers.

8.3.1.1 The Traditional Concept of Citizenship: Legal and Social Citizenship

At the core of the concept of citizenship is the "possession of the formal status of membership of a political and legal entity" and having specific rights and obligations associated with it (Bellamy, 2015). Commonly, citizenship is understood as a "political and legal artifact that creates a condition of civic equality among those who possess it with regard to the prerogative and responsibilities it bestows and requires."

While in its traditional sense, citizenship is viewed primarily as a legal and political concept, as rights and freedoms are legislated by government bodies and courts, in political science and sociology, citizenship takes on a much broader concept referring to "some form of community belonging" (Bosniak, 2008). As a legal status, citizenship entails a universal set of civil, political, and social rights. This universalist conception of citizenship stems from the theory of social citizenship by British sociologist Thomas Humphrey Marshall (1964). For him, social citizenship has three dimensions: civil, political, and social. It promotes modern social rights, which are aimed at addressing and minimizing individuals' risk of suffering problems like poverty, inadequate access to healthcare, and social exclusion. Social rights are also meant to give individuals life-long rights to income maintenance, employment, and health services (Roche, 2002). The objective of social citizenship, therefore, is "to create a social stratification on the basis of merit within each generation; so one cannot inherit wealth, but must earn it…and all are offered an equality of status at birth that allows equal competition for resources" (Revi, 2014).

8.3.1.2 Globalisation and Exclusion of Migrants from Citizenship: The Notion of Contribution and the Othering Effects

Globalisation challenges the traditional and universalist notion of citizenship, in that state borders remain open and flexible to allow non-members (non-citizens) of a state's territory inside, and remain there for a considerable time because they possess statuses or carry identifications other than citizenship, which justify their stay and access to the host country's resources. Bloom and Feldman (2011), cite the UK to make the point that although there are distinctions between being present, being a resident (precursor to citizenship, with right to education) and being a citizen (possessed of all rights), "presence is necessary and sufficient to receive emergency health care..."

For Iris Marion Young (1989), the idea of "universal citizenship" has not translated into social justice and equality for all citizens, as manifested by how contemporary social movements in the US have fought for the rights of African-Americans, Latinos, women, and other marginalised groups. According to Young, the best way to promote inclusion and participation of everyone is through the concept of "differentiated citizenship." "Differentiated citizenship" refers to "the granting of special group-based legal or constitutional rights to national minorities and ethnic groups" (Mintz et al., 2013). In the context of globalisation studies, however, "differentiated citizenship" may refer to "the ways in which nation states grant privileges to certain people (nationals or internationals) considered valuable in a market driven world, while excluding others (considered less valuable) from rights and entitlements" (Ochoa Campo, 2017).

Have "presence" and "contribution to the economy" facilitated the migrant workers' inclusion as social citizens in Singapore, Malaysia and Thailand? In the context of the pandemic, have they been treated equally to citizens in terms of emergency health care? Bloom points out that "it is precisely in the area of social rights that migrants often find themselves deficient" (Bloom & Feldman, 2011). Furthermore, is the value of their contributions sufficiently acknowledged to be considered deserving of equitable, if not equal, access to health care and social protection, given the state of the COVID-19 pandemic? Or are their contributions easily dismissed as insignificant, unnecessary or even dispensable, precisely because they are non-citizens? What validates their exclusion and their "othering" despite their economic contributions and beneficial presence in host countries?

According to Osipovic (2015), how migrants' contributions are perceived plays a crucial role in determining who is "included" and who is "excluded" from certain government programs and services. The notion of contributions can be used either to strengthen the rights of migrant workers or to do the exact opposite. On one hand, some have argued that irregular migrants are *de facto* members of the national community by virtue of their social and cultural contributions (Berg, 2007). Through this appeal to contributions, it is possible to argue that migrant workers are deserving of the rights typically associated with social citizenship. This argument does not only carry theoretical significance. For instance, it is advanced that most Europeans are prepared to grant social rights to migrants if certain conditions are fulfilled, such

as paying taxes (Osipovic, 2015). This suggests that migrant workers' contributions by way of paying taxes can be used to bolster the argument that they are more deserving of the rights associated with social citizenship.

On the other hand, Osipovic (2015) also points out that the very notion of contributions has been weaponized to curtail the rights of migrant workers. First, in some places, there is a recognition that there are greater "multigenerational" contributions by citizens which cannot be matched easily by newcomers. Hence, even if migrants manage to make some contributions, they will be seen as inferior to the contributions of citizens, and this can be used as justification to curtail their rights. Second, regardless of how much or how little contributions migrants make to the community, there is a good chance that citizens will still refuse to fully appreciate the magnitude of those contributions. This may be because certain migrant workers' contributions are rendered "invisible" in public discourse because they are considered to be more "private" than "public" (Singleton & Fry, 2015). In particular, migrant workers tend to occupy jobs which are out of sight from the general public: they "work in factories, produce food, provide domestic service, staff hospitals and contribute to a wide range of basic needs, often for low wages and with little recognition of the value of their contribution" (Wickramasekera, 2002).

This shows that even if migrant workers make substantial contributions, it may still not be "enough" for the population at large. Hence, while contributions can be used to grant migrant workers more rights associated with social citizenship, these may also be weaponised to further the opposite goal of their exclusion and invisibility.

In addition, despite their physical presence, citizenship has an "othering" effect, which makes it harder for migrant-workers to be seen as social citizens deserving of the rights of social citizenship. This effect manifests itself in different ways. First, it can turn migrant workers into scapegoats. Migrant workers are blamed for all kinds of problems, like low wages in host societies (Reza et al., 2019). In this pandemic, much of the local transmission of COVID-19 has also been linked to migrant workers in Singapore and Malaysia, though this was caused mainly by their cramped situation in the dormitories provided by their employers, rather than their status, *per se,* as migrant workers (Bloomberg, 2021). As previously mentioned, the outbreak in Samut Sakhon was blamed on migrant workers from Myanmar (Wongsamuth, 2021). Second, citizenship can be used to argue that migrant workers are undeserving of certain rights, as they are often deemed outsiders of the community, undeserving of rights associated with citizenship (Mundlak, 2007).

In the end, the notion of contributions as well as the othering effects of citizenship have made it difficult for migrant workers to be seen as possessing social citizenship, and has led to extreme disparities, particularly with regard to social security and healthcare. Thus, one might rely on the utilitarian approach and aphorism, "the greatest good for the greatest number" (Andre & Velasquez, 2014), to justify migrant workers' inclusion. Specifically, host countries ought to implement policies towards their protection as social citizens, regardless of their contributions, because in the end, this would have the greatest beneficial repercussions for the country as a whole (Dodgson & Auyong, 2017).

8.3.1.3 The Effects of Migrant Workers as "Non-Citizens": Disparities on Access to Social Protection and Healthcare

While there are international instruments meant to protect the rights of migrant workers, there are still countries that have not made committed to implementing those instruments (Reza et al., 2019). Even where such commitments are made, they are not followed (Basok & Carasco, 2010). More importantly, the sole binding international human rights treaty on migrant workers is poorly ratified, with just 56 State-Parties (OHCHR, 2021), thereby, greatly weakening the normative value of the rights articulated therein. To reiterate, there are at least two areas in which there is a huge disparity between the rights of migrant workers and rights of citizens which are critical in the context of the COVID-19 pandemic: healthcare and social security.

Migrant workers often encounter very restrictive conditions to obtain social security in their host country (Reza et al., 2019). Some social security schemes have long residency requirements, making it difficult for temporary migrants to claim benefits, which effectively excludes them from social protection (Reza et al., 2019). Even in cases where migrant workers are eligible, they nonetheless encounter difficulties in actually collecting those benefits (Basok & Carasco, 2010).

Although there may be employers who do not comply with certain requirements to provide healthcare to their workers, whether citizens or not (Chen, 2015), migrant workers are still more disadvantaged because they either do not qualify for government funded health insurance, or the costs of those insurance plans are too prohibitive considering how much migrant workers are paid (Leventhal, 2013).

In Malaysia, Singapore, and Thailand, separate social protection schemes are provided for migrant workers and these are usually contributory or voluntary in nature. The schemes are also on an employers' liability basis and with less government subsidies. Many migrant workers are also excluded for a number of reasons: the social security systems cover only regular/ documented workers, or workers in the formal economy; a minimum contribution period is required and is not met by migrant workers with short-term contracts; and/or there are other administrative barriers.

8.3.2 Challenging the Notion and Relevance of Citizenship During the COVID-19 Pandemic

As earlier stated, despite globalisation and the increased flow of labour and capital across borders, citizenship has consistently been a criterion for inclusion in, or exclusion from, a wide range rights and social benefits. By creating a hard barrier around citizenship, nation-states enforce different rights and obligations on non-citizens. The COVID-19 pandemic has exacerbated the existing inequalities between citizens and non-citizens. As discussed in the previous sections, migrant workers in

South East Asia face new challenges due to COVID-19 related to their job stability, immigration status and disproportionate rates of infection. In many cases, aid programs developed by governments are not available to non-citizens, and migrant workers may face challenges when accessing basic social services depending on the social protection and healthcare schemes of their destination country.

Most of the initial COVID-19 response measures implemented by governments in destination countries made use of existing social protection and healthcare schemes. Since migrant workers are excluded from these schemes, they continued to be excluded, despite the pandemic. Governments gave citizens one-off payments, cash dole-outs, and financial support for workers. The same happened in the case of healthcare subsidies and other socio-economic stimulus packages. Worse, there has been outright discrimination against migrant workers in employment policies during the pandemic. To restate, in Malaysia, the MHR has made it a policy that migrant workers be terminated first should layoffs be inevitable (The Star, 2020).

To recapitulate, the empirical data and lived experiences of migrant workers in Malaysia, Singapore, and Thailand during the COVID-19 posed a challenge on the existing health and social protection policies and strategies of these countries, which have been historically framed around the protection of their own citizens. The adverse consequences of the pandemic affected citizens and non-citizens alike, although migrant workers have been disproportionately affected. Therefore, the dividing line that citizenship draws in terms of social protection and healthcare should be blurred to address the pandemic effectively. In the countries which have been the focus of this study, Malaysia and Singapore seem to have realised the need to recalibrate their pandemic response and adopt a more inclusive approach in favour of migrant workers. As discussed, Malaysia has imposed a mandatory COVID-19 screening for 1.7 million foreign workers, which is subsidised by the government. Singapore, meanwhile, carried out mass COVID-19 testing, isolation, and treatment among the migrant workers. These recalibrated responses came after the government authorities realised the increasing rate of infection among the migrant workers' population, and how the migrant workers' dormitories became COVID-19 hotspots. Thailand, on the other hand, has not made significant policy changes to address the situation of migrant workers during the pandemic, except that it has declared that vaccines will also be given to migrant workers for free, with the end in view of achieving herd immunity.

8.4 Conclusion

The success of Singapore, Malaysia and Thailand's response to COVID-19 will have a direct effect on the extent and quality of health care and social support that migrant workers would receive in these countries. As previously discussed, Singapore by necessity, had to improve the living conditions of the workers and extend assistance during the lockdown because it realised that the poor conditions of the workers' dormitories were a super-spreader of the virus because of their

cramped conditions, lack of ventilation and limited toilets. Malaysia recently announced that it would vaccinate foreign workers for free because it had more than enough for its own citizens and Thailand likewise stated that it will do the same. It could be said that at on these occasions, the migrant workers' othering is diminished, and based on their presence and labour contributions to their host countries, they are treated as "social citizens," included in the health and social protection ordinarily available only to citizens.

There is no telling, however, if the adjustments and recalibrations made by these host countries will be sustained and institutionalised to improve the migrant workers' health and social protection in the long term. One should never lose sight of the fact that these recalibrations have been primarily about the survival of the state and its citizens. Migrant workers were accommodated by necessity, due to the COVID-19 pandemic.

What is clear is that citizenship as a barrier is immutable, and the exclusion of migrant workers in rights, privileges and access, will always be justified because citizenship comes with its own built-in border. Whether the challenges of the COVID-19 pandemic will serve as a catalyst for change and better treatment and protection for migrant workers in Singapore, Malaysia and Thailand remains to be seen. Even now, Singapore has already announced that it will decrease reliance on foreign workers in the near future by decreasing the S pass quota for foreign workers by 18% in January 2022 and by 15% in 2023. At the same time, it will support hiring more locals and reskilling them in order to substitute foreign workers (Seow, 2021). Singapore's proposed policy changes reflect the commonly held beliefs and negative stereotypes associated with migrant workers by the local population. Despite migrant workers' significant contributions to the Singaporean economy, many citizens continue to distrust them and believe they should not be granted equal benefits (GIA, 2021).

It is noteworthy to remember though that the othering of migrant workers is largely associated with the types of jobs they take in a foreign country. Thus, whether Singaporean, Malaysian, or Thai citizens for that matter, would be willing to take these jobs which they perceived to be "dirty," "menial," or even "dangerous," and "meant for foreign workers" is definitely something which host countries should take into account (Phua & Hui Min, 2020). Ironically, this othering of migrant workers may yet be the biggest challenge to the plan of reducing reliance on them and limiting their work opportunities in a host country, because over the years, migrant workers may have fortuitously staked their claim over these jobs precisely because they are not citizens.

Another factor to be considered in limiting reliance on foreign workers is aging. ILO attributes the aging population of some Asian countries such as Singapore, as one factor that creates a demand for foreign labour, because the aging population itself creates labour shortages in "sectors or occupations, at different skill levels" (ADBI et al., 2021). Accordingly, "the rising number of elderly people changes demand for services. Healthcare, age care, and domestic services are expected to be in more demand, even as the resident workforce in these sectors ages and is less able to perform physically-taxing jobs or work long shifts." Surely, the job opportunity

in age care and domestic services may not be attractive options for citizens or residents of host countries such as Singapore, Malaysia or Thailand.

Consequently, the option to limit reliance on migrant workers may not be so available to host countries. Treating migrant workers as social citizens, therefore, seems to be the logical next step to address the pandemic and post-pandemic recovery of these host countries.

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Chapter 9
Accounting for Children's Agency and Resilience in Independent Child Migration in Southeast Asia

Mark P. Capaldi and Alessia Altamura

9.1 Introduction

Following a growing global trend towards bringing the voices of children and youth into social studies, a body of literature on what is now commonly known as 'independent child migration'[1] has emerged in the last 10 years or so in Southeast Asia (Huijsmans, 2017). Studies have focused primarily on voluntary movements for work and, to a more limited extent, on the intersection between this scenario and migration for other purposes such as education and marriage (IOM, 2019; Khoo & Yeoh, 2018; Boyden, 2013).

Though exploring the issue from different angles, this scholarly work has contributed to questioning the predominant stereotypical portrayal of migrant child workers as solely exploited and 'victims of change' (Huijsmans, 2010, p. 14). Indeed, children and youth moving on their own in search for labour are normally labelled as trafficked children, reinforcing the perception of them as passive individuals (O'Connell Davidson, 2011). The idealised Western view of childhood as an age of innocence and vulnerability has significantly spread in Southeast Asian countries, leading to a unidimensional interpretation of independent child migration in the region as an adverse experience characterized by exploitation, abuse, coercion

[1] There is no uniform definition of 'independent child migration'. For the purpose of this contribution, we use the definition by Yaqub who described independent child migrants as: "children who have to some extent chosen to move their usual residence across a major internal or international boundary (…), live at destination without parents or legal/customary adult guardians (…), and also possibly have travelled independently" (Yaqub, 2009, p. 10). Reflecting the diversity of their mobility trajectories, Yaqub suggests that individuals below 18 years of age may display independence either during travel or at destination or both, may or may not cross an international border and may at times be travelling or living with other relatives.

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and deception. As a corollary of this interpretation, young migrant workers are generally regarded as lacking capacity and self-determination, needing to be shielded from the adult world as recipients of protection and welfare.

Whilst recognising that independent child migrants are vulnerable to abuse and exploitation, a number of scholars have begun to shed light on their 'real' lived experiences, giving impetus to a deconstruction of the hegemonic trafficking narrative (Huijsmans, 2008; Beazley, 2015; Beazley & Ross, 2017; Capaldi, 2014, 2015, 2016, 2017). The oversimplification of the child migration phenomenon within the child trafficking discourse, it is argued, has overshadowed the fact that migration can be a positive expression of young people's 'future seeking' and aspiration to the full realisation of their rights. The concepts of 'agency' and 'childhood as a social construct' are central to this growing body of research. The focus is increasingly placed not just on the competence and evolving capacities of the child but also on how childhood is conceptualised and understood in different contexts and cultures. Some scholars have gone beyond stressing children's agency. For example, Yea (2016) and Capaldi (2015, 2016) have emphasised that agency and vulnerability are not antithetical concepts while Huijsmans has proposed a relational approach to agency which underscores the importance of factors such as age, gender and generation (Huijsmans, 2012, 2016, 2017).

Research about independent child migrants in Thailand in 2014 has also drawn attention to the often neglected capability of children to be resilient (Capaldi, 2014). Based upon a constructivist approach to resiliency as theorised by Ungar, the study has unveiled the significant interaction that exists between the individual characteristics and capacities of child migrants, their social ecology and the diverse cultural contexts they navigate. The introduction of this theoretical framework has paved the way to an important change in understanding how children migrating on their own can make choices and decisions that affect their lives. Nevertheless, its application in research efforts remains limited, and its potential policy and practice implications are yet to be acknowledged by duty bearers in the region.

Building on a comprehensive literature review covering all Southeast Asian countries,[2] this book chapter seeks to illustrate the recent paradigm shift in the interpretation of independent child migration in Southeast Asia, emphasising the dimensions of agency and resilience. After a brief critical analysis of the child migration and trafficking discourse as generally presented in relevant literature, the concept of agency will be introduced to question the predominant protection and welfare approach to independent child migrants. It will be shown that the traditional

[2] Besides drawing largely from Capaldi's unpublished doctoral dissertation (2016) and subsequent scholarly articles, the review has involved an extensive literature search using databases and networking platforms such as Google scholar, Researchgate, Academia and Science direct. Keywords used for this purpose include among others: child migration, independent child migration, independent child migrants, children's agency, resilience, child labour, labour migration, child trafficking, children on the streets, trafficked children, child domestic workers. Whilst it covers all ASEAN countries, the review was not able to identify relevant research in Brunei and Singapore. Studies on migrant women and men were also scrutinised and included in the review whenever presenting information and data about adults who migrated independently before turning 18.

Western- and adult-centric conceptualisations of the 'vulnerability of childhood' are not simply replicable to the Southeast Asian context. The section that follows unpacks the theories and concepts related to risk and resilience and how they impact on adolescents, especially those relevant to a migratory context. Through the narratives of children's lives and migratory journeys, resilience will be presented as one of the key factors facilitating the navigation of risks and obstacles and a feature characterising the lives of many independent child migrants. The final section will reassess the common adult assumptions concerning children's agency, vulnerability and resilience within the migratory processes, examining the over-generalisations associated with child migration. The conclusion is that only by acknowledging this complexity and understanding the lived experiences of young migrant workers, will it be possible to develop more effective and flexible protection systems to reduce the risks of unsafe independent child migration, leading to better long-term results.

9.2 A Brief Critique of the Child Migration and Trafficking Discourse: Deconstructing Conflating Concepts

Independent child migration for work is significant in Southeast Asia, taking many forms and leading to different outcomes (IHRP et al., 2013; Capaldi, 2014; Beazley, 2015; Van Doore, 2018). The phenomenon occurs mostly internally or across borders in the region, with Thailand in particular acting as a major catalyst for child migrants from neighbouring countries (IOM, 2019; Capaldi, 2014). Most children migrating on their own are well into their teenage years and engage in highly gendered occupations: boys are primarily working in physically demanding sectors such as agriculture, construction, manufacturing or on fishing platforms, girls are most prevalent in domestic and care work, bar and restaurants, garment factories, light manufacturing, and in the service and entertainment industries (Capaldi, 2014; Chhay, 2019).

The near-absence of legal migration channels means that most independent child migrants in the region move across borders undocumented or irregularly. This condition exposes them to severe dangers at the outset of migration, while in transit and at destination (Van de Glind, 2010; Capaldi, 2014). Clearly, for children migrating internally for work, irregular legal status is not an issue, yet they also face various risks.

Children migrating alone are vulnerable to a range of human rights violations that they struggle to navigate and overcome. These include exploitative working conditions with unpaid or low salaries, long working hours and lack of safety in the workplace. In most egregious situations, independent child migrants may end up in forced labour and debt bondage or suffer serious abuse, violence and discrimination (IHRP et al., 2013). Many young migrant workers experience harsh living conditions and difficulties in accessing services due to language and other barriers, others may face arrest and detention for being undocumented:

> After being in Thailand for about one month, I went out with friends and got arrested because I didn't have any documents. My brother had to come and pay some money and then I was released. Since then I dared not to go out at all. I wish I could have the right papers but it's expensive and I can't afford it. (Cambodian boy aged 15 years; working as food vendor; migrated at age 14 years) (Capaldi, 2014, p. 86).

The discourse by UN and NGO researchers has generally focused on the myriad of perils that children moving on their own encounter, placing particular emphasis on the need to protect them from human trafficking, forced labour and exploitation. With few exceptions (Apland & Yarrow, 2019), the narrative of anti-trafficking agencies has been dominated by depictions of independent child migrants as 'passive victims'.

Echoing a dominant global trend, Southeast Asian governments have tended to conflate the issue of independent child migration for work with combating child trafficking and irregular migration. This approach leans to a legal justification in the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* which, as a matter of definition, stipulates that children's consent to any form of facilitated migration resulting in some level of exploitation is irrelevant and that such exploitative mobility always constitutes a child trafficking offence.

Crystalising the construct of child migrants' victimhood, the irrelevancy of a minor's consent to exploitative migration, combined with the fact that most migrant child workers endure some degree of exploitation, has led to the phenomenon being conceptualized as a trafficking problem (Van Doore, 2018; Huijsmans & Baker, 2012). The resultant prevailing strategy adopted by governments to address the exploitation of young migrant workers has revolved around criminal justice responses and anti-trafficking policies aimed at stemming mobility and discouraging migration. The common rationale behind this modus operandi is that children are by their very nature at risk and thus can be better protected if they are kept out of migration and work. Contrary to its supposedly protective intention, the adverse consequence of this focus on detection and arrest is that independent child migrants are often the target of policing interventions. This in turn makes their journeys more expensive and dangerous while also exposing them to a heightened risk of exploitation once at destination.

Traditional studies on child and youth migration and anti-trafficking campaigns have contributed to fuel this conflation by focusing disproportionally on bad migratory experiences through the human trafficking lens (Capaldi, 2017). There is no doubt that child trafficking and labour exploitation are among the most pernicious and heinous crimes which lead to the abuse of countless children across all ASEAN countries. Nevertheless, the assumption that all independent child migration for work is akin to child trafficking presents some conceptual shortcomings that policy makers and some anti-trafficking agencies have yet to acknowledge (Howard, 2017).

A first important dilemma lies in the notion of exploitation which is a fundamental component of the definition of child trafficking. Given that the understanding of this concept remains vague and unclear, how unfair, unhealthy and poorly paid should work be to be categorised as child trafficking? To help solve this dilemma,

ILO has tried to capture the different nuances and degrees of exploitation by distinguishing between 'children in employment', 'child labourers', 'children in hazardous work' or in the 'worst forms of child labour' (Diallo et al., 2013). The advantage of this conceptual classification is that it recognizes that not all work by children under 18 is exploitative. However, while indicators have been formulated to identify cases of child labour (FAO, 2015), the lack of nuance around what is normal or abusive work conditions, legitimate work or exploitative labour, is at best ambiguous for it involves moral and political judgements that may not be universal (Apland & Yarrow, 2019; Peleg, 2018).

The quandary around exploitation becomes even more complex when considering that the 'exploited' themselves can perceive a very different reality from that defined in international legal instruments. A number of studies in different ASEAN countries have investigated how independent child migrants or migrant workers including under 18-s felt about their current jobs, revealing that many, if not the majority, were satisfied with their employment (Open Institute, 2016; Capaldi, 2014; Nanthavong, 2013; Nguyen Thi, 2008; Huijsmans, 2007).

Focusing on undocumented labour migration from Laos to Thailand, Huijsmans, & Baker (2012, p. 940) noted that Lao young people 'rarely challenge unfairness or dissatisfaction with their work but generally put up with it, only to leave the job without any notice when exploitation is stretched beyond certain limits'. This behaviour should not be interpreted as a passive acceptance of the situation as young migrants can often be well informed of other work opportunities and thus be very mobile illustrating agency (Peou, 2016).

Furthermore, due to the lack of better alternatives in their home countries, it is not uncommon for young migrants to choose to stay in exploitative conditions even when they are allowed to leave and return home (Apland & Yarrow, 2019; Huijsmans, 2007, 2008). Though this may sound a 'paradox', the 'consensual exploitation' that some youth seem to experience calls into question the automatic labelling of all under 18-s involved in facilitated exploitative migration as child trafficking victims.

In the case of most independent child migrants, the boundaries between child trafficking, labour exploitation and smuggling are blurred, making the empirical distinction between these interrelated phenomena particularly challenging. Children migrating on their own may sometimes voluntarily cross the borders irregularly without the help of intermediaries or through the services of smugglers but may also become victims of smuggling or trafficking. They can even enter a country legally and then overstay their border-passes, becoming illegal at a later stage. During the whole migratory process, they can experience different degrees of exploitation and drift in and out of trafficking contexts by changing jobs.

The complexity and fluidity inherent to independent child migration thus requires that overlapping concepts be better analysed as a continuum within which considerable levels of variation exist. Most importantly, the peculiarities of children migratory trajectories show that the usual construct which sees children as intrinsically vulnerable and non-agentic individuals who are only in need of protection should be questioned. As noted by a key informant interviewed by Zimmerman et al. (2015, p. 28), 'we too often approach the issue of migrating children from narrow

assumptions of what we think is best for children and not enough time given to understanding what children want for themselves.' Listening to children's voices through a constructivist approach that acknowledges the interplay between context, culture and an individual's experience is therefore crucial to go beyond common adult-constructed assumptions about independent child migrants. By analysing children's agency and resilience, this paradigm shift can release many migrant children from the predominant construction of human trafficking and ultimately result in more positive child migratory journeys and outcomes.

9.3 Tensions Within the Concepts of Children's Agency and Vulnerability: At the Crossroads of Tradition and Modernisation

Contemporary social discourses on childhood have traditionally been dominated by a conceptualisation of children which sees them as lacking certain adult dispositions such as cognitive capacities, maturity, and autonomy (Boyden, 1997). By virtue of simplistic analyses viewing childhood as a transient phase to adulthood, children are depicted as innocent, naïve, immature 'human becomings' (Qvortrup, 1991, p. 8) or are reduced to 'incomplete adults' (Sinclair, 2004, p. 107) and 'semi-citizens' (Cohen, 2009, p. 155). However, the sociology of childhood that has permeated social sciences since the 1980s has refuted this dominant strand, highlighting that children are social agents with capacities to act independently, shape their life circumstances and influence their social environment. As well as emphasizing the concept of children's agency, this new approach has theorised that childhood is a social construction and, as such, conceptualizations of childhood may vary according to time, place and the socio-cultural expectations on the child.

> Children are and must be seen as active in the construction and determination of their own social lives, the lives of those around them and the societies they live in. Children are not just passive subjects of social structures and processes. (Prout & James, 1997, p. 8; cit. in Savahl, 2010)

Whilst this theoretical perspective was emerging, the adoption of the Convention of the Rights of the Child (UNCRC) in 1989 marked the definitive globalisation of the Western modern construct of childhood (Boyden, 1997; Imoh, 2012). Despite some criticism that the CRC's pre-occupation with the protection of children has reinforced the portrayal of their vulnerability, the CRC has also legitimately been regarded as one of the conceptual origins of children's agency as it acknowledges that children have rights to participation, autonomy and self-determination (Abebe, 2019). This is particularly evident in Art. 12 which encapsulates a child's right to participate in all decisions affecting their lives 'in accordance with their age and maturity', and art. 5 which for the first time in an international human rights treaty introduces the notion of 'evolving capacities' (Kosher et al., 2016).

The tensions within the concepts of children's agency in the UNCRC reflect the coexistence of two conflicting approaches underlying the formulation of this legal instrument: protectionism and liberationism. These contrasting positions also have a bearing on how the issue of independent child migration for work is interpreted and addressed. Indeed, if the liberal view of childhood advocates for the right of children to migrate and make decisions about their own education regardless of their age, the paternalistic perspective supports the idea that child work is incompatible with studying. For example, Rehfeld (2011, p. 144) strongly argues that children's education and welfare must be a priority before space is created for the development of their citizenship capabilities; he describes childhood as 'a naturally precarious time' with millions of children living in unstable environments vulnerable to many threats. Rehfeld believes that a healthy childhood that is 'protected from the concerns of adults,' means that we need to be wary of the potential harm of children engaging in the adult world. However, the protectionist approach that sees education and child work as mutually exclusive ignores that children themselves are continuously looking for livelihood options, to learn about the world of work and engage in activities in safe work environments. As many scholars have recognized (Peleg, 2018; Howard, 2014; Huijsmans, 2007; Pinheiro, 2006; Molland, 2005), without provision of such opportunities, children's vulnerability to socio-economic marginalisation grows, forcing them to access resources through informal or unsafe means that may increase their exposure to abuse and exploitation. Prioritising protection needs by generically assuming incompetency on the part of children reduces them to welfare recipients rather than accounting for the reality of their localized childhoods which sees them as active social agents of change with resilience and capacities, particularly in the setting of cross-border migration for work. The accounts given by older migrant child workers in particular demonstrate that they are mature, agentic and resilient citizens; at the same time their complex situations challenge the idea of a universal and individualistic autonomy and resilience, suggesting that their choices and aspirations are embedded in socio-political and cultural contexts and relational dynamics that may either restrain or facilitate their agency and ability to respond to adversities (Abebe, 2019; Tisdall & Punch, 2012; Huijsmans, 2017; Capaldi, 2016).

Similar to other developing nations, countries across Southeast Asia have all taken to institutionalizing the modern Western concept of childhood. Today, the notion of childhood as a happy and 'golden' time that must be devoted to schooling and play is widespread especially among ruling elites and educated middle-class, particularly in urban areas (Beazley, 2015; Huijsmans, 2010). However, this idealised construct is at odds with the reality of much of the poor in Southeast Asia whose children increasingly take up work responsibilities as they get older.

Cultural norms of filial obligations and parental expectations on children to contribute to the family livelihood are a key component of the traditional Southeast Asian value system. Permeating society at all levels, the idea that children should help with labour and earn family income is more common among rural communities. In these contexts, migration can provide an opportunity to improve the

household economic conditions while at the same time ensuring adherence to traditional roles:

> My family led a modest life. We did not have much. I saw how other families were improving their lives because of migrants' money. I felt I must also migrate to help my parents. I didn't want to see them left behind. (Indonesian girl, age unknown; migrated to Taiwan at age 17 years as a domestic worker) (Chan, 2017, p.8).

Whilst several studies suggest that the final decision to engage in labour migration is often the result of a personal choice made by the children and young people themselves (Chhay, 2019; Bylander, 2015; Capaldi, 2014; Patunru & Kusumaningrum, 2013; Hesketh et al., 2012), discussions usually take place within the household to reach an agreement and get permission from parents (Chan, 2017; Chhay, 2019).

Like in most of the developing world, in Southeast Asia migration is viewed as a transition from childhood to adulthood. On par with other key life course events such as quitting school and entering the labour market, getting married or having children, leaving home to find work represents a normal rite of passage through which adolescents stop to be considered dependent children and 'establish themselves more firmly as youth' (Huijsmans, 2017, p. 128).

Within the region's patriarchal societies, traditional practices and gender norms tend to depict the experience of migration as a male prerogative while women's independent mobility is deemed inappropriate. If relocating for work is a strategy allowing men to fulfil their conventional role of breadwinners, moving away from home is commonly perceived as a risk for young girls of ending up in socially-condemned sexual behaviours (Huijsmans, 2014; Kusakabe & Pearson, 2015).

The social stigma associated with girls' mobility contrasts with the process of feminisation of labour migration that Southeast Asia has experienced since the last decades of the twentieth century. Together with important socio-economic transformations, modernisation in the region has brought with it a reshaping of traditional gender norms and relations through a process of 'negotiation and contestation' (Yeoh, 2016, p. 78). An example is that of contemporary Indonesia where the once male dominated practice of *merantau*[3] (wandering) is now used to justify the prevailing young girls' involvement in independent migration (Beazley & Ross, 2017; Khoo et al., 2017; Khoo & Yeoh, 2018).

Yet across the region 'deep-seated transformations in gender ideologies or scripts are resistant to change' (Yeoh, 2016, p.75). In contrast to boys, girls are usually persuaded to leave home for work solely if they can rely on social and family networks at destination (Bylander, 2015). On the other hand, cultural specificities and gender norms in each ASEAN country also mean that expectations on boys and girls to migrate may differ. In countries such as Cambodia and Lao PDR, for example, young boys still face stronger household pressure towards transnational migration due to the persistence of the traditional bride price system which requires wealth accumulation in view of marriage, as well as by the likelihood of higher earnings as

[3] *Merantau* refers to men involvement in migration, usually for work and to improve social status (Beazley & Ross, 2017).

compared to girls (Huijsmans, 2014; Bylander, 2015). Instead, in the Philippines and Thailand it is the daughters who are expected to migrate and act as financial helpers when they are adolescents or young women (Anderson et al., 2017; Capaldi, 2016).

9.4 Theories, Concepts and a Constructionist Discourse on Resilience

If increasing scholarly attention has been paid on how children exercise agency throughout the migratory journey, a key capability of independent child migrants still requiring analysis and research is resiliency. As noted by Ensor and Gozdziak (2010, p. 7), 'it is important to acknowledge that children's agency, and their ability to overcome the challenges of migration, … reflects their own individual and socially generated vulnerabilities and resilience'. It is by tapping into resilience skills, factors and strategies that children are capable of successfully and proactively manage the innately risky process of labour migration and, in many cases, secure positive outcomes.

9.4.1 Early Conceptualisations of Resilience

The concept of resilience first appeared in the scientific arena in the 1970s when a group of clinical researchers found that some children achieved good outcomes despite being exposed to a high risk for psychopathology. These pioneering efforts led to a significant shift of focus from mental disease and deficits to mental health and resources, giving impetus to a new research field (O'Dougherty Wright et al., 2013).

The construct of resilience has become increasingly fashionable, yet there is a lack of consensus and ambiguity on the meaning of this term (Ungar, 2011). Different understanding of this concept reflects the variety of theories and models that have been developed over the years. However, it is now widely accepted that two recurring elements feature in all definitions of resilience: exposure to serious stress and positive functioning. As Vella and Pai (2019, p. 233) recently stated, 'resilience is commonly described as the ability to bounce back or overcome some form of adversity and thus experience positive outcomes despite an aversive event or situation.'

Scholars have identified different waves or approaches to researching resilience in the last few decades (Ungar, 2011; O'Dougherty Wright et al., 2013). Originally, the study of resilience focused on the individuals and their particular traits, capacities and internal resources (Lee et al., 2009; Shaikh & Kauppi, 2010). Several intimate qualities (such as spirituality, self-efficacy, self-esteem, intelligence, optimism, empathy, life skills and problem-solving ability) were found to particularly

contribute to positive outcomes in children and function as protective factors (O'Dougherty Wright et al., 2013; Ungar, 2004). However, the major limitation of resilience being portrayed as an assemblage of inborn traits is that it becomes viewed as a static individual attribute which some children have and others do not (Shaikh & Kauppi, 2010). Furthermore, this approach does not give credence to the influence of dynamic factors that can change over time and also misses out another key aspect: the social context and conditions that build, nurture and reinforce resilience among children.

Thanks to the groundbreaking work by Rutter and others (e.g. Garmezy, Werner, Luthar and Masten), the initial focus of research on resilience has shifted from identifying and measuring psychological innate factors to understanding the processes and interactions between the environment and the individual's internal aptitudes (Ungar, 2011).

Early ecological understandings of resilience identified clusters of resilience related factors and processes that were thought to be applicable globally. However, the validity of this 'notion of resilience as an independently existing entity which is measurable using universal norms' (Heffernan, 2017, p. 17) has been more recently questioned. It is argued that, far from being universal, resilience related factors are not necessarily protective for all children and their relevance varies according to children's development stage and the context in which they grow up and develop. If few of these variables can be exclusively assigned to risk or protective factors, more interactive and contextual processes are likely at play and therefore a different approach is needed to capture such complexity.

9.4.2 A Constructionist Approach to Resilience and Ungar's Socioecological Theory: A Useful Model to Understand Independent Child Migrants' Subjective Experiences?

One of the latest directions taken by resilience research is the constructionist conceptualisation proposed by Ungar. While still anchored on an ecological perspective, this model has strengthened the belief of the benefits of integrating resilience and negotiation into the local context, culture and diversity of the individual (Ungar, 2004, 2008). Of central importance is the individual's own interpretation of adversity and what the person sees as viable behaviours and outcomes. The notion of resilience as a social-ecological construct is reflected in the following definition:

> In the context of exposure to significant adversity, resilience is both the capacity of individuals to *navigate* their way to the psychological, social, cultural, and physical resources that sustain their well-being, and their capacity individually and collectively to *negotiate* for these resources to be provided and experienced in culturally meaningful ways. (Ungar, 2008, p. 225)

Challenging an individualistic and Western-centric approach, the socioecological theory of resilience introduces the concepts of 'decentrality' and 'cultural relativity'. Unlike other scholars that have placed emphasis on the child's personal qualities or

the interaction between the individual and the environment, Ungar proposes to shift attention away from the child and focus on their ecologies. 'Resilience', he argues, 'is as, or more, dependent on the capacity of the individual's physical and social ecology to potentiate positive development under stress than the capacity of individuals to exercise personal agency during their recovery from risk exposure' (Ungar, 2012, p. 15). As such, prominence should be given to resilience-building interventions targeting the social environment of the child.

The notion of cultural relativity is well illustrated by multi-country studies by Ungar and colleagues (Ungar et al., 2007, 2008). Through this work, multiple culturally embedded paths to resilience were identified. However, this does not mean that there are no global aspects or cross-cultural similarities. Indeed, seven universal tensions were defined, namely: access to material resources, relationships, identity, power and control, cultural adherence, social justice and cohesion. Though being universal, these tensions are resolved by each child in their own way and according to the culture and context they belong to/grow up in (Ungar, 2008).

In particular, this resilience model was used by Libório and Ungar (2010) to support a literature review of children's own experiences of work. Whilst identifying a range of risk factors at structural, relational and personal level, the study revealed that in contexts of limited resources, work may result in good outcomes for some children allowing them to resolve successfully the seven tensions. Similar findings also emerged from another research by these authors (Libório & Ungar, 2014) which investigated children's economic activity in a Brazilian municipality of São Paulo State. In contrast to a common view of child labour as being always harmful, children's employment was found to contribute to positive functioning and psychosocial growth.

9.4.3 The Why, the What and the How: From Constructiveness to Interconnectedness

The notion of resilience is clearly an important concept in the analysis of independent child migration as the child's individual resilience influences their agency. As the constructionist conceptualization of resilience examines personal traits within the individual's cultural and contextual lives, this raises the need to better understand the child's agency and the reasons for their migratory journeys. Within Southeast Asia the only attempt to examine resilience of this group of children from a constructionist perspective was conducted by Capaldi (2014, 2015, 2016). Certainly, independent child migrants were able to successfully 'navigate their way' through Ungar's seven tensions with Capaldi suggesting that the 'glue' holding these all together was perhaps the reasons for them migrating and entering the labour market in the first place. For most of the children and youth moving for work in Southeast Asia, economic reasons were the main factor for their migration (Capaldi, 2014; Peou, 2016; Beazley, 2015). Cultural and historical factors mean

that children have grown up expecting to contribute to the family income. This concept was clearly articulated by a key informant in research on independent child migrants in Thailand:

> Asian children have a strong sense of responsibility to parents – this is the 'bottom line' on why they migrate. Asian's have a different definition of what is a good child. The children have responsibilities to send money back home, need to be prepared to be exploited and must make sacrifices for the family (Capaldi, 2014, p. 68).

A number of studies on migrant remittances suggest that responsibility and desire to send money back home is strong, particularly amongst girls (IOM, 2019; Kusakabe & Pearson, 2015; Rahman & Fee, 2009; They & Treleaven, 2013). Yet independent child migrants' remittances are rarely regarded as positive indicators because of the generally negative demographics of irregular, displaced, unaccompanied or trafficked children (Cortina, 2010). However, in many regions of the world, they are a concrete manifestation of an 'inter-generational contract' that is a major motivational factor that influences migrant children, manifested within a sense of pride, independence and aspirations for a better future. Self-direction and motivation theories are integral to a constructionist interpretation of agency and resilience within the context of work environments. Frederic Herzberg identified that the prime motivators included recognition, responsibility and goals as opposed to lesser secondary factors such as working conditions or compensation (Herzberg cited in Christensen et al., 2012). Across a number of ASEAN countries, child migrants clearly articulated their personal and collective sense of purpose and consistently reported a sense of pride and stronger social recognition as a result of sending remittances back to their families:

> When I was in Cambodia, my relatives and neighbours never treated me as their niece. After I worked here for two years and then returned home, they were so nice to me. I was so surprised and proud of myself. (Cambodian female aged 28 years; working as domestic worker; migrated first to Phnom Penh at age 17 and later to Malaysia) (Chhay, 2019, p. 68)

Many believe they have matured, become independent and acquired knowledge and skills through their migratory experience (Jampaklay & Kittisuksathit, 2009; Capaldi, 2014; Chhay, 2019; Hesketh et al., 2012):

> …here… I feel that I'm improving my communication skills and general knowledge. I would not have these skills if I stayed in Myanmar. Thailand is more developed and improved to our own country. (Burmese male aged 19 years; working in food processing; migrated to Thailand at age 14 years) (Capaldi, 2014, p. 136).

Some youth are increasingly fascinated by the opportunity to experience new adventures, access consumer goods and reshape their identity by accruing wealth and status via labour mobility (Peou, 2016; Beazley, 2015; Bylander, 2015; Anderson et al., 2017). Others consider the earnings deriving from labour migration as a practical solution to cover the high costs associated with continuing education (Hesketh et al., 2012), though the complex reality facing those relocating across borders is such that they are normally forced to abandon their initial educational aspirations (IOM, 2019). Research has also identified that some young leave home in search for

work to postpone marriage and gain more power to negotiate the choice of a partner (Khoo & Yeoh, 2018; Huijsmans, 2018; Chan, 2017):

> My sister is in the village. She is married and has a baby. I would probably be married now too if I stayed. (Indonesian girl aged 15 years; migrated to Jakarta from villages elsewhere in Java; profession unknown) (Bessell, 2009, p.536).

If these strong motivations are *why* children migrate, despite the vulnerabilities and dangers, then their resilience is *what* helps the child to withstand such adversity and even thrive; the child's agency is *how* they navigate the obstacles and challenges of migration. Capaldi (2016) suggests that it is the interconnectedness between 'the why, the what and the how' that best empowers the child within independent migration.

Whilst independent child migrants moving for work face numerous risks at different levels, when listening to their voices, it is clear that their involvement in an economic activity dispels the view that they only need protection. Their experiences show that labour migration provides them with an opportunity to make a significant contribution and build resilience amid adversity (Libório & Ungar, 2010). A successful approach to mitigating vulnerabilities associated with independent child migration should therefore not ignore the impact of this experience on their identity, empowerment and aspirations, creating the conditions for them to resolve the seven tensions of Ungar's socioecological theory as safely as possible.

9.5 Conclusion

This chapter has questioned the conventional adult constructions of independent child migration for work in Southeast Asia. By complementing mainstream research, the aim was to understand the phenomenon from children's perspective, drawing from existing literature. Indeed, a relatively recent wave of studies based on a child-centred participatory approach has shed light on the lived experiences of many cross-border and internal young migrants, proposing a paradigm shift.

Such emerging fieldwork does not deny that these youth are not vulnerable to exploitation and abuse. The trafficking and exploitation of migrant children clearly exist in the region and are intolerable crimes requiring urgent action. We should also be wary of overzealous enthusiasm for children's resilience and agency that downplays their lack of choice and the types of exploitation experienced. However, the common understanding of all children migrating voluntarily for work as victims of unscrupulous traffickers due to their intrinsic vulnerability does not reflect the reality.

When listening to their voices, young people engaging in labour migration tell us a story that does not match the usual narrative of most anti-trafficking agencies and Southeast Asian governments. In pursuing their migratory projects, independent child migrants undoubtedly exercise agency and self-determination building their confidence and bringing pride in the work they do. Their accounts show that

migration may be a constructive aspiration of young people's search for the full realization of their rights and a better life. A significant motivational factor shapes their lives that is largely influenced by socio-cultural beliefs around familial obligations and the transition from childhood into adulthood. Not differing much from young adults, adolescents embarking in independent labour migration possess capabilities, skills, and a reservoir of resilience, enabling them to make decisions and successfully navigate the potential dangers associated with irregular or unsafe migration. This is at odds with the more deficit model of capacity that is too often associated with the age bound limitations of 'evolving capacities' enshrined in the CRC. The legal definition of a 'child' applied to a 16- or 17-year-old migrating on their own for labour can easily neglect that these older children are in fact competent youth migrants.

Migrant children as independent and voluntary workers is rarely acknowledged as it does not sit well with the Western-centric expectations of childhood. A number of factors contribute to the existing disconnect and tension between this scenario and the dominant anti-trafficking approach. Firstly, a lack of definitional clarity of what constitutes exploitation and human trafficking and the rendering of a child's consent to migrate irrelevant if exploitation is deemed to occur, all serve to entangle and confuse the anti-trafficking discourse. Secondly, the CRC and its associated modern concept of childhood ignore the economic development needs of the children of the majority world. Whilst the heavy focus on protection is not unwarranted when there is a danger to child migrants of trafficking and exploitation, in many cases of child migration the exploitation appears as advantageous for both the child and the employer. This is even more true where there are no better alternatives in communities of origin. Interpreting this exchange as human trafficking risks reducing the less exploitative work options, pushing child migrants (who are mostly irregular) into more dangerous and exploitative work conditions. Thirdly, accurate and verifiable data about the scale of child trafficking compared to successful child migration outcomes is absent, making the development of appropriate policies and programmes problematic. Fourthly, despite child trafficking being generally pictured as a lucrative business run by criminal gangs and ruthless exploiters yielding coercive power, the stories recounted by many adolescent migrant workers show that this is not a common situation. The fluidity and nuances typical of their experience and condition demonstrate that the spectrum of child agency within migration can easily oscillate from positive experiences at one end of the continuum to exploitation and child trafficking at the other.

Therefore, the generic categorisation of child migrants who are of legal age to work as trafficked victims and inherently vulnerable is misleading. Throughout numerous studies, the children tell us that their problem is not that they haven't reached 18 years; rather, it is the common forms of migrant discrimination, exploitation, and poor implementation of labour rights that prey on other vulnerabilities such as their irregular status.

Clearly, this does not entail that policies and programmes to stop child trafficking and exploitation should be sidelined. Addressing the worst forms of child labour in specific places and industries through distinct responses that access the most

vulnerable should remain a priority. However, we must guard against the use of select elements or principles of the international child rights framework and advances of legislation, policies and programmes being misinterpreted or detached from reality. Dealing with child migration as assumed human trafficking, the best interest of the child may be overlooked in the political rush to crack down on 'illegal migrants'.

Moving from generic or adult-centric approaches to prevent child migration or that only situate the issue within the child trafficking discourse brings with it a significant shift. It means developing adequate policies, approaches and regulations that reduce the risks and hazards of irregular migration and that provides a more supportive environment for children's well-being. This could include awareness-raising campaigns around exploitation and safe migration in sending communities for example. Another option could be to promote labour law reform in countries of destination and raise awareness amongst the public of the contribution of migrants in order to stem stigma, discrimination or exploitation of adolescent migrants. Equally relevant is to systematically target employers that exploit young migrant workers to make them accountable for their actions and design specific programmes that help build these youth's resilience.

Regardless of the type of strategy to adopt, it is imperative that the voices of the adolescent children do not remain unheard. This can only be achieved by expanding research efforts using a child-centred approach that focuses on the aspirations and positive outcomes of child migrants (in more localised settings) and not just the worst-case scenarios of child exploitation and trafficking. These latter narratives paint a bleak picture of child migration fueling self-prophesying rhetoric of poor parenting, vulnerabilities, trafficking and exploitation. Further research is needed on the different contexts for child migration that is age-specific, including of adolescents of a legal working age who have completed compulsory education and who have the right to appropriate and legal employment.

Longitudinal studies should also be conducted to understand whether children's agency in independent child migration is embedded in the best interest of the child and inter-generational relations over longer periods of time. Finally, issues around free and full consent or positive outcomes and impact are better assessed through longer life course dynamics.

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Part III
Forced Migration in Southeast Asia

Chapter 10
The Refugees Vanish: Rohingya Movement, Emergency's Temporality and Violence of the Indonesian Humanitarian Border

Avyanthi Azis

10.1 The Refugees Vanish: Emergency, Temporality and Recurring Crisis

In December 2015, an article appeared in *The New Humanitarian*, reporting on the vanishing of hundreds of Rohingya refugees from camps in the northern parts of the Indonesian island of Sumatra (Vit, 2015). It was one of the few international news articles that covered the incident,[1] and the light coverage of the topic stood in great contrast to the heavy media focus on what is now known as the 2015 Rohingya refugee crisis, which had begun unfolding just a few months earlier. Indeed, the refugees who vanished from Sumatra were the very same ones that had been rescued during the crisis. As the article reported,

> Nearly 1,000 Rohingya refugees were rescued last May after human smugglers and traffickers abandoned boats at sea when Thailand and Malaysia launched a crackdown on their networks. Nearly eight months later, less than 400 Rohingya refugees remain in the temporary centres set up in Aceh and North Sumatra provinces, according to UNHCR.

The New Humanitarian reporting is interesting because it adds a coda to the standard narrative about the 2015 crisis. After initial reluctance and then an ensuing squabble with fellow Southeast Asian nations, the Indonesian and Malaysian governments finally acceded to public pressure and agreed to give temporary shelter to the stranded boat people for a limited one-year timeframe, in which they would be

[1] As I will elaborate, local media reporting about Rohingya refugees leaving the camps has started much earlier.

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assisted by the international community to get resettlement or be voluntary repatriated (Cochrane, 2015). The message sent by the gesture of the two countries was reassuring; as non-signatories of the 1951 Refugee Convention, they would not allow local integration as a solution—but at least for now, the distressed refugees would be safe, and well-taken care of.

Most accounts conclude with this bilateral decision as the ending point, yet the disappearance of the refugees from Aceh, long before the one-year accommodation period expired, disturbs this neat narrative. It raises pertinent questions about the appropriateness of the regional refugee response: why had the refugees crossed the borders again in spite of the solution (albeit in the short-term) arranged for them? What explains the disparity between the two events, both transpiring at the borders just months apart—why had arrival elicited alarm and consternation, while exit drew little attention? What does the differentiated response signal to us, and how do we explain refugee movements beyond moments of emergency? And the most immediate puzzle obviously at hand—*where did they go?*

The last question presented above is the easiest, as the answer has always been obvious to long-term, regional observers. The refugees decided to go, by irregular means, to Malaysia, where they had always wanted to go, and where a sizable Rohingya diaspora community has formed, especially in the past two decades.[2] The other questions are more difficult to address as they point to contemporary dilemmas with regard to refugee movement and their right to it. If we take the Universal Declaration of Human Rights as reference, the rights to movement (Article 13) and to seek asylum (Article 14) are recognised as fundamental. The prevailing world order, whose arrangement rests on modern nation-states, however, limits and confines these rights into national discretion. Article 13 (1) guarantees right to movement only within the borders of each state—and while everyone has the right to leave any country, there is no stipulation about the right to enter them. Similarly, the right to seek asylum indicates an open-ended process, as there is no obligation on the part of nation-state (as the only entity that can provide it) to actually give it.

Movement undoubtedly confronts us with the most problematic aspect in efforts to govern refugees—evident in how anxieties increasingly grow in regard to durable solutions, and the manner in which refugees travel as borders are increasingly shut for them. In a recent paper, Bender (2021) has attempted to challenge the boundaries of democratic governance for refugees, raising the normative question of the possibility for refugees to govern their camps. Bender asserts that they should be afforded self-rule, pointing to their legitimacy, '…as situated and epistemically diverse knowers of the problems they face and the solutions that would work best.' This chapter questions if such an option for democratic self-rule can further be radically expanded to regulating the terms of their movement?

[2] As of end June 2021, there are some 154,860 refugees of Myanmar origin in Malaysia, 102,960 of whom are Rohingya (UNHCR, 2021). This is in stark contrast to available estimate which puts the number of Rohingya population in Indonesia at less than 1000 (643 per July 2020) (U.S. Commission on International Religious Freedom, 2020).

In this chapter, I use as a departure point the work of the critical political scientist, Peter Nyers (2006), particularly building on his argument that to achieve a full appreciation of refugee politics, movement must be positioned as an ontological activity. Whereas Nyers's interest is on encounters of bodies—especially between refugees and the state, i.e. the entanglement between moving bodies and the movement of body politics—my aim is less theoretical and more pragmatic. Through focusing on movement, this chapter juxtaposes the Rohingya's ontic practice of crossing borders (their way of being/moving) and persisting epistemologies (ways of seeing) that have severely limited collective understanding and responses to them. Illuminating this gap, this chapter draws attention to temporality through an examination of *when* border-crossing refugees evoke crisis and *the short time horizon* in which refugee response typically occurs. Nyers' discussion of emergency as a powerful discourse that subsumes refugees is especially important in this regard. Emergency presses on the now, or as Brun (2016, p. 402) asserts, it *de-futurises*, "The understanding of future invoked in the emergency imagery does not stretch out before us like an open field, but it comes at us."

Whereas Brun problematises the futureless-ness of emergency through protracted displacement, I attempt here to do so through recurrence. Instead of forgotten emergencies, I am interested in both how soon and repeatedly emergencies are forgotten, drawing from the observation that the disappearance that took place in December 2015 was not a one-time event. Within the past 5 years, Rohingya refugees have continued to arrive and then vanish from Indonesia. In April 2018, two vessels arrived in Aceh—the first on April 1, with five surviving passengers; the second arriving on April 20, with 79 people on board (IOM, 2018). By March 2019, 72 of them have left the camps, presumably heading for Malaysia, through 11 separate escapes which took place since December 2018 (Kompas, 2019). In June and September 2020, two large boats arrived, carrying 99 and 296 refugees respectively (IOM, 2020, 2021). By January 2021, they had begun to disappear again (Jakarta Post, 2021), and as of March 2021, it was reported that only 82 refugees remained in Lhokseumawe (IOM, 2021).

Something of this insensitivity to time that is observable in policy/public discussion also pervades current academic discourse. I take issue with how the recurring disappearance of the Rohingya has also been largely absent from scholarly publica-tions. That these departures have not been more prevalent in analyses suggests that our engagement with the Rohingya is also characterised by the dictates by emergency. Every time a boat crisis unfolds, we treat it anew as we direct attention to pressing solutions, re-invoke root causes of their statelessness, condemn the lack of political will on the part of the states, lament existing regional and institutional arrangements, and repeat. While they may not be ahistorical, inquiries into the Rohingya predicament appear to be taking a forgetful, atemporal viewpoint.

This is not to say that the literature has been unproductive. Quite the contrary, the body of work that has appeared within the past decade gives *exigency* to the Rohingya predicament, which had earlier been obscured to many. And a solution to the Rohingya predicament is indeed needed. The problem lies, however, with how we think of such solution(s) as we go from crisis to crisis, in the loop of emergency.

How can we build durable solutions if we cannot imagine post-emergency trajectories? This is pertinent especially as one the most durable solution to the Rohingya predicament seems to become even less attainable as Myanmar re-descended into turmoil following the coup in March 2021 (Susetyo & Chambers, 2021). It also prevents us from understanding how borders—in this regard, Southeast Asian borders—operate beyond the emergency context. There is clearly a need for a more sustained analysis. I argue that if we take a less intermittent perspective, we get a fuller understanding of the refugee as a figure, and therefore, may be able to formulate more relevant policies and responses with/for them.

Though taking the larger regional dynamics into consideration, this chapter will lean more toward Indonesia's response, as one of the countries most involved in managing the Rohingya crisis in Southeast Asia. The analysis presented here draws from secondary/media sources chronicling events relating to Rohingya's recurring arrivals in and subsequent departures from Aceh between 2015 and 2021. The chapter's organisation is as follows: first, it re-visits the 2015 Rohingya refugee crisis, and the predominantly future-less problem-solving approach that characterised it. The next section looks in greater detail at the reporting on the Rohingya's series of disappearances in local media, examining the emerging discourse of 'escape' that has begun to form, in tandem with the construction of the humanitarian border, which guards against illicit entanglement and the mixedness of migration. I end with a contemplation of the future of refugees and their governance (as the humanitarian border is established in Indonesia's newest refugee regulation) and a consideration of existing research trajectories that could prove to be more productive springboards for our refugee responses.

10.2 The 2015 Rohingya Refugee Crisis Revisited: Sovereignty and the Search for a Technical Solution

In May 2015, what later became known as the 2015 Rohingya refugee crisis (also known as the Andaman Sea crisis) unfolded. The series of events began early in May, with the discovery of mass graves, believed to be those of refugees/migrants from Myanmar and Bangladesh in Sadao district, Thailand's Songkhla province, located very near the borders with Malaysia. The Thailand government quickly followed up this discovery with a massive crackdown on smuggling/trafficking networks. Thailand's criminal justice-oriented measures brought devastating consequences—the crackdown immediately impacted the networks, driving traffickers, smugglers, agents and brokers into hiding to avoid capture.[3] As these

[3] While smuggling and trafficking are distinct from each other, I use both terms to refer to the practice through which the Rohingya are moved across borders by a profiteering third party. Although involvement with smugglers is marked by consent, events can subsequently unfold to transform this consensual practice into trafficking.

networks went underground, more than 5000 Rohingya asylum seekers and Bangladeshi migrants were effectively abandoned and became stranded at sea.

As their strandedness was brought into public attention, Thailand, Malaysia, Indonesia, became embroiled in a 'maritime ping-pong' (in the words of IOM's spokesperson in Bangkok). The three countries engaged in a bizarre competition to push back vessels (DW, 2015), as they come to the aid of the stranded boat people, but in the name of sovereignty, refused to take them onshore. In the words of then Commander of the Indonesian Armed Forces, Gen. Moeldoko, 'With regard to the Rohingya, as they make their way along the Malaccan Strait, insofar as they face trouble at sea, then it's our obligation to help. If they need water or food, we help because this concerns the *human*. But if they enter our territory, then it's the Armed Forces' duty to guard our sovereignty' (Kompas, 2015a). Moeldoko made it a point to emphasise that aid distribution would take place, '…in the middle of the sea, so that the boats carrying the Rohingya refugees did not to come into Indonesian territory,' adding that patrols by the Indonesian Navy and Air Force would be dispatched to ensure Indonesian waters stay 'sterile'.

The idea of distributing aid offshore must be absurd to many, but for Southeast Asian nations, sovereignty is a notion which is particularly effective to evoke, considering the region's idiosyncratic insistence on non-interference (Ramcharan, 2000). In the past two decades, emphasis on territorial sovereignty in particular has become more pronounced as the Nunukan tragedy in 2002 established the firm link between migration and security (Tirtosudarmo, 2004, 2018). As undocumented migration is constructed as constituting a danger to the society (Arifianto, 2009), Rohingya movement is conveniently framed in border-policing discourse as a violation of sovereignty, justifying the state's decision to not allow them to land.

The turning point during the 2015 crisis was the altruistic decision of local fishermen in Aceh to rescue those stranded at sea, an act of citizenship (Isin & Nielsen, 2013) which put governments to shame and provided substantive lessons for the international regime (McNevin & Missbach, 2018). Three major arrivals occurred in Aceh between May 10 and 15—first, a vessel carrying 578 onboard came onshore in Seunodon, followed by two others (each carrying 678 and 96 passengers), which disembarked in Kuala Langsa and Pangkalan Susu. On the Malaysian side, a boat carrying 1107 also arrived in Langkawi on May 11. Pressures mounted on governments to take clear action, and the ultimate drama during the weeks of crisis resulted in a series of high-level meetings convened to address the situation, culminating with an agreement between the foreign ministers of Indonesia and Malaysia in Putrajaya, on May 20, which brought the crisis to its close.

While the eventual decision to intervene and allow the refugees on land is much preferable to the alternative of leaving them to die at sea, these two seemingly opposite responses are similar in at least two ways. Firstly, both responses converge on sovereignty. Following Walker (1993), sovereign relations arrange the spatial order—the national order of things, as Malkki (1995) puts it—on the basis of, '…[a] distinction between and an inside and an outside, between the citizens, nations and communities within and the enemies, others and absences without' (Walker, 1993). According to Nyers, this does not translate into a "mere oppositional relation"

between the state and refugees—rather, what transpires is a relationship that he describes as "inclusive exclusion," where the state affirms its position as a dominant figure in the public political imagination through practices that exclude the refugees.

This inclusive exclusion was obvious in the initial response (as Moeldoko's remark elucidates), but it became much more apparent in public debates in Indonesia once the decision to temporarily shelter the Rohingya was made. Here, it is important to turn to the notion of the humanitarian border, which Walters (2011) introduces to problematise the entanglement between security and humanitarianism that emerges once border-crossing is established as a matter of life and death. In the humanitarian border, securitisation of migration becomes concomitant with the delivery of relief and aid services. With reference to Fassin (2007), Walters links humanitarianism to a broader field of government, which is conceptualised not as an attribute of states, but a rationalised activity involving both state and non-state actors. In administering human collectivities, the humanitarian border involves a complex assemblage guided by a moral principle that values the preservation of life and the alleviation of suffering above all else.

While the humanitarian border has been widely discussed in the context of Europe, the less discussed 2015 Rohingya crisis provides a compelling comparative experience. Similar to how sea rescue becomes presented as an alternative to the militarised practices of 'Fortress Europe', the bilateral agreement between Indonesia and Malaysia came to contrast Australia's response, as reflected in the categorical 'Nope' from PM Tony Abbott, who considered the crisis to be primarily an *Asian* one.

In Indonesia, one of the most peculiar, and yet most supported proposal for the rescued Rohingya refugees was the call to process and accommodate them on an isolated island. Despite the highly different geopolitical context from the Cold War era, the public's imagination of a solution continued to be shaped by a previous experience as stakeholders in Indonesia kept making references to Galang,[4] an island allocated by the Soeharto government to accommodate hundreds of thousands refugees during the Indochina refugee crisis. Local media extensively reported of recommendations and plans to relocate the stranded Rohingya into a designated island in the fashion of Galang (Hidayat, 2015; Kompas, 2015b; Tempo, 2015). The continued appeal of this idea of processing refugees in a remote island[5] is highly interesting as it indicates a failure to reconcile the Rohingya crisis with contemporary realities. In both Indonesia and Malaysia, the ethnoscapes of urban centres are increasingly marked by the growing presence of refugee populations.[6] Most

[4] Most recently, Galang is used to shelter COVID-19 patients undergoing isolation.

[5] Prominent international law expert, Hikmahanto Juwana, is among consistent proponents of this idea (Liputan 6, 2015; Republika, 2019).

[6] The outdated Cold War reference is also observable in Indonesia's futile diplomacy in persuading Australia in particular, to take on the responsibility to resettle the stranded Rohingya. Unlike during the Cold War, Southeast Asian nations can no longer rely on supportive geopolitics that they could manipulate to free themselves from taking up responsibility in responding to the crisis (Davies, 2006).

importantly, however, this island fantasy suggests the staying power of sovereign logic, and demonstrates the far-flung reaches of the narrative of crisis, which succeeds in gaining widespread support for confining refugees to the humanitarian border.[7] While the Indonesian government did not manage to find a Galang-like island for the Rohingya boat people, it was able to construct four refugee camps across Aceh in Blang Adoe, Lhokseumawe, Langsa and Bayeun—the sites of the Rohingya's later disappearance.

In addition to sovereignty, the pre-and post-rescue responses are similar in how they are orientated toward solutions. Nyers writes of the emergency discourse as thoroughly dominated by the problem-solving mentality, in which the urgent, collective question is, 'What is to be done?' There is an insistence on the now, and the immediate need to do something. Within that timeframe where there is no future, emergency becomes a temporal enclosure as it focuses on biological life (Brun, 2016), the pre-occupation is centred on saving the lives of people. Technicalities come to define action. If in the initial response, the exit was encouraged as respective navies assisted the boats, supplying them with food and fuel supplies; in the latter, the bilateral agreement represented the ultimate technical solution to the problem "refugee", as it spelled out the terms for allowing the stranded boat people to land, i.e. the offer is valid only for 1 year, and international organisations must provide assistance.

As Ticktin (2016) elaborates, humanitarian borders concern the setting up of clear distinctions between innocence and guilt, putting an emphasis on 'deservingness' to limit acceptance. During the 2015 crisis, state authorities launched efforts to separate Rohingya refugees from Bangladeshi migrants (Nayak, 2015). Indeed, one of the most important questions asked by the Indonesian Navy during the height of the crisis was, 'How to differentiate the Rohingya from the Bangladeshis in terms of their physical features?' as both Malaysia and Indonesia agreed only to accommodate those found to be *genuine* Rohingya refugees. In Indonesia, as elsewhere, the International Organization for Migration (IOM) came to play an important role in assisting the government as it sorted out Bangladeshi migrants from the stranded boat people, and put them in voluntary repatriation programmes (IOM, 2015). (This differentiating process continues to manifest in the problematisation of mixed flows by the humanitarian border that I will elaborate later.)

The focus on the moment—and the detailed technicalities it gave rise to—allowed Indonesia, Malaysia, and the region to operationalise a humanitarian governmentality, which functions to manage controversies during migration crisis (Bendixsen, 2019). The solution outlined by the bilateral agreement also served a convenient purpose, as the countries involved were able to skirt any serious conflict with Myanmar as a fellow ASEAN member state by avoiding the region's obvious political failure. Nevertheless, this technical solution proved untenable. By early 2016, more than 700 of the Rohingya brought into Indonesia were believed to have

[7] It is Bangladesh that has managed to carry out a similar initiative; since December 2020, it has relocated Rohingya refugees to Bhasan Char. See Human Rights Watch (2021).

left Indonesia for Malaysia via the Malacca Strait (UNHCR, 2016). As of April 2016, local news reported that of the 1807 original rescuees[8] (of whom around 1000 identified as Rohingya), only around 250 stranded Rohingya remained (Hasan, 2016). As the public moved on and forgot about the humanitarian rescue in May, the eventual result of the crisis was what the refugees wished for in the first place, joining the Rohingya community already established in Malaysia (Moretti, 2017).

10.3 *Kabur*: Escape from the Humanitarian Border

As early as July 2015, local media outlets had begun reporting on the disappearance of the rescued refugees. One of the first news items (Utami, 2015) appeared under the provocative title, '*Sepuluh Pengungsi Rohingya Kabur dari Penampungan di Aceh Timur'* (Ten Rohingya Refugees Escape from Shelter in East Aceh).[9] The word of choice, *'kabur'* or escape in narrating the disappearance here is instructive, as people—refugees especially—supposedly do not escape from safety, but from violence (Zolberg et al., 1989). There has been a noted increase in the use of the word 'escape' in describing the Rohingya's post-rescue departures after 2015. If previously the media had also employed the more neutral terms of 'missing' or 'leaving', the word *kabur* is now used much more frequently to describe the event. Analysts too have come to embrace the term to describe the Rohingya's post-rescue sea crossings (IPAC, 2020).

This vocabulary shift invites questions about what happens at the site of protection. Dave Lumenta, an anthropologist who was present in Aceh following the 2015 rescue, offered a detailed observation of the stranded Rohingya's first days in Aceh, 'It was obvious that they only wanted to return some sense of normalcy into their lives. Aside from betel leaves and cigarettes, among the first things that they asked for was access to mobile phones, to call their relatives and family members in Malaysia' (personal communication). Instead of providing the stranded Rohingya with relevant resources, Lumenta notes that the well-meaning hosts appeared more keen on establishing everyday routines, asking them to join in congregational prayers and other Islamic activities. In addition, he also observes that the stranded boat people turned into a spectacle, as locals came, while still bringing aid and supplies, mainly to watch. Peddlers and street vendors, too, flocked to join the crowd, that in the end, the camps started to resemble funfairs.

Rescue carries with its violence as it forms one side of the same coin as sovereign capture (Pallister-Wilkins, 2017). Brun (2016) temporally locates the violence of humanitarianism in the clash between biological and biographical lives. Drawing

[8] UNHCR and governments' data per April 2016 as cited in UNHCR (2016).

[9] Element of drama is added to the reporting as the opening gives emphasis to how the event transpired while the *tarawih*, a special night prayer performed by Muslims each night of the Islamic holy month of Ramadan, was taking place.

from de Beauvoir and Arendt, the first insinuates repetition and maintenance of cyclical activities. Directed at maintaining 'needs and biologies', '…it produces nothing that endures,' and is interested in life movement rather than history-making (p. 399). This contrasts with biographical life, which is productive as it creates durable artefacts of world-making. In the care/security nexus, the Rohingya's biological lives are saved—but their biographical lives are disregarded by rescuers who are not keen on helping them in the one matter that matters the most. Instead, intervention comes in disciplining forms that cautiously keep the rescued subject in that non-productive space. One only needs to look at situation reports by international organisations to understand the kinds of controlled activities allowed for refugees: mitigation of gender-based violence (listed under protection), physical and mental health support (with the pandemic, there has been an additional emphasis on the health crisis), educational provision (English and Indonesian classes), or sporting events.

The humanitarian violence that silences refugee voices has been widely discussed in studies of forced migration,[10] yet popular imaginations of refugees as 'speechless emissaries', helplessly floating about in a 'miserable sea of humanity' stubbornly persists and becomes more and more common as the same scenario keeps getting re-played in different settings. As has transpired with other refugee groups around the world, the Rohingya thus become shaped by humanitarian intervention into an 'object of knowledge, assistance, and management' (Malkki, 1996, p. 377). Conceived as a universal figure, they are stripped of their historicity, and as passive, mute victims, they rarely get consulted in decision-making processes, which directly affect their lives. In Aceh, the administrators of the camps, UN agencies, NGOs, and the Indonesian government (at the national and local levels), decide on what is best for them.

To return to our focus on movement, emplacement in the camp evinces how aid becomes merged with surveillance and control (De Lauri, 2018). The following excerpt from a short article that appeared in *Kompas*, one of the largest media outlets in Indonesia, in November 2015 (Kompas, 2015c), gives insights into the collective efforts of the border assemblage in keeping refugees contained.

> **LHOKSEUMAWE, KOMPAS.com** – As many as seven Rohingya have left the shelter location in the Village of Blang Adoe, District of Kuta Makmur, North Aceh, Sunday (1/11/2015). They are thought to have gone to the District of Lapang, North Aceh. However, until this evening, the whereabouts of these Rohingya natives from Myanmar cannot be ascertained. Head of the Public Relations of the North Aceh government, Amir Hamzah, mentioned to Kompas.com, on Sunday (1/11/2015) that per this evening, the shelter is only inhabited by 133 of the supposedly 140 residents. 'Just now I contacted one Lapang local folk. They said that they had spotted some Rohingya earlier. However, at the moment, their location is unknown.' Amir encouraged village heads, district head, and all state apparatus

[10] The seminal works of anthropologist Liisa Malkki (1996, 1995) laid the grounds for problematising humanitarianism in refugee responses, whereby the refugee emerges as a population of concern that needs to be cared for—but whose agency often suffers from erasure by experts and well-meaning actors.

> in Lapang to bring these Rohingya home to the shelter location. Because, in the past, the Rohingya have often left the shelter to go to Medan, and from there they depart to Malaysia. "For those of you who happen to see them, you can contact the North Aceh government, the Lhokseumawe Police Resort, the Lhokseumawe Immigration, ACT (a local charity organisation), IOM, and UNHCR," he said.

A refugee should stay put in the designated space that is the shelter. They should not be wandering about toward Medan and beyond. If found meandering, they must be brought home to the safe confines of the shelter. The refugees are further missing from the actors responsible for their own well-being—their say supposedly does not count in the micro-level refugee governance of the camp.

It is pertinent to note that in addition to the safe, carefully curated activities that have been mentioned above, international organisations work hard to conduct awareness sessions for refugees, as well as building capacities for local partners, in relation to preventing and reducing risks of trafficking in persons. They dedicate constant efforts to reminding remaining refugees of the dangers and risks involved in leaving, including by engaging smugglers' services (Antara, 2021a, b; Jakarta Post, 2021), underscoring trafficking is a criminal act in Indonesia. Here, non-involvement with trafficking/smuggling networks comes to qualify refugees—in this regard, the ideal refugee subjects are the ones who stay on in the camps, who entrust themselves to the care of international organisations, "…responsible for their overall protection, including registration, refugee status determination and resettlement" (IOM, 2021).

Complementing the anti-trafficking socialisation, international organisations pointed to doubled measures as security details were placed around refugee compounds (Antara, 2021a, b). Here, it is particularly interesting to note how a BBC Indonesia coverage of the most recent disappearance in 2021, included the following remarks from the head of Lhokseumawe Social Service as he commented on the refugees' departure. 'Although we had guarded them as best as we could, they still fled. We had tried in a humanitarian way for them to not run away' *(Walaupun kita jaga sebaik mungkin, mereka tetap kabur. Kita sudah mencoba secara kemanusiaan agar tidak kabur)* (Tambunan, 2021). The mention of 'humanitarian guarding' here is particularly interesting—as supposedly, what should the humanitarian guard against?

Primarily, the humanitarian border guards against refugees leaving. They are to remain and to refrain from undertaking that dangerous journey across the straits. Here we see a subtle working of disciplining, where "good" refugees are confined into waiting, a process which 'feminises' them (Hyndman & Giles, 2011). At the same time, the emphasis is against *mixing* migration, both in terms of involvement with irregular means and duality of motives.

Stakeholders are aware that in 'correcting' their journeys, Rohingya refugees resort to the same means that undocumented Indonesian migrant workers use *en route* to Malaysia (UNHCR, 2016). Missbach (2016) makes notes of the 'lively exchange by boat' between Sumatra's east coast and Malaysia's west coast, which is also utilised by Indonesian migrant workers seeking to avoid the costly and heavily bureaucratic official deployment scheme. While their undocumented migration

is also resented, in the case of Indonesian migrant workers, no confluence of state and non-state actors has formed in the way the border assemblage that captures the rescued Rohingya came together.

For the Rohingya, entanglement with illicit networks is heightened as taboo—the dominant framing of smuggling as a criminal activity means that engaging with them involves complicity. This certainly clashes with imaginaries of refugees as victims, but in reality, there are often limited options in travelling to places of refuge as documented migration becomes more an exception than the norm. In the Rohingya's case, the demand for regular means is particularly perplexing considering their plight as stateless people who have never been conferred identity documents, to begin with. The purist approach that would not have refugees mix with law-transgressors is neither just nor possible, particularly in Southeast Asia, a region where smuggling has long featured in the history and landscape (Tagliacozzo, 2002).

The debate on mixed migration, as well as the refusal of many countries to grant refugees the right to work speak to the overall difficulty in accepting the idea of a *working refugee*, despite the actual practice and evidence otherwise (especially in protracted refugee situations), where refugees do work (Filipski et al., 2021; Wahab, 2017). While persecution is the obvious reason for Rohingya migration, the refuge they are headed for is not indeterminate. It cannot just be anywhere but Myanmar. For many, there is a clear destination in Malaysia, which presents economic opportunities to foreign labour that most other Southeast Asian nations, or neighbouring Bangladesh, for that matter, cannot offer. An officially non-receiving country that nevertheless allows their inclusion as workers, Malaysia's occupies an ambiguous position *vis-à-vis* refugees as decades of continuous refugee movement have created a Rohingya community that has access to Malaysia's labour market. In earlier work, I have touched upon how for the Rohingya men especially, the predicament of not being allowed to work is felt as particularly degrading (Azis, 2014). Malaysia, above all, presents a chance for work, whereas camps represent non-productive space. In this context, it was not at all surprising that CSO initiatives to launch livelihood programs in Aceh—an example was the Geutanyoe Foundation's attempt at setting up a vegetable and a duck farm (Vit, 2016)—proved unsuccessful as they do not correspond with the refugees' idea of work, which they have envisioned for themselves in Malaysia. Idleness as refugees in Aceh is a painful reminder of how they are not good citizens who are able to provide labour.

10.4 Concluding Notes

While the initial conception of the humanitarian border situated it in the territorial frontier, recent writings have forayed away from the actual, physical geography (i.e. the edge of nation-states) into more general discursive practices (Bendixsen, 2019). Along this line, by way of conclusion, this chapter considers how the violent humanitarian border has become entrenched through Indonesia's current regulation.

Indonesia adopted the Presidential Regulation No. 125 of 2016 concerning the Treatment of (Foreign) Refugees on December 31, 2016. Explicitly drawing on lessons from the 2015 crisis, the 'PR' is currently the highest legal regulation on refugees in Indonesia. Among the positive things highlighted from this regulation is that it adopted the same refugee definition as stipulated by the 1951 Refugee Conven-tion, which leads observers to consider it, '…an important development in Indone-sia's distinctive response to refugee issues at both a national and regional…level' (Kneebone et al., 2021). Indonesia's growing involvement in existing regional efforts, especially with the Bali Process is likely to factor into this normative shift in its refugee response.

While criticisms have also been levelled at the PR, not much attention has been given to how—*through the framing of refugee issue as an offshore disaster*—it has established a more enduring humanitarian border. Narrowly focusing on rescue at sea, the PR elaborates in painstaking detail, stipulations on handling of (alleged) refugees, i.e. discovery, sheltering, securing, and immigration monitoring. Simultaneously, the document enumerates state agencies, local governments, and international organisations involved in refugee emergency. In effect, it provides a comprehensive outline of the merging of rescue and control, as well as the assemblage that sustains this duality.

To illustrate how this PR has gained ideational footing, as of the writing of this chapter, another wave of Rohingya boat people has reached Aceh. On June 4, 2021, 81 Rohingya refugees arrived on the shores of Kuala Simpang Ulim after sailing from Bangladesh for 4 months since February. Once again, Aceh's fishermen came to their rescue after the boat was stranded in the waters for 4 days. Initially, the head of East Aceh's Board for Disaster Management had stated that the refugees would be 'pushed back into the sea' (BBC, 2021), but instead they were later guarded in a secure location—away from the prying, enthusiastic public (VoA Indonesia, 2021)—and eventually moved to IOM facilities in Medan. The re-location of the refugees resulted from a meeting between the East Aceh local government, the Ministry of Home Affairs, Ministry of Law and Human Rights, IOM, and UNHCR (Acehsatu, 2021; Merdeka, 2021).

With the latest wave of disappearances transpiring only months ago (in January 2021, see Kompas, 2021), it is unclear how long it will be before these new arrivals will follow suit. Whether or not that possibility is realised, a path dependence has nevertheless emerged under the prescription of the PR. The rescue has ascended to be the primary response during the refugee crisis (Pallister-Wilkins, 2017), becoming a more politically credible policy measure, as the most recent arrival in Aceh illustrates. Yet, the refugees do not want to stay in that zone of rescue, they have continually expressed this through 'corrections' to their interrupted journeys. That subsequent escape has repeatedly formed as a counter-response is symptomatic of the violence of the humanitarian border, which restricts life forms and possibilities into the rubric of emergency. This is not a treatise against humanitarianism—the critique presented here concerns itself with how contemporary refugee responses might run counter

against the aspirations and *actually* more tenable solutions, which refugees consider for themselves. In this case, this chapter has illustrated this contention through a simple matter of where they want to go, why, and most importantly, how.

To sum up, while the PR perhaps bodes well for future refugee governance in Indonesia and ASEAN, it is unclear whether and how it would accommodate the refugees' own futures. The emergency framing adopted by the PR evinces continued episodic preoccupation with the Rohingya, which is unlikely to help either in understanding their survivability and their formation as a refugee diaspora (van Hear, 2014). Smaller news reports have surfaced to describe how Rohingya refugees also move about within Indonesia, or rather, more candidly, how they are being moved about by the assemblage of actors caring for them in the humanitarian border. One news item from April 2021 gives rather detailed reporting on how four Rohingya immigrants requested a transfer from Sumatra to a facility in Makassar, South Sulawesi to be closer to their family (Merdeka, 2021). Despite the repeated escapes that might impress otherwise (Tambunan, 2021), I concur with the observation that Indonesia will not remain a transit country for refugees (Mixed Migration Centre, 2021).

Contemporary anxieties about refugee movements say a lot about our ontological (in)security. To move forward and out of this rut, understanding of the Rohingya needs to follow them beyond emergencies. More critical research trajectories have emerged as scholars turned to 'the realm of ordinary politics' to unpack refugee dynamics in the hope of being able to render better-informed analyses and policy recommendations regarding their predicament. Aiming to understand the agency of marginalised groups produced as 'irregular' and give attention to their active subjecthood (Strange et al., 2017), these research avenues are more attentive to the textures, nuances, and open possibilities of everyday life, these studies stretch the temporal view that the crisis focus restricts.

In analysing movement, Mainwaring and Brigden (2016) point to the usefulness of clandestinity and ambiguity as key concepts for understanding contemporary migration. In discusssions of Asian labour migration, much attention has been directed at intermediation (Lindquist et al., 2012), this might need to be expanded further to refugee movement, as their involvement with smugglers continues to be mired in moralistic judgements that has fortified rather than opening the 'black box' of migration research.

A growing body of work has provoked more exploration of the 'market-based, economic activities of refugees' (Betts et al., 2017, Introduction). In this direction, interesting studies focusing on Rohingya's participation in the national economies of various host countries have also started to emerge, for example, Wahab's (2017) inquiry into the supposed economic isolation of the Rohingya in Malaysia. This should not reduce analysis into simplistic push and pull factor considerations—rather, such studies can effectively assist us in understanding their relative acceptance in certain societies, and the factors that support their inclusion, despite legal status.

Lastly, works on refugees' internal mobility are useful comparatives as they are least likely to be constrained by the emergency discourse. Franck's study on movement occurring internal to the border (2019) provides a productive insight into corruption, which might enable Myanmar refugees in navigating and manoeuvring everyday life. Considering the pervasiveness of corrupt practices—not just in Malaysia, but the region at large—we can begin to contemplate how they are also performative of Southeast Asia's international borders, or the humanitarian border that is the focus of this chapter.

I believe that above-mentioned research trajectories potentially engender more truthful accounts to illuminate the fuller possibilities of refugee emotions, practices, and aspirations, beyond representations and writings that have been limited to fear. However, a final point that needs to be driven home is that knowledge production of refugees/migrants remains fraught with potential alignment with the interests to control. Vigneswaran's (2021) warns of a clear problem with the built-in ontology of migration studies (which I assert could also be presumed of refugee studies), as the positioning of migrant (or refugee) as an *object* of study makes it highly difficult to generate research that is not inimical to their political interests.

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Chapter 11
The Nexus Between Corruption, Migrant Smuggling, and Human Trafficking in Southeast Asia

Joseph Lelliott and Rebecca Miller

11.1 Introduction

Millions of people migrate throughout the Southeast Asian region each year, driven primarily by large wage differentials, economic disparities, and demand for low-skilled labour. In particular, Malaysia, Singapore, and Thailand have become regional hubs for migration, seeking to fill their own labour shortages while at the same time providing much needed work opportunities for migrants from neighbouring countries. Despite this demand and the ongoing importance of migration to the labour market in Southeast Asia, substantial numbers of (primarily low-skilled) migrants resort to irregular avenues of migration, often due to the cost and complexity of regular migration channels. High levels of irregular migration have become a highly sensitive political issue for governments throughout the Southeast Asia region, who have increasingly sought to curtail such movements through the imposition of strict border controls (Henry, 2018).

These controls, combined with tightly managed migration systems, have increased demand for the services of migrant smugglers. Smugglers help migrants, including stateless populations and those seeking asylum, evade migration restrictions. While many migrants are smuggled safely, their decisions to travel outside regular migration avenues and their irregular status in destination countries place them at greater risk of human trafficking and other human rights violations. Many smuggled migrants are also trafficked persons, just as trafficked persons are often smuggled, and it seems clear that the interrelated dynamics of irregular migration,

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migrant smuggling, and human trafficking have driven significant levels of each phenomenon in Southeast Asia, even if reliable data on their exact scale is almost non-existent (UNODC, 2018, p. 67). Though smuggling and trafficking are conceptually distinct, this chapter addresses them together due to their overlap in practice and nexus in the context of irregular migration.

Consistent with the goal of deterring irregular migration and punishing those who profit from it, combating smuggling and trafficking has become a key concern for Southeast Asian States. Although a range of laws, policies, and other measures have been implemented to this end, several important aspects of these crime-types remain broadly overlooked and under-addressed. One such aspect is corruption.

Corruption appears to play an integral role in facilitating both smuggling of migrants and trafficking in persons. As the United Nations Office for Drugs and Crime (UNODC) has observed, 'high levels of corruption are believed to drive human trafficking in Southeast Asia' and '[c]orruption among government officials and private employers in Southeast Asia is a major contributor to the smuggling of migrants across international borders' (UNODC, 2019, p. 87). Corruption weakens immigration controls, hinders the investigation and prosecution of illicit activities, and prevents the effective protection of smuggled migrants and victims of trafficking. Nonetheless, there are few reliable studies of the role of corruption in facilitating smuggling and trafficking, information is often anecdotal, and prosecutions are rare. Corruption is a facet of smuggling and trafficking that urgently needs further attention, not least because it exposes significant failings in States' prevailing approach to combatting these crimes and upholding the human rights of migrants.

This chapter examines the relationship between corruption, smuggling, and trafficking in Southeast Asia. It explains that, while corruption may be perceived by States as a symptom of smuggling and trafficking, it is, ultimately, attributable to the restrictive migration regimes that push migrants into irregular channels. This chapter argues that strict border controls and harsh policies are only likely to increase the markets for smuggling and trafficking and, in turn, amplify corruption risks. This reality means that, in addition to adopting stronger anti-corruption measures, States in Southeast Asia must also place a greater focus on opening further avenues for regular migration and ensuring the protection of migrants.

To this end, this chapter briefly explains smuggling, trafficking, and corruption in Part 2, before turning to a review of evidence concerning the role of corruption in smuggling and trafficking in Part 3. In Part 4, the chapter proceeds to a discussion of the relationship between corruption, border controls, the drivers of smuggling and trafficking, and rights-based concerns. It sets out several recommendations for States to address these intersecting issues in Part 5, before concluding in Part 6.

11.2 Concepts and Definitions

11.2.1 Smuggling of Migrants

The *Protocol against the Smuggling of Migrants by Land, Sea, and Air* (*Smuggling Protocol*), which supplements the *United Nations Convention against Transnational Organized Crime* (*UNTOC*) is the principal international instrument concerning smuggling. Article 3 of the Protocol defines smuggling as procuring a person's illegal entry into a State for profit or some other material benefit. Importantly, the need for a 'benefit' excludes smuggling carried out for altruistic and humanitarian reasons. The focus of the Smuggling Protocol is on transnational organised criminals that profit from the smuggling services market.

Migrant smugglers facilitate the movement of people who wish to cross borders, but do not have the legal means to do so. They may assist people in different ways, such as by procuring, producing, or supplying fraudulent travel documents or arranging transportation. Although some migrant smuggling ventures are more complex, involving corrupt officials, fraudulent identity or travel documentation, and other methods to lower the risk of detection, others are more amateur. Some smuggling methods, especially smuggling by sea, may put the lives and safety of those smuggled at risk. Migrant smuggling costs tend to fluctuate based on the likelihood of success and level of danger involved.

11.2.2 Trafficking in Persons

Like the *Smuggling Protocol*, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (*Trafficking Protocol*), is the leading international instrument addressing human trafficking. Simply put, the Protocol defines human trafficking as the recruitment, transportation, transfer, harbouring or receipt of people through force, coercion, fraud or deception, with the aim of exploiting them for profit (Article 3). This definition combines elements relating to acts of trafficking, the means used by traffickers against victims, and the purpose of trafficking, which is exploitation. Trafficking in persons is a serious crime that can take many forms and encompasses abuses such as (but not limited to) slavery, forced labour, sexual servitude, and forced marriage. While migrants, including smuggled migrants, may be victims of trafficking, the crime can be distinguished from smuggling in two key ways.

First, the trafficking definition does not involve an element of transnational movement, unlike smuggling which involves a person's illegal border crossing. Thus, it may occur completely within one country, and may involve legal border crossings. Second, trafficking and smuggling can be differentiated based on their respective purpose elements, which reflect the intention of the perpetrator. The purpose of trafficking in persons is to exploit the trafficked person. The purpose of

smuggling is to obtain a 'financial or other material benefit. Typically, smugglers have 'no intention to exploit the smuggled migrant after having enabled him or her to irregularly enter or stay in a country' (UNODC, 2010, p. 10).

This is not to say that smuggling ventures never involve abuse and exploitation. Traffickers often also derive financial or material benefits from their activities and move victims transnationally to places of exploitation. It is not uncommon for smuggling and trafficking to overlap in practice. For example, a perpetrator may be guilty of both smuggling and trafficking offences where they intend to gain a benefit from transporting a migrant from one country to another, and also intend to exploit them. In such a case, the migrant will be both a smuggled migrant and a victim of trafficking.

11.2.3 Corruption

Unlike smuggling of migrants and trafficking in persons, there is no internationally agreed definition of 'corruption'. Corruption encompasses a range of illicit activities including bribery, embezzlement, trading in influence, abuse of functions, illicit enrichment, and money laundering. The *United Nations Convention against Corruption* (*UNCAC*), a major component of international efforts to combat corruption, defines and criminalises these discrete crimes.

For public officials, corruption involves giving or obtaining an advantage through illegitimate means or through means inconsistent with their duties (Rose-Ackerman & Palifka, 2016, pp. 7–9). Corruption also occurs in the private sector and can involve a range of acts with the goal of securing some benefit for a company or its employees. Corruption may occur on a small scale, involving one or a handful of individuals in a larger public organisation taking advantage of opportunities to exploit their power and/or professional position for personal gain (Rose-Ackerman & Palifka, 2016, pp. 7–9). Ad hoc abuses of power by public officials during their interactions with ordinary persons are often defined as petty corruption. Corruption can also occur on a larger scale and affect entire organisations or public bodies, including law enforcement, immigration, and justice systems. In these situations, corruption is often systemic, and due to structural weaknesses and insufficient governance. When practices within an organisation are perverted by corruption, it is not uncommon for a culture of tolerance and permissiveness to develop. Corruption, at the highest levels, may involve actions of high-ranking public officials and causes significant loss to a state or its people, by eroding confidence or otherwise depriving them of fundamental rights (UNODC & RSO, 2021, p.6).

11.3 Corruption as a Facilitator of Smuggling and Trafficking

Corruption intersects with and facilitates in persons and smuggling of migrants in numerous ways. Governments, international agencies, civil society organisations, and experts alike contend that corruption significantly hampers national and international efforts to combat both smuggling of migrants and trafficking in persons (see, e.g. OECD, 2015, pp. 7–8; Transparency International, 2011; Sakdiyakorn & Vichitrananda, 2010, p. 55; Kendall, 2011, p. 35).

Corruption is commonly identified as a predictor of smuggling and trafficking. Both crimes flourish in states or regions with weak institutions and ineffective law enforcement; places with high levels of smuggling and trafficking tend to align with places where there is a perception of widespread public corruption. Zhang and Pineda (2008) argue that 'corruption is probably the most important factor in explaining human trafficking', while a 2016 report by Europol and Interpol (2016, pp. 7–8) observes that:

> smuggling hotspots may also emerge in areas with weak law enforcement controls or no rule of law as migrant smugglers rely on inadequate border controls and the corruption of border guards, police patrols or navy officers to facilitate their activities.

The presence of corruption may also drive smuggling and trafficking. In particular, persons may be more likely to seek the services of smugglers, or fall prey to traffickers, if they wish to leave places where corruption affects their political, social, or economic circumstances and opportunities. Indeed, the perception of corruption can help smugglers and traffickers recruit and manipulate potential migrants. In countries with high levels of corruption, migrants may not dispute claims by traffickers or smugglers that intermediaries are required to obtain passports, visas or other travel documents. Moreover, migrants who have experienced or heard of corruption in their home countries are more likely to believe traffickers' claims that attempts to escape or report situations of exploitation are fruitless, because corrupt police will simply return them to their exploiters or take advantage of them (UNODC, 2011, p. 12).

As well as acting as a predictor and driver of smuggling and trafficking, corruption appears to play a key role in facilitating these phenomena. Nonetheless, specific evidence linking them remains scarce. For example, a 2016 report of the International Bar Association's (IBA) Presidential Task Force against Human Trafficking (pp. 5–7) observes that, while '[c]orruption is an endemic feature of human trafficking', evidence is often anecdotal, vague, and uncorroborated; and though 'the link between trafficking and corruption is widely acknowledged, there is little data available to help explain what is happening, how, and to whom'. There is also limited information regarding how governments respond to corruption and its role in facilitating smuggling and trafficking. These information deficits are likely attributable to a range of factors, including the commonly clandestine nature of smuggling and trafficking ventures, unawareness by smuggled migrants and victims of trafficking

of the role and presence of corruption, the difficulty of uncovering and investigating corruption, and a lack of awareness of the nexus between corruption, smuggling, and trafficking (Aronowitz et al., 2010, p. 56).

The lack of information concerning corruption as a facilitator of smuggling and trafficking is reflected in the literature on Southeast Asia, despite general evidence of the links between these phenomena. A 2021 research report, *Corruption as a Facilitator of Smuggling of Migrants and Trafficking in Persons in the Bali Process Region with a focus on Southeast Asia,* carried out by the authors, highlights and, where possible, seeks to address this lacuna.[1] While many of the examples presented in that report—and those included here—remain anecdotal, taken together, they provide some indication of the prevalence, roles, and forms of corruption. Broadly, it appears that corruption facilitates smuggling and trafficking in two primary ways: it allows circumvention of immigration controls and it allows smugglers and traffickers to evade investigation and prosecution of their criminal activities (and profit from them). In turn, corruption prevents the identification and protection of victims of exploitation and abuse.

11.3.1 Corruption and Immigration Controls

Consistent with Broad and Lord's (2018, p.73) observation that '[t]he opportunity for corruption during the transportation phase will be greater where international borders are crossed', bribery appears particularly prevalent in facilitating the crossing of land, air, and maritime borders in Southeast Asia. This form and context of corruption can be systemic in particular border posts or stations, with bribes received by low-level officers passed on to superiors. In a 2019 report, the Human Rights Commission of Malaysia (2019, p. 85) referred to comments of a political representative who stated that 'potential corruption … encourages human-trafficking activities … [S]ome border agents demand money from vehicles moving back and forth over the border without conducting proper inspections according to their respective agencies'. An example of this is a 2014 case, where a Myanmar migrant smuggler reportedly paid regular bribes to political, police, and immigration officials to facilitate the transport of 40 to 50 migrants from Myanmar to Thailand each day (Chongcharoen, 2014, 2015). There are some reports of public officials providing smugglers or traffickers with government vehicles to help evade detection, or even transporting migrants themselves (Sakdiyakorn & Vichitrananda, 2010, p. 63; Ngamkham et al., 2013; Missbach & Crouch, 2013, p. 15). Indeed, in some cases officials may do more than simply 'turn a blind eye' to illicit activities and may be

[1] The report was written for UNODC, in partnership with the Regional Support Office (RSO) of the Bali Process. Additional information drawn from surveys and interviews (which is not reflected here) is contained in the report. It is available at: https://www.unodc.org/southeastasiaandpacific/en/2021/03/research-report-migrant-smuggling-huma-trafficking/story.html

more deeply involved in smuggling and trafficking networks (UNODC, 2017, p. 132).

A detailed example of corruption facilitating border crossings comes from the Philippines, centring on the smuggling (and sometimes trafficking) of predominantly undocumented Chinese migrants into the country. Many of these migrants were smuggled into the country to work for Philippine offshore gambling operators (often referred to using the acronym 'POGOs'), while others were trafficked and placed into exploitative situations. Links between POGOs and trafficking in persons have been widely reported ([s.n], 2020; Robles, 2020). The migrants entered by air and passed through immigration checks in Philippine airports without the necessary documents. This smuggling was enabled by large-scale bribery of officials. Following discovery of this scheme in 2020, it was referred to as the 'pastillas' scandal, on account of the way the bribes were paid: wrapped in paper in a way resembling a pastillas (a type of Filipino pastry).

The bribes paid to airport and immigration officials reportedly amounted to PHP 2000 per migrant. Documents obtained from informants during a senate investigation of the case detailed how the PHP 2000 in bribes was split (Abad, 2020):

- Immigration officers (IO) received the highest amount, at PHP 650.
- Duty immigration supervisors (DIS) received PHP 470.
- Travel central enforcement unit (TCEU) received PHP 280.
- Border control and intelligence unit (BCIU) received PHP 240.
- Operations (OPS), or administrative/clerical officers received PHP 260.
- The Terminal head (TH) received PHP 100.

In addition to these bribes, migrants paid some PHP 8000 to smuggling syndicates responsible for arranging their entry into the Philippines.

The scale and organised nature of smuggling in this case, and the amount in bribes paid (approximating some PHP 40 billion, with officials involved in the scheme earning between PHP 5000 and 20,000 every week), indicates that the corruption was systematic. Several media reports further allege that some officials received sexual favours from persons trafficked to the Philippines.

Many of the most widely reported examples of the use of corruption to circumvent immigration controls include the production or procurement of fraudulent documents. As the IBA (2016, p. 28) observes:

> '[a]n immigration official willing to falsify information or forge immigration documents provides traffickers with significant opportunities. A falsified document can achieve a variety of aims. It can facilitate the movement of trafficking victims out of their countries of origin and into destination countries … They also facilitate the stay of trafficking victims in a country.

Investigations and prosecutions of public officials in Southeast Asian states have uncovered numerous instances of corrupt issuance and dealing with fraudulent documents. These officials may collude with labour recruitment agents to facilitate the irregular travel of migrant workers, some of whom are victims of trafficking in persons, throughout Southeast Asia. For instance, at Kuala Lumpur Airport, between

2016 and 2017, several immigration officers allegedly sold Malaysian passports for RM 44,000, in collusion with a human trafficking syndicate based in China. Fifteen immigration officers were also accused of sabotaging and disabling immigration systems (which verify the veracity of passports) at the airport ([s.n] 2017a).[2] According to a Reuters report, 'the airport's passport-verification system was deliberately disrupted at certain times of the day, possibly since 2010, raising suspicion people were being smuggled through immigration when it was down' (Latiff & Chow, 2016).

In another Malaysian case, an investigation in the state of Johor uncovered collusion between a smuggling syndicate and numerous public officials. The syndicate had brought some 43,000 migrants in and out of Malaysia between 2014 and 2020, with estimated illicit gains of around USD 14.1 million, facilitated by bribes to secure fraudulent documents and tip-offs regarding security operations (Chew, 2020). In June 2020, Johor police announced the arrest of 18 members of the Royal Malaysian Police and Malaysian Armed Forces for allegedly accepting bribes of approximately RM 500 to 1000 a month (Kadenen, 2020). Further arrests of immigration officers, including an assistant director of the Immigration Department, followed for document fraud (Khalid, 2020; Hammim, 2020):

> the syndicate was believed to be providing fake [immigration] inbound and outbound stamp services for use by migrants using social visit pass that had expired […] As they arrived at the Pasir Gudang Ferry Terminal, the movement of migrants using counterfeit stamps would be handled by an immigration officer who was cooperating with the syndicate to administer their return home (Indonesia).

11.3.2 Corruption, Investigation and Prosecution

In addition to facilitating the circumvention of immigration controls, corruption appears to play a significant role in preventing the investigation and punishment of smugglers and traffickers. At times, law enforcement officials accept bribes from smugglers and traffickers in return for 'turning a blind eye' to their offending. In other cases, law enforcement officials may more actively facilitate trafficking or smuggling, for example by returning escaped trafficked persons to their exploiters or disclosing confidential information about police raids or other operations to smugglers or traffickers. Jonsson (2019, p. 110) observes that, '[e]ssentially, police corruption lowers several of the costs faced by traffickers'. Missbach (2015, p. 438) refers to law enforcement officials who help ensure that smuggling operations go undetected as 'protectors', noting that they 'have the greatest potential to undermine the legal prosecution of people smugglers, and are rarely themselves prosecuted for

[2] As a result of ongoing corruption concerns, some 600 immigration officers from Kuala Lumpur International Airport (comprising around 40% of immigration staff working there) were transferred in 2017 ([s.n.], 2017a)

their involvement in people-smuggling operations'. Speaking to the Indonesian context, Lolo (2012, p. 31) explains that:

> [o]n the one hand, [some law enforcers in Indonesia] formally seek the eradication of human smuggling; on the other, however, [they] are involved in transactional encounters with the people smugglers. Smugglers tend to have good links with the authorities and they are aware what is happening on the ground. [I]f arrests have to be made, they are often engineered and selective as it is often the less important agents that fall victim to arrests, whereas the organizers whose role is more substantial will walk free.

Media and other reports of traffickers and smugglers bribing local law enforcement officials to ignore exploitation of trafficked persons and/or the presence of irregular migrants support these research findings (see, e.g. Gjerdingen, 2009, p. 725). In a 2017 reported case, Malaysian police officers were detained by anti-corruption authorities for taking bribes from companies to prevent the arrest of foreign workers without valid documents or work permits ([s.n] 2017b). Another example comes from an investigation by Human Rights Watch (2019, p. 73) into forced marriage in Myanmar, which observed failures by law enforcement to arrest perpetrators: 'brokers are never arrested because they can pay a bribe and always escape'. Particularly troubling are reports of corruption within anti-trafficking units. Holmes (2009, p. 88) notes a case where a 'former Deputy Director of the Police Anti-Human Trafficking and Juvenile Protection Department in Cambodia was convicted for involvement in trafficking and received a 5-year prison sentence. Two of his subordinates were also convicted and sentenced to 7 years' imprisonment'.

A report for the Thai National Anti-Corruption Commission states that brothels are often located close to local police stations, alleging that this makes it easier for police to collude with brothel owners and harder for victims of trafficking to escape (Sakdiyakorn & Vichitrananda, 2010, p. 63). Indeed, there are various reports of corrupt involvement of police in sexual exploitation in brothels. In a 2018 case, a massage parlour named 'Victoria's Secret' was raided by Thai Police. Over 100 migrants from Thailand, Myanmar, Lao PDR, and China were found inside, including some under the age of 18, many of whom appeared to have been trafficked for sexual exploitation. Notably, lists of 'special guests' at the parlour included officers 'from virtually every department' at the nearby police station, who had received free or discounted services. This included an anti-human trafficking officer as well as tax officials ([s.n.] (2018).

There are also numerous accounts of the direct involvement of police and other officials in the recruitment of persons into exploitative situations (Trajano, 2018). One of the most widely reported examples was the involvement of public officials in the smuggling and trafficking of Rohingya and Bangladeshis into and through Thailand and Malaysia (Fisher, 2013). Many were apprehended by officials and detained in immigration detention centres or government shelters, after which, they were handed over to traffickers. Victims and traffickers reportedly described the receipt of bribes by officials in exchange for 'turning a blind eye' to the camps where they were held. Officials would also assist in transporting Rohingya and Bangladeshis, extort them, and alert traffickers to raids by police (Human Rights

Commission of Malaysia & Fortify Rights, 2019, pp. 77–87). One trafficked person described corrupt interactions between traffickers and officials:

> When we were arrested, the [state agency redacted] tied our hands together in groups of seven to ten people […] Then, we had to walk for a while to a rubber plantation. Then, the [authorities] ordered a car to take us to the [authorities'] station. When the car arrived, the [traffickers] negotiated with the [authorities]. The [authorities] said they would take us away unless [the traffickers] paid. After [the traffickers] gave [authorities] money, the [authorities] left […] [The traffickers] handed [authorities] money in front of us. Later the [traffickers told us, "We had to give them 35,000 Thai Baht (US$1,090; 3,800 Malaysian Ringgit) for your release" (Human Rights Commission of Malaysia & Fortify Rights, 2019, pp. 82-83).

Many migrants trafficked into Thailand have been placed into exploitative conditions in the country's fishing industry. Public officials sometimes brokered deals with boat captains, while law enforcement officials were allegedly bribed to ignore exploitation on vessels. In this context, a report by Human Rights Watch (2018, p. 82) observed that:

> In Kantang, Trang, broker surveillance systems and overt intimidation kept workers confined to port areas for years. Police sold attempted escapees back to brokers for 1,000 to 4,000 baht ($30 to $122), which the broker would then inflate and add to the individual's debt. One broker regularly reported drunk fishers to corrupt police, who would promptly arrest them. The broker would then "bail them out," adding the bail fee to their debt […] Other fishers said they were forcibly confined between fishing trips by corrupt police officers being paid by brokers.

Corruption can also reach beyond law enforcement investigation and protection and subvert prosecution and trial processes. Allegations of corruption against officials themselves may be left unpursued by prosecutors or efforts to prosecute may be deliberately impeded by inadequate evidence gathering, while judges may accept bribes to release offenders or give them more lenient sentences (Kendall, 2011, p. 36). Missbach (2014, p. 229) notes that 'only in exceptional cases have [police and military officials accused of involvement in smuggling in Indonesia] faced legal consequences'. Keo et al. (2014, pp. 217–218), presenting information drawn from interviews with convicted traffickers, explain that some traffickers alleged that if they had been able to pay the bribe requested by the police or the judiciary, they would not have been convicted or would have received a more lenient sentence: '[a]ccusations of extortion attempts by judicial officials […] were numerous.' Missbach (2015, p. 434) notes that convicted smuggler Dawood Amiri

> insisted, when asked by journalists, that he only played a minor role in the people-smuggling network, saying, "[i]f I made a lot of money, I wouldn't be here" (Sheehy & Salna 2013). His memoir mentions that, after his initial arrest, Indonesian authorities encouraged him to pay a bribe of US$24,000 to make the evidence in his case disappear but that he could not afford to do so.

Similarly, another convicted smuggler, Hadi Ahmadi, claimed that

> he had been targeted over the 'real smugglers' because he could not afford to bribe Indonesian authorities. He alleged that the most serious offenders were not investigated by

law enforcement agencies, and that, if they were arrested, they would pay money to be freed (Schloenhardt & Ezzy, 2011, p. 120).

11.4 Addressing Corruption, Smuggling, and Trafficking: Challenges and Realities

It is clear that smuggling and trafficking occur on a significant scale in the Southeast Asian region and corruption plays an important facilitating role. To States, an attractive strategy to respond to these intersecting phenomena may simply be the further strengthening of border controls and criminal measures. The logic of this seems simple: more systems of control at the border (and within it) should prevent and deter illegal crossings. In reducing opportunities for smuggling and trafficking this should, in turn, reduce opportunities for corruption. Examples of such approaches are evident around the world, including in Southeast Asia (see, e.g., Malaysian Government, 2019).

Responses centred on deterrence and criminal justice have, however, tended to prove counterintuitive. As many experts have argued over the past 20 years, irregular migration and migrant smuggling are driven primarily by migration control. As Triandafyllidou (2018, p. 214) observes, facilitators of irregular migration emerge 'as a direct consequence of the very mechanisms and instruments mobilised to control borders' (see also Koser, 2010). In the Southeast Asian context, Deshingkar (2021, p. 136) explains, for example, how bans on international travel for domestic work from Myanmar did little to stop such migration, leading instead to a thriving 'black market for migration brokerage and domestic worker placement which exacerbated exploitation and human suffering'. Hoffstaedter and Missbach (2021) observe more generally how migration controls in Malaysia and Indonesia have created opportunities for smugglers and traffickers to provide illicit border crossings. Indeed, the increasing securitisation and sophistication of borders may contribute to the greater professionalisation and organisation of facilitation networks (Triandafyllidou, 2018, p. 215). While it may be theoretically possible for a State to overcome these dynamics and eliminate irregular migration through border control, the economic and political drivers for migration are often strong enough that only the use of overwhelming force, vast fiscal expenditure, and serious human rights violations would be sufficient.

Just as they are ineffective at reducing smuggling and trafficking, simply strengthening migration controls are unlikely to reduce corruption. Conversely, such an approach may only serve to exacerbate the risk of corruption (Broad & Lord, 2018, p. 73). As many of the examples in Part 3 of this chapter show, the very mechanisms and officials put in place to detect and police irregular migration and exploitation may be subverted and turned complicit. Instances of corruption range from isolated instances, through to systemic abuses of power and bribery. Simply put, there will be greater vulnerabilities to bribery and abuse of power in larger and more complex migration systems, especially in States where corruption is already

widespread. Additionally, these vulnerabilities are more readily exploited by the adaptable smuggling networks born out of migration control; networks that are likelier to pursue relationships with officials and have the resources to fund corrupt activities. As Hoffstaedter and Missbach (2021, p. 30) posit, the migration policies in Indonesia and Malaysia themselves create the conditions for public officials 'to profit from engagement in illicit markets of people smuggling and trafficking'.

The dynamics that displace migrants from regular avenues of migration and into the hands of illicit networks also increase risks of exploitation and other dangers (see, e.g., Gallagher, 2015; Sanchez, 2017, pp. 18–20). Irregular migration can be unsafe and migrants are vulnerable to a range of threats, both from facilitators and state actors (Carling et al., 2015, pp. 6–7). The morphing of smuggling processes into situations of trafficking are common and, as noted above in Part 2.2, situations of irregular migration can defy easy categorisation (Baird & van Liempt, 2016, p. 402). Campana (2020) observes that greater border controls may also push facilitators to use riskier methods and exacerbate the dangers faced by migrants during transit. The higher costs of methods needed to circumvent migration controls may also increase the debt burden on migrants paying for facilitation services and expose them to risks of debt bondage and exploitative labour.

Strict migration controls themselves can also compound vulnerabilities and give raise to human rights concerns. Measures aimed at deterrence of irregular migration, such as immigration detention, punishment for status-related offences, and forced returns, often entail the ill-treatment of migrants and breaches of fundamental rights and freedoms. They may also prevent persons from seeking asylum and lead to the refoulement of persons owed protection under international law.

Given these realities, arguments are made for dismantling migration control systems and opening borders. On this line of reasoning, States will never be able to properly control migration and irregular migration in particular but, if borders were substantially relaxed, smuggling as well as corruption among border officials would cease to occur. Some will find it difficult to fault these sentiments and, indeed, it is difficult to refute that current Southeast Asian migration regimes force migrants into unregulated and often dangerous forms of travel and perpetuate discrimination, exclusion, and other human rights abuses. But the fact remains that 'States are not going to open their borders to the free flow of migrants, no matter how much they are criticised' (Miller & Baumeister, 2013, p. 23). Short of total political and socio-economic realignments nationally, regionally, and internationally, any significant reduction of migration control is clearly untenable for States in Southeast Asia. It may also be said that such systems can play an important role in detecting human trafficking prior to exploitation, notwithstanding the challenging nature of identification of victims at international borders.

It is more constructive to take a pragmatic approach and argue for a balance of effective measures palatable within the realpolitik of Southeast Asia. As outlined below, these measures should be broadly encompassed within three objectives: (1) preventing and combating corruption; (2) improving mechanisms to protect migrants from exploitation and the consequences of corruption and encourage the reporting

of criminal activity; and (3) as possible, ensuring more pathways for regular migration and easier access to existing avenues.

11.5 The Way Forward: Obligations and Objectives

The three objectives set out above are, we argue, sensible goals. While they are not a complete solution, together they can contribute to an approach that reduces smuggling, trafficking, the corruption that facilitates them, and mitigates against the ill-treatment of migrants. Importantly, they also align with the international obligations of States in Southeast Asia. All ten ASEAN Member States have ratified UNTOC, the Trafficking Protocol and UNCAC, six are parties to the Smuggling Protocol,[3] and they have also ratified (to varying degrees) a range of international human rights treaties. They are also parties to the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ASEAN Convention), a binding legal instrument modelled on the Trafficking Protocol. It requires criminalisation of trafficking and corruption (Articles 5 and 8), and has an accompanying Plan of Action referred to as the Bohol Work Plan (2017–2020) that sets out specific steps to be taken by Member States both nationally and regionally.[4] Together, the range of actions they must take (or refrain from) under these instruments provide a solid and consistent normative basis across the region on which to advocate for each of these objectives.

11.5.1 Preventing and Combatting Corruption

At the international level, UNTOC, its Protocols against Smuggling and Trafficking, and UNCAC variously contain general obligations to use legislative and other measures to promote integrity, prevent, detect, and punish corruption of public officials (and, to a lesser extent, private entities), prevent and combat corruption as a facet of organised crime, including smuggling and trafficking, and address corruption as a driver of these crimes. Building on these general obligations are a range of specific provisions across these instruments that mandate or encourage measures relevant to different aspects of addressing corruption. These broadly cover criminalisation, good governance, cooperation, data collection, and protection of victims and whistle-blowers. Regionally, the ASEAN Convention obliges Member States to

[3] As of May 2021, Brunei Darussalam, Malaysia, Singapore, and Viet Nam had not yet signed. Thailand has signed but not ratified the Smuggling Protocol.

[4] ASEAN Member States reviewed the Bohol Work Plan in 2021 the first half of 2022 and are working on a new Plan. If all remains on track, it will ready for endorsement at the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) by November 2022.

criminalise corruption and obstruction of justice, and take steps to improve law enforcement and prosecution of these crimes.

First and foremost, States must prosecute and punish instances of corruption. Allegations against border, immigration, law enforcement, and other officials need to be thoroughly investigated and addressed and any decisions to discontinue cases reviewed (UNCAC, Article 10). This is particularly important where the involvement or complicity of officials in smuggling or trafficking involves human rights abuses. Ideally, legislation on smuggling of migrants and trafficking in persons should include clear provisions for addressing corruption and the involvement of public officials, with penalties commensurate with the gravity of offending (UNTOC, Article 11; UNCAC, Article 30). For countries in the region, this may be addressed by incorporating specific offences and penalties for corrupt officials who facilitate or are otherwise engaged in these crimes (see ASEAN Convention, Article 5(3)(g)).[5] This is in addition to general corruption offences, as required by UNTOC (Articles 8 and 23) and UNCAC (Article 15–25). An example of good legislative practice in this context is Indonesia's law on the *Eradication of the Criminal Act of Trafficking in Persons*, which contains stronger penalties for '[a] state official who commits an abuse of authority resulting in the criminal act of trafficking in persons'. Similarly, the Philippines' *Expanded Anti-Trafficking in Persons Act* criminalizes persons who 'utilise his or her office to impede the investigation, prosecution or execution of lawful orders in a case' or otherwise influence or tamper with trafficking investigations or prosecutions.

In a similar vein, anti-corruption measures should be aligned and incorporated with anti-smuggling and anti-trafficking policies, procedures and training. Due to the nature of their work, border, immigration and other law enforcement officials are particularly vulnerable to corruption. States should pay close attention to their obligations under UNCAC, which broadly requires 'integrity, accountability and proper management of public affairs and public property' (Article 1(c)). Systems of recruitment and promotion should be 'based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude'. Mechanisms must be implemented to prevent and report conflicts of interest and codes of conduct should regulate public functions and secondary employment (Articles 7 and 8).

Closely tied to good governance measures are reporting and whistle-blower mechanisms that allow officials to raise concerns or report offers of bribes or use of undue influence, particularly where State officials are directly involved in smuggling and trafficking. Article 8(4) of UNCAC asks States to consider establishing 'systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions'. Article 13 further requires States parties to promote the participation of society in the prevention and combating of corruption. Anonymous public reporting

[5] One positive example is Indonesia's law on the *Eradication of the Criminal Act of Trafficking in Persons*, which contains stronger penalties for '[a] state official who commits an abuse of authority resulting in the criminal act of trafficking in persons', including dishonourable discharge from their position.

mechanisms should be available to allow whistle-blowers to alert agencies to potential corrupt acts and steps should be taken to raise public awareness of these reporting mechanisms.

Beyond criminalisation and good-governance measures, further integral elements of prevention efforts include cooperation and information collection and sharing efforts. UNTOC, UNCAC, and the Protocols all encourage cooperation between States. In particular, States should, where appropriate, collect and share intelligence regarding corrupt activities and cooperation at specific 'at risk' points for trafficking and smuggling, such as border crossings. Several existing mechanisms in Southeast Asia, such as ASEAN Parties Against Corruption and the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, exist to facilitate such cooperation. For the first time in 2021, the Bali Process began to address corruption as a facilitator of trafficking and smuggling in the Asia-Pacific region.

11.5.2 Protecting Migrants

Several of the examples of corruption described in this chapter demonstrate how immigration, law enforcement, and other public officials have directly facilitated smuggling and trafficking or, at the very least, turned a blind eye in exchange for a bribe or some other benefit. The consequences of such corruption may be the abuse, exploitation, or even death of migrants. Yet, the implications of corrupt practices are rarely considered in the context of human rights abuses and the obligations of States to uphold the rights of smuggled migrants and trafficked persons. But it is clear that smuggling and trafficking involve human rights violations when these crimes are perpetrated by State officials, or otherwise when States fail to uphold their prevention and protection obligations (UNODC, 2021, p. 8). Failures to properly acknowledge and address the human rights consequences of corruption can further entrench the harms experienced by smuggled migrants and trafficked persons. Compounding this problem is the fact that migration control measures taken to detect and combat corruption, smuggling, and trafficking often come at the expense of the rights of migrants. While States in Southeast Asia broadly recognise the need to fight corruption, the level of commitment to protecting the rights of smuggled migrants and trafficked persons is often weaker and varies considerably across the region.

The reticence of States in Southeast Asia, and indeed other regions, to properly recognise the human rights aspects of smuggling and trafficking is reflected in UNTOC and its Protocols. These instruments (and UNCAC) are primarily criminal justice instruments and only contain somewhat cursory references to protection and assistance, which are generally framed in non-mandatory language (asking States to 'consider' measures, for instance). It is not difficult to find critiques of these facets of both Conventions and the Trafficking and Smuggling Protocols (noting that, shortcomings aside, few scholars and practitioners working in the areas of trafficking, smuggling and corruption argue against the need for an international legal

framework to deal with these crimes) (see, e.g. Gallagher, 2002; Lelliott, 2017; Schloenhardt & Stacy, 2013). Nonetheless, the protection of rights is one of the core purposes set out in Article 2 of both Protocols and both instruments also include identical 'savings' clauses that preserve the rights of smuggled migrants and trafficked persons under the broader international legal framework (see further UNODC, 2021). Importantly, this includes the multitude of rights contained in international human rights law instruments, such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC), as well as (where smuggled migrants and trafficked persons may be refugees) the protections afforded under international refugee law. The ASEAN Convention also contains a range of protection-related provisions which are, in several respects, more developed than those in the Protocols (Article 14). States must not prevent and combat corruption, smuggling, and trafficking in ways inconsistent with their human rights obligations. Indeed, it is worth emphasising that the goals of secure borders and the protection of smuggled migrants and trafficked persons are not mutually exclusive. Rather, they should be viewed as both complementary and mutually reinforcing (see OHCHR, 2014; OHCHR & Global Migration Group, 2018, pp. 56–57).

While it is beyond the scope of this chapter to articulate in detail how States' protection obligations towards smuggled migrants and trafficked persons should be considered in the context of corruption, two general points may be made. First, there should be accessible and confidential complaints mechanisms for migrants and trafficked persons to report human rights abuses and corruption. Ideally, and in accordance with UNCAC, such complaints may be made to an independent body (or bodies) with a remit to prevent and respond to corruption. Second, consistent with UNTOC, appropriate protections for whistle-blowers and witnesses to corruption offences must also be provided to prevent potential retaliation or intimidation against them, their relatives, or persons close to them. It is important that border, immigration, and law enforcement officials work with smuggling migrants and trafficked persons to learn about their experiences, gather information as to how corruption facilitates smuggling and trafficking, and gain insights into the prevalence of corruption. In some situations, smuggled migrants and trafficked persons may be able to identify corrupt officials and provide evidence to support criminal investigations and prosecutions. Where this occurs, witness protection measures must be in place to protect smuggled migrants and trafficked persons from possible intimidation or retaliation.

11.5.3 Regular and Accessible Migration Avenues

As explained in Part 4, a major contributor to irregular migration and, in turn, opportunities for smugglers and traffickers are the lack of pathways for regular migration. While it is States' prerogative to maintain migration controls (consistently with their human rights obligations), opening further channels for regular

migration and improving the accessibility of existing ones is integral to reducing the market for irregular migration and its corresponding corruption risks. UNTOC and its Protocols require prevention measures that address the root causes and demands of smuggling and trafficking. As noted in the *Legislatives Guides* to the Trafficking Protocol, States should view prevention holistically and take into account issues such as migration and labour policies (UNODC, 2020, p. 79). UNODC (2021, p. 31) observes that 'policies and practices that promote safe migration in line with economic and demographic realities […] reduce incentives, opportunities and demand for traffickers and smugglers'. Such an approach also accords with the *Global Compact for Safe, Orderly and Regular Migration* (General Assembly 2018), voted for by eight ASEAN Member States (Singapore abstaining and Brunei Darussalam non-voting). The Compact (para. 21) commits States 'adapt options and pathways for regular migration in a manner that facilitates labour mobility [and] responds to the needs of migrants in a situation of vulnerability, with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration'.

11.6 Conclusion

Corruption has a pervasive negative impact on the ability of Southeast Asian States to combat trafficking in persons and the smuggling of migrants. It erodes border protection and immigration controls, weakens the protection of smuggled migrants and trafficked persons, and enables smugglers and traffickers to operate with impunity. It is clear that corruption, as a facilitator of smuggling and trafficking, must be combatted in order to strengthen border and immigration systems. At the same time, States must remain aware of the fact that restrictive border and immigration systems themselves can create intersecting markets for smuggling and trafficking and, in turn, create the conditions for corruption.

While most governments across the region have adopted a range of legislative and policy measures to combat trafficking, smuggling and corruption, with many laws mandating the protection and support to trafficked persons in particular, responses to these crimes still remain inadequate, incomplete, often problematic in human rights terms, and overly focused on stricter forms of migration control. Stronger efforts to address corruption, protect migrants, and implement regular and accessible avenues for migration are required, in accordance with States' obligations under international and regional instruments they are parties to.

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Chapter 12
The Politics of Forced Migration in Southeast Asia

Tri Nuke Pudjiastuti and Steven C. M. Wong

12.1 Introduction

Forced migration occurs within and across borders for highly compelling reasons. These include natural disasters, famine, climate change, environmental degradation, development induced displacement, and, of course, persecution and conflicts. In this chapter, forced migration is used in the last two senses, thus corresponding closely to the United Nations 1951 Convention Relating to the Status to Refugees (the Refugee Convention) and its 1967 Protocol (the Protocol). The fact that this term is required at all, rather than the commonly understood 'refugee', is a political matter, with some states steadfastly refusing to recognise the existence, legal or otherwise, of the latter.

Forced migration is deeply and concurrently enmeshed with the interests, aspirations, and competencies of nation states. The state refers to a polity with a defined territory, population, and government with the sovereign authority, instruments and means to administer the same through fiat and force. The nation, in contrast, refers to the real or imagined qualities that give the peoples within it a sense of identity and belonging (Anderson, 1983). These range from exclusive ethnoreligious centric, to inclusive liberal and civic forms. These two concepts are key to understanding the many dimensions and complexities of forced migration politics. In the case of Southeast Asia, nationhood appears especially cogent.

Throughout history, violent conflicts have been common when competing ideas of statehood and nationhood are heatedly contested. These escalate when the parties to the conflict are supported by other countries aligned according to the latter's

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strategic, political, and economic interests. Those caught up in the ensuing violence are then forced to flee persecution, atrocities, and death within and across borders, with women, children, the sick and the elderly as their greatest victims. The states they seek refuge in, however, may themselves be experiencing security and internal challenges of their own. These weigh heavily, shaping defensive, uncooperative or, at best, ambivalent and non-transparent policies.

In Southeast Asia, forced migration politics cannot be understood in purely abstract or normative terms, i.e., divorced from the complex milieu of political-social contexts and situations of its individual member states. The nation states of mainland and archipelagic Southeast Asia have all been party in one way or another to the lethal interplay of inter- and intra- state and national factors. Today, open inter-state conflicts are by and large avoided in favour of quieter bilateral diplomacy and negotiation. Behind borders, however, nation building, with ethnicity and religion as central elements, remains an ongoing process and play a significant role in the treatment of citizens and non-citizens (Suryadinata, 2015).

There has been a tendency for some scholars and advocacy groups to overlook the messy histories and present-day political and social divisions and constraints within and among states (see, for example, Tubakovic, 2019). Instead, there is assumed to be a Southeast Asian collective mindset by virtue of their membership of the Association of Southeast Asian Nations (ASEAN). ASEAN's longevity and global acceptance is certainly notable. For all its declarations and agreements, however, it is itself an imagined community, and one that is as fallible as others of its genre. These have been clearly and extensively documented by those who know the region well.

In this chapter, the differences of Southeast Asia's member states are highlighted. Whatever their aspirations and desired impressions, these states are as (if not more) dissimilar as similar, and they act accordingly. It then proceeds to examine two key episodes of forced migration: from mainland Southeast Asia (1975–1996) and Myanmar (1980s-present). The dynamics and some of the key differences between the two are noted. Following this, some of the realities forced migration politics at the regional and global and concludes with what might be the main takeaways. Nation states change when their perceptions of advantage and disadvantage do. The development of new norms and societal changes hold the hope to the evolution of their forced migration policies.

12.2 Southeast Asia: As Dissimilar as Similar

Except for Thailand, the pre-statehood histories of Southeast Asian states were shaped by the interests of their colonial powers (Abraham, 2020). As Croissant and Lorenz (2018, p. 6) note: "In Southeast Asian postcolonial societies, nation-building was the project of political and intellectual elites in the almost complete absence of a common sense of nation and culture." Not only were many fledgling democracies left with the task of integrating ethnic and religious minorities left behind but also a

large absence of civil and humanitarian values and traditions in the treatment of 'the other'—both within their borders and outside of them.

The aftermath of this were conflicts, some large scale and immediate, such as on the Southeast Asian mainland, while others, comparatively smaller and more drawn-out, were faced by archipelagic states. The latter included their own inter-state disputes, armed insurgencies, and ethnic-religious separatist movements such as in Mindanao (Philippines), Aceh (Indonesia) and three Southern provinces of Thailand. Each of these led to people movements crossing borders, forced or otherwise, and in the 1970s and early 1980s, Malaysia was a haven for migrants from all three. In the case of Myanmar, inter-ethnic conflicts, which predate independence, remain an existential challenge to the present day.

ASEAN has been widely cited as a key factor for ensuring peace and stability in the region. Its role, however, has not been instrumental in resolving conflicts and disputes but as a diplomatic mechanism to build political trust and confidence through cooperation (initially only economic) despite them. It would take almost 10 years before members were sufficiently assured to hold the first summit of leaders, another 34 years before this became an annual affair, and 42 years for the summit to be biannual. During this time, cooperation has greatly diversified, and member states today are working to create an ASEAN Community by 2025 comprising political-security, economic and socio-cultural pillars.

Southeast Asia has gained a reputation for economic dynamism, with exports and direct foreign investment figuring prominently. The region is promoted as a region of 656 million, with intra-regional trade and investment policies facilitating the economic growth and development. This, however, neglects important structural developmental characteristics. Singapore and Brunei, with a combined population of less than 1% of the total, achieved high income status in 2020, while Malaysia and Thailand, at 15% of the total, were upper middle-income status (World Bank 2020). The remaining six states of Cambodia, Indonesia, Laos, the Philippines, Myanmar, and Vietnam—comprising 86% of the region's population—remain categorised as lower middle income.

Per capita incomes in purchasing power parity terms vary widely. (Table 12.1) The UNDP's Human Development Index (HDI), which, in addition to standards of living factors in life expectancy and years of education shows that Indonesia, Laos, the Philippines and Vietnam, fall in the third quartile of the world's countries, with Cambodia and Myanmar in the bottom quartile. Where it can be stated that there is greater uniformity in the region is with respect to income distribution. The shares of national income of the bottom 40% of households are relatively similar, as are their Gini coefficients.

These differences do not capture the full extent of the political economic complexities within them. If there is one mindset that permeates the region, however, it is developmental statism. A developmental state is one where governments assume active roles in the planning and guiding of economic activities. Scholars have emphasized that government guidance of private sector activities (but also interventions), combined with external orientation, is what Southeast Asia learned from the

Table 12.1 Southeast Asia – Human development, income distribution & poverty

No	Country	2020 GNI/ capita PPP $	2020 HDI rank N = 189	% Income of lowest 40%	% Below national poverty	Gini coefficient
1	Brunei D	63,965	47	Na	Na	na
2	Cambodia	4246	144	Na	17.7	na
3	Indonesia	11,459	107	17.5	9.4	38.1
4	Lao PDR	7413	137	19.1	18.3	36.4
5	Malaysia	27,534	62	15.9	7.6	41.0
6	Myanmar	4961	147	18.6	24.8	38.1
7	Philippines	9778	107	16.6	16.7	40.1
8	Singapore	88,155	11	Na	Na	na
9	Thailand	17,781	79	18.4	9.9	36.5
10	Viet Nam	7433	117	18.8	6.7	35.3

Source: World Bank (2020)

economic successes of Northeast Asia, and that was, and is, responsible for their rapid economic growth and transformation.

The darker side of developmentalism is that it also leads to varying degrees of what has been termed predatory or rent-seeking behaviour. Predatory states naturally operate where the rule of law, control of corruption and government effectiveness are at their weakest. Here, World Bank (2020) indicators suggest that lower middle-income states also have the lowest scores in this regard. In terms of voice and accountability, Indonesia and the Philippines (regarded by many scholars as the region's only two electoral democracies) have the highest scores, followed by Malaysia and Singapore. This is supported by the Freedom House (2020) scores for civil and political rights.

The political elites of member states, especially when backed by the force of their militaries are, not surprisingly, the least sensitive to the freedoms and rights of its citizens, never mind those of forced migrants. Regimes of source states may even cynically view those fleeing as a way of ridding themselves of troublesome elements in the population. For those that have gained a measure of developmental success through external orientation, there are greater tensions. The ability to continue to perform is progressively harder (the so-called 'middle-income trap') especially with economic partners demanding not just national treatment provisions but also labour, environmental and, increasingly, human rights standards.

In short, the development needs and demands of the region are still widespread and real. These have a bearing on forced migration policies in terms of their perceived economic, social, and political costs. The extent of the rule of law, control of corruption and government effectiveness also vary widely in practice. These can, and are known to, be relevant towards the humane treatment of forced migrants. Less than optimal levels of voice and accountability and civil and political rights further mean that the consequences of actions are non-transparent and largely unaccountable.

12.3 Global Action, Unsettling Memories (1975–1996)

After the end of the Vietnam War in 1975, over 1 million people from mainland Southeast Asia fled their countries in the space of four short years (UNHCR, 2000). The US had formally arranged to resettle 120,000 Vietnamese and 5000 Cambodians in 1975 but this proved to be woefully inadequate. By 1979, despite 200,000 more having been resettled, 160,000 remained in Thai border camps, while about 180,000 were on islands of the Philippines, Indonesia, and Malaysia. In the first 6 months of that year, there were three new arrivals for every one forced migrant resettled and the ratio was growing. In June alone, there were 54,000 arrivals of 'boat people' and ASEAN as a block formally announced that they could not accept more arrivals and Malaysia and Thailand began pushing back vessels out to sea.

As highlighted earlier, Southeast Asian countries were still struggling with their own security aspects of state and internal nation building in the 1970s. It is important to note that their economies were deemed by the World Bank as either less developed or developing in status. In 1980, Malaysia's and Indonesia's US dollar per capita income was less than a fifth of the present, while Thailand's was just a tenth. The Philippines' economy was relatively the highest at a little less than a quarter of 2020 (IMF 2021).

No ASEAN state in 1979 had ratified the Refugee Convention or the Protocol. (The Philippines would do so in 1981 and Cambodia later in 1992). The facilities that they had been persuaded to offer by international agencies were fast outstripped by the rising numbers of arrivals. For example, Pulau Bidong, a tiny island off the east coast of Malaysia, had a carrying capacity of 4500. In June 1979, it was reported that 40,000 forced migrants were housed there (Refugee Camps, 2012–2014). Obviously, conditions in the overcrowded camp were extremely poor. Also, of concern were signs of better organisation and the use of larger seaworthy vessels by people smuggling networks.

Given the urgent humanitarian crisis, the UN Secretary General, Kurt Waldheim, convened a Meeting on Refugees and Displaced Persons in South-East Asia in July 1979 in Geneva at which 65 countries participated. At that meeting a "major breakthrough" was announced, with Indonesia and the Philippines officially announcing that they would host processing centres. The meeting officially underscored the fact that ASEAN would only allow boats to disembark on the condition that the occupants only stayed more than a specified period. This came later to be known as "open shores for open doors" but critics called it ASEAN's "passing of the buck". Whatever the case, the practice of pushing back boats was largely (but not totally) halted, and the UN High Commissioner for Refugees (UNHCR) was able to hold meetings with states to negotiate capacity and administrative improvements.

No commitments of resettlement places were made at the Geneva meeting. The international community was nevertheless fully engaged in funding the forced migrant centres and, most importantly, offering and processing resettlement places. These were vital but equally critical was the cooperation of Vietnam, which signed and implemented an Orderly Departure Programme (ODP) in 1979. The ODP

bolstered the confidence of first asylum states that fewer boats would be in the water, thus easing the strain on the processing centres. From 1980–86, the numbers of new arrivals fell below those resettlements, which went to 20 countries, led by the US, Australia, France, and Canada.

In 1987–88, however, there were new waves of boat arrivals. By this time, the international community showed little appetite for accepting more forced migrants, believing them to be driven by economic and not political motives. Unsurprisingly, first asylum states mostly responded by closing borders and pushing boats back out to sea, causing a second humanitarian crisis. This was discussed at a non-government dialogue on the side lines of ASEAN meetings in Bangkok by officials of the US, Australia, Thailand, and the UNHCR. Their draft, finalized in Kuala Lumpur, formed the basis for a second Geneva meeting in 1989 and the Comprehensive Plan of Action (CPA) for Indochinese Refugees (Casella, 2016).

Two controversial policy changes were embedded in the CPA. The first was that forced migrants arriving after a cut-off date were subject to refugee status determination, while those arriving before would continue to be resettled. This meant that there would be those who would not qualify for resettlement and would have to be returned to the source country. The second essential component of the CPA was the agreement of the source state, Vietnam, to take back those that had been deemed unsuitable for resettlement without imposing penalties and allowing UNHCR to independently monitor its implementation. This was seen to be the key to avoiding violating the non-refoulement principle but gave rise to objections by legal and political scholars, non-government organizations and even those in international humanitarian agencies themselves who were concerned that standards of refugee protection had been lowered.

That Vietnam was prepared to cooperate may say as much about the global and regional environmental conditions as its own policy enlightenment. Its main economic and military supporter, the (then) Soviet Union was weakening while tensions with China were rising. In any case, the CPA formally ended in 1996 with the repatriation of those who remained in camps in Indonesia, Malaysia, and Thailand to Vietnam.

In total, of the three million people that had fled from mainland Southeast Asia, 2.5 million had been resettled and half a million had been returned. Between 1975–95, ASEAN first asylum countries had given temporary refuge to some 1.4 million by land and sea, with Thailand bearing the major burden (53%), followed by Malaysia (18%), Indonesia (8%) and the Philippines and Singapore (6%) (Stange & Sakdapolrak, 2018).

The lessons learned from the two decades of forced migration from mainland Southeast Asia depend on the perspective adopted. International relief agencies hailed the extraordinary response by the international community, while expressing regret that concerns were not always consistent at the cost of lives lost at sea and the human suffering at the hands of pirates and human traffickers. Humanitarian and legal groups saw this as entirely avoidable were it not for the staunch refusal of ASEAN countries to offer anything more than temporary refuge (Robinson, 2004).

The lessons in Southeast Asian nation states have not been adequately studied and documented but invariably internalised would be the social, economic, and political considerations (especially costs) that had to be made amidst great policy uncertainty. A related argument is the belief that more favourable treatment of forced migration incentivises further flows (as was the case in 1987–88). This so-called 'floodgate' argument appeals to simple logic and is pervasive in many host countries, including those in Southeast Asia. It is an issue that humanitarian agencies, non-governmental organizations and donor countries know intimately, having to operationally address and work through them.

12.4 Global Outcries, Subdued Responses (Late 1970s – Present)

Even before the flow of forced migrants from mainland Southeast Asia had formally ended, another wave of forced migrants, though smaller, was growing due to political unrest, multiple armed conflicts, and ethnic persecution in Myanmar. Myanmar offers further insights into the local-national-regional-global nature of political forced migration. In the east, the affected states were Thailand which as a bordering state once again bore a brunt of forced migration, Malaysia, and Indonesia, while to its west, it was Bangladesh and India.

Resettlement efforts began in the late 1970s and 1980s, mainly from camps on the Thai border and Malaysia, but data is unavailable. From 2003–2020, however, it is known that a total of 217,100 Myanmar nationals, primarily the Karen but also smaller numbers of Karenni, Kachin, Chin and other ethnicities, were resettled, with the US taking the lion's share at 80%, and Australia and New Zealand accounting for 12% (UNHCR, 2021a). In contrast, the resettlement of the Muslim Rohingya was far fewer at 12,000 "plus" to the US as of 2017.

As of mid-2020, the UNHCR considered 1.9 million in Myanmar to be Peoples of Concern (POC), of which 1.6 million Rohingya accounted for 84% (UNHCR, 2021b). Of the balance, 104,000 of other ethnicities were internally displaced in Kachin and Northern Shan, and the 93,000 housed in nine camps on the Thai border adjacent to Kayah, Kayin and Tanintharyi states. UNHCR Malaysia reported that 153,000 forced migrants were from Myanmar, of which the Rohingya account for 101,000 (66%) and the balance of 52,000 from the various ethnic groups of Chin, Kachin, and other Western Myanmar states. The number of unregistered forced migrants, many of them children, are unknown. Since 2021, the situation has further devolved, with another 206,000 internally displaced person because of armed conflicts and unrest since the February 1 military coup.

Discriminatory policies had long been practiced against the Rohingya but in 1978, the Myanmar military (Tatmadaw) began a concerted operation of mass arrests and acts of violence, forcing 200,000 Rohingya to seek refugee in neighbouring Bangladesh before being repatriated. The situation worsened in 1982 when

Myanmar introduced a citizenship law that officially deprived the Rohingya of citizenship (Ostrand, 2014). After the 1988 nationwide protests and annulled 1990 elections, another 250,000 Rohingya in 1991–92, were driven across the border, and again in 1996–97 and 2012. During each of these incidents, atrocities against women and children were reported.

In 2012, US President Barak Obama made a historical visit to Myanmar, and again in 2014 when the country held the ASEAN chair. On both occasions, he spoke out on behalf of the Rohingya, calling for an end to their discrimination. In 2015, Myanmar held national elections, with National League for Democracy (NLD) of Aung San Suu Kyi winning more than half of all seats in both the upper and lower houses. There was widespread optimism that Myanmar had turned the corner on democracy and human rights, although long-time Myanmar watchers, and Suu Kyi herself, were more cautious about the course that progress would take.

As it turns out, the latter were right. The 2008 Constitution, under which the 2015 elections, had been contested reserved 25% of seats for Tatmadaw appointees and gave its Supreme Commander control over the home affairs, border affairs and defense portfolios, powers that could be used without parliamentary or judicial oversight. In the Rakhine State Parliament, the Arakan National Party garnered the most votes, followed by Tatmadaw appointees. Except for the appointment of the Chief Minister, the NLD was relegated to a minor political role in the state's affairs.

The year 2015 was notable for another reason. People smuggling networks from Bangladesh and Myanmar had been quietly operating for an unknown number of years, both by land (the so-called "Terror Road") as well as by sea. In that year, the mass graves were discovery on the Thailand-Malaysia border led Thai, Malaysian and Indonesian authorities to intercept boats from Bangladesh and Myanmar and push them back out to sea. This left some 6000–8000 stranded at sea without food or water and an unknown number perished at sea. Amidst the international outcry of what has come to be known as the Andaman Sea Crisis, separate meetings were quickly convened in Jakarta, Putrajaya, and Bangkok.

At the Putrajaya meeting, Indonesia and Malaysia relented by announcing that they would halt boat pushbacks and offer temporary shelter, again with the provision that the forced migrants were resettled in a year (Joint Statement of the Ministerial Meeting on the Irregular Movement of People in Southeast Asia 2015). Thailand did not agree to this but undertook commitments to rescue and resupply at sea. Countries provided financial assistance but offers of resettlement were limited. When Australian Prime Minister Tony Abbot was asked if Australia would provide resettlement places, his emblematic answer of "nope, nope, nope" was perhaps representative of countries at that time (Asian Dialogue for Forced Migration, 2016).

Any hopes for a lull were dashed in August 2017 when the bloodiest actions yet undertaken by the Tatmadaw and paramilitary groups caused around 740,000 Rohingya to flee to Cox's Bazar in Bangladesh. In contrast to previous episodes, there has been no success in their return from the UNHCR camps. As State Counsellor, Suu Kyi herself came in for international criticism for not speaking out

for minorities in general and the Rohingya in particular and it did not help her reputation when she chose, for what can only be considered political motives, to appear at the International Court of Justice at the Hague in 2019 to defend the actions of the Tatmadaw against accusations of rape, arson, and killing of Rohingya victims. She described "the conflicts as internal conflicts and said if human rights violations had occurred that would not rise to the level of genocide."

The plight of the Rohingya and the solidarity shown by members of the 57-member Organization of Islamic Countries (OIC) is an interesting political phenomenon that deserves more research. The matter is regularly on the agenda of OIC summits and states have supplied finance and material. Bangladesh, which maintains that they are Forcibly Displaced Myanmar Nationals (FDMN), has allowed them to reside in camps run by UNHCR with the assistance of other international humanitarian agencies and donor countries. Apart from Malaysia, Pakistan, Saudi Arabia, and the United Arab Emirates also house significant numbers of Rohingya. Yet there have been no collective discussions of the block offering resettlement places (Rahman, 2021).

In Malaysia, political Islam plays well in domestic politics with visas having been given to relatively small numbers of Bosnians, Palestinians, Syrians, Iranians, and others with capital and professional skills from the Middle East and South Asia. Those without visas, notably the stateless Rohingya, however, are afforded scant protection, little access to medical and education services, and are at constant risk of harassment and arrest. Despite this, Malaysia has remained a destination of choice among many Rohingya, partly due to the existence of family and community networks.

In Indonesia, the 2016 Presidential Regulation No. 125 addressed some humanitarian concerns such as the rescue of forced migrants and temporary protection in internationally funded shelters but not including resettlement thus leading to a state of what researchers have called a state of "permanent temporariness" (Missbach et al., 2018). Indonesia has had strong relations with the Myanmar government since the 1940s (Lang, 2012). Indonesian foreign policy prioritises non-intervention in its regional and multilateral relations. This prudence, however, is not without challenges because of domestic pressures from Muslim organisations for greater humanitarian actions (Adiputra & Missbach, 2021).

In contrast to forced migration from the mainland Southeast Asia, forced migration from Myanmar, and particularly the Rohingya, has not commanded the same level of global attention or coordinated responses. The return and repatriation of Rohingya to Myanmar after 2017 had seen no progress, much to the frustration of Bangladesh. Developed countries have been vocal in speaking out against their political persecution, funding the Joint Response Plans for the Rohingya Humanitarian Crisis, and providing bilateral assistance. There have been negligible offers of resettlement places, however, so that ASEAN states do not have the assurances of being first asylum states and an ODP-type scheme cannot be negotiated.

12.5 Regional and Multilateral Politics

In 2007, ASEAN member states adopted the ASEAN Charter which, for the first time since 1967, gave the organisation a legal personality. Article 14 of the Charter provided for the formation of an ASEAN human rights body and in 2009 the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established. AICHR was responsible for drafting a ASEAN Human Rights Declaration which, in 2012, was subsequently signed by the ASEAN Summit, the supreme policy-making body. Paragraph 16 of the Declaration clearly states that "everyone has the right to seek and receive asylum in another country based on the laws of that country and applicable international treaties" (ASEAN Declaration of Human Rights 2012).

The Declaration was well received and greatly enhanced ASEAN's reputation as a progressive regional organization. In international law, however, declarations are not legally binding but have the effect of norms setting and establishing principles that member states intend to work towards. Since 2012, there have been no further discussions on common regional positions and strategies on forced migration or any other articles in the Declaration for that matter. The Declaration's provisions thus remain, if at all, aspirational goals and it is unlikely that ASEAN will decide to adopt a regional approach and framework on forced migration any time soon (Petcharamesree, 2016).

Nor has there been a motivation by more ASEAN member states to concent to the UN Refugee Convention and Protocol. It is important to note that of the 193 members of the UN, three-quarters have signed and ratified the Convention and Protocol, including low and lower middle-income ones. Among ASEAN member states, only the Philippines and Cambodia are signatories, making the region an anomaly by international standards (Table 12.2).

Table 12.2 Southeast Asia states' ratification/signing of selected international instruments

	Country	1951 Refugees Conv. & 1967 protocol	1954 UN Conv. on statelessness	2000 UN Anti-smuggling protocol	2000 UN Anti-trafficking protocol	2015 ASEAN Conv. in trafficking in persons	2019 global compact for migration	2019 global compact for refugees
1	Brunei D	–	–	–	2020	2016	2018	2018
2	Cambodia	1992	–	2005	2007	2016	2018	2018
3	Indonesia	–	–	2009	2009	2016	2018	2018
4	Lao PDR	–	–	2003	2003	2016	2018	2018
5	Malaysia	–	–	–	2009	2017	2018	2018
6	Myanmar	–	–	2004	2004	2016	2018	2018
7	Philippines	1981	2011	2002	2002	2017	2018	2018
8	Singapore	–	–	–	2015	2016	Abs.	2018
9	Thailand	–	–	–	2013	2016	2018	2018
10	Viet Nam	–	–	–	2012	2016	2018	2018

Source: The Core International Human Rights Instruments and their monitoring bodies | OHCHR
Note: Conv = Convention

Interestingly, in May 2018, a coalition of Malaysian opposition parties, the *Pakatan Harapan*, won the right to form the government for the first time. Among the pre-election promises that had been made, largely at the behest of civil society organisations, were to sign and ratify the Refugee Convention and Protocol, along with other human rights instruments. This was later reaffirmed by the Prime Minister, Mahathir Mohamad, in his speech to the 73rd UN General Assembly that year. His government was preoccupied with its domestic reform agenda, but a parliamentary committee was established in late 2019 to explore the legislative requirements of accession. The *Pakatan Harapan* government, however, was replaced in January 2020.

While all ASEAN states have acceded to the UN Convention Against Transnational Organized Crime, only half of its members are parties to the supplementary Protocol on the Smuggling of Migrants by Land, Sea and Air (the Anti-Smuggling Protocol). All, however, have now acceded to the Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Anti-Trafficking Protocol), the last ones being Singapore in 2015 and Brunei in 2020.

The Andaman Sea Crisis of May of 2015 called for a regional response, and, in addition to the diplomatic measures described earlier, an Emergency ASEAN Ministerial Meeting on Transnational Crime (EAMMTC) was convened in July. This led to the issuance of an ASEAN Ministerial Declaration on the Irregular Movement of Persons in Southeast Asia in September. The Declaration expressed concern over the movement of persons and the "impact on the national security of the affected countries, namely Malaysia, Myanmar, Thailand and Indonesia" and agreed to include people smuggling on its agenda. It also urged for the early ratification of the 2015 ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP), one of the few legally binding instruments it has managed to agree on, as well as its Plan of Action.

By 2015, almost all ASEAN members already had national anti-human trafficking laws in place. (Brunei which would subsequently introduce one in 2019) National legislations and the ACTIP itself, however, were non-uniform and of varying standards (UNODC, 2017). Of equal, if not greater, concern was the question of enforcement. If the US State Department's Trafficking in Persons (TIP) Report is anything to go by, only the Philippines and Singapore fully met its minimum Tier 1 standards in 2021. Indonesia and Laos were in Tier 2, indicating that significant efforts were being made to meet the minimum standards, while Brunei, Cambodia, Thailand, and Vietnam were on the Tier 2 Watchlist (US State Department, 2021). Myanmar was in the lowest Tier 3 category, i.e., not making significant efforts to meet minimum standards, joined by Malaysia which had been downgraded from the Tier 2 Watch List the year before.

Meanwhile, the Bali Process as a consultation forum did not take direct action in relation to major displacement incidents. Its role in the 2015 Andaman Sea crisis was retrospective. The Sixth Bali Process Ministerial Conference (March 2016) affirmed the core objectives and priorities of the Bali Process through the adoption of the Bali Process Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crimes, where the scale and complexity of irregular

migration challenges, both within and outside the Asia Pacific region, were addressed. It noted how regional consultations and the establishment of the Bali Process Regional Support Office (RSO) strengthened practical cooperation in refugee protection and international migration, including human trafficking and smuggling, and other components of migration management in the region. As with any organisation, the Bali Process depends on its leadership to be visionary and proactive. Political relations between its two co-chairs, Australia and Indonesia, further appear to be a factor in inhibiting regional collective action from going beyond statements and declarations, and to ensure that responses to forced migration are tangible and timely.

Anti-human trafficking efforts impact forced migrants but do not address the latter's need for protection and welfare. In 2016, the global community was galvanised when all 193 members of the UN adopted the New York Declaration for Refugees and Migrants, which contained the elements of the Comprehensive Refugee Response Framework (CRRF) and paved the way for the negotiation of the Global Compact for Safe, Orderly and Regular Migration (GCM) and the Global Compact for Refugees (GCR). This first-ever framework and the two compacts were arguably the most important global developments since the 1951 Refugee Convention and 1967 Protocol. The new approaches taken by the CRRF were, first, to ease pressures on host countries and communities, second, enhance refugee self-reliance, third, expand third-country solutions and, fourth, support conditions in countries of origin for safe return.

The CRRF, GCM and GCR are also non-legally binding on states which, in any case, retain the rights to manage their affairs in accordance with their national laws and policies. Their value lies in the setting of international norms over time and articulation of principles worked towards. It was hoped that this would encourage developed countries to be as engaged in these humanitarian concerns as they were during the 1970s and '80 s. It was disappointing therefore that the US, under President Donald Trump, voted against both Compacts. Among European Union countries, Hungary, Czech Republic, and Poland voted against the GCM, while Hungary also voted against the GCR. Among ASEAN member states, Singapore abstained from voting for the GCM but voted in favour of the GCR, as did the others.

Throughout the twentieth Century, the US has not only resettled the greatest number of forced migrants but also exercised leadership, in concert with like-minded states, to encourage other states to do so. In the context of the Cold War (1947–91) with the (then) Soviet Union and its allies, democracy and human rights were critical to contrast the competing ideologies. One might have wished for a stronger role to be taken by the UN, but the institution depends critically on the five members permanent members of the Security Council, not all of whom take an expansive view of humanitarian issues. From 2017, anti-immigration sentiments spilled over to forced migration in the US, Australia and even among members of the European Union.

US President Joseph Biden in 2021 announced a ten-fold increase in refugee resettlements to 125,000 in the first year of his administration but there have not been clear indications as to whether the US will become a party to the GCM and

GCR. Immigration in general has become a divisive issue in US domestic politics and the resettlement of forced migrants is unfortunately conflated with it. Backing the global initiatives at a time when parties to the Refugee Convention and Protocol appear to be backsliding on their commitments will do much to ensure that the humanitarian agenda is preserved, not only in Southeast Asia but around the world.

The COVID-19 pandemic has put undoubtedly thrown a spanner into any movements to any further progress (Crawley, 2021). With member states now at various stages of success in managing it, forced migrants have been unwelcomed, with closure of borders and denial of boat landings. Within borders, the protection and treatment of forced migrants, never high to begin with, have further regressed (Crawley, 2021). This defensive stance will no doubt remain at least until there is a return to 'normalcy'. Even then, it remains an open question as to whether the informality under which forced migrants have been treated will remain or whether more formal (and stringent) measures will be taken.

12.6 Conclusion

The politics of forced migration is fundamentally conditioned by governmental elites acting in what they see as the real and perceived interests of nation states at the local, national, regional, and global levels. Where states are large, secure, and sufficient, they can provide humanitarian assistance and offer resettlement places. The former has been, and is, critical for the support of the Rohingya camps in Bangladesh and prevented much more chaotic outcomes. Southeast Asian states generally perceive of themselves as not having the resources, ability, or the luxury of distance to do so. This perception continues to be held despite 86% of the world's 82.4 million forcibly displaced persons being hosted by developing countries in 2020, with 73% being neighbouring countries (UNHCR, 2020).

The institutional capacities of states to implement their national interests is also an important consideration. Source countries in Southeast Asia may have incentives to permit citizens to leave owing to poverty and underdevelopment, or a means of getting rid of 'unwanted' or 'troublesome' elements of the population, usually ethnic and religious minorities. For transit countries, there may be hesitancy in acting as first asylum for fear of ending up as *de facto* long-term hosts, i.e., the "permanent temporariness" phenomenon. As elsewhere, camps on the Thailand/Myanmar border, for example, have existed for over four decades despite resettlements to third countries and some voluntary returns. Border closures since the annulment of 2020 general elections on 1 February 2021 have meant that the numbers in the camps have not swelled.

For the more developed states, especially those already relying on foreign workers, it may seem that the case for including forced migrants into their low-wage labour force is straightforward. Foreign worker intakes, however, are regulated by inter-governmental memorandums of understanding, visas determine lengths of stay and sectors of employment, while contracts set out remuneration and working

conditions. Forced migrants do not have similar legal status and their lengths of stay, particularly if they are stateless, are indeterminate. Regardless of their status, international law prohibits states from refoulement or sending them back to their countries of origin if they safety and treatment is not assured.

These, together with the inherent unpredictability of forced migrant flows, mean that Southeast Asian states remain cautious in adopting legal obligations towards forced migrants. The fact that Thailand and Malaysia do host forced migrant populations without formal policy announcements or change of laws deserves recognition. The political decision-making behind these 'off-the-book' actions have not been adequately studied and documented. While clearly suboptimal as forced migrants are not afforded even minimal levels of protection and welfare, and they are subject to discretionary actions and harassment by state actors, international humanitarian organisations and concerned countries nevertheless do recognise that the situation could potentially be far worse if this were not the case.

ASEAN is a useful for member states to defend their national interests but those expecting its many declarations, agreements, and conventions to be binding, translated into national policies, and implemented, even when not perceived to be in national interests, are often disappointed. Even for serious crimes such as human smuggling and trafficking there is a variety of practices. When there is leadership and forced migration is framed as a collective global endeavour, ASEAN members have shown a willingness to take more positive and cooperative attitudes and actions. This was the case when the UN took initiatives from 1979–1988 and 1989–1996 with respect to dealing with the problem forced migration from mainland Southeast Asia. This has not been as notable with respect to the ongoing Rohingya crisis. Likewise, the Bali Process, which is a consultation forum for countries of origin, transit and destination with the support of RSO, faces its challenges in developing strategies for solving the problem of forced migration in the Asia Pacific.

The GCM and GCR are norm setting and intended to encourage work towards the progressive achievement of long-term goals. The COVID-19 pandemic ravaging the region make the prospects of a more accommodating approach to forced migration particularly bleak in the near term, understandably, turning nation states inwards. It is vital that these efforts continue through and after this global challenge. As part of the GCR, the CRRF, is already being rolled-out in stages. As of 2021, Thailand is the only Southeast Asian state that is implementing programs, namely, by enhancing refugee self-reliance through education and supporting conditions for safe and dignified return to the country of origin.

These efforts can considerably improve the conditions on the ground with respect to provision of more services such as health, education, and housing to make up for the lack of accessibility by forced migrants. In other affected states, local civil service organisations are taking on these responsibilities out of religious obligations and social consciousness. Non-governmental think tanks and scholars are also seeking to influence their respective polities in adopting initiatives, many of them at the micro level, that will alleviate the suffering of forced migrants without comprising their state and national interests.

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