



# Exploring the Nexus Between Technologies and Human Rights

**Opportunities and Challenges  
in Southeast Asia**

**Edited by**

**Khoo Ying Hooi  
Deasy Simandjuntak**





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This book is the result of SHAPE-SEA's 2019 Commissioned Research Project on "Exploring the Nexus between Technologies and Human Rights: Opportunities and Challenges in ASEAN/Southeast Asia." The project sought to examine potential and current impacts of technologies on various aspects/issues affecting human rights in Southeast Asia. SHAPE-SEA collaborated with Southeast Asian scholars and practitioners to comprehensively identify and critically analyse harms and benefits of technologies towards the protection of human rights and fundamental freedoms in the region.

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# FOREWORD

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Throughout the world, technologies are increasingly changing ways in which individuals and societies interact, influence others, and enjoy rights and freedoms. In Southeast Asia, technologies have shaped ways that we develop and disseminate information about our experiences and identities. Furthermore, in recent times, technologies have helped defy political and social norms, and have broken structural, language and even, ideological barriers amongst individuals and groups. People who are silenced and powerless have found technology as an ally in their daily struggle. While technologies have contributed to the improvement of the protection of rights, in the meantime, it also raises serious questions about potential harms against human rights and freedoms.

In realising its mission to build a culture of human rights and peace through evidence-based research, education and informed policy advocacies, SHAPE-SEA is well aware of the power of technologies in supporting steps towards achieving programme goals. In fact, we've been utilising the Internet to reach more learners through our online platforms and digital library on human rights and peace and to enable virtual participation in our national and regional events. We are also greatly conscious about its negative effects, especially the ill-use of information to oppress the people, proliferation of anti-human rights sentiments on social media, violations of the right to privacy, and purging of human rights defenders.

Hence, this book on “Exploring the Nexus between Technologies and Human Rights: Opportunities and Challenges in Southeast Asia,” is an homage and our contribution to efforts in increasing awareness and strengthening understanding on existing and imminent impacts of technologies towards the protection of human rights and fundamental freedoms throughout the region.

We are most grateful to the Swedish International Development Cooperation Agency (Sida) for supporting this commissioned research project. Our heartfelt gratitude is given to our editors, Dr Khoo Ying Hooi and Dr Deasy Simandjuntak, for their excellent leadership in developing this book. Last but not the least, we deeply appreciate the time, efforts and expertise shared by our esteemed authors in producing their respective book chapters.

We fervently hope that this book, among the very first under the theme of technology and human rights in the region, will inspire more collaborations amongst academics and practitioners towards maximising opportunities, as well as, eliminating harms brought about by technologies towards our quest to mainstream human rights and peace discourse and praxis in all corners of our beloved region.

A handwritten signature in black ink, reading "Petchara S.", with a stylized flourish at the end.

**Dr. Sriprapha Petcharamesree**  
*Programme Chair*  
**SHAPE-SEA**

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# CHAPTER 1

## Introduction

*Khoo Ying Hooi and Deasy Simandjuntak*

### Background

Technologies are increasingly changing ways in which individuals and societies interact and influence others. In this information age, technology has the power to significantly affect the nature, frequency, speed, and cost of interaction in the world we live in and the way we live (Metzl, 1996; Schwab, 2016; Australian Human Rights Commission, 2018; Paladino, 2018). We are said to be in the Fourth Industrial Revolution, “characterized by a range of new technologies that are fusing the physical, digital and biological worlds, impacting all disciplines, economies and industries, and even challenging ideas about what it means to be human” (Schwab, 2016). Today’s popular “disruptors”, as the terminology is widely used in the response of the Fourth Industrial Revolution, such as Grab, Alibaba, and the like are now household names in Southeast Asia. These forms of “disruptors” were relatively unknown just a few years ago. Mobile technology, for instance, has spread rapidly around the world, as of 2019, according to Pew Research Centre, it is estimated that more than five billion people have mobile devices with more than half of them being smartphones. Applications such as Apple’s Siri provide a general landscape of the rapidly advancing artificial intelligence (AI) field, also known as the “intelligent assistants” (Schwab, 2016).

Since the late 1980s, the use of information, communication, and technologies (ICTs), has grown rapidly with the technology becoming increasingly user-friendly and accessible (Brophy and Halpin, 1999). Scholars and human rights organizations generally reach the consensus that technology has dual or multiple uses that can impact on society. For instance, a drone can transport blood to the accident scene in time to save lives (Cohn, 2017). But in Thailand and Myanmar, for instance, the government regulated the usage of drones due to the political challenges that they face (Parameswaran, 2018). Within the context of Southeast Asia, technologies have shaped ways that we develop and disseminate information about our experiences and identities. Furthermore, technologies have helped defy political and social norms and have gone beyond structure, culture, heritage, language, and even ideological barriers amongst individuals and groups (Barredo, & Ardivilla, 2018).

Southeast Asia is anticipated to be the fastest-growing Internet market in the world by 2020. Access to the Internet in the region is made possible by a combination of favorable

policies and technological advances that have made cellular communications affordable (Metzl, 1996; Paladino, 2018). People share information on social networking sites; of which Facebook and Twitter are among the most popular. Such technological, that brought unprecedented connectivity by allowing individuals and societies to gain access to knowledge and information and that transcend geographic and cultural boundaries, present an optimistic picture where technology should advance and promote human rights protection, however, its trajectory reveals that technology is a double-edged sword. Southeast Asia serves as a particularly interesting region, in the absence of a legal framework (Paladino, 2018) that allows free flow of information exchange, mainly due to the diverse political systems ranging from democracy to authoritarianism.

On the positive side, the proliferation of technology has brought about benefits to communities and societies. For instance, information technology systems enable information to be collected and disseminated in a rapid and cheaper way (Metzl, 1996; Brophy, & Halpin, 1999). This expansion of technology has brought change in many spheres of society, including the operational nature of the human rights organisations that have utilised technology as a tool for their advocacy work (Brophy, & Halpin, 1999). There are vast opportunities to advance human rights protection that can be used by the human rights non-governmental organisations (NGOs) (Metzl, 1996; Piraces, 2018), as human rights campaigns, nowadays, rely heavily on social media to push for accountability for human rights violations as they adapt to the informative society. For instance, technology is seen as a pathway to improving human rights in labour supply chains, where it is estimated that 30 million people currently work in forced labour (International Labour Organization and Walk Free Foundation, 2017). It enables an authentication mechanism that provides transparency in supply chains of corporations. There are many successful case studies, for instance, the Google Flu Trend, a form of disease surveillance that monitors the flu-related search terms to estimate influenza activity (Ginsberg, Mohebbi, Patel et. al, 2009). Technologies can also be used for empowerment purposes to reduce inequality and enable participation for groups who have been traditionally excluded.

However, on the negative side, mass developments in online platforms, artificial intelligence (AI), and automation at the same time raise doubts about potential harms against human rights and freedoms. There is a risk that the use of technologies (both hardware and software) may result in further economic and social inequalities and injustice (O'Neill, 2016). The growth of the giant economy, facilitated by technology, has contributed to changes in nature of work by increasing the availability of flexible positions that provide opportunities for some, while negatively affecting the livelihoods of others (Amnesty International, 2018). For instance, due to economic inequality, people in advanced economies are more likely to have mobile phones and are more likely to use the Internet and social media than people in emerging economies (Pew Research Centre, 2019).

While it is generally agreed that accurate information is necessary for the formulation of action in response to human rights violations, it is often not enough to lead to positive

action directly. It is increasingly common to see the tensions among the governments, societies and legal frameworks in adapting to technology's pace (Piraces, 2018). States across Southeast Asia have, at the same time, tightened their grips on cyberspace. In Vietnam, a new Cybersecurity Law is introduced to regulate content available on the Internet. Likewise, Singapore passed the Cybersecurity Act, which defines cybersecurity threats as, "threats to national security, defence, foreign relations, economy, public health, public safety or public order of Singapore" (Southeast Asian Press Alliance, 2019). All these moves by governments have broader implications for civil society development and human rights protection in the region. Mass collection of data could potentially lead to violations of the right to privacy and make it easier for governments to monitor the activities of activists arbitrarily. The use of technology to spread fake news and facilitate cyberbullying and violence, most of which are directed against women (Metzl, 1996; Amnesty International, 2018), has endangered one's personal security and freedom of expression.

Given the traditional interpretations of ASEAN norms and values such as sovereignty, non-interference, equality and independence, there have been concerns that some governments have used new technologies to violate human rights and this had gone unchecked. Most ASEAN governments also emphasized the notion of "state sovereignty" in order to conceal their own legislative weaknesses (Narine, 2012). This explains why many ASEAN governments started to regulate online activities under the names of protecting public order and peace. Although the regional mechanism of human rights, the ASEAN Intergovernmental Human Rights Commission (AICHR) has been created, references to human rights continue to raise the question of whether traditional interpretations of ASEAN norms are under challenge. ASEAN member states continue to show resistance (Narine, 2012; Poole, 2015), especially when it comes to human rights protection.

## Objective and Approach

Despite the challenges and instances of resistance in the region, new technologies prompted us to rethink our understanding of human rights issues. However, the nexus between human rights and technology remains underexplored (Land, & Aronson, 2018). The elaborated realities give rise to the critical questions that guided the direction of this edited book and explore the nexus between technology and human rights in the context of Southeast Asia: How can we defend and claim human rights in a technological landscape? What is the role of technological development in protecting human rights and freedoms?

Technology and society co-exist. Our technological devices have gradually integrated into our personal ecosystem, where it is listening to us, anticipating our needs, and helping us. The future of human rights will therefore be intertwined with the advancement

of technology, even at times when we do not ask for it (Schwab, 2016; Piraces, 2018). While human rights treaties do not prescribe detailed rules in respect of technology, UN documents and the UN Office of the High Commissioner for Human Rights (OHCHR) further interpret and elaborate on the intersect of human rights and technology (OHCHR, 2015). For instance, General Comment No. 34 in relation to Article 19 of the International Covenant on Civil and Political Rights (ICCPR) protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.

The contributions in this volume, therefore, while they are not exhaustive of all the themes and issues pertaining to the nexus between human rights and technologies in the globally interdependent world, are nonetheless good indicators of the most pertinent issues in the Southeast Asian context; issues are ranging from those which highlight the regulatory issues, such as debates over the right to be forgotten, cyberbullying of sexual minorities, the interconnection between access to health and pharmaceutical intellectual property rights, ASEAN's disability rights legal frameworks and workers' right in the digital ride-hailing sector, to those which highlight technology as instrument to protect and/or to challenge human rights, such as the role of the region's digital rights movements, the role of the internet in both the proliferation and mitigation of sex trafficking, and the role of social media in supporting and/or resisting extra-judicial killings.

This volume is therefore among one of the first which specifically addresses the interconnectedness of human rights and technologies in the Southeast Asian context. Albeit much having been written on the aforementioned issues, they were written in the context of other regions, such as Europe, Latin America, and Africa, or are comparative studies of different regional contexts. With regard to regulatory issues, for example, concerning workers' rights in the era of digital transformation, many are familiar with research conducted on the gig economy, digital labour, and platform capitalism such as that of Graham, Hjorth, & Lehdonvirta (2017) which compares the livelihood of digital workers in Sub-Saharan Africa and Southeast Asia, taking Kenya, Nigeria, South Africa, the Philippines, Malaysia and Vietnam as case studies, or on specific platforms such as workers of Uber and Amazon Mechanical Turk (Antonio, 2015); yet, very few focus specifically on Southeast Asian countries or on platforms which are specific to Southeast Asian such as the ride-hailing companies of Go-Jek or Grab. Further, on the issue of cyber-crimes on LGBT communities, a new study by McNeal, Kunkle and Schmeida (2018) highlights the situation in the US, whereas Powell, Scott, & Henry (2018) surveyed Australian and British adults with regard to digital harassment; yet few has been written taking into account the socio-cultural and religious context of specific countries, let alone those in Southeast Asia, in which ethno-religious identities inform politics and societies. Further, on the issue on the debate over the right to be forgotten, many research that has been conducted focuses on the context of the EU, understandably so, as it was first introduced as part of the EU - General Data Protection Regulation (EU-GDPR), or the

conflict between the regulations in EU and US; thus few has been written on such debate in Southeast Asia, especially in Indonesia, as the first Southeast Asian country which recognizes this right.

With regard to technology as an instrument to improve or impede human rights activism and protection, John Postill's seminal work "Nerd Politics" (2018) highlights the role of digital activists in inciting political change in the domains of data activism, digital rights, social protest, and formal politics. As a follow-up, a contribution on digital activism in this volume sheds light on challenges faced by digital rights advocates in Southeast Asia, and most importantly, is one of the very first empirical observations on this theme which specifically seeks to conceptualize Southeast Asia's "digital rights" by exploring its four spheres, as seen by digital activists and practitioners themselves. Similarly, while much has been written on the Philippines' "war on drugs" and the massive human rights violation with regard to the extra-judicial killings (for example Stansfield, 2017; Simangan, 2018), few have endeavoured to explore the role of social-media both in facilitating the violence, as well as a tool for activists to promote human rights, which is a topic of one of the contributions in this volume.

The goal of this volume is therefore twofold: academically, a better understanding of the interconnectedness of technologies and human rights will enrich the ever growing body of knowledge on the role of technology development in various aspects of human lives, especially in the context of Southeast Asia. However, more importantly, with regard to advocacy, a better understanding of the role of technology will open new possible avenues for the promotion of human rights. It is therefore crucial for stakeholders such as Southeast Asian governments, business, academia, and civil society to gain a better knowledge on the themes and issues that are relevant for the region. Whiles the themes and issues discussed in this volume are not exhaustive of the trends that will shape the future of this on-going discourse, we still hope that this can be a starting point to expand the understanding of the role of technology on human rights.

## Outline of Chapters

This volume is organized around the issues mentioned above. In 2009, ASEAN established the ASEAN Intergovernmental Commission on Human Rights (AICHR) to promote and protect the human rights of ASEAN people. Milestones include the establishment of a human rights mechanism, regional action plans on connectivity and on information and communication technologies, and on mainstreaming disability rights in the region. Shedding light on the lack of technical capacity as a major gap in addressing digital rights violations, Tan Jun-E in Chapter 2, *Digital Rights in Southeast Asia: Conceptual Framework and Movement Building*, builds a conceptual framework for digital rights by drawing from the experiences of digital rights advocates in Southeast Asia. She especially highlights four spheres of digital rights: 1) conventional rights translated to digital spaces, 2) data-centred

rights, 3) rights to access to digital spaces and services, and 4) rights to participate in the governance of the digital or the Internet. By using an empirical observation approach, this chapter looks into the digital rights movement in Southeast Asia, specifically on the work that advocates do and the challenges that they face. The chapter provides a baseline understanding of the current state of the digital rights movement, indicating gaps to be bridged, and providing the basis for future strategising in advocacy.

In Chapter 3, Sih Yuliana Wahyuningtyas's observation on *The Right to be Forgotten: Bargaining the Freedom of Information for the Right to Privacy?* untangles the discourse on the right to be forgotten, which was heretofore mostly observed in the EU (by the introduction of EU-GDPR) or in the 'EU vs. US' contexts. In the digital world, what has been recorded in the Internet, will stay in digital memory, which means that forgetting becomes difficult. However, there are circumstances where forgetting is needed. Yuliana's chapter aims to explore the balancing of the interest of the right to be forgotten against the protection of the freedom of information. Focusing on Indonesia, as the first Southeast Asian country ever to recognize the right, the chapter discusses the right's scope, the role of courts and data controllers. It furthermore compares the Indonesian experience with Malaysia and Singapore, which did not yet recognize the right.

In Chapter 4, entitled *These Abled ASEAN: Assessing How ASEAN Uses Technology to Promote Human and Disability Rights*, John Paul P. Cruz, using a holistic tool called the Disability Convention (DisCo), examines how disability-inclusive ASEAN uses technology to advance the rights of its people to political, economic, social, and cultural lives. In order to understand the intersection of technology and disability in ASEAN, this chapter assesses ASEAN's legal framework to gauge its inclusivity for people with disabilities.

Arman Raafi Seiff's *Seesaw Diplomacy: Balancing Access to Health, Intellectual Property Rights and Technology in Indonesia, Singapore and Malaysia* chapter examines the intersectionality between the access to health and pharmaceutical intellectual property where the interests of inventors who want to protect their patents and countries who need to provide accessible and affordable healthcare clash. This chapter analyses the balance between access to health, intellectual property rights and technology with a focus on Indonesia, Singapore and Malaysia by taking into account the relevant international legislation, regional frameworks and treaties to explore: 1) Southeast Asia's relationship towards intellectual property and access to health and 2) the experiences of Indonesia, Singapore and Malaysia in balancing intellectual property rights, access to health and technology.

As a "lucrative economic enterprise", sex trafficking is a problem in the Southeast Asian region. It has been reported by the UNODC 2013 that in Cambodia and Thailand alone sex trafficking has raked in US\$181 million, making it the second most profitable business in the region and in the world, after the smuggling of drugs. Theresa W. Devasahayam, in her Chapter 6 on *Sex, Crime and Deceit: Women and Child Trafficking and Sexual Abuse in the*



*Internet Age in Cambodia and Thailand*, investigates the role of the Internet in the trafficking of women and children for sexual exploitation in Cambodia and Thailand. The chapter examines the Internet as a technological tool: 1) for facilitating the recruitment and movement of trafficked women and child victims within the countries of Cambodia and Thailand and across borders and 2) to connect with potential clients locally and transnationally.

Collin Jerome's observation in the chapter *The Right to Be Me, Queerly Cyberly: Cyber Crime and Queer Individuals in Malaysia* uncovers a phenomenon affecting the lives of lesser-studied queer individuals in Malaysia. Despite the existence of cyber crime laws, concerns abound as to whether those laws provide sufficient and effective safeguards for its queer citizens against criminal depredations. With more and more people becoming victims of cyber crimes simply because *anyone* can be a cyber criminal so long as there is access to and sufficient knowledge of the Internet, the Chapter examines queer individuals' right to self-identify in the cyber world. It draws on poignant examples from 132 respondents through a range of real-life examples respondents recalled illustrating the argument.

Focusing on extrajudicial killings under the administration of President Rodrigo Duterte in the Philippines, Karl Arvin F. Hapal, in chapter xx on *Engaging the Trolls: Reactions of Netizen' and Philippine Human Rights Organizations on Extrajudicial Killings*, problematizes the prevalence of anti-human rights content and the explicit support for the war on drugs on Facebook by the netizens and the Philippine human rights organizations. Tapping into a retributive moral framework of *salvaging*, this chapter provides an analytical explanation to understand the explicit support for the war on drugs in social media, despite its horrific consequences. In addition, the Chapter also focuses on the social media responses and strategies of human rights organization Human Rights Online (HR Online), a volunteer-based organization whose main advocacy and competence are centred around digital advocacies and literacy, before and immediately after Duterte's anti-drug campaign was launched.

M. Falikul Isbah, in Chapter 9 on the *Workers' Rights in the Digital Economy: Assessing the Impacts of Technology Usage by Go-Jek and Grab in Indonesia*, explores potential human rights abuses and adverse impacts on workers of the on-demand transportation industry in Indonesia, looking into Go-Jek and Grab services. In the Indonesian context, the on-demand transportation industry plays a significant role in the country's new employment landscape. This industry has evidently become a promising new source of income for many people and an opportunity to increase their quality of life. Guided by the rights-based perspective in studying jobs in the gig economy, this chapter explores the impact of the technological usage of platform companies on workers and their human rights in Indonesia. Based on fieldworks done in Jakarta, Medan, and Mataram, Falikul's chapter addresses the potential abuses on workers' rights, the lack of work accident protection and broader social security, negative impacts of the algorithm-based order distribution, unlimited working hours, as well as cultural or religious constraints for female workers.

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## CHAPTER 2

### **Digital Rights in Southeast Asia: Conceptual Framework and Movement Building**

*Tan Jun-E*

#### **Abstract**

This chapter builds a conceptual framework for digital rights by drawing from digital rights advocates in Southeast Asia, and provides a snapshot of the digital rights movement in the region through the advocates' areas of work, challenges faced, and recommendations for advancing the movement. The conceptual framework proposes four spheres of digital rights, as follows: 1) conventional rights translated to digital spaces, 2) data-centred rights, 3) rights to access to digital spaces and services, and 4) rights to participate in the governance of the digital or the Internet. Empirical observation of the digital rights movement in Southeast Asia reveals that most work has been done on conventional rights translated to digital spaces. The lack of technical capacity is a major gap in addressing digital rights violations that require a deeper understanding of how the technology functions.

#### **Introduction**

With sixty percent of its population online<sup>1</sup> and many more getting connected every year, Southeast Asia has stepped into the digital era. Communication is revolutionised with the shrinking of time and space constraints, bringing benefits such as economic empowerment and access to knowledge at an unprecedented level. Yet, as the region reaps these developmental benefits (admittedly, at an uneven rate), the darker side of the digital world also manifests in the form of new authoritarian controls and corporate interests which are little understood by most of the people using the new technologies. Digitally transmitted misinformation is rife, and marginalised communities are targeted by cyber attacks and hateful speech. Civil society celebrates new capabilities and forms of organising afforded by the technology but is taken aback at the speed in which human rights violations are facilitated by the new platforms.

In general, civic space in Southeast Asia is limited and has been observed as narrowing (Gilbert, & Benedict, 2018). Governments in the region have kept a tight grip on its citizens, using mechanisms such as draconian laws to restrict civil freedoms. This

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<sup>1</sup> Source: Internet World Stats (2019). See Table 6 for more details.

situation continues into the digital era, where legal frameworks have been updated to cover communication on the Internet, such as anti-misinformation or cyber libel laws which have mushroomed within the region, to enable individual countries to tighten control on online speech. To further illustrate the point, none of the eight Southeast Asian countries assessed under Freedom House's *Freedom on the Net* report in 2018 obtained a "Free" status in terms of Internet freedom. Five Southeast Asian countries gained a "Partly Free" status (Cambodia, Indonesia, Malaysia, Philippines, and Singapore) while three countries were "Not Free" (Myanmar, Thailand, and Vietnam). As stated by the report, not only legal frameworks are employed - other mechanisms include the blocking of content and platforms, manipulating online discussions through astroturfing, and conducting technical attacks against human rights defenders.

To understand the bigger picture of how to defend and uphold rights in this digital age, a good place to start is to observe the frontliners who are already doing it. The first hurdle that we encounter in this endeavour, however, is the lack of understanding or conceptual clarity of what digital rights actually is (Dheere, 2017). This lack of clarity undermines any academic work building upon the concept, to be akin to blind men describing an elephant by touching different parts of its body. Therefore, the first objective of this chapter is to build a conceptual framework of what digital rights is, by drawing from insights provided by digital rights advocates themselves. After forming a clearer picture of digital rights, the second research objective is to look at the digital rights movement in Southeast Asia, specifically the work that advocates do and the challenges that they face in mainstreaming problems of digital rights issues to the rest of civil society and the wider public. As little has been written on this nascent topic in the context of Southeast Asia, this study provides a baseline understanding of where the digital rights movement is at the moment, focusing on gaps to be bridged, thus providing the basis for strategising further in advocacy work.

Data collection was done through focus group discussions with digital rights advocates, at the national levels of Malaysia, Thailand, and the Philippines, and also at the regional level. From the analysis of the data, it was found that digital rights is seen differently according to how "digital" is interpreted and if one approaches it from developmental angles of access and governance. The umbrella of digital rights therefore contains four spheres: 1) through viewing the digital as a space/spaces and thus digital rights as a translation of conventional rights to digital spaces, 2) through viewing the digital as data representation of physical entities, therefore focusing digital rights on data security and privacy, 3) access to digital spaces and meaningful participation, and 4) participation in the governance of the digital or the Internet. Currently, the lack of conceptual understanding of digital rights slows the growth of the movement and weakens the ability of advocates to work together or to communicate the importance of their work to a wider audience. A major gap found is the lack of technical capacity in the digital rights movement, and most of the work on the ground is focused on translating conventional rights to digital spaces.

In terms of theoretical contribution, this chapter contributes to theory building through untangling and abstracting distinct viewpoints that form the complex substance of digital rights, each coming with their body of existing work, historical context, and underlying assumptions. There is a widespread perception in the global digital rights community that Western countries are the subject of most digital rights research, and that research areas most compatible to Internet policy concerns of Western governments and corporations receive more funding and research attention (Remensperger, Schwartz-Henderson, & Cendic, 2018). It has also been pointed out that digital rights is differently perceived and defined in non-Western countries, so much so that local societies may resist the agendas of international digital rights organisations, which are mostly based in the West (Daskal, 2018). This chapter, drawing from perspectives of digital rights advocates in Southeast Asia, fills an important void in academic literature, and channels homegrown insights back into advocacy work in the region.

This study employs qualitative methodology, engaging digital rights and advocates from Southeast Asia in focus group discussions (FGDs) and interviews. A total of five focus groups were conducted: one for regional activists, one each for country-level activists in the Philippines and Thailand, and two for Malaysia<sup>2</sup>. One supplementary interview was held with a respondent with a regional perspective. The countries were chosen based on two factors: the level of activity in digital rights work and the ease of gaining access to the field, as most of the researcher's contacts of digital rights advocates were based in these three countries. Only three countries were chosen to represent national perspectives in Southeast Asia due to resource limitations in conducting fieldwork. As displayed in Table 1, there was a total of 24 respondents. Data collection was performed in July 2019 in Manila, Kuala Lumpur, and Bangkok. The focus groups were facilitated by the researcher and audio-recorded. Respondents were informed of their rights as research subjects through an informed consent form.

Table 1: Details of Data Collection

Data collection sessions	Location	No. of Respondents
Regional focus group	Manila	5
Philippine focus group	Manila	7
Malaysian focus group #1	Kuala Lumpur	2
Malaysian focus group #2	Kuala Lumpur	4
Thai focus group	Bangkok	5
Supplementary interviews	Bangkok	1 (regional)
Total number of respondents		24

<sup>2</sup> A second focus group was held to accommodate those who cancelled for the first.

The sessions lasted an average of three hours, with the time length varying based on the number of participants. The questions can be divided into two main sections: digital rights (definition and digital rights issues in the region/country), and the digital rights movement (areas of work, challenges, strategies, and recommendations). In the first section, because of the broad nature of the questions, discussions were structured using a workshop style letting the participants express their opinions on post-it notes, clustering the post-its according to theme, and finally using them as discussion points. The second section was conducted in the style of a conventional FGD.

## ***What is Digital Rights?***

### ***Digital Rights in the Literature***

What is “digital rights”? While “digital rights” has been used in the context of digital rights management, i.e., in managing intellectual property of digital content (e.g., Van Tassel, 2016), this is not what this paper is interested in. Instead, we are looking at digital rights in the context of rights advocacy in the digital era. While the term has been used in academic papers and in practice, the definition of the concept is elusive, as this review has only been able to find one comprehensive definition of digital rights. In a paper that details a process of mapping the legal landscape for human rights online, Dheere provides a working definition of digital rights, with the goal of establishing a reference point of whether a law can be considered to affect digital rights or not:

*“Digital rights” describe human rights – established by the Universal Declaration of Human Rights, UN resolutions, international conventions, regional charters, domestic law, and human rights case law – as they are invoked in digitally networked spaces. Those spaces may be physically constructed, as in the creation of infrastructure, protocols and devices. Or they may be virtually constructed, as in the creation of online identities and communities and other forms of expression, as well as the agency exercised over that expression, for example, management of personally identifiable data, pseudonymity, anonymity and encryption. Such spaces include but are not necessarily limited to the internet and mobile networks and related devices and practices. (2017, p.12)*

Dheere emphasises that this definition is a work in progress, and no other definition has been found so far. This should not be an indication of the lack of interest in the term or that it is seldom used – indeed, digital rights has been used widely as a term for advocacy, but rarely defined by the actors who use it, as observed by Dheere. It has been argued that digital rights has not emerged as an academic field of its own, because most academic writing on it is not anchored in strong theoretical frameworks, but drawn mainly from empirical observations: on the opportunities and threats to established human rights standards brought about by ICT, on case studies of digital activism, and on norm-setting for human rights protections in the online space (Joergensen & Marzouki, 2015, cf. Dheere, 2017).

As the area of digital rights remains nebulous, some studies on the topic anchor their work on existing frameworks or guidelines instead, mostly in the form of Internet/digital bills of rights or charters, which provide sets of norms and principles agreed upon by various constituencies through stakeholder consultations (Gill, Redeker, & Gasser, 2015; Dheere, 2017; Daskal, 2018; Redeker, Gill, & Gasser, 2018). For example, the *Charter of Human Rights and Principles for the Internet* by the Internet Rights & Principles Coalition (IRPC) outlines ten general Internet rights and principles and provides a breakdown of these rights in 21 articles, using the Universal Declaration of Human Rights (UDHR) as a framework (Internet Rights & Principles Coalition, 2018). Another framework that is oft-mentioned is the *APC Internet Rights Charter* by the Association of Progressive Communication (APC), which organises 31 rights by seven themes.<sup>3</sup> There are many such charters and attempts to create “magna cartas” of sorts of Internet rights. In a comparative study of principles for governing the Internet, UNESCO (2015) identified more than 50 Internet-specific declarations and frameworks. In another attempt on analysing “digital constitutionalism” or initiatives that “seek to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet”, Gill et al. (2015) identified 30 such initiatives and collected a list of 42 rights which they categorised into seven themes<sup>4</sup>.

Gill et al. (2015) found that freedom of expression, privacy rights, and the right of access to the Internet were the three most featured out of the 30 digital constitutions studied (27, 26, and 24 times out of 30). Freedom of information, as well as transparency, and openness (of Internet governance processes and of networks), were other focal points which were covered by more than two thirds of the documents analysed (22 times out of 30). Indeed, some studies or documents have found it expedient to narrow down their scope to the top two to three rights and to move along with their analytical work or practical advocacy (Daskal, 2018; Global Network Initiative, 2017; Hope, 2011; Kumar, Prasad & Maréchal, 2017). This may be sufficient if the purpose of the authors is to look specifically at freedom of expression and privacy rights, however, most discussions do identify these choices as main or representative foci of digital rights or human rights in the online space. The challenge then seems to be the lack of a theoretical or conceptual framework to define the boundaries of digital rights, compelling researchers and advocates to choose the rights that are most representative and forgoing some other rights that are deemed less central.

The concepts of digital rights and Internet freedom have been operationalised for the purposes of ranking corporations and countries on their performance of upholding rights in the digital or online space. The Corporate Accountability Index, produced yearly by Ranking Digital Rights, for example, ranks a selection of the most influential Internet,

<sup>3</sup> Accessible at [https://www.apc.org/sites/default/files/APC\\_charter\\_EN\\_0\\_1\\_2.pdf](https://www.apc.org/sites/default/files/APC_charter_EN_0_1_2.pdf)

<sup>4</sup> 1) Basic or fundamental rights and freedoms, 2) General limits on state power, 3) Internet governance and civic participation, 4) Privacy rights and surveillance, 5) Access and education, 6) Openness and stability of networks, 7) Economic rights and responsibilities.

mobile, and telecommunications companies on their policies and practices that affect their users' freedom of expression and privacy.<sup>5</sup> The *Freedom on the Net* report, produced by Freedom House, is also an annual report which produces country reports and ratings on Internet and digital media freedom based on three categories: 1) obstacles to access, 2) limits on content, and 3) violations on user rights<sup>6</sup>. These reports provide a useful, up to date, and comparative understanding of the global digital rights situation. While the operationalisation of the concepts in these reports does help in concretising the concepts, they focus on the measurement of a list of indicators and do not dive deep into the conceptualisation beyond what is needed for practical application. At the time of writing, Ranking Digital Rights is refining its methodology to include human rights harm in targeted advertising and artificial intelligence, which provides an indication of where digital rights violations are heading towards, but does not situate them within a systemic, big picture framework of digital rights. From the literature review, it is clear that there is much interest in the field of digital rights, however, its development is hindered by the lack of a strong theoretical framework. The next two sections attempt to address this gap.

### ***Building a Conceptual Framework***

During the FGDs, digital rights activists and advocates were asked what “digital rights” meant to them and what would be important to include in a definition of digital rights. They were instructed to write down their thoughts on pieces of paper, and then to stick the notes onto the wall. A discussion was facilitated with the group based on the notes posted. In all focus groups, the notes exhibited a similar pattern of two types of notes: overarching statements and specific rights and issues that the participants thought should be included as part of digital rights. Table 2 provides a representative sample of these notes<sup>7</sup> from all the focus groups.

<sup>5</sup> More information can be found here: <https://rankingdigitalrights.org/index2019/report/index-methodology/>

<sup>6</sup> The report can be found at <https://freedomhouse.org/report/freedom-net-methodology>

<sup>7</sup> Notes with the same meaning have been omitted.



Table 2: What is Digital Rights? Overarching Statements and Specific Rights and Issues Collected from Focus Group Discussions

A. Overarching statements	B. Specific rights and issues
1. Human rights as it is effected in digital space and technologies	B1 Access to government and other services online
2. Ensure human rights online are same as offline	B2 Access to information
3. Civil, human, labour, consumer rights in the digital environment	B3 Access the Internet
4. Digital rights are human rights	B4 Access to hardware/software
5. Basic principles protecting representational entities in digital spaces	B5 Right to assemble
6. Protecting the analogue by protecting the digital	B6 Freedom of expression online
7. My rights (currently given and fighting for) being reorganised on the Internet and other ICTs	B7 Privacy and data security
8. Based on the Internet Rights & Principles Coalition, Philippine Declaration on Internet Rights and Principles	B8 Control and ownership over personal and organisational information
9. Rights that protect against violations of freedoms upheld	B9 Consumer rights added to digital devices
10. Rights by design	B10 Robust copy left/right understanding, and more access to porn
	B11 Right to seek joy and pleasure
	B12 Right to be consulted on policy issues
	B13 Informed consent on participation
	B14 Safety to participate
	B15 Right to exist free from violence
	B16 Digital governance
	B17 Right not to be discriminated
	B18 Right to information (fair use)
	B19 Access for all
	B20 Right to understand, know, access, create, control the digital (environment, infrastructure, things)
	B21 Privacy from the onset
	B22 Right to publish without interference or fear of reprisal
	B23 Right against hateful speech, harassment
	B24 The right to know how our data is used
	B25 Data flow
	B26 Digital inclusion
	B27 Data protection
	B28 Freedom from surveillance

From discussions on the overarching statements, some observations arose, forming the initial thoughts on the conceptual framework. A key point that stood out is that the distinction between “digital” and “online” was not always clear. Two pairs of polar opposites were often mentioned: online versus offline, and digital versus analogue. In some groups not much distinction was made between the first pair and the second pair, conflating online with digital, implying offline as analogue. However, some groups did unpack these concepts, with the participants emphasising that digital and online are distinct. For example, a respondent stressed that a key card or a facial recognition system to permit access to an office may not be “online” or connected to the wider Internet,

however, these are digital devices that make use of digital technologies and therefore are still considered as “digital”. It is worth mentioning that the conceptual fuzziness between online and digital is present also in academic literature. The terms of digital rights and Internet freedom, for example, have often been used interchangeably to refer to the same thing<sup>8</sup>.

The nuance between “online” and “digital” points at two different views of what “digital” means, forking the discussions on the topic into two directions. The first is to view the digital and online as spaces which stand separate from spaces that are analogue, or offline (e.g., “human rights as it is effected in digital spaces and technologies” (A1), “ensure human rights online are same as offline” (A2), and “civil, human, labour, consumer rights in the digital environment” (A3)). In this viewpoint, the translation of existing human rights into these spaces is the basis of digital rights – one respondent claimed that there are no new rights, only a different application and interpretation of existing rights into digital spaces.

The second viewpoint sees the digital as a data representation of physical entities. A definition provided by another respondent, drawing from his organisation’s understanding of digital rights, was that digital rights are “basic principles protecting representational entities in digital spaces” (A5). In this view, digital rights infringements on individuals happen when their data is mistreated, hence, one “protects the analogue by protecting the digital” (A6). These two views of the digital can be applied to some of the rights listed in Section B of Table 2, as rephrased and categorised in Table 3. The separation of these two different paradigms of the digital enables us to achieve a clearer view of digital rights according to different standpoints. One view seeks to adapt existing rights into a different space, and the other addresses “new” rights that focus on the centrality of digital data.

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<sup>8</sup> One example from the literature can be seen in a paper by Remensperger et al. (2018) titled “Using research in digital rights advocacy”, subtitled “Understanding the research needs of the Internet freedom community”, implying that digital rights and Internet freedom are one and the same.

Table 3: Two Different Paradigms of “Digital” and Associated Rights

Digital as spaces	Digital as data representation of physical entities
<input type="checkbox"/> Rights to freedom of expression, association and assembly online <input type="checkbox"/> Right to consumer protection <input type="checkbox"/> Right to seek joy and pleasure <input type="checkbox"/> Right to exist free from violence, hateful speech, and harassment <input type="checkbox"/> Right to not be discriminated <input type="checkbox"/> Right to have informed consent on participation	<input type="checkbox"/> Right to data privacy <input type="checkbox"/> Right to freedom from digital surveillance <input type="checkbox"/> Right to data ownership and control <input type="checkbox"/> Right to data security and protection

There are certain rights mentioned that do not fall within the digital paradigms. These are rights that pertain to the access to, and the governance of the digital (see Table 4). Access and governance can be grouped together under a developmental paradigm, as access is one of the key concerns of information and communication technologies for development (ICT4D), and governance has to do with the contestations of power to define the direction of the development of digital environments.

Table 4: Two Different Paradigms of Digital Development and Associated Rights

Access to the digital	Governance of the digital
<input type="checkbox"/> Right to access state and other services online <input type="checkbox"/> Right to access the Internet <input type="checkbox"/> Right to access information and content <input type="checkbox"/> Right to access hardware/software	<input type="checkbox"/> Right to participate in digital governance processes or be consulted on Internet policy issues

## Four Spheres of Digital Rights

The framework proposed therefore includes four spheres, organised by two sets of paradigms as discussed in the previous section: the digital, and the developmental (See Table 5). The framework provides a structure to think about digital rights and is not a neat categorisation of each individual right; certainly, some rights may belong to more than one of the spheres. Through thinking about digital rights from these four spheres, we are able to draw from their respective areas of academic literature. From the data collected from the focus groups, it is also apparent that each sphere comes with its own implications and challenges. The following sections provide further elaborations. As one can dive as deeply into each sphere as one wants to, here I will only provide an idea of what the sphere entails as far as it makes sense within the scope of this paper, combining the insights from literature and from the data collected.

Table 5: Four Spheres of Digital Rights

Paradigm	Digital Paradigms		Developmental Paradigms	
Sphere	Conventional rights in digital spaces	Data-centred rights	Access to the digital	Governance of the digital
Description of sphere	Rights of individuals in digital spaces / on the Internet	Digital data that represents physical entities	Access to digital spaces and meaningful participation	Digital and Internet governance
Examples of rights	<input type="checkbox"/> Rights to freedom of expression, association and assembly online <input type="checkbox"/> Right to consumer protection <input type="checkbox"/> Right to seek joy and pleasure <input type="checkbox"/> Right to exist free from violence, hateful speech, and harassment <input type="checkbox"/> Right to not be discriminated <input type="checkbox"/> Right to have informed consent on participation	<input type="checkbox"/> Right to data privacy <input type="checkbox"/> Right to freedom from digital surveillance <input type="checkbox"/> Right to data ownership and control <input type="checkbox"/> Right to data security and protection	<input type="checkbox"/> Right to access state and other services online <input type="checkbox"/> Right to access the Internet <input type="checkbox"/> Right to access information and content <input type="checkbox"/> Right to access hardware/ software	<input type="checkbox"/> Right to participate in digital governance processes or be consulted on Internet policy issues

### *Conventional Rights in Digital Spaces*

It has been repeatedly mentioned, both on the ground and in academic works, that the UN Human Rights Council states that, “the same rights that people have offline must also be protected online” (Kumar et al., 2017). From the FGDs, it is clear that this forms much of the thinking of Southeast Asian advocates when they consider digital rights.

What are digital spaces? In 1996, John Perry Barlow<sup>9</sup> wrote a Declaration of the Independence of Cyberspace, considering “cyberspace” as a global, borderless, free, and liberated social space that is formed of “transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications, [...] a world that is both everywhere and nowhere, [...] a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth, [...] a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.”<sup>10</sup> The romantic and idealistic description of a brave new world free from powers that be and structural constraints is further from reality than ever in the mainstream online world of today. Instead, with the advent of social media, linking our virtual identities with our real world connections, digital spaces can be seen as some sort of “digital togetherness” (Marino, 2015) in which people can connect in social spaces online which are not bound by geographical or time limitations but ultimately be rooted within socio-political and cultural structures of the physical world. It would be good to be reminded at this juncture that not all digital spaces are online – for instance, one’s collection of electronic books in her e-book reader is within a digital space but may not be connected to the Internet.

In digital spaces, rights, as outlined by the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), should still stand or be modified to suit the specificities of the spaces afforded by new technologies. While freedom of expression online is often singled out as representative in the set of rights that must be protected in the digital space, it is only one of the many rights under the UDHR, and these rights should be viewed as a system and not be divisible (Joergensen & Marzouki, 2015). At a different level, the UDHR, while often cited, is only one of the frameworks to organise rights. Discussions in the regional focus group pointed out that there are other frameworks that can be used, based on social justice, democracy, or feminist principles (see the Feminist Principles of the Internet<sup>11</sup>), for instance. As each framework would have its own limitations, the diversity of frameworks is not seen as a problem but to contribute to the overall discussion of what digital rights are.

It should be pointed out that digital spaces do not exist in a vacuum but are shaped by state and market forces. As expressed by respondents of the study, on one hand, Southeast Asians face challenges from the state, imposing draconian laws onto digital spaces. On the other hand, they are subjected to using online platforms which have community guidelines and moderation by tech companies which are culturally removed

<sup>9</sup> John Perry Barlow was an American poet, essayist, and political activist. He co-founded the Electronic Frontiers Foundation, one of the first digital rights organisations, and served on its board of directors until his death in 2018.

<sup>10</sup> The declaration was written in response to the enactment of the Communications Decency Act in the US. Full text accessible at <https://www.eff.org/cyberspace-independence>.

<sup>11</sup> See <https://feministinternet.org/en/principles>.

from the region and do not provide enough resources to handle issues such as cyber harassment or account hacking. Most of the digital spaces online, especially popular social networks sites, are developed and maintained by private entities such as Facebook. The platform features are designed by these companies, which have a disproportionate amount of control over how people communicate and engage with each other on their platforms, from a technical point of view (such as the algorithm that determines the news feed) or a policy point of view (such as the use of real names). Users have little say in these decisions and are compelled to play within the rules of the game if they want to be part of the network.

Besides considering state and non-state actors that dictate the rules of engagement in digital spaces, digital technologies themselves come with certain technological affordances which sometimes exacerbate wrongdoing. Doctoring images and spreading rumours, for instance, can be done with minimal cost and to great effect; something which could not be done in the pre-digital era. More sophisticated cyber attacks come in the form of hacking and taking over online presences, or seizing control of one's digital resources, or intercepting communication with surveillance tools. In certain cases, access to justice is hampered by the lack of capacity of law enforcement when it comes to digital rights issues. A discussion in one of the focus groups in Malaysia illustrates the point that, in certain cases, violations of rights online are not taken as seriously as offline violations. In a specific case, a woman who received multiple death and rape threats online had reported the case to the Malaysian police, whose first recommendation for her was to log off the Internet, implying that the threats sent to her would not affect her security if she did not read them. Upon deciding to pursue her case, she was instructed to sift through thousands of hate comments and profiles to capture the most salient attacks that would then be investigated by the police. This is not an isolated incident as other cases of online violence have been handled similarly, suggesting the police's reluctance or incapability to protect citizens' safety online.

Despite their shortcomings, digital spaces are still important spheres for exercising civil rights, especially in the situation of countries with closed civic spaces (Vietnam was given as an example) or marginalised, and persecuted communities (such as LGBTIQ communities in Malaysia). As digital spaces afford more freedom than physical spaces, these communities exercise their rights as much as they can within the digital spaces in order to expand the access to these rights within offline and analogue spaces.

### ***Data-Centred Rights***

“If you can make sure that the data that represents a person is protected in a way that it cannot be weaponised against him, you are essentially protecting the human rights of that person,” said one of the respondents. This has been worded in a different way in the literature: by “turning citizens into data doubles,” corporations and governments have been able to conduct “social sorting and alter access to resources and life chances,

producing inequality and discrimination” (Hintz & Milan, 2018, p. 3943). The data representation of entities goes beyond individuals. Technological advances such as smart home applications enable us to build data models of homes to control their security and ambience; in smart cities there are sensors deployed or data collected in other ways to give us a treasure trove of data which can analyse and moderate traffic, air pollution, crime rates, and so on. Measurable characteristics and behaviour of physical entities are abstracted into data representations, enabling a multitude of usages with societal implications.

Data protection, security, and privacy therefore becomes the centre of this set of digital rights, with the understanding that digital technologies enable efficient collection and analysis of data, to “good” and “bad” ends. While we will not dwell on philosophical questions of what good and bad are, there are certain baseline agreements. Bad data practices have been observed to include mass gathering of data without transparency and accountability (sometimes illegally and unethically) and the increased use of that data in algorithmic decision-making, which involves the masses but is often opaque and unaccountable. Good data practices, on the other hand, protect and promote human rights and social justice towards achieving sustainable development (Mann, Devitt, & Daly, 2019).

The datafication of society has brought about implications at a global scale. For one, there is the use of data for surveillance both for the ends of corporate interests and state control. Surveillance capitalism (Zuboff, 2015) has emerged as a new form of market capitalism, set to surpass previous forms that were based on products and services, or financial markets and speculation. Zuboff explains that surveillance capitalism involves the following model: 1) companies push for more users and collect user data and data from users’ online behaviour, 2) the data is analysed through artificial intelligence (AI) and machine learning, 3) these analysis are converted into products that predict human behaviour, and 4) prediction products are refined into products that convert human behaviour. As can be imagined, the ability to change human behaviour is highly coveted, and can have many consequences ranging from making sales to fixing elections. Hintz & Milan (2018) flatly state that data-based surveillance is a brand of “Western” authoritarianism in the digital realm that is institutionalised in law and normalised in society through popular culture, with implications no less powerful than “classic” authoritarian practices in targeting civil society and democratic institutions.

From a Southeast Asian perspective, some of the issues that were mentioned in the FGDs include the mass collection of citizen data through national identification and/or biometric systems, massive data breaches of citizen information, blanket and targeted digital surveillance, and the lack of public awareness of the importance of keeping their data safe and private. Data flows are transnational, as most popular services used are not local companies, with servers located all over the world. Respondents pointed out that users of the services have no control over their own data and how it is used by



corporations. In almost all focus groups the threat of China was mentioned, not only in light of Chinese surveillance technologies and ideologies that are being pushed to authoritarian governments within the region, but also scepticism that Southeast Asian governments would have the abilities to protect their citizens' data against external surveillance by China.

At the national level, respondents offered insights of increased collection of citizen data by the state, through "objectifying the individual with numbers, whereby sometimes the numbers are more important than the individual", as put by a respondent. In the Philippines, the law to put in mandate the universal adoption of a national identification system is highly debated. On one hand, it provides the convenience of administering state services, but on the other hand a log is kept of where the ID holder has used the card, thus collecting and anchoring one's digital trail to one ID number. Advocates voiced their scepticism of the ability of the government to prevent data breaches. In the Thai focus group, a respondent opined that much of the state procurement of systems and technologies for mass collection of citizen data is vendor-driven, which is to say that the data is collected without any immediate goal and is not done in a critical manner. In Malaysia, concern was expressed on the imminent inclusion of one's mobile phone number into the information of one's national ID, which links different datasets by default, making it even easier to form a digital profile of the individual.

### *Access to the Digital*

About 60% of Southeast Asia's population is connected to the Internet, with uneven access across the region, as shown in Table 6. The top four countries of Brunei, Singapore, Thailand, and Malaysia have more than 80% of their populations online, while the bottom three of Laos, Myanmar, and Timor Leste have only a third of their populations online. These figures have to be considered against the population size, as Indonesia with its vast population has more than 300 times the number of Internet users in Brunei, even if its Internet penetration is only 53.2%. Respondents pointed out that access is not only about basic infrastructural access but also about quality of service and affordability, as well as literacy in how to maximise the access to connectivity.



Table 6: Internet and Facebook Penetration in Southeast Asia

	Population (2019 est)	Internet users	Percentage of Internet users out of population	Facebook users (31 Dec 2018)	Percentage of Facebook users out of population	Percentage of Facebook users out of Internet users
Brunei	439,336	416,798	94.9 %	350,000	79.67%	83.97%
Singapore	5,868,104	4,955,614	84.5 %	4,300,000	73.28%	86.77%
Thailand	69,306,160	57,000,000	82.2 %	46,000,000	66.37%	80.70%
Malaysia	32,454,455	26,009,000	80.1 %	22,000,000	67.79%	84.59%
Vietnam	97,429,061	64,000,000	65.7 %	50,000,000	51.32%	78.13%
Philippines	108,106,310	67,000,000	62.0 %	62,000,000	57.35%	92.54%
Indonesia	269,536,482	143,260,000	53.2 %	130,000,000	48.23%	90.74%
Cambodia	16,482,646	8,005,551	48.6 %	6,300,000	38.22%	78.70%
Laos	7,064,242	2,500,000	35.4 %	2,200,000	31.14%	88.00%
Myanmar	54,336,138	18,000,000	33.1 %	16,000,000	29.45%	88.89%
Timor- Leste	1,352,360	410,000	30.3 %	390,000	28.84%	95.12%
Region- wide	662,375,294	391,556,963	59.11%	339,540,000	51.26%	86.72%

Source: Internet World Stats, 2019<sup>12</sup>

It can be seen in Table 6 that most of the Internet users in Southeast Asia are connected to Facebook. One observation that arose from a respondent was that social media was a main pull factor for much of Southeast Asia's population to connect to the Internet. According to the respondent, prior to the rise of social media, most of the digital rights work focused on information and communication technologies (ICT) for development (ICT4D), which is to see ICT as a public good, and champion issues along the lines of Internet access, digital economy, distance learning, etc. With the mass adoption of Internet connectivity and increased participation of the public and private sectors, the narrative of digital rights and funding priorities within civil society shifted towards a rights-based framework.

It is true that most of the discussions in the focus groups did not zero into Internet access, even if the data shows that there is still much room for improvement in connecting the

<sup>12</sup> <https://www.internetworldstats.com/stats3.htm>

region. This could be due to the fact that all of the focus groups were conducted in the major cities with high Internet penetration. Instead, access was discussed from some other levels, such as from the point of view of the right to access digital spaces and services. Sometimes access is blocked by the state in terms of Internet shutdowns or blocking of websites – an example of the latter was given of Malaysia’s blocking of a fan fiction website, Fanfiction.net, which is popular among women and gender minorities as a space to explore creative writing and erotic literature. Sometimes access is not blocked, but is a result of negligence when entire communities are excluded because technologies are not designed to accommodate them. For example, automatic teller machines (ATMs) in Malaysia are currently not designed for the blind, and in the process of phasing out human bank tellers with ATMs, the blind’s access to banking becomes increasingly difficult.

Discussions also brought up digital products and services that force the consent of the users in accepting the terms and conditions before they can access them. An example is the common practice of having to agree to all of the terms of use when participating on digital platforms or using certain devices, or otherwise lose access to the benefits offered by connectivity or a smart phone that one just bought. The principle of the matter is similar with another example provided by a Philippine respondent on his inability to apply for a passport, if he did not opt in for a national identity card, which in his perspective meant that he would have to provide his data in exchange for access to state services.

One more interesting example that arose from the discussions with regards to access is the case of *Free Basics*. Free Basics by Facebook is a free service for partial access to the Internet (to certain designated websites including Facebook) for communities that did not have access to the Internet before. In Southeast Asia, Free Basics is available in Cambodia, Indonesia, Laos, Philippines, Thailand, and Timor Leste<sup>13</sup>. It was pointed out in the context of the Philippines that users of Free Basics only read the headlines of links in their Facebook newsfeed, as they would have to pay to visit the actual pages linked. The unintended consequence of this partial access is the incentivisation of clickbait and misleading headlines, fuelling the spread of misinformation, as sensational headlines get shared even if the content of the article is of low quality or has nothing to do with the title. This issue falls under net neutrality, which is one of the many ways that the Internet can be fragmented into connectivity islands through technological developments, governmental policies, and commercial practices (Drake, Cerf, & Kleinwachter, 2016). The next section on governance addresses issues like these.

## ***Governance of the Digital***

Beyond working on issues of access and driving digital innovation, the real challenge of the digital era is the governance of the digital. Digital governance, as defined by Floridi,

<sup>13</sup> <https://info.internet.org/en/story/where-weve-launched/>

is, “the practice of establishing and implementing policies, procedures, and standards for the proper development, use and management of the infosphere,” (2018, p.3) with the infosphere defined as, “that special place [...] that is seamlessly analogue and digital, offline and online” (Floridi, 2018, p.1). The main right, connected to the governance of the digital, is the right to participate in the governance processes that shape the digital space, to make policy decisions on issues that have been alluded to in the previous sections.

The governance of the digital is no simple matter, involving multiple state and non-state actors, from many layers. Governments perform certain governance functions such as regulating the industry and ensuring that digital technologies are used lawfully. In the private sector, risks of rights violations (in terms of freedom of expression and privacy rights) can happen across the entire value chain of the ICT industry, as mapped out by Hope (2011), who identified risk drivers across eight segments of the ICT industry<sup>14</sup>. Zooming into the governance of the Internet, an important subset of digital governance, a wide range of global players participate in the policy processes including the defining of protocols and standards and managing critical Internet resources<sup>15</sup>.

The wide-ranging issues of digital governance from human rights to cyberwarfare provide a dizzying number of possibilities for policy interventions. However, the policy directions differ depending on which vision of the digital one is working towards – there are at least four visions, according to the geopolitics of digital governance (O’Hara & Hall, 2018). There is the Silicon Valley view of an open and transparent Internet with data and software portability and interoperability, the European vision of a so-called “bourgeois” Internet where bad behaviour is contained and privacy is protected, the Chinese authoritarian Internet that holds extensive surveillance and regulation of citizens’ behaviour would ensure a harmonious society, and the Washington D.C. angle of protecting online resources and intellectual property for monetisation. Other proponents (countries pointed out are Russia, Iran and North Korea) exploit the openness and vulnerability of the Internet for misinformation and hacking, creating another dimension for the evolution of the Internet’s possible futures.

Southeast Asian digital rights advocates mainly work at national levels, such as mobilising to oppose draconian cyber crime laws, or providing input to local ICT policies. Beyond that, much of digital or Internet governance happen outside their sphere of influence, given that they are far removed geographically from the geopolitical centres or from tech companies that design, develop, and dictate the terms of use of online platforms and other digital technologies. Users have little say in how the companies that provide digital

<sup>14</sup> The eight areas are the following: 1) telecommunication services, 2) cell phones and mobile devices, 3) Internet services, 4) enterprise software, data storage, and IT services, 5) semiconductors and chips, 6) network equipment, 7) consumer electronics, and 8) security software.

<sup>15</sup> More information on these processes and participation mechanisms can be found in a guide by the Internet Society, accessible at <https://www.internetsociety.org/wp-content/uploads/2017/09/ISOC-Internet-Ecosystem.pdf>

spaces are run, “short of boycotting the product”, as put by a respondent. Some digital rights advocates also view the rise of Southeast Asian tech companies with trepidation, pointing out that these companies are bound by data protection and privacy regulations of their own country, which the advocates view to be not as stringent as laws in developed countries.

## **The Digital Rights Movement in Southeast Asia**

While scholars have written about various aspects of digital rights and related violations in Southeast Asia (e.g., Liu, 2014; Laungaramsri, 2016), the digital rights movement itself has not been documented much within the literature. This is the first such attempt to give a snapshot of the movement within the region, drawing from insights of national-level and regional-level digital rights advocates and activists within Southeast Asia. All of the following observations come from the FGDs unless otherwise stated.

There are eleven countries within Southeast Asia with varying levels of progress in their advocacy on digital rights. Naturally, the digital rights movement as a smaller subset of civil society within a country would reflect the characteristics of the country’s civil society. From the impression of one of the respondents, the most active countries appear to be the Philippines, Indonesia, and Myanmar – groups have galvanised behind various digital rights issues and worked together on governance issues. In Thailand and Malaysia, there are pockets of activism happening, but mostly ad hoc and issues-based. Cambodia, Laos, and Vietnam as a cluster of countries have civil societies that are fractured; some segments are more closely aligned with the government, hence, there is limited resistance towards state violations of digital rights – there are champions of issues but not a movement per se. In Singapore, Brunei, and Timor-Leste, there is no perceived digital rights movement; while Singapore and Brunei have a weak civil society in general, Timor-Leste as the youngest country in Southeast Asia has a civil society that is focused on other developmental priorities.

There is not much of regional advocacy in terms of digital rights. Respondents have attributed the lack of a regional voice to some few factors. Firstly, as a region with diverse cultures and tongues, the digital rights movement faces language barriers in understanding what is happening in each country, which obstructs movement building. For instance, a non-Thai speaking respondent who lives in Thailand expressed that it is difficult to understand the dynamics of what is happening, as most of what is translated to English is just a summary. Another respondent asserted that a joint movement would have to first start at the national level and move on to the regional level because of the language barriers, as opposed to Latin America which can mobilise across borders in a more efficient manner, with fewer language-related challenges.

Secondly, there is no viable platform to advocate for digital rights issues at the regional level common to the Southeast Asian states. While there is the inter-governmental

Association of Southeast Asian Nations (ASEAN), there was unanimous agreement that ASEAN does not work well as a platform to champion for digital rights – the principle of non-interference in ASEAN<sup>16</sup> meant that any issue would be referred back to the national level. The lack of faith in ASEAN as a platform draws also from the discouraging experience of civil society in attempting to interface with the association for more than a decade, with not much to show as progress. The Asia Pacific Regional Internet Governance Forum (APRiGF)<sup>17</sup> was mentioned as another platform to push new ideas at the regional level, however, it was pointed out by a respondent that governmental officials from Southeast Asian countries do not participate in that forum; even when they do speak on the panels they usually come in their individual capacities. This was contrasted with East Asian government representatives who do participate and defend their positions, which leads to a more fruitful engagement.

In terms of movement building across the region, a notable effort is the COCONET Southeast Asian Digital Rights Camp, held in Yogyakarta, Indonesia in October 2017 by EngageMedia, the Association for Progressive Communications (APC), and the Southeast Asian Press Alliance (SEAPA) with seven other partners<sup>18</sup>. The camp gathered 105 digital rights “experts, journalists, activists, artists, technologists, researchers and film-makers”, about 80% of them from Southeast Asia, with 5-15 participants per country<sup>19</sup>. Some outcomes of the event were increased cross-country networks and collaborations at small scales but which are nonetheless important for a new movement. COCONET 2 is happening in November 2019, with a COCONET 3 planned within the pipeline.

Across all focus groups there was agreement that digital rights is not mainstreamed within the rest of civil society. Different issue areas are able to mobilise different sectors of civil society. For instance, media freedom groups are natural instigators or allies on freedom of expression online, and women and children’s groups have a stake in online safety. However, digital rights as an umbrella issue attains scarce attention, as civil society focuses on their main mandates and priorities (such as environmental work, refugee and migrant issues, public health, etc.) that preceded the new and unfamiliar threats brought about by digital technologies.

<sup>16</sup> The principle stems from the notion of respecting the sovereignty of each member state to manage its own internal affairs, and has been enshrined within the Treaty of Amity and Cooperation in Southeast Asia of 1976.

<sup>17</sup> APRiGF is an annual conference to foster multistakeholder discussions on Internet governance at the regional level of Asia Pacific, and also serves as a platform to aggregate discussions of national Internet Governance Forums of countries within the region.

<sup>18</sup> Including Empower (Malaysia), Myanmar ICT for Development Organization (MIDO), SAFENET, and PurpleCode Collective (Indonesia), Thai Netizen Network, WITNESS, and the Cambodian Center for Human Rights.

<sup>19</sup> The outcomes report can be accessed here: <https://www.engagemedia.org/CoconetShortReportFinal.pdf>

## *Areas of work*

As a comprehensive account of areas of work on digital rights would require a mapping exercise that goes beyond the scope of this study, this chapter provides some broad strokes of trends and observations gathered from the FGDs, which future work can build on. From the FGDs, there is agreement that the Southeast Asian civil society focus mostly on online freedoms of expression and information; somewhat due to reactions of civil society towards the encroachment of draconian laws into digital spaces. Media freedom organisations are equipped to deal with these issues, together with the existing clout of civil society championing for civil freedom issues. Another area that has been well-covered is online safety in the way of gender-based violence online, cyber-bullying and trolling, or digital security training for human rights defenders and marginalised communities. These issues tend to have a larger buy-in from the concerned publics because the narrative is clear cut and builds on legacy problems of the past. Other issues that have generated discussions within civil society include data collection and retention, due to massive data breaches; digital surveillance is an issue of concern but most point out that stories of surveillance are mainly anecdotal and based on hearsay, with no substantial evidence to base advocacy on. However, these discussions have not moved beyond civil society into mainstream public awareness.

Access to the Internet, as one of the earlier issues in terms of ICT for development, seems to have fallen out of favour when it comes to advocacy work, possibly due to a shift in funding priorities, but also because governments have taken over the responsibility to connect their citizens to the Internet. Some consumer groups had been working on quality of service and affordability in the past, as well as the free and open source software movement which sought to promote access to non-proprietary software, but these groups are not as active anymore within the region, or are disconnected with civil society that is more political. Overall, it seems that the discussion has shifted beyond basic access, to include issues, such as clear language in informed consent, digital literacy, and web standards for accessibility for people with disabilities.

In terms of issues of concern that are not addressed enough, technical attacks on civil society rank highly. These technical attacks come in the form of Distributed Denial of Service (DDoS) attacks, interception of data through fake cellphone towers (IMSI-catchers such as Stingray), supply chain attacks, and so on. Artificial intelligence and other ways of manipulating big data are also considered difficult and are scarcely discussed, when there are other immediate concerns that violate digital rights. In general, digital rights advocates find it difficult to advance in issues that are shrouded in state or corporate secrecy, such as surveillance, biometrics and national identification systems, organised astroturfing, arbitrary website or account take downs, and so on.

In terms of strategies employed for advocacy work, a wide range was mentioned, from policy advocacy to capacity building. All of the focus groups at the national level

mentioned some form of engagement with governments, whether through consultations or through multistakeholder meetings such as Internet Governance Forums. Digital security trainings for human rights defenders or high risk and marginalised communities are common. In all of the countries within the sample, large scale online campaigns have been organised against draconian law-making, affecting digital rights, such as Thailand's fight against the amendments of the Computer-related Crime Act which garnered more than 300,000 petition signatures (according to figures by Human Rights Watch (2016), even though a respondent put the figure at 370,000)), Malaysia's Internet Blackout Day against Section 114A within the Evidence Act (Cheong & Yeap, 2012), and the Philippines in their crowdsourcing of a Magna Carta for Philippine Internet Freedom in opposition to the Cyber Crime Act 2012 (York, 2013). In most of these instances, the campaigns were successful in generating public awareness and conversations, even if many did not lead to a change in policy direction. There has also been work on protecting civil society with technical support and defense, as well as attempts to link civil society with tech communities, even though these areas of work are limited compared to other areas.

### ***Challenges Faced***

In terms of challenges that are specific to digital rights work, an oft-mentioned one is the lack of understanding of the topic, within civil society and also by the general public. Within civil society, digital rights work has an "inconsistent constituency", according to one of the respondents. As people do not completely understand what digital rights is, participation in the advocacy is ad-hoc and reactive, based on issues that crop up. Change is difficult to sustain without a strong core movement, and when resources within civil society are spread thin. There is a "sheer lack of digital rights activists" - on one hand, some advocate on digital rights issues without seeing themselves as advocates for digital rights, and on the other hand digital rights issues are fragmented, and those who are working on specific issues (for instance, online gender-based violence) without identifying with the larger movement end up working with the same people repeatedly, without connecting their work with other issues such as data collection and retention.

On top of that, the lack of digital literacy within the wider circle of human rights defenders means that activists continue to use third party platforms with problematic privacy and data policies, inadvertently contributing to corporate and state surveillance; lax attitudes towards personal and organisational digital security also mean that they would compromise themselves and their stakeholders if their devices or systems are compromised. Without a clear understanding of digital rights, human rights defenders and their funders end up perpetrating practices such as the indiscriminate collection of stakeholder data without a data retention policy or a data security plan.

Digital rights advocates find it difficult to communicate their work, which compounds the problem of the lack of awareness in the general public. Sometimes the issues do not bring immediate consequences and are just potential violations that may happen in



the future, such as the case of indiscriminate data collection vulnerable to future data breaches, which makes it difficult to generate support for the cause. Digital rights activists tend to “shortcode” their communication with underlying assumptions (such as the value of privacy or the importance of data protection) which may not relate to stakeholders outside of the movement. The result adds to the silo effect and digital rights advocates end up preaching to the choir, reaching those who are already converted – as the general public continues to overshare on social media and give out their personal information without much concern.

Even within the digital rights movement, there is a lack of technical expertise, as most of the advocates come from civil society and not from a technical background. There are a few organisations that work with or are run by tech professionals, but more often than not digital rights issues are taken up as programmes and focal areas by organisations which have an interest in certain areas but may not have the technical capacity to deal with the digital aspect of digital rights. As such, advocacy work stagnates at a level of obtaining the low hanging fruits such as conducting digital security training workshops (through outsourcing to a small pool of available trainers) or networking events on topical issues. When digital rights violations include technical attacks, civil society does not have the capabilities of defense or offense.

Language barriers also affect digital rights work. At one level, English is the main language used for cross-border work. Those who do not speak the language will find themselves at a disadvantage, whether during civil society forums at the regional or international level, dealing with platforms such as Facebook when reporting problems, or when accessing digital security helplines set up by international NGOs. Participation in Internet or digital governance is even harder when language-related barriers include technical jargon that even good English speakers would have difficulties understanding. At another level, even within countries themselves there is a diversity of languages being used, fragmenting communication.

On access to funding, there are mixed responses. On one hand, it is acknowledged that digital rights as a field has been attracting donor funds in the past five years and will probably continue to do so, as more and more people get connected to the Internet and human rights violations in digital spaces continue to mount. On the other hand, CSOs appear to have difficulties accessing these funds. An example given by respondents in Thailand is that sometimes the funding is offered in an amount that surpasses the managerial capacity of smaller organisations to manage, therefore placing the funds beyond their reach. Another point mentioned in the Malaysian group is that funding for digital rights is usually project-driven and core funding is few and far between, making it difficult for organisations to run their day-to-day operations and pay living wages to their staff. In the Philippines, it was mentioned that the lack of resources makes it difficult to acquire new technologies, to test, experiment, and learn on.



On challenges faced by digital rights advocates that are common to the wider Southeast Asian civil society, these include difficulties in registering and running an organisation, politics within civil society, and the narrowing civic space in general. Organisations that are not registered then lose access to funding as well due to most funders' policies to give only to registered organisations. Civil society organisations get entrenched in the issues that they set out to solve and that they already have expertise in. There is often no exit strategy or resources to move to newer issues, hence, the adoption of digital rights issues is slow. In general, smaller local civil society organisations are often personality-driven, with weaker institutions compared to their corporate counterparts, and fail to attract good talent.

A respondent opined that people in the region are more interested in bread and butter issues, relegating civil freedoms to a lower priority – making the promotion of digital citizenship or the rights and responsibilities of being a citizen in the digital space even harder. A bottom-up approach in pressuring the governments to change the law based on principles of civil freedoms is therefore very difficult, whereas issues framed from an economic point of view would be much better received.

### ***Recommendations to Improve the Digital Rights Movement***

There are a number of recommendations that digital rights advocates offer as what would improve the movement in Southeast Asia, as follows:

- *To communicate the relevance of digital rights issues to the wider civil society and other stakeholders.* It was mentioned often that digital rights activism happens in silos and that the same faces appear in the same issue-based forums repeatedly. The concerns of digital rights activists should be conveyed to the wider civil society in a manner that would relate the issues to the stakeholders – for example, case studies on digital rights need to frame violations in a manner and language that would be understandable and relatable to the general public. Advocates should also reach out to communities who are likely to be sympathetic towards digital rights issues, such as activists who are power users of social media for their causes, or communities who are interested in digital media, such as hackers, gamers, or free and open source software enthusiasts.
- *To push for a wider education of digital literacy and digital rights to the public.* Although digital technologies are now widely taught in universities and schools, most of the lessons focus on the application of the technologies and not deeper issues such as philosophy and politics of technology. In incorporating these overlooked perspectives, the younger generation can be inculcated to think more critically about the impacts of technology use. It is also vital to educate the older members of the public who tend to be holders of power and policymakers on these issues or those who tend to be less savvy in using technology in a safe and responsible manner.

- *To have more movement building and collaborations at the regional level.* This would bring multiple benefits, such as knowledge transfer and capacity sharing, and soliciting support from the international community when individual countries are facing crises. It was also mentioned that governments within the region learn from each other in terms of authoritarian measures, and so digital rights advocates should form networks to collaborate. While there are some individuals within the Southeast Asian region with the knowledge and experience in participating in Internet governance forums, this knowhow needs to be mainstreamed within the movement for effective policy change.
- *To increase the involvement of the tech community within the digital rights movement.* The gap between the digital rights movement and the tech community needs to be bridged, as the expertise from the tech community is much needed to provide the movement with the knowledge of the technicalities of digital rights, technical support upon cyber attacks, and tools to facilitate some digital rights work, such as apps to combat fake news, or to maintain connectivity when mobile signals are jammed during demonstrations. For this to happen, there has to be more outreach to the tech community to sensitise them for human rights, and to entice them to contribute their skills into the area. The case of Taiwan was given as an example of active involvement of hacktivists in its digital rights movement, who have the combination of the technical skills and understanding of social issues.
- *To increase the technical capacity within the digital rights movement.* For some digital rights issues, especially technical topics such as data security on various technologies, technical experts are needed to analyse the societal implications of technology. At the moment, even though there are organisations doing some work in this area, the lack of technical expertise is a major gap within the region to propose or oppose policy directions. The digital rights movement needs tech professionals for more policy research, advocacy and recommendations, as well as to conduct more workshops and capacity building within civil society. Organisations should hire their own technical personnel, which would then be a basis of putting together a collective of technical professionals within civil society. Another suggestion was for civil society organisations to organise themselves into a membership organisation or cooperative which offers support for technical needs.
- *To improve access to funding.* Funding structures need to be diversified to include core or operational funding. Regional or bigger organisations can work on obtaining big grants and subsequently breaking it down to sub-grants to channel funding to local partners. Funders should also work on simplifying reporting, and understand that some aspects of digital rights work, such as building digital literacy, are long term efforts which may not have immediate impacts that can be measured. The reality on the ground is that many Southeast Asian digital rights activists do not register their organisations because of overly burdensome requirements, hence, barring them from receiving funding – an aspect that should also be considered by funders.

- *To support digital rights organisations with capacity-building on the administrative and financial management aspects of running their organisations.* As new organisations are being set up to advocate for digital rights as an emerging issue, these organisations need support and training in terms of managing projects, human resources, cash flow, and so on. Incubators have been suggested, or even the pooling of secretarial resources, in order to ease organisations from administrative bureaucracy and enable them to focus on their advocacy work.
- *To increase the amount of research and documentation that originate from within the region.* Although there are reports generated by international organisations which touch on the realities within the region (such as the *Freedom on the Net* report by Freedom House), there is a lack of regional-based reports and studies that focus on improving digital rights advocacy in terms of concrete strategies. Homegrown research would be able to better incorporate Southeast Asian cultural and political contexts, as well as the perspectives of regional activists into strategy-building. It was also mentioned that those who attend international conferences should bring the insights back to the local communities in order to build capacity, whether in the form of reports or presentations.
- *To seek out more platforms for the mainstreaming of digital rights.* National Human Rights Institutions (NHRIs) at the country levels were mentioned as potential platforms for mainstreaming, and also the ASEAN Intergovernmental Commission of Human Rights (AICHR). Free trade agreements and their negotiations may be good transborder platforms to champion digital rights. Also somewhat overlooked by Southeast Asian digital rights advocates are multistakeholder platforms such as the Internet Society, the Internet Corporation for Assigned Names and Numbers (ICANN), or the Internet Engineering Task Force (IETF), mainly from the perspective of inserting digital rights into web standards and hard coding ethical considerations into the Internet's architecture.

## Conclusion

Many of the challenges within the digital rights field in Southeast Asia stem from the lack of a conceptual understanding of what digital rights is. Without a clear vision of the big picture, the movement ends up being fragmented into silos working on individual issues instead of working across issue areas to generate greater support. Advocacy is reactive instead of proactive due to the lack of a coherent framework to support strategy. Communication of problematic issues to the wider civil society and the general public is also weakened, leading to a slow growth of the movement itself.

The conceptual framework proposed within this paper aims to address the gaps mentioned. From the focus group discussions conducted with digital rights advocates, four spheres of digital rights arose: two that were based on different ways of viewing the digital (as spaces, or as data representation of physical entities), and two that were

based on developmental angles of access and governance. It is found that Southeast Asian digital rights work centres on addressing many of the digital rights that pertain to conventional rights translated to digital spaces, through existing movements on civil freedoms. There is an increasing focus in the spheres of data-centred rights and digital governance, while work on access is shifting beyond basic Internet access and is more concerned about the quality of access. As most of the digital rights advocates originate from civil society rather than the tech community, technical capacity is sorely lacking, limiting most advocacy work to awareness campaigns rather than more technical aspects of the different spheres of digital rights, such as technical measures against cyber attacks, or data protection from a software architectural point of view. Participation in digital governance at a technical level, such as in the development of standards, is also difficult.

The digital rights movement studied is situated within the context of Southeast Asia and subjected to existing social, political, and cultural contexts. Difficulties in civil society work manifest within the microcosm of digital rights work – in the face of authoritarian governments, tight resources within civil society, and publics that are more concerned about economic development than rights violations. Although there is movement building at the regional level, most of the digital rights work in the region focus on the national level. While advocates are concerned about the transnational implications of geopolitics and powerful tech companies based in the West, the lack of resources, networks, and capacity limits their work in these aspects, with only a small number of familiar faces working in the international arena.

It is hoped that this paper will provide a strong basis for future research, whether to apply and refine the conceptual framework to other regions and localities, or as a baseline to deepen the understanding about digital rights work in Southeast Asia. As more and more of the world's population joins the global networked society, protecting and upholding digital rights will remain to be a salient issue for the foreseeable future. Perspectives and insights from the developing world will contribute to advocacy and research to ensure a safer, more equitable, and rights-based digital environment for all.

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## CHAPTER 3

### **The Right to be Forgotten: Bargaining the Freedom of Information for the Right to Privacy?**

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#### **Abstract**

The vast development of technology contributes to the improvement of human life. However, it also shapes people's lives and brings new challenges to the protection of human rights. As part of the protection of the right to personal data and privacy in the digital world, a new right, the so-called right to be forgotten was introduced, notably under the European Union-General Data Protection Regulation (EU-GDPR). In Southeast Asia, Indonesia is the first country which recognizes the right. In contrast, although Singapore and Malaysia already have comprehensive personal data protection laws, these countries have not recognized the right to be forgotten. This chapter focuses on the scope of the right to be forgotten in Indonesia, the role of the state through court and of data controllers, and the intricate balancing of the right to be forgotten and the freedom of information as aspects of human rights.

#### **Introduction**

Human's capacity to remember allows him to relate and process various information he receives, and based on such process, to make decisions in his daily life. However, the limit of human's capacity to remember is also valuable as it keeps him from the mental stress of constantly remembering and helps him forgive past mistakes (Jones, 2016). In the digital world, the Internet helps us to remember beyond the capacity of our human memory, yet it also means that forgetting becomes difficult. What has been recorded on the Internet will stay in its digital memory. Once a piece of information is uploaded on the Internet, it stays in the public memory.

However, there are circumstances in which forgetting is needed, also in the digital world. A person might have uploaded his picture on the Internet when he was underage and unaware of the implications of his action, only to realize later on that it was a misrepresentation of his personality and capacity and has hindered him from getting a job. Similarly, the news on the Internet concerning a murder suspect would make him always be remembered as a person who was accused as a murderer even when later on



the court found him not guilty. In this case, the digital ability to remember in combination with public memory removes the opportunity for rehabilitation or to forget past mistakes.

The right to be forgotten is thus a legal construct to keep the balance between remembering and forgetting in the digital world. It covers different forms of rights that are subject to different legal norms, such as the right to rehabilitation; the right to deletion or erasure; the right to delisting, delinking, or de-indexing; the right to obscurity; and the right to digital oblivion (Voss and Renald, 2016).

The right to be forgotten has been acknowledged in different jurisdictions – notably in the European Union (EU) under Regulation 2016/679 of the Parliament and of the Council of 27 April 2016 (General Data Protection Regulation, EU-GDPR) – as one of the rights to data protection and privacy anchored in the recognition and protection of human rights. In the Google Spain case (2014), the European Court of Justice (ECJ) required Google to remove links to websites that contain true information from its search results under the fair information practices set forth in EU Directive 95/46/EC (which was later repealed by the EU-GDPR). The case has become a landmark in the studies about the right to be forgotten and its implementation in the EU and beyond. The right to be forgotten is incorporated in the EU-GDPR in Article 17.

In Indonesia, while the making of a new law on personal data protection is in an on-going process, the Law No. 28 of 2011 as amended with Law No. 19 of 2016 (Electronic Information and Transaction, EIT Law) attempts to close the loophole by regulating the protection of personal data when it comes to cyber activities under Article 26. The right to be forgotten has been included in the amended EIT Law in Article 26 par. 3-5. The Law covers a broad scope of the right to be forgotten without specific guidelines that makes it hard to implement and raises concerns about the risk it poses to the freedom of information. It covers the removal of the information on any source of electronic system provider. Further, the removal of data shall be done under a court order for which the affected data subject shall submit a request to the court.

A question is thus raised on to what extent is the right to be forgotten recognized and enforceable. This question is important for defining whether the data in question is important for the public. In the EU, an affected data subject can submit a request to a data controller for the data erasure. For instance, a data subject can submit a request to a search engine for a removal of the link to a source containing the data that is subject to the right to be forgotten. In Indonesia, the data subject must go to court for the same purpose. While the question about the efficacy of the procedure is important, this chapter focuses more on whether leaving the process of implementing the right to be forgotten to data controllers, as both intermediaries and infomediaries would be a better option than keeping it as the sole competence of state; for example, through the court. Next, a key issue is balancing the right to be forgotten with the freedom of information or commonly known as the right to information (Mendel, 2008) that recognizes the right



to access information (McDonagh, 2013). Hence, a measurable mechanism is needed. Although the proportionality test is widely recognized, it also has certain drawbacks. This chapter will address the difficulties of implementing the test and offer recommendations.

This chapter thus aims at answering the following research questions: (1) To what extent is the right to be forgotten protected under the existing laws and under the draft of the personal data protection law in Indonesia? (2) Is there a risk of decentralizing internet governance to intermediaries in the self-regulation model at the cost of the freedom of information? (3) Which elements need to be considered when balancing the right to be forgotten and the freedom of information under the proportionality test and what are the challenges in applying the test? (4) How can we understand the right to be forgotten as part of human rights?

This chapter uses a legal research method by examining legal documents such as policies and regulations, as well as relevant literature in the field of data protection and privacy, including the right to be forgotten, the freedom of information, and human rights. The type of data collected was mainly secondary data, supported by primary data gathered by means of interviews with legal experts in the relevant fields. The discussions with the resource persons were conducted to clarify and confirm certain aspects that are not sufficiently explained in the secondary data. The choice of resource persons was based on expertise in the fields of personal data protection, privacy, and the right to be forgotten.

This chapter also uses a legal comparison method by comparing the regulations and best practices in the relevant field in Indonesia and in the EU, particularly the EU-GDPR. The choice of referring to the EU-GDPR is based on the consideration that it is considered to be the most comprehensive and detailed regulations concerning data protection worldwide. The legal comparison on best practices and existing regulations in three ASEAN countries – Indonesia, Singapore and Malaysia – was aimed at gaining a better understanding on the state of the art of the development of data protection and privacy in the other countries in the region. Although Indonesia, Singapore, and Malaysia belong to different legal systems (Indonesia has a civil law system, while Singapore and Malaysia have a common law system), these differences do not significantly affect the regulation of the protection of personal data and, more specifically, the right to be forgotten and its implementation. Even when differences occur, they are not consequences of the differences in the legal system.

The remainder of this chapter is organized as follows. After explaining the background and the research questions in the first part, the second part describes the research methodology. The second part tackles the issue of how the right to be forgotten could affect other aspects of human rights. The fourth part will discuss the right to be forgotten as part of the right to personal data and privacy in the EU and in three countries in Southeast Asia, namely in Singapore, Malaysia, and Indonesia. The fifth part will examine the exercise of the right via court compared to outsourcing it to private intermediaries.

The sixth part will analyze the balancing of interest of the right to be forgotten against the protection of the freedom of information. The last part contains the conclusion.

## The Right to be Forgotten as a Human Rights

The right to privacy entails restrictions to a certain level on the part of the state and private party activities against the privacy of individuals. Long and commonly understood as the right to be left alone (Yankwich, 1952), the right to privacy falls within the scope of the right of life (Warren & Brandeis, 1890). The Universal Declaration of Human Rights (UDHR) laid down the right to privacy as one of the fundamental legal norms in Article 12: “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

It is further safeguarded under the International Covenant on Civil and Political Rights (ICCPR) Article 17 par. (1): “No one shall be subjected to arbitrary or unlawful interference with his privacy...”. According to the General Comment of the Human Rights Committee, the term ‘unlawful’ means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims, and objectives of the Covenant. The Committee also clarified that the expression “arbitrary interference” is also relevant to the protection of the right provided for in the provision. In the Committee’s view, the expression “arbitrary interference” can extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims, and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances (General Comment of the Human Rights Committee No. 16 on Article 17 ICCPR).

In the judicial review on Law No. 11 of 2008 on Electronic Information and Technology, the Indonesian Constitution Court affirmed the acknowledgement of the general norm provided for in both the UDHR and ICCPR regarding privacy protection (Constitutional Court Decision No. 50/PUU-VI/2008). The decision of the Constitution Court echoes the basic principle of the recognition of privacy in the legal and political framework in the Indonesian Constitution of 1945 as part of the fundamental rights. Article 28G par. (1) of the Constitution provides that “Everyone has the right to protection of privacy ... as a human right”. However, the right to privacy is not absolute in character. It must be balanced against other fundamental rights, such as freedom of expression and of the media, and its implementation must be assessed on a case-by-case basis. One of the forms of the rights to personal data and privacy is the right to be forgotten. The concept of the right to be forgotten emanates from the right of data subject to full control of his or her personal data, including the removal of personal data that has been published on the Internet.

Fichtelman (2018) wrote that the right to be forgotten is a new legal concept. It is also known as the right to erasure or the right to be delisted. Prior to the EU-GDPR, the right to be forgotten in the EU was recognized in the case *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* on 13 May 2014 (hereafter, *Google Spain Case*). Thus, the concept precedes the current legislation in the EU under the GDPR and the case has become a landmark case on the right to be forgotten.

In the case, the question concerns the interpretation of the Directive 95/46 Article 12(b) and Article 14(1)(a) as to whether the provisions allow the data subject to demand the operator of a search engine to remove the subject's personal data from the list of results, on the basis that the information concerned may be prejudicial to him or her or that he/she wishes it to be "forgotten" after a certain time (Case C-131/12, ECLI:EU:C:2014). In its judgment, the ECJ acknowledged the right to be forgotten that can be invoked against operators of search engines (Kranenborg, 2015). It is only after the *Google Spain* Judgement by the ECJ in 2014 that the right to be forgotten came into legal existence (Fichtelman, 2018). In Continental Europe, the right to be forgotten is regarded to be contained in "the right of the personality, encompassing several elements such as dignity, honor, and the right to private life" (Weber, 2011).

After the enactment of the EU-GDPR, the exercise of the right to be forgotten can be seen for instance in the *Dutch Surgeon Case* in 2019. The case concerns a Dutch surgeon who was formally disciplined due to medical negligence; after an appeal, the sanction was changed to a conditional suspension and she was allowed to continue to practice. However, Google's search results remained unchanged after entering her name, linking to a website containing an unofficial blacklist that was claimed to be a "*digital pillory*". After an initial rejection by Google and the Dutch data privacy watchdog, *Autoriteit Persoonsgegevens*, to have the link removed, the District Court of Amsterdam subsequently ruled the surgeon had "an interest in not indicating that every time someone enters their full name in Google's search engine, (almost) immediately the mention of her name appears on the 'blacklist of doctors', and this importance adds more weight than the public's interest in finding this information in this way". Further, the judge stated that although the information on the website with reference to the failings of the doctor was correct, the judgmental blacklist site suggested the doctor's incapability to treat patients, which was not supported by the disciplinary panel's findings. The court also dismissed Google's claim that most people would have difficulty finding the relevant information on the public record. The case was the first case of the right to be forgotten involving medical negligence (Boffey, 2019).

The right to be forgotten plays an important role specifically in the online environment, where personal data can easily be collected, accessed, and stored. An important aspect of the right to be forgotten is the ability of the Internet to extend human capacity to memorize information and to pass it to others. This is significant because the ease of

passing information to others can also result in a greater number of information receivers who will memorize the information. While “remembering” as such could be good or bad, it depends on the context. The same applies to “forgetting”. The term “forgetting” shall not refer to the act of rewriting history. Nor, as De Terwangne (Ghezzi et al., 2014) put it, is it about erasing past misdeeds. Instead, she claimed, it is about removing information concerning the past that does not have a direct impact on an individual’s present (Gollins, 2016).

Rustad and Kulevska (2015) argued that while the brain’s ability to memorize is important, its ability to forget is also important because it allows humans “to adjust and reconstruct memories, to generalize, and to construct abstract thoughts.” Moreover, nobody can be held liable for their past mistakes for the rest of their life (Reymond, 2019). Hence, in the online environment, the right to be forgotten is important to allow so-called “digital redemption” (Rosen, 2012; Jones, 2019). Cook (2015) argued that the right to be forgotten has brought a positive turn in cyber law and policy for three reasons. First, it has strengthened the data subject’s control over the use of personal data in online activities to a level where irrelevant personal data can be subject to erasure. Weber (2011) asserted that the right to be forgotten accentuates recognition of the autonomy of rights-holders to decide what to do with their personal data. Second, Cook (2015) explained that the right to be forgotten restores the balance between the freedom of speech and privacy in the digital world. Further, it provides the opportunity for the data subject to “start over” when negative information concerning her/ him in the past no longer serves the public interest, by allowing the removal of such data.

## Comparison Between Jurisdictions

This chapter compares the policy and regulations, as well as best practices in the relevant field with other jurisdictions. First, between Indonesia’s regulations and those of the EU, notably the EU-GDPR. Second, with those in two ASEAN countries: Singapore and Malaysia.

### *The EU-GDPR*

Under the EU-GDPR, EU citizens or residents are entitled to have their personal data removed when the data is no longer needed for the purposes for which it was collected in the first place (Cunningham, 2017). The EU-GDPR reinforces the CJEU’s ruling in the Google Spain case in 2014. While strengthening the protection of the right to personal data, the EU-GDPR also aims to ensure the freedom of information (Neville, 2017). Reymond (2019) argued that the concept of the right to be forgotten is based on the proposition that a person cannot be held liable for her or his past mistakes for the rest of their life. Thus, the right to be forgotten reflects a recognition of the ability of the society to forgive past mistakes, which in the context of the online activities can be seen as “digital redemption” (Rosen, 2012; Jones, 2019).

However, as Jones (2019) correctly stated, despite the good intention of the immediate response to technological challenges, careful considerations of social variations and legal certainty are necessary. Otherwise, extreme responses could lead to what she called “internal injustices and cross-cultural struggles”. Further, she noted that, with Europe’s long history concerning the regulation to protect privacy, the recognition of the right to be forgotten has become more relevant in the region. The same might not apply to other jurisdictions. Moreover, while recognizing the right to be forgotten as part of the right to privacy, and hence, part of fundamental rights, a balancing of rights between the right to be forgotten and other fundamental rights – that is, freedom of expression and freedom of information – is needed. The balancing becomes even more urgent in cases that involve public interest, such as information about convicted criminals.

Recital (65) of the EU-GDPR Consideration (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016) reads: *“A data subject should have ... a ‘right to be forgotten’ where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject.”* Further, Recital (66) of the EU-GDPR states: *“[t]o strengthen the right to be forgotten in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to, or copies or replications of those personal data. ....”*

The term “the right to be forgotten” is used under the bracket after the term “the right to erasure” as the heading of Article 17 of the EU-GDPR. However, in the Commentaries of the EU-GDPR, the two terms have different meanings and scope of implementation as discussed above (Bensoussan, 2017; Voigt & Bussche, 2017). Article 17 par. (1) of the EU-GDPR provides for legal grounds for data subject to exercise the right to data erasure as follows:

- (a) *the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;*
- (b) *the data subject withdraws consent on which the processing is based ... and where there is no other legal ground for the processing;*
- (c) *the data subject objects to the processing ... and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing ...;*
- (d) *the personal data have been unlawfully processed;*
- (e) *the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;*
- (f) *the personal data have been collected in relation to the offer of information society services ...*

Further, the right to be forgotten can be found in Article 17 par. (2), which rules: *“Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation,*

*shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.”*

The exercise of the right to be forgotten can be seen in the delisting requests to search engines. However, the scope of application of the right is not limited to search engines alone. According to Ausloos (28 September 2019), the right to erasure under the EU-GDPR is intended to empower data subjects throughout the data processing lifecycle. Thus, it is aimed at enabling data subject to control what happens to his or her personal data, regardless whether it is public, for instance on a website or search engine, or private, such as in a company server or where it is used to profile the data subject.

The right to erasure and the right to be forgotten are applicable under certain limitations. Article 17 par. (3) lists the limitations of the applicability of the right to erasure and the right to be forgotten as follows:

- a. for exercising the right of freedom of expression and information;*
- b. for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;*
- c. for reasons of public interest in the area of public health ...;*
- d. for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes ... in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or*
- e. for the establishment, exercise or defence of legal claims.*

In the interview, Munir (17 September 2019) asserted that the right to be forgotten is not absolute. It applies in certain circumstances if certain conditions are satisfied. Hence, the right to be forgotten is neither irreversibly guaranteed nor prevailing over other fundamental rights, such as the right of information, and public interests.

According to Voss and Renald (2016), the right to be forgotten encompasses different forms of rights that are subject to different legal norms. They listed those rights as follows: the right to rehabilitation; the right to deletion or erasure; the right to delisting, delinking, or de-indexing; the right to obscurity; and the right to digital oblivion. The right to be forgotten is a new concept as part of the right to personal data. While some countries in South East Asia already adopted a relatively comprehensive personal data protection laws, notably Singapore and Malaysia, the right to be forgotten itself has not been recognized. One of the reasons is that the right to be forgotten had not even been recognized elsewhere when Singapore and Malaysia adopted their personal data protection laws respectively.



On the other hand, Indonesia has not adopted a comprehensive personal data protection law until today. However, Indonesia is the first country in Southeast Asia that recognizes the right to be forgotten, not under a personal data protection law, but under the EIT Law that basically regulates the activities on the Internet. The decision to recognize the new right was taken in 2016 during the amendment of the EIT Law that took place after the adoption of the EU-GDPR that includes the new right in the regulation.

### ***The Singaporean Data Protection Act***

The protection of personal data in Singapore is regulated under the Personal Data Protection Act 2012 (No. 26 of 2012) (hereafter, Singaporean PDPA) (Chik, 2013). The Singaporean PDPA recognizes the right of data subject to personal data and governs the use and collection of personal data. However, it also recognizes the needs of organizations of personal data and hence, the collection, use and disclosure of personal data are allowed as long as based on legitimate and reasonable purposes. The Singaporean PDPA also governs the Do Not Call (hereafter, DNC) Registry (Article 39 and 40 of the Singaporean PDPA) that is further regulated under the Personal Data Protection (Do Not Call Registry) Regulation of 2013. The DNC Registry Regulation allows individuals to add their Singapore telephone numbers in the Register for choosing not to receive marketing calls, mobile text messages, and faxes from organizations. Individuals can also have their telephone numbers removed from the Register. For the administration of the Act, the Singaporean PDPA empowers the Personal Data Protection Commission (hereafter, PDPC) (Article 5 par. (1) and (2) of the Singaporean PDPA).

The concept of the limitation of retention of personal data is recognized in the Singaporean PDPA as part of personal data processing (Advisory Guidelines on Key Concepts in the Personal Data Protection Act, 2017). Article 25 of the Singaporean PDPA rules on the restriction of personal data retention as follows: *“An organisation shall cease to retain its documents containing personal data, or remove the means by which the personal data can be associated with particular individuals, as soon as it is reasonable to assume that –*

- (a) the purpose for which that personal data was collected is no longer being served by retention of the personal data; and*
- (b) retention is no longer necessary for legal or business purposes.”*

However, although one might argue that the notion of the right to be forgotten or the right to erasure could be drawn from Section 25 of the Singaporean PDPA, the scope of protection is very limited and insufficient to enforce the erasure of personal data publicly available on websites (Zeller, Trakman, Walters, & Rosadi, 2019). Article 25 of the Singaporean PDPA merely recognizes a data subject's right to a termination of data retention under conditions that the purpose of the retention ceases to exist and that the retention is no longer needed for legal or business purposes. Article 16 of the Singaporean PDPA also recognizes the right of data subject to withdraw consent for the

processing of personal data that is no longer required for data processing and when there is no longer legal ground to keep the data.

The right under Article 25 of the Singaporean PDPA shall be distinguished from the right to be forgotten or the right to erasure. The former concerns termination of data retention of and access to personal when the reason for its use and the purpose no longer exists (Chik, 2013). Article 25 of the Singaporean PDPA is formulated as an obligation for data controller referred to as the retention limitation obligation (Advisory Guidelines on Key Concepts in the PDPA, 2019). The right to withdraw consent (Article 16 of the Singaporean PDPA) along with the right to access (Article 21 PDPA) and the right to correction (Article 22 of the Singaporean PDPA) represents the power of the data subject given by the law to control the use of their personal data. Meanwhile, the right to be forgotten deals with the erasure of personal data when the data is no longer relevant. The right to be forgotten per se has not been included as part of the right of data subject under the Singaporean PDPA.

### ***The Malaysian Data Protection Act***

The protection of personal data under the Malaysian legislation can be found in Act 709: the Malaysian Personal Data Protection Act 2010 (hereafter, the Act 709) as at 15 June 2016. Act 709 governs the processing of personal data in commercial transactions. Accordingly, Act 709 excludes the matters concerning the processing of personal data for non-commercial transactions. Hence, unlike the EU-GDPR, it also exempts public authority from the application of the Act. For the enforcement of the Act, it establishes the Data Protection Commissioner appointed under Section 47 of the Act.

Similar to the Singaporean PDPA, Act 709 also encompasses the limitation of personal data retention. Article 10 of Act 709 reads:

- (1) *The personal data processed for any purpose shall not be kept longer than is necessary for the fulfilment of that purpose.*
- (2) *It shall be the duty of a data user to take all reasonable steps to ensure that all personal data is destroyed or permanently deleted if it is no longer required for the purpose for which it was to be processed.*

Similarly, in the Singaporean PDPA, although the notion of the right to be forgotten seems to be drawn from Article 10 of Act 709, the scope of protection is very limited. The provision does not provide sufficient legal grounds to exercise the erasure of personal data publicly available on websites. During the interview, Munir (17 September 2019) explained that similar to the Singaporean PDPA, the right to be forgotten has not been recognized in Malaysia, likely because the right is relatively new. However, he explained further, there is an obligation imposed on the data user or controller to destroy data that is no longer needed.



According to Mohamed (2016), there might be a claim that the right to be forgotten could be implicitly derived from the Malaysian Federal Constitution Article 5 concerning the right to life and personal liberty. However, he argued further that in Malaysia, an invasion of privacy is not regarded as actionable wrongdoing and so far, the court does not allow claims based on privacy violation. In 2015, the Malaysian Communication and Media Commission (hereafter, MCMC) as the Internet regulator required Google and several websites to block certain content. It also requested Google to block certain websites that did not comply with the blocking requirement. However, the action was based on the Malaysian Communication and Multimedia Act 1998 (Act 588) Section 233 concerning improper use of network facilities or network service, and Internet Content Code, rather than relying on the right to be forgotten.

An argument against the adoption of the right to be forgotten in Malaysia is based on the view that the right to be forgotten is prone to abuse when there are no comprehensive guidelines and it is not accompanied with appropriate policy (Mohamed, 2016). The view reflects how the right to be forgotten is perceived in different jurisdictions. While the EU has embraced the new right, Malaysia seems to be more cautious in how the adoption of the right might challenge the recognition of other fundamental rights. As experienced in Indonesia, without a clear policy and the absence of appropriate guidelines, the implementation of the right to be forgotten could be problematic.

### ***Policy and Legal Instruments in Indonesia***

The right to be forgotten has been acknowledged as part of the right to personal data. In its Second Amendment, the Indonesian Constitution (Undang-undang Dasar 1945, UUD 1945) added Article 28G par. (1), which recognized the right to privacy as part of human rights. Article 28G par. (1) becomes the fundamental legal basis for the protection of the right to personal data. Further, the constitutional mandate to protect personal data has been implemented in separate derivative regulations, including Law No. 11 of 2008 on Electronic Information and Transactions as amended with Law No. 19 of 2016 (hereafter, EIT Law) in Article 26. With the amendment of the EIT Law, the right to erasure was introduced in Article 26 with the addition of par. (3) to (5).

Article 26 par. (3)-(5) reads:

- “(3) Every Electronic System Operator shall remove Electronic Information and/or irrelevant Electronic Documents that are under its control at the request of the Person concerned based on the court’s decision.*
- (4) Every Electronic System Operator shall provide a mechanism for the erasure of Electronics and/or Electronic Documents that are no longer relevant in accordance with the provisions of the legislation.*

- (5) *Provisions concerning procedures for the removal of Electronic Information and/or Electronic Documents as referred to in paragraph (3) and paragraph (4) are regulated in government regulations."*

There are substantial problems for the implementation of the right to be forgotten under the EIT Law Art. 26 par. (3)-(5), as identified during the interview with Djafar (3 September 2019), as follows:

1. There is no clear categorization concerning "information", whether it encompasses all types of information or whether it only concerns information that falls under the category of personal data. For comparison, under the EU-GDPR, the right to be forgotten only concerns personal data. The broad scope of information that is covered under the Law raises concerns about whether it could be applicable to data such as prosecuted criminals or other types of public data.
2. There is no clear limitation when information becomes "irrelevant"
3. Although Art. 26 par. (4) requires a Government Regulation for the erasure procedure, no Government Regulation has been enacted. Currently, the Government is undergoing the process to draw a Government Regulation.
4. There are concerns about the readiness of the court to implement the Law.
5. There is no clear procedure about how to take the interest of the freedom of information should be taken into consideration and how the electronic system provider's view should be taken into account.

To date, no comprehensive law has specifically regulated the protection of the right to personal data and privacy. The draft of the Personal Data Protection Act (hereafter, PDPA) has been taking is still undergoing a political process for its adoption by the legislators (Djafar, 2019). With the enactment of the GDPR in the EU and the impacts it brings to other jurisdictions, including Indonesia, the drafting of the PDPA also considers the adoption of relevant principles of the EU-GDPR. Another important consideration for such adoption is that EU-GDPR is regarded as the most comprehensive regulation to protect the right to personal data.

The Draft of the PDPA regulates the right to erasure and distinguishes between "data deletion" and "data removal". Such a distinction is not recognized under the EU-GDPR. The distinction itself is unnecessary, unclear, and contains conflicting views of what "being forgotten" essentially means. Under the concept of the right to erasure, the affected personal data shall be erased in such a way that it no longer exists. The concept of data deletion in the PDPA Draft means that personal data that has been "deleted" can be recovered under certain circumstances; therefore, there is, technically, a certain degree of data retention on the part of the data controller that allows a process of data recovery. As such, the affected personal data is not erased, it is merely hidden; that is, it does not appear to exist, but it does exist in another form. Such provision may potentially give

leeway for data controllers to escape from the obligation to protect the right of the data subject when it comes to the implementation of the right to erasure.

The large scope of the right to be forgotten could lead to abuse of the right, for instance, in cases of information about anti-corruption offenders being hidden to conceal their past criminal offences. Such abuse would violate the rights of society to public information. During the interview, Dewi (18 September 2019) suggested that the right to be forgotten should not be applicable to criminal convictions, including convicted corruptors, and other types of data that belong to public information, such as data of public officials (Munir, 2019). However, until today, there is no case submitted to the court for the exercise of the right to be forgotten (Pratama, 2019).

The concern is not unjustified, since the EIT Law does not clearly specify the requirements of the affected personal data being “no longer relevant”. Under the EU-GDPR, the right to erasure only applies under certain requirements as listed in Article 17 par. (3).

To provide guidance for the exercise of the right to be forgotten and to tackle the problems under the EIT Law as identified above, a new Government Regulation is currently drafted, which seems to adopt similar principles to the EU-GDPR (Yuda, 19 September 2019). However, he also suggested that measures should be taken to address the problem of the readiness of the court to handle the right to be forgotten cases. Shidarta (3 September 2019) during the discussion on the integration of the right to be forgotten in the future legislations also emphasized on the need to ensure that the interests of others for the exercise of the right to information should be taken into account. Table 1 below summarizes the comparison among the EU, Indonesia, Singapore and Malaysia in the regulation and implementation of the right to be forgotten.

Table 1: The Regulation and Implementation of the Right to be Forgotten (TRTBF)  
in the EU, Indonesia, Singapore and Malaysia

Item to compare	EU	Indonesia	Singapore	Malaysia
Personal data protection law	EU-GDPR	Not in a specific law, governed in separated laws, inter alia EIT Law	Singaporean PDPA	Malaysian PDPA
TRTBF	EU-GDPR Article 17	EIT Law Art. 26 par. (3)-(5)	Not recognized	Not recognized
Year of recognition	2014 (Google Spain Case), 2016 (EU-GDPR)	2016	-	-
Type of data	Personal data	Any information	-	-
Requirement	<ul style="list-style-type: none"> <li>a. no longer necessary in relation to the purposes of collection or process</li> <li>b. withdrawal of consent by data subject and no other legal ground for the processing</li> <li>c. objection of the data subject to the processing and no overriding legitimate grounds for the processing</li> <li>d. unlawful processing</li> <li>e. subject to erasure according to a legal obligation</li> <li>f. personal data collection in relation to the offer of information society services</li> </ul>	<p>Information is irrelevant.</p> <p>However, similar principles with the EU-GDPR are adopted in the Draft of the Government Regulation to implement to EIT Law to provide more detailed guidance to implement the right to be forgotten.</p>	-	-
Exercise against	Data controller	Any electronic transaction system provider	-	-
Applied to	Data controller	Court	-	-
Implementation	Implemented	Not yet	-	-

Note: the information provided in the table is a summary from the paragraphs above.

## The Exercise of Right via Court vs. Outsourcing to Private Intermediaries

There is a difference in the procedures used to exercise the right to be forgotten in the EU under the GDPR and in Indonesia under the EIT Law. Under the EU-GDPR, a data subject can submit requests for personal data erasure to a data controller, but under the Indonesian EIT Law, the data subject must file a request to a court.

As seen in the Google Spain case, the CJEU placed data controllers – such as search engines or Internet intermediaries like Google — in the mechanism for the exercise of the right to be forgotten. Hence, private entities could play an important role to decide on the exercise of the right, such as to determine whether a request for a delinking can be granted or not. By taking such an approach, private intermediaries are requested to be part in the regulation of the Internet. Although the decision of the private intermediaries can be appealed to the data protection authority and court, the role of the private intermediaries has become similar to what a judge in a court has when ruling a case (Voss & Renald, 2016). Ausloos (28 September 2019) pointed out certain difficulties in the process for the exercise of the right to be forgotten under the EU-GDPR, such as due process issues, scope of responsibilities, and different sensibilities on how to draw the balance in different jurisdictions.

A different approach is taken in Indonesia, where the court has the sole authority to make the decision on a request for data erasure. As discussed in the previous section, the scope of the right to be forgotten in Indonesia is also broader. The reliance on the court for the implementation of the right to be forgotten places the burden of balancing between the right to be forgotten and other fundamental rights, including the right to information, solely on the court. Although it seems legit, it also has downsides, for instance, a large number of cases in comparison to the number of judges handling the cases and the limited technical knowledge of the judges about the personal data processing and the technical aspects of the right to be forgotten that might influence the judgement. With the current procedure taken under the EIT Law, there is a need to ensure that the interests of the electronic system and transaction provider would be taken into account in the judgement of the court. Shidarta (2019) asserted the need for the exercise of the principle of *audi alteram partem*, to listen to the other party. This principle is important to ensure that other human rights, such as the freedom of information would not be harmed.

There could be a risk of decentralizing Internet governance to intermediaries in the self-regulation model at the cost of the freedom of information when the state policies and regulations on the matter are unclear. Post (2018) criticized the outsourcing of the enforcement of the right to be forgotten to private entities, such as search engines, as shown in the Google Spain case. However, the critics sought to address the root of the problem that led to the Court decision in the Google Spain case, rather than why the outsourcing itself could be problematic. Post also argued that the case missed the

distinction between two different forms of privacy that led to the decision. The first form is data privacy, which refers to the protection of personal data to ensure that it is used and processed only for the specific purposes for which the data is legally collected. The second is dignitary privacy, which refers to the protection of individual dignity by means of prohibiting inappropriate communications that threaten to humiliate the data subject. While data privacy cannot be applied in public discourse when the data processing in question is legal, dignitary privacy can. Post further contested that the Court did not clearly distinguish between the two rights. A clear focus on dignitary privacy and its requirements might have resulted in a different judgment.

Whether the choice to rely on the court would be better than outsourcing the judgement on requests for the exercise of the right to be forgotten, it depends on at least two factors. First, the scope of the right to be forgotten would play a role to define which mechanism would be the better option. For a broad scope of the right, like in Indonesia, the reliance on the court would be preferable, because of the substantial role in striking a balance between the right to be forgotten against other fundamental rights, such as freedom of information. Outsourcing such a role to private intermediaries would not be appropriate due to the heavyweight of public interest that could be affected by the judgement. Second, the choice to rely on the court would also be preferable in cases where there is insufficient and clear policy as regards self-regulation. This is also the case in Indonesia. However, a reliance on the court should be accompanied by appropriate rules and guidelines to avoid legal uncertainty. In addition, proper training for judges to handle such cases is highly necessary to allow adequate judgement.

## **The Principle of Proportionality and Its Applicability for the Balancing of Human Rights**

As discussed by Fazlioglu (2013), there is fear that the right to be forgotten conflicts with the freedom of information. Brock (2016) asserted the potential conflict between the right to be forgotten and the right to know and to the free expression. The concerns remain, even in the EU, even though the GDPR has clarified the limits of applicability of the right to be forgotten, among others, when it is in conflict with the freedom of information EU-GDPR, Article 17 par. (3)(a). While examining the nature of the freedom to information, Tiilikka (2015) described the main functions of publicity of information. First, it has a substantial function to personal self-development. Second, it contributes to the creation of open and public discussion that would give feedback and might bring new additional information to influence decision-making processes. Third, it is indispensable for civil and democratic society by providing public knowledge and discussion that would make it possible to protect society from abuses, mismanagement, and corruption.

Freedom of information has been recognized human rights under the Universal Declaration of Human Rights of 1948 Article 19: '[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference

and to seek, receive and impart information and ideas through any media and regardless of frontiers.' It is also recognized as an extension of the right to freedom of expression (Mendel, 2008). Further, freedom of information has become an important element in a democratic society. Iyer (2001) listed six reasons why freedom of information has the ability to improve desirable objectives of society and therefore needs to be maintained. First, it allows the accountability of the government for its people. Second, by allowing the public to obtain knowledge, it encourages self-fulfillment. Third, freedom of information is a useful tool to combat corruption and abuse of power. Fourth, it helps decision-makers improve the quality of their decisions. Fifth, it improves public participation in state governance. Six, freedom of information helps balance power between the government and the people while reinforcing the power of individuals when dealing with the government.

The conflicting interests between the two rights lie in the following aspects:

- (1) Potential misuse of the right to be forgotten from its initial intent to give data subjects full control over their personal data to an attempt to "rewrite history" or to "conceal past wrongdoings" for unjustified personal gain;
- (2) Unclear procedures to integrate the considerations on the freedom of information in cases of the right to be forgotten;
- (3) Unclear measures to identify when a right-to-be-forgotten claim might interfere with the freedom of information;
- (4) Potential shortcuts taken by the data controllers such as search engines to avoid right-to-be-forgotten claims by an overly strict filtering process might lead to unnecessary censorship of information that would otherwise have been openly available to the public; and
- (5) Potential limitations of national courts to take account of different safeguards taken by other jurisdictions to protect the freedom of information in cross-border cases concerning the right to be forgotten.

Nearly all fundamental rights have limitations (Anđelković, 2017). Along this line, Munir (2019) asserted that the right to be forgotten also has limitations. Rights and freedom are rarely absolute in nature. The rights and freedoms of one individual are limited by the rights and freedoms of others (Booth, 2001). Fundamental rights need to meet certain requirements for their validity. Another form of limitation is that one kind of fundamental right might also limit another kind. Anđelković (2017) argued that fundamental rights are subject to the principle of proportionality.

As described by Schlink (2012) and Kenan, Kremnitzer, and Alon (2016), the principle of proportionality has its root in legal history and is considered a fundamental concept of justice. It was first applied in German administrative law in the 19th century. Although it is not mentioned in the Constitution of Germany (*Grundgesetz*), the principle of proportionality has been recognized as an unwritten constitutional principle that originated



from the principle of “lawfulness” (*Rechtsstaat*) (Panomariovas, 2010). It was recognized in the field of human rights for the first time in German Federal Constitutional Court jurisprudence in the second half of the 20<sup>th</sup> century. The principle of proportionality has been applied in many legal areas, such as at the European Court of Human Rights jurisprudence. While the European Convention on Human Rights does not mention the principle of proportionality (Cianciardo, 2010), the principle has been recognized by the European Court of Human Rights through its practices (Anđelković, 2017).

While examining the principle of proportionality, Alexy (2014) proposed the use of the necessity thesis, in which he divided the principle of proportionality into three sub-principles: (1) the principle of suitability, (2) the principle of necessity, and (3) the principle of proportionality in the narrower sense. Alexy explained further that the three above sub-principles represent the concept of optimization that, according to the principle theory, is the essence of “principles”, namely optimization requirements: how to optimize norms as far as it is allowed, both factually and legally.

The proportionality test has been used in human rights adjudications (Clayton, 2002; Alexy, 2010; Klatt & Meister, 2012; Craig, 2016). It has been recognized as an important part of constitutional law debates (Challenor, 2015) and is one of the most studied subjects in comparative constitutional law to understand different approaches used in different countries (Dixon, 2018). According to the European Court of Human Rights, “*inherent in the whole of the [European Convention on Human Rights] is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights*” (Soering v United Kingdom (1989) 11 EHRR 439). Such fair balance would require the proportionality test to include a measurement process. Its use to weight the exercise of human rights in the online environment was also proposed by Wolfgang Schulz (2018) in his paper entitled “Regulating Intermediaries to Protect Privacy Online – the Case of the German NetzDG”.

In his book review on “The Ultimate Rule of Law” (Beatty, 2004), Jackson (2004) argued for the use of proportionality in constitutional analysis for three reasons. First, the proportionality test offers transparency to address the issue of fairness in judgment and this quality is useful to help the process of decision making. Second, it allows participatory consideration for the decision-making by means of structured investigation of a measure being taken, concerning both its impacts and justification. Third, as an instrument to protect the rights and simultaneously safeguard constitutional law, the proportionality test is sufficiently flexible and becomes a legal effective control of government action in the long term.

However, the use of the proportionality test has also been criticized. While arguing for the positive qualities of the proportionality test, Jackson (2004) also warned against its downside as an ultimate rule of law. He explained that proportionality analysis resembles



and supports structure intuitive notions of fairness and pragmatic reactions to factual circumstances, an approach that is prone to political consideration. Rubina (2012) argued that *“either proportionality is insensitive to important moral considerations related to human rights and their limitations, and thus it is an unsuitable tool for human rights adjudication; or proportionality can accommodate the relevant moral considerations but at the price of leaving the judge undirected, unaided by the law.”*

Klatt and Meister (2012) defended the use of proportionality analysis as “the most sophisticated means to solve the very complex and intricate collision of human rights with competing principles”, rather than “distorting” fundamental rights. As an analysis tool, the proportionality test offers “fundamental standards of rationality” to identify key aspects of various cases and ensures an appropriate judgment. Möller (2012) argued that while the proportionality analysis survives the criticisms addressed at it so far, it is also necessary to continue the debate of its value, proper content, and meaning, in the interests of refining the application of the analysis.

The European Court of Human Rights (ECtHR) balanced the right to be forgotten and the freedom of information by considering the following elements: (1) the extent to which information influences general interest, (2) the reputation of the data subject concerned and its relation with the press, (3) the prior conduct of the data subject concerned, and (4) the circumstances in which the information at issue was obtained (Szelghami, 2018). The protection of personal data has been preserved under the Charter of Fundamental Rights of the European Union (hereafter, the Charter) Article 8. However, like other fundamental rights, the right to personal data is not absolute in character. The limitations of the right to personal data are subject to the requirements of Article 5 (1) of the Charter to be lawful, as follows: “(1) it must be provided for by law; (2) it must respect the essence of the rights; (3) it must genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others; (4) it must be necessary; and (5) it must be proportional” (EDPS, 2017).

To provide guidance for the implementation of Article 52(1) of the Charter requiring that lawful limitations to the right to personal data *“must be ‘necessary’ for an objective of general interest or to protect the rights and freedoms of others”*, the European Data Protection Supervisor (hereafter, EDPS) developed a Toolkit for assessing the necessity of measures that limit the fundamental right to the protection of personal data (hereafter, EDPS Toolkit) (EDPS, 2017). Similar approaches could be adopted for the implementation of the right to be forgotten in Indonesia. First of all, the proportionality test as discussed earlier offers a proper tool for balancing between the right to be forgotten and freedom on information. There is no uniform rule that one right wins over the other. Each case must be weighed individually.

In addition, in order to balance the two competing rights, the following steps shall be taken:

- (1) Clearly define the circumstances when the right to be forgotten is in conflict with the freedom of information. For this matter, it is important to define which information is subject to the right to be forgotten, namely personal data, for instance, pictures, videos, gender, and medical records of a person. However, the right to be forgotten should not be applicable to certain data such as criminal convictions and other types of data that are subject to public interests (Dewi, 18 September 2019);
- (2) Adopt transparent standards for the balancing process that shall be taken by the court or companies; and
- (3) Develop a monitoring process to avoid excessive filtering of information by data controllers such as search engines that might put freedom of information at risk.

The right to be forgotten is a legal construct that is created to serve certain purposes as laws do. While laws attempt to safeguard the interest of human rights, the basic idea remains that the interests of humans themselves are the most important considerations. In the even advanced technologies in the way humans communicate and interact with each other, where the flow of information is technically becoming limitless, there should be rooms preserved to shield human dignity and to keep basic human needs for redemptions. This is what the right to be forgotten is for. Laws in their best attempt they can be, tend to have flaws. However, the role of the human in implementing the laws in good faith will always be crucial to achieving what laws are trying to achieve: justice, utility, and certainty (Radbruch, 1932), but above all, protecting humanity.

## Concluding Remarks

This chapter revealed that among the three ASEAN countries, the existing Personal Data Protection Act in Singapore and Malaysia respectively, the right to be forgotten has not been recognized. However, there is an obligation imposed on the data user or controller to destroy data that is no longer needed. Hence, the essence of the necessity to allow the removal of certain personal data that is no longer relevant is recognized. In Indonesia, unlike in Singapore and Malaysia, personal data protection is still regulated in separate laws, thus, there is no comprehensive law on personal data protection. However, the right to be forgotten has been recognized under the EIT law in its latest amendment in 2016, although unlike the regulation under the EU-GDPR from where the new right was adopted, the right to be forgotten is not clearly regulated for instance due to the lack of scope limitations and implementation guidance. A Government Regulation adopting similar principles under the EU-GDPR is currently undergoing a process for its adoption to implement the law including the provision on the right to be forgotten.

The right to be forgotten as human rights, like other rights, are not absolute. The right is limited by other rights. In the EU, it is for instance limited by the right to information. Although such limitation is not explicitly mentioned under the EIT Law, the balancing between fundamental rights is inherently part of the implementation of human rights. Hence, the balancing process by private intermediaries or in the court judgement and the use of the balancing tool, such as the proportionality test is important for the exercise of the rights.

While comparing between relying on the role of the court or outsourcing the judgement on requests for the exercise of the right to be forgotten to private intermediaries, the study found that there could be a risk of decentralizing Internet governance to intermediaries in self-regulation model at the cost of the freedom of information, when the state policies and regulations on the matter are unclear. Two considerations are important: first, the scope of the right to be forgotten would be a determining factor: For a broad scope of the right, like in Indonesia, the reliance on the court would be preferable, because of the substantial role in striking the balance between the right to be forgotten against other fundamental rights, such as freedom of information. Second, the choice to rely on the court would also be preferable in cases where there is insufficient and clear policy as regards self-regulation, like in Indonesia. Further, a reliance on the court should be accompanied by appropriate rules and guidelines to avoid legal uncertainty and proper training for judges. The latter is currently still missing from the enforcement mechanism of the right to be forgotten in Indonesia.

The balance between the right to be forgotten and the freedom of information under the proportionality test should meet the elements of suitability, necessity, and proportionality in the narrow sense. To minimize the subjectivity in the balancing process, the circumstances when the right to be forgotten is in conflict with the freedom of information should be clearly defined and transparent standards for the balancing process that shall be taken by the court or companies should be adopted. In addition, it is necessary to develop a monitoring process to avoid excessive filtering of information by data controllers such as search engines that might put freedom of information at risk.

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## CHAPTER 4

### **These Abled ASEAN: Assessing How ASEAN Uses Technology to Promote Human and Disability Rights**

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#### **Abstract**

Using a holistic tool called the Disability Convention (DisCo) Policy Framework, this chapter aims to assess the Association of Southeast Asian Nations (ASEAN), as a regional body, on how inclusive it is for persons with disabilities. In particular, the DisCo elucidates how ASEAN uses technology to advance the rights of its people to political, economic, social, and cultural lives. It assesses how it employs technology in its legislative measures; its leadership; support for budgetary needs; its institutional capacity to administer and coordinate programs; how it engages the disability community in the policymaking process, and its attitudes toward persons with disabilities. The chapter finds that ASEAN is on the right path to developing an inclusive and sustainable region with its strong commitment to implement the Convention on the Rights of Persons with Disabilities (CRPD) and its recent adoption of its own regional plan of action on disability - the ASEAN Enabling Masterplan 2025 on Mainstreaming Disability Rights across ASEAN.

#### **Introduction**

The ASEAN has taken monumental steps in the past decade in advancing human rights, technological innovations, and the disability discourse in the region. These milestones include the establishment of a human rights mechanism, regional action plans on connectivity, on information and communication technologies, and on mainstreaming disability rights in the region. In 2009, ASEAN established the ASEAN Intergovernmental Commission on Human Rights (AICHR) to promote and protect human rights of ASEAN people (AICHR, 2019; Yen, 2011). As part of its Terms of Reference (TOR), the AICHR led the development of the ASEAN Human Rights Declaration (AHRD), which was adopted in 2013. Included among the Declaration's key tenets are the recognition of the inalienable, integrated, and indivisible human rights and fundamental freedoms of persons with disabilities along with other marginalized groups such as women, children, older persons, and migrant workers (ASEC, 2013).

To promote connectivity across the region, ASEAN put in place a connectivity regional action plan called the Masterplan on ASEAN Connectivity (MPAC). The MPAC aims to increase the connectivity of its people through the improvement of ICT infrastructure and a regional broadband corridor, and by increasing educational opportunities (ASEC,

2016b). On the same year, ASEAN adopted its second five-year ASEAN ICT Masterplan (AIM), which aims to foster an inclusive and integrated region using information and communication technologies (ICT) (ASEC, 2016a). Following this progress, member states adopted the ASEAN Enabling Masterplan (AEM), which will be used to guide the region towards mainstreaming disability rights across ASEAN's three pillars. Key areas such as access to justice, education, access to financial services, political participation, and accessibility of ICT are central to the AEM's priority action points.

While several researches have been conducted on these topics, there is still a need to bring all these into one study. This Chapter attempts to bridge this gap by developing a lucid narrative on how ASEAN advances human rights of persons with disabilities through technology. The World Health Organization (WHO) 2011 report, the most recent global study on disability, estimates that about one billion or 15% of the world population experience some form of disability (UNESCAP, 2015; WHO & WB, 2011). Studies indicate that the disability community is left behind in their political, economic, social, and cultural lives. Persons with disabilities often encounter more challenges to political participation such as voting in elections due to inaccessible polling precincts, materials, and equipment (Kingston, 2014; Mattila & Papageorgiou, 2017; Sackey, 2015; Schur & Adya, 2013). Disability as a result of industrial accidents or as a result of a medical condition increases expenses, reduces a person's income and economic activities, and could lead to poverty (Bae et al., 2018; Kwiatkowski et al., 2014; Minh et al., 2015; Mont & Cuong, 2011; van Campen & van Santvoort, 2013). Another study on the prevalence of disability indicates that as people age, their rate of acquiring chronic and/or severe disability also increases. Furthermore, their disability is associated with bad economic outcomes such as a drop in earnings, after-tax income, and food consumption ("The prevalence and economic consequences of disability," 2013). Disability, depending on the age of its onset, can also impact a person's life satisfaction (Infurna & Wiest, 2018). Persons with disabilities also exercise their citizenship through various leisure opportunities with the use of technological innovation (Cappe, 2016). In addition, engaging in governance of arts and cultural organizations improves their self-esteem, participation in the society, and well-being.

People with disabilities have limited access to gainful employment, are not able to run for public office, have a higher likelihood of experiencing poverty compared to abled bodies, are not able to participate in cultural or social activities due to inaccessibility of transportation or public venues, etc. The United Nations Department of Economic and Social Affairs' (UNDESA) report on the 2030 Agenda and Sustainable Development Goals and Disability entitled "Disability and Development: Realizing the Sustainable Development Goals by, for, and with Persons with Disabilities" highlights that people with disabilities are underrepresented in political participation, have limited access to financial services and justice, and are excluded from the educational systems (UNDESA, 2019).

About 260 million<sup>1</sup> people, which is roughly two in every five individuals in the region, experience various impacts of disability in ASEAN (Return on Disability, 2016; UNESCAP, 2012a, 2015; WHO & WB, 2011). This Chapter looks into the disability community in the region and how technology facilitates its members' access to fundamental rights and basic freedoms including the right to quality education, political participation, access to financial services, and justice. It underscores these areas because of their critical role in ensuring that people with disabilities can exercise their rights to political participation (enshrined in the ASEAN Political-Security Community - APSC), to inclusive education (enshrined in the ASEAN Socio-Cultural Community - ASCC) and to having access to financial services as stipulated within the ASEAN Economic Community - AEC). The fourth – the equal right to accessing the justice system, although falling under the APSC, is an overarching right across all three pillars.

Focusing on ASEAN, this chapter employs both qualitative and quantitative data from secondary sources. These include documents from international and regional organizations, the public sector, non-governmental organizations, industries, academic institutions, and civil society organizations working in the field of education, financial services, political participation, and access to justice. Various ASEAN documents were reviewed and analysed based on their content and their accessibility to people with disabilities.

The study used online accessibility assessment tools such as the Web Accessibility Evaluative Tool (WAVE)<sup>2</sup>, other similar accessibility auditing tools available online, as well as screen reader software for Mac (VoiceOver), Windows (Non-Visual Desktop Access or NVDA), and iOS devices (VoiceOver)<sup>3</sup>. WAVE and other online tools were developed using international standards for accessibility. The analysis included online digital content from social media platforms and ASEAN websites from January to July 2019. These included online news articles, reports from ASEAN and its sectoral bodies, as well as documents from various UN bodies that are available online. To triangulate information collected online, an interview with a member from a regional organization working with persons with disability and a review of documents from conferences and workshops on disability in ASEAN were conducted. Furthermore, data was also collected from engaging with Task Force members who developed the AEM before, during, and after its adoption by ASEAN.

<sup>1</sup> The conservative estimate is an aggregate of persons with disabilities and their caregivers, including family members, friends, personal assistants, and the like. This chapter uses a 1.85:1 ratio to persons with disabilities.

<sup>2</sup> This is one of the many automated web accessibility tools that tests the level of accessibility of websites based on international web accessibility guidelines. These web accessibility guidelines ensure that persons with disabilities can navigate any website while using assistive technologies such as text-to-speech software. Other examples of web accessibility testing tools can be found in this link: <https://atigmu.edu/testing-tools/>.

<sup>3</sup> Screen readers are types of assistive technologies used mainly by people who are partially sighted or who are blind. They convert any text on a screen to speech or audio format. They read aloud any text on their desktop, tablets, or smartphones.

This study aims to identify experiences of the disability community in ASEAN and how technology is shaping their narrative. To understand intersections of technology and disability in ASEAN, this study assesses ASEAN’s legal framework and how inclusive it is for people with disabilities. The following questions on ASEAN institutional capacity to advance disability rights using technology guided this study:

- Are people with disabilities meaningfully engaged in the policy making process and implementation?;
- Do technologies facilitate these engagements?; and
- Are these technologies accessible to all?

## Analytical Framework

To understand intersectionalities between disability and human rights, this chapter uses a holistic analytical tool called the Disability Convention (DisCo) Policy Framework developed by Victor Pineda, an international disability rights advocate and thought leader in the field. Using the DisCo Policy Framework allows for the assessment of policies that reflects ASEAN vision for its disability community. The framework also examines ASEAN’s leadership towards inclusion for all and how to operationalize its vision in its work plans, programs, and activities. The DisCo Policy Framework analyzes the role and level of engagement of the disability community within the ASEAN communities.

DisCo Policy Framework focuses on the analysis of policies and their implementation towards a disability-inclusive society (Pineda, 2010). The framework measures salience or the level at which the principles of the UN Convention on the Rights of Persons with Disabilities (CRPD) have been harmonized within an organization, a country, or local government unit. To achieve this goal, the framework uses evaluative criteria that probe into legal, institutional, and social environments. The criteria are as follows:

Table 1: Disability Convention (DisCo) Policy Framework Evaluative Criteria

Type of Environment	Evaluative Criteria
Legal Environment	Existing legislative measures
Institutional Environment	Level of executive and budgetary support
	Administrative and coordinating capacity of the institution, country, or local government unit
Social Environment	Level of participation of people with disabilities in the policymaking process
	Attitude of the society or institution towards people with disabilities

## ASEAN and Accessibility

ASEAN is home to about 90 million persons with disabilities. This is almost as large as the combined population size of Brunei, Laos, Myanmar, and Malaysia (ASEAN, 2019; World Population Review, 2019). A survey conducted by the UNDESA in 2019 on individuals of 15-29 years old in 41 developing countries indicated that ASEAN Member States (AMS) have the highest gaps between people without disabilities and people with disabilities in terms of whether they attend school (UNDESA, 2019). Indonesia has the largest percentage gap with 45%, followed by Cambodia with 43%, and Vietnam with 35%. These gaps indicate slow progress after almost a decade of committing to addressing disability issues in the region through the Bali Declaration on the Enhancement of the Role and Participation of Persons with Disabilities in ASEAN Community and its Mobilisation Framework (ASEAN, 2011b).

Contrary to this slow progress in fulfilling ASEAN's commitments to promoting disability rights, technological development and digital transformation have been fast paced. More than half of the world is now online (ITU News, 2018). The International Telecommunications Union's (ITU) report shows that more than 45% of people from developing countries have been connected by 2018 while 47% of connections are found in Asia-Pacific region where ASEAN is. This allows for more devices to be connected, digital content having wider reach, and more people accessing the benefits of modern communication tools and technologies.

Technology may potentially be used to close these gaps. Technology, if made accessible by following international standards, can make reading learning materials fun and enriching for the blind. It can give voters with disabilities informed decision on political candidates. It can make on-site banking easy for customers who are deaf, and it can aid lawyers with disabilities in providing effective services to their clients. By ensuring that technologies are accessible to people with disabilities, studies indicate that benefits extend to the broader community (Return on Disability, 2016).

There are several definitions of disability. Most of the widely used definitions are informed by Amartya Sen's capability approach (1993, 1999), Sen underscores that people have agency and that they are the ends and means to development. Nagata, on the other hand, argues that people have weak agency and that they are the means to development. This chapter looks at disability as a unique experience of functional deprivation as a result of their health condition (e.g., impairment), and their social, political, economic, and cultural environment. A person can have an impairment but may possibly not experience functional limitation if his/her environment is accessible. For instance, a person who is hard-of-hearing, yet who is provided with a sign language interpreter during his/her classes, can participate in class activities. However, if the same person goes to a cinema and watches a movie without option for closed captions, subtitles or sign language interpretation, his/her functional



capabilities are deprived. These scenarios illustrate how two different environments can have significant impacts on a person with the same health condition.

It is also important to highlight Mitra's definition of functioning against disability. She points out that functioning relates to body and structural function, activities, and participation while disability relates to a person's impairment, activity limitation, and barriers to participation (Mitra, 2018). Accessibility is a result of the removal of barriers in an individual's physical, digital, social, economic, political, and cultural environments. Designing accessible technology allows people with disabilities to equally perceive, understand, interact, and contribute to their development without any barrier (WAI, 2019). For example, an online video is accessible if a person who is blind can perceive the same content the way sighted viewers do. Or it allows a person who is deaf to understand the content through closed captions or sign language interpretation. Or it allows people with learning disability to consume the information like everyone else. Accessible technologies also make it possible for a person with limited dexterity to navigate a device with ease.

It does not mean that when you provide any computer to a person with disability, the device can be considered accessible. Not all technologies are created equally accessible. It is also important to consider the individuals personal preferences. Usability of technology makes products effective, efficient, and satisfying. When a product is usable, it allows the completion of a user's task. Often, usability considers a product's ease-of-use, overall user experience, visual consistency, and a clear and defined process (Rouse, 2005; WAI, 2019). Inclusive or universally designed technology fosters diversity and attempts to involve everyone. This addresses issues such as accessibility for persons with disabilities, access to and quality of hardware, software, and internet connectivity, computer literacy and skills, economic situation, education, geographical, cultural, issues concerning youth and older persons, and language (WAI, 2019).

Often, accessibility impacts a product's usability. For instance, closed captions from seminars help researchers review and analyze the whole discussion in the room. The voice recognition technology originally developed for people with disabilities helps a driver to send SMS hands-free. The text size adjustment capability found in most devices and which were made for people who are partially sighted also benefits people experiencing functional limitation as a result of their age. Accessible technologies designed for inclusion benefits not only the disability community but also people with low literacy or not being fluent in a language, people with low bandwidth connection, those using older technologies, new users and infrequent users, and mobile device users (WAI, 2019).

For instance, Apple's Siri<sup>4</sup> is available in multiple languages. This allows non-native English speakers command their Apple devices using other languages. Another example

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<sup>4</sup> Siri is a speech-to-text program that is built-in to iOS and MacOS devices.

is a web conferencing tool called Blackboard Collaborate<sup>5</sup> which can work even in low bandwidth situations. This allows remote participants to benefit from a distributive learning experience anywhere in the world (Blackboard Collaborate, 2018). Inclusive technology leads to the digital transformation of the broader society. Rich Donovan, CEO of the Return on Disability Group and a global leader on the interplay between disability and corporate profitability, highlights in their company's annual report that when technology and processes are designed to benefit the disability community, these often evolve to benefit everyone outside the disability community (Return on Disability, 2014, 2016). For example, the research notes that when a beverage bottle is being designed for people with limited dexterity, manufacturers make it easier not only for the intended user but also for older persons, children, and average adults to open the bottle.

Another example of this spillover of inclusive technologies are voice recognition programs. These technologies were originally created to make websites, platforms, and devices usable to people with disabilities. Over time, their creation led to their practical application by the general public. These are popularly known in the market as Apple's Siri, Amazon's Alexa, Microsoft's Cortana, and the Google Assistant that were originally designed for people such as those who have dyslexia, learning disabilities and people with limited dexterity (Amazon, 2019; Apple, 2019; Google, 2019; Kikel, 2019; Microsoft, 2019). These programs can convert speech to text, allowing anyone to type much faster than typing with a keyboard. The programs also make it possible for us to give simple commands to our computers, tablets, and smartphones such as opening applications, composing an email, writing reports, searching the web, solving mathematical problems, turning on home appliances, and many more. Simply put, inclusive technologies make everyone's lives easier and much more efficient. Such products also illustrate that inclusion of the disability community in the economy could spur innovation, increase ease-of-use of products and services, and expand the economy (Return on Disability, 2016; UNDESA, 2019; UNESCAP, 2012a).

In terms of education, technology has progressed from analog to the digital era we know today (G3ict, 2015a). From having predetermined source material and output formats such as braille, to the use of synthetic voice and braille conversion software in the 1980s, to digital content that can be converted instantly translated from text to audio output. In the analog era, students who are partially sighted or blind often required a narrator or a transcribed material that is converted into a braille book. Often, the process of producing these accessible formats took longer than the class time (G3ict, 2015a, 2018b). G3ict, a leading global organization in ICT accessibility, notes that the timeliness and the capacity to provide accessible learning materials has often been a problem. More recently, with the advent of online digital content, people with disabilities have to work around the issues of encryption or document protection which could prohibit a screen reader user from accessing a document's content. Another problem is the lack of tagging features in some

<sup>5</sup> Blackboard Collaborate is a web conferencing tool that can be used to hold virtual meetings and classes. It has accessibility functions such as live closed captions, sign language interpretation, and is accessible to blind or screen reader users.

documents. Tags or identifiers allow a screen reader user to navigate every section of a document with ease. If not properly done, it could take a person who is partially sighted or blind to read the whole document.

In the area of political participation, technology plays a critical role in ensuring opportunities to attend activities and to engage in meaningful participation. Political participation includes involvement in the local and national. Electoral cycles, engagement in organizations such as organizations of and for persons with disabilities and undertaking an active role in the policymaking process. (UN, 2006; UNDESA, 2019; UNESCAP, 2015; WHO & WB, 2011). For people with disabilities to participate in the political processes, policies, accessible built and institutional environment, funding for implementing disability policies, and adequate training of implementing personnel need to be provided. Such is the case in the US and in some parts of ASEAN (NCD, 2013; The Center for Election Access of Citizens with Disabilities (PPUA Penca) & General Election Network for Disability Access (AGENDA), 2013). Technology enhanced the experience of people with disabilities in exercising their right to suffrage. In some cases, the technologies such as voting machines or assistive devices, failed to deliver the equal voter experience for people with disabilities. Accessibility of information is also a key in political participation. Information about political parties, candidates, debates, campaign materials, both print and those distributed through social media, need to be accessible.

Similarly, global reports indicate that persons with disabilities are denied their right to access to justice because of inaccessible information (G3ict, 2018a; OHCHR, 2018). There is a growing consensus that the justice system remains inaccessible to the disability community and that using technology can resolve many of the issues on information (G3ict, 2018c; Larson, 2014). For instance, with accessible technologies in the justice system, witnesses can testify remotely using video conferencing tools. Hard-of-hearing or people who are deaf can attend a court hearing with an interpreter signing from another part of the world. Legal documents can be reviewed by prosecutors, judges, and court administrators with disabilities.

While the use of technology to access the court system and the justice system has begun only recently, the disability community's access to financial services has been ongoing for several years now. Despite global efforts for decades, people with disabilities remain one of the largest unbanked groups in our society (G3ict, 2015b). Many financial institutions are still physically inaccessible. Banks do not have ramps and Automated Teller Machines (ATMs) are too high for wheelchair users. People who are partially sighted or blind cannot navigate an ATM independently. People with cognitive or learning disability have it difficult to understand financial literature or bank policies. In some banks, people with disabilities are denied opening a bank account or applying for a loan because bank policies require that the applicant is able to read the application form and its terms. By and large, bank forms are in print, making it impossible for a person with print-related disability to pass the first requirement of the application process. In some developing countries, like Myanmar,

people with disabilities are shifting to technologies to access financial service and engage in other economic activities (Hurulle, Fernando, & Galpaya, 2018). Modern platforms such as Internet banking, mobile banking, and social media are employed to undertake transaction, pay fees, buy stocks, and engage in entrepreneurship.

In all these, there is a need for clear policies that serve as a vision for companies, non-governmental organization, countries, or regional organizations. Moore (2000) advocates the concept of public value which is created when people's lives improve. These public values are often manifested in policies or legal frameworks. In order to create public value, such as creating an inclusive society for everyone using technology, this public value needs to have legitimacy and support. Legitimacy comes from people who have the power and political will to achieve the public value. Educators, school administrators, court administrators, judges, election commissioners, CEOs of financial institutions, Central Bank governors, vendors of digital technology, ASEAN sectoral bodies, Deputy Secretary General of ASEAN pillars, and the ASEAN Secretary General are all examples of sources of legitimacy and support. The final component of Moore's strategic triangle is the operational capacity, which allows the first two components to be realized. The operational capacity includes the resources, the skilled workforce, the data, innovation and change management knowledge, and communication, among others. The ASEAN's human capital, its people's knowledge and skills to understand and analyze disability issues and data and ASEAN's capacity to communicate effectively with the disability community regarding disability issues are some of the key ingredients to help ASEAN achieve an inclusive region.

## **Analyzing ASEAN Using the DisCo Policy Framework**

### ***The Legal Environment***

The adoption of the ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities (ASEAN, 2018) warrants an assessment of ASEAN's employment of technology to advance disability and human rights. The ASEAN Enabling Masterplan (AEM) was informed by several international and regional human rights instruments. These include the UN Convention on the Rights of Persons with Disabilities, the 2030 Agenda for Sustainable Development Goals (UN, 2016), the Incheon Strategy to "Make the Right Real" for Persons with Disabilities in Asia and the Pacific (UNESCAP, 2012b), the Beijing Declaration including the Action Plan to Accelerate the Implementation of the Incheon Strategy (UNESCAP, 2018), the ASEAN Human Rights Declaration (ASEAN, 2012), the ASEAN Charter (ASEAN, 2007), the ASEAN Blueprints 2025 (ASEAN, 2015, 2016b, 2016c), and the Bali Declaration on the Enhancement of the Role and Participation of Persons with Disabilities in ASEAN Community and its Mobilisation Framework (ASEAN, 2011b), among others.

Prior to the adoption of the AEM, the Bali Declaration and its Mobilisation Framework were still in progress. Similar to the AEM, the Declaration and its Framework aim to mainstream disability rights in the region. The document is aligned with key international and regional human rights instruments including the UNCRPD, the Incheon Strategy, and the 2030 Agenda. A policy map of these instruments can be viewed in Table 2. ASEAN's own regional disability framework, the Bali Declaration as well as its Mobilisation Framework align with the UNCRPD (ASEAN, 2011a). The mechanism has overlapping principles of equality and inclusion in the areas of education, political participation, financial services, and access to justice. It also employs a rights-based approach towards promoting disability rights. Another important legal instrument that the author reviewed was the Masterplan on ASEAN Connectivity 2025 (ASEAN, 2016d) (MPAC 2025) aims to improve financial access and inclusion through technology and to facilitate technology adoption of micro small and medium enterprises (MSMEs). The ASEAN Digital Financial Inclusion Framework that will be the regulatory mechanism of ASEAN is underway. The Working Committee on Financial Inclusion is in collaboration with the World Bank in the development of the Framework.

In line with the MPAC 2025 is the ASEAN ICT Masterplan 2020 (ASEAN, 2016a) which aims to foster economic development and transformation in the region through ICT. The Masterplan promises integration of less abled in the digital economy. It also promises a people integration, empowerment, and inclusion through ICT. Using G3ict's Digital Accessibility Rights Evaluation Index (G3ict, 2019), ASEAN (excluding Brunei in the computation) receives an average score of 38%, a relatively low score based on key metrics used in the tool. The benchmarking tool measure countries' level of commitment to disability rights and accessibility, the capacity to implement the commitment, and policies and programs outcomes of ICT products and services, accessibility, and levels of implementation.

### ***Institutional Environment***

By far, ASEAN is showing an increasing level of leadership in the field of disability and ICT. Disability issues have been under the ASCC pillar for decades. The ICT sector remains under the AEC. Both areas are in the process of being mainstreamed across all of ASEAN's pillars, sectoral bodies, and AMS. With only about 300 staff and holding an average of 1,200 meetings every year, the ASEAN Secretariat has a limited capacity to facilitate its own day-to-day activities, let alone to implement additional tasks indicated in regional action plans (Muqbil, 2015). The Secretariat is often part of the administrative and coordinating mechanism for its meetings and data collection.

## ***Social Environment***

The participation of the disability community in the regional policy making process became apparent with the recognition of the ASEAN Disability Forum (ADF), the umbrella organization of organizations of and for persons with disabilities at the national level. ADF's secretariat is based in Jakarta which is strategic in terms of its engagement with ASEAN. The organization has a consultative status with ASEAN, which allowed it to actively engage during the negotiation process of the text of the AEM. ADF also collaborated with another network of organizations of and for persons with disabilities called the General Elections Network for Disability Access (AGENDA). AGENDA convened its partner disability organizations in line with Task Force meetings, which provided opportunities for Task Force members to have a better sense of what people with disabilities expect from the new regional disability rights action plan.

ADF provided an overview of disability issues in the region during their interface with members of the Task Force. Their presentation included the different barriers that people with disabilities encounter on a daily basis and the limited disaggregated data on disability. ADF underscored issues faced by people with disabilities in the education system, in political activities, in accessing financial opportunities, and judicial systems (ASEAN Disability Forum, 2018).

In a regional disability dialogue, when the AEM was launched, several of the resource persons from UNESCAP and the UN Educational, Scientific, and Cultural Organization (UNESCO) highlighted the need for more robust data on disability to influence and inform the policy making process in the ASEAN region. ASEAN's Deputy Secretary-General also recognized this during an interface with the disability community in 2018. To enhance the region's capability on data collection, Dr. Seree Nonthasoot mentioned in a forum his proposal for the AEM to create a devoted commission on the rights of persons with disabilities (AICHR, 2018). However, this proposal was not adopted in the final text of the AEM.

During a discussion with Mr. Lauro Purcil, Jr., ADF lead convener and founding member, it has been noted that "ADF has no available data on disability and assistive technology". This is partly due to the lack of a standardized data collection method in ASEAN and ADF's network of organizations of persons with disabilities. Further, he underscored the limited resources and capacity of ADF to conduct its own monitoring. He stressed that ADF relies on its member organizations which also need more capacity building and budgetary and executive support from their member states.

In its workforce, currently, ASEAN has only one employee with a disability. He was recently hired in 2018. Its openness to hire people with disabilities indicates ASEAN's perception towards people with disabilities. This is also manifested in ASEAN's design for its physical infrastructure, as well as its digital content. My observations, during visits



to ASEAN's meetings venues since 2015, shows that ASEAN is partially accessible with ramps in some of its key hallways. However, there are no visible signages for people with low vision and meeting facilities require a lot of room for improvement.

Another indicator of ASEAN's attitude towards people with disabilities can be observed in its digital platforms including its website, and social media tools. The author's assessment of these platforms, using online accessibility audit tools and screen reader software, shows that ASEAN is not meeting international standards on web accessibility (International Organisation for Standardization, 2008 2014; W3C Web Accessibility Initiative, 2018). The author's accessibility audit indicates that ASEAN is partially compliant with international accessibility standards. Its website, for instance, has several elements that could be improved. A snapshot of the report can be found below (Illustration 1). The landing page of ASEAN ([www.asean.org](http://www.asean.org)) contains several errors including one missing alternative text on an image, two missing form labels, and 15 empty links. Alternative texts or Alt+text describes to a screen reader user what is on an image or the content of the link. If an image has no alternative text and only has its filename as its description, a screen reader user could read an image as a random string of numbers (e.g., 244121/1224238899%53234.jpeg). Receiving such information is meaningless to an average user. Similarly, empty links that have no text will not be able to tell a screen reader user the purpose of the link. A link is considered empty when it has only strings of characters (e.g., numbers, letters, special symbols). Web developers can use specific codes to accomplish this task. The concept of adding a description to a link is similar to a process that can be done in emails or Microsoft Word documents. One can first write the text to be read by a screen reader (e.g., "this is the link to the website of SHAPE-SEA"). Afterwards, the text can be highlighted to click the function where a hyperlink can be embedded in the text. For links to be accessible and meaningful to screen reader users, they need to have alternative text that describes what the link is all about. Most of the content were justified in format. This causes some issues in the readability. Another example of accessibility is the use of PDF as a document format. PDFs and Word often have accessibility limitations. These document formats are usually opened in a separate application, which could be inaccessible to some users. It is good practice that only accessible PDFs are uploaded and that site visitors are informed about a link to a PDF or Word document. ASEAN social media sites (Facebook and Twitter) are also partially accessible. Similar to the website, photos do not have Alt-text or links are often empty as described above. Hashtags used often use either all capital or small letters. It is a good practice to use camel-backing or capitalizing the first letter of the word to help screen reader users distinguish each word from one another. For instance, instead of using #sustainabledevelopment, it is better to use the hashtag #SustainableDevelopment.

ASEAN videos are also partially accessible. Some have closed captions while others do not. For those without closed captions, alternative sign language interpretation is not available for the deaf community. Some videos, which only contain music, would require alternative means for users who are blind to understand what is happening in the video. Audio description could be considered. While these are only some of the key accessibility



features lacking in ASEAN's digital content, the organization's chief information officer can start from these basics.

## **How Inclusive is ASEAN's Vision for its Disability Community?**

The adoption of the ASEAN Enabling Masterplan became an impetus for further scrutinising this topic - Is ASEAN going to be ready for an inclusive region? The Bali Declaration and its Mobilisation Framework was a good start. It had all the key ingredients to an inclusive policy. It was aligned with the UNCRPD and other international human rights instruments. It focused on equally important priority areas. And it had a public value that impacts everyone. However, its efforts to mainstream disability rights were limited by its own structure. It was developed within the administrative domain of the Senior Official Meeting of Social Welfare and Development (SOMSWD) of the ASCC; and, it was confined there for many years. ASEAN's structure did not allow pillars and sectoral bodies to work on crosscutting and intersectional issues such as disability.

The ASEAN community perceived disability issue as the work of SOMSWD. In spite of SOMSWD's efforts to mainstream it, legitimacy to mainstream the issue was missing. For the issue to be mainstreamed, legitimacy and support need to come from all three pillars. Such is the case of the AEM. The AEM was developed through several interfaces with the Deputy Secretary-Generals (DSGs) of all three ASEAN pillars. These engagements provided opportunities for the Task Force on the Enabling Masterplan to seek guidance and support from all DSGs, from the negotiation of the text up, to the adoption and implementation of the regional action plan.

The new legal regime was also grounded on the fact that all AMS have already ratified the UNCRPD, obliging them to fulfill their commitment to the disability community. The Bali Declaration was already halfway through when Brunei ratified the UNCRPD in 2016. It is evident that inclusion and the advancement of disability and human rights is gaining traction within ASEAN's leadership. It is worth highlighting that the AICHR's leadership in the development process of the AEM was critical in gaining legitimacy. Dr. Seree Nonthasoot, then AICHR Thailand's representative and chair of the Task Force on the AEM, strategically convened AICHR, SOMSWD, and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) representatives to discuss the future plans of ASEAN for the disability community. As a champion of disability rights in the region, he was able to convince the AEC DSG to join the negotiating table. This presence of all ASEAN pillars, sectoral bodies, and AMS representatives created a disability-inclusive vision for ASEAN.

## **Can ASEAN Achieve this Vision?**

This vision is still in its early stages. At its onset, ASEAN has made grand gestures of openness for development. It hired its first staff with a disability in the same year that

the AEM was adopted. Having partially accessible websites and digital content indicates ASEAN's administrators having a higher level of understanding of the need for accessible technologies. However, it does need to strengthen its capacity to administer, coordinate, monitor, and evaluate the progress of sectoral bodies towards mainstreaming disability rights in their work plans and programs. It needs to develop a pool of experts on disability and human rights within the organization. Or better yet, it should continuously train all its 300 staff about disability rights issues and how to protect and promote these rights. This would increase their awareness about disability issues and potentially encourage them to integrate the principles of accessibility and universal design in their daily activities.

The AEM does not create a new body that will focus on monitoring and evaluating disability issues across three pillars. Hence, budget and other resources from sectoral bodies and each pillar need to be allocated in a way that disability programs and activities are considered. For instance, when holding meetings, organizers need to consider budget allocation for sign language interpretation, remote or in-person closed captioning, or audio description for audio visual presentations.

The AEM and disability issues intersect with many, if not all, of ASEAN's priority areas in its Blueprints 2025. Mainstreaming disability rights across the three ASEAN pillars recognizes the limited resources and equally important issues that compete for these resources. Hence, mainstreaming can also solve this resource limitation. By empowering ASEAN's sectoral bodies and its Secretariat through capacity-building efforts and awareness-raising campaigns, all bodies can share the cost associated with the initiatives. ASEAN's statistical unit also needs to enhance capacity to collect and analyze disability data. One promise of the AEM is to facilitate the discussion on how to collect data and what data to collect. This allows the organization to use the data for development.

The disability community, through organizations of persons with disabilities, will be more empowered with the availability of multiple technological platforms. As many of them are shifting to digital platforms to learn, to make economic transactions, to express political opinion, or to access legal contents, they also now have the power to inform national and regional channels monitoring and evaluating the AEM. People with disabilities can use the AEM to call ASEAN's attention when it fails to meet ICT accessibility standards. They are in the best position to increase the awareness of ASEAN, its Secretariat, and Sectoral Bodies about disability rights. And they can use technology to achieve this. For instance, ADF can reach out to the Committee on Financial Inclusion to aid them in developing a disability-inclusive financial framework.

## Conclusion

Using the DisCo Policy Framework, there 1) ASEAN has an existing legal environment that legitimizes its vision of creating an inclusive region for people with and without disabilities; 2) ASEAN has a limited institutional environment to mainstream disability rights across

its pillars, and; 3) its social environment is getting stronger with disability rights issues gaining more traction from ASEAN, its Sectoral Bodies, and organizations of persons with disabilities. AEM priority action points underscore key measures towards creating an inclusive society. They can be summarized as follows: First, ASEAN can enhance its legal frameworks by making them inclusive. Second, there is a need for leadership in ASEAN that will advance disability human rights by increasing awareness of its officials about disability rights and by encouraging more funding support for disability mainstreaming programs and activities. Third, ASEAN must build institutional and human capacity to undertake mainstreaming measures. Fourth, ASEAN need to engage the disability community as agents and beneficiaries of inclusive measures. And finally, ASEAN needs to continuously engage all stakeholders to embed the understanding on disability rights.

Following these measures from the AEM action points, this chapter recommends undertaking the following steps to ensure that people with disabilities in ASEAN are able to claim their human rights through accessible technologies. ASEAN, together with its Sectoral Bodies, the Secretariat, and organizations of persons with disabilities, can survey existing policies on the use and procurement of ICT in education, financial services, access to justice, and political participation and examine how inclusive they are. It is important that the assessment uses the terms inclusive, accessible, and usable as they relate to disability rights.

The study also finds that enhancing ASEAN's policy and procedures can facilitate human capital formation. The organization needs to include in its training the principles of accessible and universal design, particularly in using ICT. The chief information officers of ASEAN and content producers have to be trained to understand accessibility standards.

Finally, to ensure that its programs and activities are inclusive, ASEAN needs to employ an accessible ICT procurement policy for all products and services related to its activities. This will create a public value that has legitimacy, generates support, and increases operational capacity of all its organs.

Table 2: Legal Framework  
Map Legal Framework Map and Relevant ASEAN Enabling Masterplan Action Points

ASEAN Enabling Masterplan Action Point	International and Regional Human Rights Commitments of ASEAN
APSC 1	Bali Declaration Priority Area (BD PA) 1, 2, 6; ASEAN Human Rights Declaration (AHRD) Article 25.1, 25.2, 20.1, Art. 33; Beijing Declaration, including Action Plan to Accelerate Implementation of the Incheon Strategy (BD APAI IS) 1, 2, 6,16; Incheon Strategy Goal (ISG) 2, 6, 9; Sustainable Development Goal (SDG)10, Target 10.2, 10.3, 10.4, SDG 16; UN Convention on the Rights of Persons with Disabilities (CRPD) Article 4, 5, 7, 9, 20, 21, 29
APSC 2	
APSC 4	
APSC 7.5	
AEC 2	BD PA 3, 7; BD APAI IS 5, 13; ISG 1, Target 1.A, 1.B, 1.C, ISG 4, Target 4.B, ISG 6, Target 6.A; SDG 1, Target 1.3. SDG 8, Target 8.3, 8.5, 8.7, SDG 10, Target 10.1, 10.2, 10.3, 10.4, SDG 16, Target 16.2; CRPD Article 27, 27.3, Article 28.
AEC 3	
AEC 8	BD 3, 7; BD APAI IS 5, 13; ISG 1, Target 1.A, 1.B, 1.C, ISG 4, Target 4.B, ISG 6, Target 6.A; SDG 1, Target 1.3. SDG 8, Target 8.3, 8.5, 8.7, SDG 10, Target 10.1, 10.2, 10.3, 10.4, SDG 16, Target 16.2; CRPD Article 27.3, 28, 30..
AEC 9ee	
AEC 13	BD 13; BD APAI IS 3; ISC 3; SDG 9, 10; CRPD Article 9, 30.
AEC 21	BD 1, 3, 7, 13; AHRD 26, 27, 28; BD APAI IS 10: 10, 11; ISG 4: Target 4.A. ISG 6, Target 6.C, 6.D; SDG 8, 10; CRPD Article 9, Article 27.
AEC 24	
ASCC 11	BD 1, 4; BD APAI IS 3, 5; SDG 4; CRPD 9, 24
ASCC 12	
ASCC 27	BD 1, 3, 7, 13; AHRD 26, 27, 28; BD APAI IS 10: 10, 11; ISG 4: Target 4.A. ISG 6, Target 6.C, 6.D; SDG 8, 10; CRPD Article 9, Article 27.

## ASEAN Enabling Masterplan Action Points Related to Political Participation, Education, Financial Services, Access to Justice and Accessible Information and Communication Technologies

APSC 1 Encourage taking all appropriate legislative and administrative measures to promote and protect the rights of persons with disabilities to fully and meaningfully participate in public and political life to vote, to be elected and to access to justice on an equal basis with those without disabilities;

APSC 2 Encourage access to information from public and private sector websites on reasonable accommodation for court services, elections, accessible election and universal design polling stations, and other political processes by developing a disability-inclusive system with the use of new technologies and alternative formats such as braille, audio, closed-captioned and/or audio- described videos, and universally designed electronic formats, making available subtitles in the videos and television, assistance of professional sign language interpreters, and cartoon materials for persons with learning disabilities;

APSC 4 Conduct training and capacity-building activities on disability perspectives and human rights principles and their application in the daily work of legal professionals such as lawyers, judges, prosecutors, correctional officers, social welfare officers, police and others as a means of respecting, protecting and fulfilling these rights;

APSC 7.5 Enhance cooperation between ALAWMM and ALA and other Track II organisations including organisations of persons with disabilities, through seminars, workshops and research on international law, and application of international conventions such as CRPD to national legal frameworks;

AEC 2 Enhance equal-opportunity marketplaces for persons with disabilities as consumers, clients, suppliers and entrepreneurs in all ASEAN member states by facilitating more inclusive, accessible, and liberalised trade in services, financial services, and the facilitation of movement of skilled labour and business visitors;

AEC 3 Enhance financial inclusion by encouraging the development of accessible financial institutions, equipment, and modes of conducting economic transactions such as universally designed banks, ATMs, banknotes and coins, debit/credit card, banking apps and websites, as well as enhancing financial literacy and consumer protection;

AEC 8 Further enhance the support system and enabling environment for highly mobile, intelligent and creative human resources that thrive on knowledge creation and application by encouraging the use of accessible technologies in research and development (R&D) activities and by continuously engaging individuals who use these accessible technologies such as persons with disabilities;

AEC 9 Foster a more inclusive economy in the region by encouraging reasonable tax exemption on the sale of assistive and/or adaptive devices and technologies which are used by persons with disabilities and elderly/older persons to increase their productivity in a built-environment that is yet to be made accessible and enabling;

AEC 13 Encourage inclusive ICT by improving its accessibility and usability for persons with disabilities and by upgrading digital skill sets of developers and users to have a more digitally empowered and connected ASEAN people and stakeholders;

AEC 21 Provide support to persons with disabilities to enable them to start business by providing access to diversified financial sources that are responsive to the economic status of persons with disabilities and streamlining processes in obtaining permits and licenses;

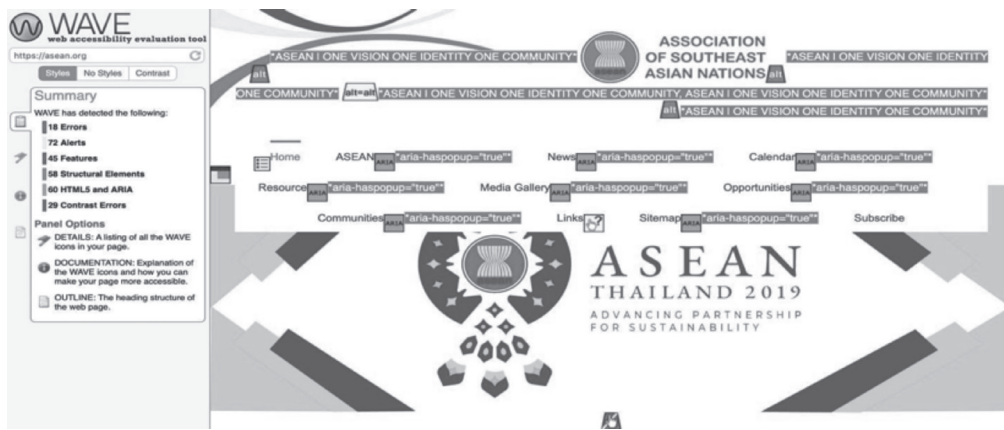
AEC 24 Encourage and support the creation of inclusive business opportunities for growth and employment, and access to financial services of persons with disabilities.

ASCC 11 Promote the rights of persons with disabilities as a core ASEAN Community value by including this concept of inclusive disability in the ASEAN studies curriculum to be promoted for adoption by educational institutions of ASEAN Member States;

ASCC 12 Advance inclusive educational systems and capacity building activities at all levels by promoting universal access to quality education for students, along with their teachers, school administrators and staff, and parents with or without disabilities; through, among others, providing sign language interpretations, and note takers;

ASCC 27 Promote one-stop entrepreneur centres for persons with disabilities to make available in one place important funding information including start-up MSMEs; entrepreneur networking; accessible financial equipment; and modes of conducting economic transactions

**Illustration 1:** Automated Accessibility Audit of ASEAN's Website



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## CHAPTER 5

### Seesaw Diplomacy: Balancing Access to Health, Intellectual Property Rights and Technology in Indonesia, Singapore and Malaysia

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#### Abstract

The ever-increasing innovation that is present due to the rise of technology has brought a greater avenue to access to health. However, this “seesaw diplomacy,” which represents the continuous balance of interests between stakeholders, exists between access to health, as well as intellectual property rights where in this case, the interests of inventors who want to protect their patents and countries who need to provide accessible and affordable healthcare clash. This Chapter seeks to analyze the balance between access to health, intellectual property rights and technology with a focus on Indonesia, Singapore and Malaysia by taking into account the relevant international legislation, regional frameworks, and treaties.

#### Introduction

Technology and innovation have transformed the right to health. Health has always functioned as an inalienable right for all people and is “disrupted” by the fact that the competition developed influences the way in which people view access health going forward. Indeed, the dynamics between technology and innovation trigger greater opportunities for accessing health at the national and international level. However, accountability towards the utilization of health technology remains challenging. Hence, the clash between the need for inventors to protect the medical innovations that have been paved through is met with the need to prioritize human rights and making sure that all people are able to access health in a manner that is impactful and less costly. This is where the balancing act is prevalent, to which people are placed in a tug-of-war between patents and affordable healthcare.

Access to health in itself pertains to several dimensions: physical, economic, informational, and through the practice of non-discrimination (Huls, 2008). On the other side of the coin, patents function as a way where individuals are able to take ownership of what they have created in a manner that can be validated and protected under the eyes of the law (Becker, 1993). Hence, these two definitions that cater to different interests result in seesaw diplomacy where pharmaceutical companies seek to benefit from the advantages given



in intellectual property rights, utilising patents to a lengthy degree to solidify inventions (Cockburn, 2017). This constant shift between private and public interests establishes barriers, as well as potential monopolies, towards medicine and health technology for the masses.

The international community has acknowledged this conundrum, usually under the umbrella of the World Trade Organization (WTO), the World Health Organization (WHO), as well as the World Intellectual Property Organization (WIPO). However, international commitments in this aspect, instead, have favoured wealthier countries and big industry juggernauts in the pharmaceutical business rather than countries that are left behind economically. Thus, the seesaw diplomacy seen pertains to the conflict between regulations discussed internationally and the misconceptions of Southeast Asia's parameters as linked to intellectual property, access to health, and relevant medical technologies.

Technology becomes the bridge between access to health and intellectual property in which health technologies and medicine serve as a commodity for the private sector and a necessity for the public sector. Technology, after all, is seen as the culmination of pharmaceutical products and tools in creating medicine (Brougher, 2014). Furthermore, the analysis of research under the umbrella of human rights is needed. To summarize, with technology comes an opportunity to bring access to health, but at the same time innovation produced from technology should be protected. Using the human rights approach, this chapter will touch upon two main aspects, namely: 1) Southeast Asia's relationship towards intellectual property and access to health and 2) the experiences of Indonesia, Singapore, and Malaysia in balancing intellectual property rights, access to health, and technology.

Indonesia's biggest case in relation to the three components above is the Avian flu outbreak of 2005 when, despite having shared its virus strains to the World Health Organization Collaborating Center, the virus strains that Indonesia had provided were utilized for potential commercial use without compensation and the consent of the Indonesian government. This brought Indonesia into direct conflict with the international community and shed new light on access to health, intellectual property rights and technology through the principles of equality, transparency and fairness. Singapore, on the other hand, represented a utopian side of the situation, where Asia's 'little red dot' was able to utilize the infrastructure and policies of preparation to curb a swine flu outbreak in the country, despite stricter patent laws regarding access to health due to its bilateral and international commitments. Malaysia's experience deals with the rising drug prices of HIV/AIDS medicine due to patent. In the face of potential international pressure, Malaysia successfully negotiated with pharmaceutical companies to lower costs under the pretext of international agreements.

Indonesia, Singapore and Malaysia are chosen because each country has a unique situation and relationship with intellectual property and access to health. In addition, regional participation among the three countries have distinct qualities: Singapore represents a country with a limited public healthcare system but with strong foundations to mitigate

public crisis, Indonesia is a reflection of a country handling a crisis whose magnitude breaks barriers and challenges the current status quo and Malaysia, lastly, had sought to find success through its long-standing international commitments. Furthermore, the three countries are different in terms of their economic and legal frameworks and thus provide an interesting sample as to how the three-member states respond and balance intellectual property and access to health under the nuances of technology.

The chapter sheds light on challenges, as well as positive aspects found in the exploration of intellectual property rights and access to health as well the approaches of Singapore, Indonesia and Malaysia. This chapter will first address intellectual property rights, access to health and technology in a general sense. Through the lens of international law as well as human rights, this chapter will also look at Southeast Asia's response towards the situation in the form of declarations, frameworks, existing agreements and roadmaps. The crux of this research is normative, combined with the support of empirical research since the challenge lies in bridging established concepts, theories and views. The research is normative-descriptive in nature and utilizes primary legal resources. Secondary resources such as commentary, newspapers, articles, reports, academic papers and policy briefings are also used, giving greater distinction and depth in the establishment of research. For this chapter, the primary source comes from interviews with government officials and academics.

## **Understanding Access to Health, Technology and Intellectual Property Rights**

Access to health can be regarded as the technical approach to fulfil the right to health, which is one of the parts of international human rights (Huls, 2008). Access to health can be viewed in five dimensions, which are ensuring non-discrimination, physical accessibility, economic accessibility, and information accessibility (UN Economic and Social Council, 2000). Access to health is a fundamental human right that is guaranteed to all races in any circumstance, conviction and distinction (World Health Organization Constitution, 1946). Furthermore, access to health also has a relevant link with health ethics, where the scope of discussion ranges from the treatment of patients that are dying, to the relationship between patients and medical professionals (Soekanto, 1987). Hence, one can define access to health as an inalienable human right, to which every person must be able to receive the best care and medicine in an accessible and affordable manner.

Intellectual property rights are intangible (Easterbrook, 1990) legal rights that are a production of intellectual actions, be it through the fields of literature, science or industry (WIPO, 2004). Patents serve as one of the branches to which inventors can claim rewards and rights over the disclosure of what they create (Mazzoleni, 1998). There are two types of intellectual property, the first one is industrial property that includes patents for inventions, trademarks, industrial designs and geographical indications. Whereas the other branch is copyright which is linked to literary works, films, music, artistic works, and architectural design (WIPO, n.d.)

The types of intellectual property which are used are patents, where it equates to the opportunity for companies to protect technology such as the processing systems used to develop a drug or various approaches to treating a specific disease (Brougher, 2014). Technology to treat a disease can be considered as an invention that may be patented for as long as 20 years. According to WIPO (2002), it is important to mention that the invention is groundbreaking and is an industrially applicable solution to a technical problem, and in this notion, treats a disease that cannot be treated by a generic drug. Technology also serves as the bridge that links the two otherwise different intersections. Indeed, technologies in this context include medical devices, vaccines, procedures and systems that solve challenges that better the quality of people's lives (World Health Assembly Resolution WHA60.29, 2007). So, the crossover relies on the need to bring people affordable and accessible health products where at the same time, patents protect the innovation of inventors but give leverage to inventors to take advantage of their right to be excluded, which is the capacity to create a barrier for others to utilize or sell the invention (Mossoff, 2009).

Major stakeholders include pharmaceutical companies who influence the accessibility consumers have towards their own health. The United States (U.S.), home to many of the biggest pharmaceutical companies in the world, have a direct impact on how other countries are affected by access to health, intellectual property and technology. Indeed, pharmaceutical companies in the United States have exceeded profits well above margins (Anderson, 2013). In the U.S., for example, the pharmaceutical industry is seen as champions, where in 2015, the Chief Executive Officers of Gilead Sciences, Regeneron Pharmaceuticals, Celgene, Baxter International, Alexion and Biogen Idec each received compensation that amounted to more than US \$10 million (Hodgson, 2015).

Pharmaceutical companies have attempted to justify such high profits by the amount of research and development conducted when, in fact, evidence underlines that the high cost of drugs are not linked to aspects such as research, development and manufacturing but actually are based on what can be described as a "blank cheque" where companies have the complete discretion to inflate the prices of drugs. This is troubling, knowing that most ASEAN Member States, with the exception of Singapore, do not have the ability to develop new drugs, and are usually net importers of pharmaceuticals (Ratanawijitrasin, 2009). The UN Millennium Development Goals (MDGs) have pushed for better healthcare by 2015 but the fact remains that two billion people in the world have minimal to no access to much-needed medicine and vaccines (UNCTAD Secretariat, 2015). Thus, pharmaceutical companies and other key industry players have the opportunity to both profit or assist in closing the gap regarding access to health.

Patent law allows inventors of medical technology such as pharmaceutical drugs and other tools to gain control and ownership, but over a period of time, these inventors must let others utilize what has been created (Brougher, 2014). According to Feldman (2018), one can see the justification of such regulations as a reflection of the ideas of John Locke,

where people can freely choose to set aside particular freedoms so that the community as a whole can benefit. However, Feldman does not only present an idealistic scenario that is justified through patent law but also brings forward challenges that can open avenues to abuse patent law such as the process of “evergreening”, where the duration of a patent is prolonged by manipulating or “artificially” extending the monopoly period. Hence, patents, in the realm of intellectual property, are used as a way to protect and widen the power that inventors have over medical technologies.

## **International Legislation Governing Intellectual Property Rights, Access to Health and Technology**

International law serves as a fundamental legal instrument that ensures uniformity and applicability when it comes to intellectual property rights, access to health and technology. Pieces of international legislation most relevant to the case include the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Doha Declaration of 2001. Within the confines of international law, access to health fulfils the right to health, which serves as a component of human rights as mentioned in the UDHR and the ICESCR.

The UDHR contains international norms that were accepted by almost all countries in 1948 through the United Nations. The declaration became a framework for human rights objectives that generally acknowledges the right to life, protection, freedom of thought and of course, consequently, the right to a healthy standard of living which extends not only towards the individual but also towards the individual’s social circles, with medical care and social services included (Universal Declaration of Human Rights, 1948). Within the ICESCR, it is stated that it shall protect the right of the people to enjoy the highest attainable standard of physical and mental health, which includes and is not limited to the prevention, treatment and control of epidemic, endemic, occupational and other diseases. Going forward, these legal instruments serve as a way to realize the rights of people to obtain access to health.

As mentioned in the previous subchapter, intellectual property can be pivotal to the development of health technology and the influence of the efforts to ensure the people’s right to access to health. The UDHR and ICESCR both recognize intellectual property as an important . In Article 27 of the UDHR pursues that “everyone has the right to enjoy the arts and to share in scientific advancement and its benefits, also the right to the protection of the moral and material interests resulting from any scientific production of the author (UDHR, 1948).” Whereas the ICESCR, it is set forth in Article 15.1 (c) as “a way to safeguard the moral as well as material interests that come from any scientific, literary or artistic production of the inventor (International Covenant of Economic, Social, and Cultural Rights, 1966).”

One can look at the It is also important to look at WTO's TRIPS agreement, which taps the intersection between human rights and intellectual property. Subhan (2006) argues that TRIPS is intended to present a uniform set of standards that can ensure that intellectual property protection is a consistent norm within the international community. TRIPS gives the opportunity for intellectual property by protecting as well as enforcing intellectual property rights that play a viable role in the transfer and dissemination of technology in a fashion that is appropriate to social and economic welfare, where the provisions in regards to patent are set forth in Section 5 of the treaty (Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994).

Health products can be the subject to TRIPS as mentioned under Article 27, where it is stated that patents shall be available for any inventions, and any technology. In this sense, TRIPS has also allowed states to conform to the necessary steps to ensure that public health and nutrition is protected as to stop the abuse of intellectual property rights (TRIPS, 1994). So, in general, TRIPS has tried to protect the right of the inventor for his/her invention towards medical products while at the same time it tried to ensure the public right of access to health. In addition, Article 31 addresses the concept and scope of compulsory licenses, a mechanism where a country that faces a public health crisis can be issued leniency in the production of generic drugs even if there is an existing patent (WTO, 2001). However, what constitutes as a public health crisis has various connotations and can even lead to international lawsuits and sanctions against wealthier countries towards developing countries (e.g., United States v. Brazil, v. South Africa, 2002). Hence, what is determined as a public health crisis in the views and legislation of one state might not correspond to the views of another member state (Crook, 2005). TRIPS, however, does add benefits that could become of use to developing countries, especially when it is about finding the cheapest medicine available by utilizing parallel importing.

Presently, the dangers in the TRIPS agreement are that it serves as a launchpad for multilateral, trilateral and bilateral contracts between member states that can either extend the authority and breakaway the limits that the TRIPS agreements can have or actually erase flexibility such as parallel importing and compulsory licenses (Okiediji, 2011). Before the TRIPS were enacted, there was the Patent Cooperation Treaty (PCT) that constituted the international patent system (Patent Cooperation Treaty, 1970). It should be noted that one of the main lobbying groups that were paramount during the discussion regarding the development of the TRIPS agreement was to no surprise the pharmaceutical industry that was very eager to have TRIPS signed due to the restrictions it had in developing countries and the leniency it gave to wealthier countries (Velasquez, 2017). Still, this did not stop individual countries to determine what constitutes an 'emergency'. Indeed, the TRIPS agreement, with its fervent ability and demeanours to pursue heightened protection towards intellectual property, in turn protected and elevated the pharmaceutical industry. Such is the case with Thailand's experience in the 1990s where according to Lalitha (2002), the pharmaceutical company BMS was able to patent a better formulation of previous anti-AIDS treatment, thus securing a monopoly by putting forward the concept of compulsory

licenses and selling the drug for \$2.5 a tablet, even though it was based on a generic drug that was cheaper.

Such actions led to public outcry, leading to the Doha Declaration of 2001, which, according to Pascal Lamy, who served as Director-General of the World Trade Organization, “solved about 10 percent of the problem of access to medicines by developing countries” (Tamar, 2017). The Doha Declaration reaffirms the commitments of the international community to utilize the principle of compulsory licensing to lower prices - giving strong preference and support for developing countries (Lalitha, 2008). However, despite the international support of the Doha Declaration (Gostin, 2014), this does not stop legal frameworks to have political interpretations and ramifications. For example, Colombia wanted the WHO’s assistance in the issuance of a compulsory license that could in effect, lower the prices of imatinib, a cancer drug from the United States, which was part of the WHO’s list of essential medicine (FM’Hoen, 2018). In response to these efforts, the U.S. threatened to withdraw its financial support for Colombia (FM’Hoen, 2018). This underlines that political sentiments continue to hinder perceived legal victories. In cases where prioritization is necessary, human rights shall be given more weight than intellectual property rights (Cullet, 2003).

Based on previous discussions, it has to be established that intellectual property rights are temporary rights granted by the state that can be revoked and transferred, while the right to access to health is inherent and inalienable. The UN Sub-Commission on Human Rights concluded that the obligations to maintain human rights ranked higher than international economic policies and agreements (WTO, 2001); in terms of the law in place, TRIPS shall not negatively impact on the fulfilment of human rights. This is further strengthened in International Health Regulations (2005) where it is stated that “the sovereign right of States over their biological resources”, and further recognized that “intellectual property rights do not and should not prevent the Member States from taking measures to protect public health”. ICESCR is drafted in a general approach, in order for no technical provision prevailing to follow through the enforcement process. Most of the time, these approaches may be settled through the interpretations of the contracting states. Although it is commonly accepted in a legal perspective, this makes adjudication and accountability difficult in the context of the WTO (Cullet, 2003).

## **Southeast Asia’s Regional Response and Development**

The roots of Southeast Asia’s commitment towards intellectual property and access to health can be found within the ASEAN Socio-Cultural Community Blueprint 2025 (ASCC) that seeks the promotion and registration of intellectual property rights, to enable partnerships in the areas of food safety, medicines, traditional cultural assets, as well as biodiversity-based products (2016). When it comes to Southeast Asia’s intent to ensure health as a human right, one may look towards the ASEAN Post-2015 Health Development Agenda Goals for 2020 that underpin universal access to crucial healthcare that is safe



and products which include traditional as well as medicine that is complementary (2018). Furthermore, this post-2015 health agenda is divided into clusters that have specific missions to provide better access to medical services and products that are affordable and secure, being accessible to all stakeholders including vulnerable groups. In addition, ASEAN also adheres to the principle of the rational use of medicine (RUM) (ASEAN, 2017) which the WHO sees as a way in which patients obtain medicine in accordance to their needs, in proportion to the requirements, within a duration of time and at a price that is affordable to the individual as well as the community (WHO, 2015).

Regionally, ASEAN has communicated the TRIPS in the capacity of a Framework Agreement on Intellectual Property, with the prime vision of boosting trade and economic synergy (Barizah, 2018) but inconsequent to this, member states followed through and complied to the regulations laid out in TRIPS where public health, nutrition and the promotion of public interests were significant to the socio-economic and technological development of member states with a note that they follow international commitments (ASEAN Framework Agreement on Intellectual Property, 1995). Furthermore, the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC) finds that intellectual property is vital towards trade and investment between member states. In conjunction with this, ASEAN also established four-year plans regarding intellectual property which aimed to establish intellectual property rights registration systems as well as to empower activities related to intellectual property among communities and institutions (ASEAN, 2010). However, the next four-year plan which was crafted in 2016 showed that there was neither specific nor significant progress and that it did not open avenues to discuss health in relation to intellectual property rights. The only sliver that considered health in this regard was found in the context of education. At the ministerial level there was more movement with regard to the discussion on access to health and intellectual property, as through the Health Ministerial Meeting Joint Statements, member states were committed to provide opportunities to negotiate increased availability of medicine and underlines the importance of the flexibilities provided by the TRIPS. Closely related to this, was the launch of the Southeast Asian Regulatory Network in 2016 which seeks to bring forward partnerships that assist the codification and classification of regulations within the medical sector (Singh, 2018).

Although ASEAN serves as a hub for discussion, it does not specifically bind member states to adhere to the same international commitments. This can prove to be problematic since particular member states such as Malaysia, Singapore and Vietnam are part of the Trans-Pacific Partnership (TPP) where the process of ever-greening will be easier and may provide an extension towards the permits of patents (Kimura, Chen, Iliuteanu, Yamamoto, & Ambashi, 2016). Other challenges are the lack of enforcement as well as clear cut regulatory policies for the region regarding compulsory licenses; there have been instances where ASEAN member states have relied on their own national bodies or government institutions to negotiate between a respective foreign government and pharmaceutical companies, such as the Philippines being able to bring forward a “win-win solution”



through its Office of Intellectual Property utilizing this exact medium (Garcia, 2017). Hence, it can be emphasized that there is a clear disinterest between ASEAN member states to bring forward a connection between access to health and the challenges faced through intellectual property. With regard to this, we can see that intellectual property is treated as an entirely separate issue from health. This reluctance has resulted in an individualist approach that can be useful for member states that already have strong infrastructure in the health sector, with lax policies in the pharmaceutical industry but as discussed in the next subchapter, such a position can influence member states in different ways.

## Indonesia's Experience

### *Challenges and Controversy: Avian Flu Outbreak in Indonesia*

One of Indonesia's greatest tests in the realm of public health was when the avian flu broke out across Southeast Asia. In this regard, Indonesia clashed with the international community over sharing virus strains and samples from the country with the WHO, stating its disinterest was due to vaccine and medicine for the virus were not being distributed (Cassier, 2010). Indonesia was thus concerned about developing countries where the flu broke out sharing virus strains samples for free under the aegis of the WHO, which gave wealthy countries the opportunity to patent vaccines and then capitalize on it. Avian flu is a contagious disease caused by the H5N1 virus and can cause sudden death in poultry and spread very fast. In its development, avian flu can be transmitted to humans from poultry infected by the H5N1 virus. Transmission occurs through direct contact with infected poultry (when carrying/transporting, slaughtering and being contaminated with poultry droppings) and eating blood, eggs or undercooked poultry meat. It was found from the data sequencing of the virus that was sent to the WHO that human-to-human transmission of H5N1 had never happened in Indonesia. What happened in Indonesia was only transmission from animal (poultry) to humans.

In Indonesia, avian flu was first discovered in 2005 in Tanah Karo, North Sumatra. Indonesia was also the highest-ranking country in terms of cases of avian flu. This situation was caused by various factors, namely: early detection that was difficult to be done, public awareness of the dangers of avian flu at the time was still low, and the vigilance of medical staff was lacking. Another notion that further worsened the situation was that the so-called bird flu's initial symptoms resembled that of other diseases such as dengue fever, influenza, etc. In addition, the majority of avian flu patients were taken to the hospital with severe conditions, resulting in treatment that was not optimal and that did not provide much benefits for recovery efforts. This proved to be a monumental crisis throughout the region, but it hit Indonesia hardest.

Indonesia had thus to balance its moral commitments for the Global Initiative on Sharing All Influenza Data with the developing situation within the country. From the perspective of the former Health Minister of Indonesia at that time, Dr. Fadhilah Supari (Personal

Interview, 2019), it was a situation where intellectual property (patents) and access to health clashed in their interests, as the innovations produced by inventors were usually protected but on the other hand, there needed to be an avenue that could open a greater access to health and medicine. Makarim Wibisono, who was Indonesia's Ambassador to the United Nations, stated that the then Director-General of the WHO, Margaret Chan, had directed Indonesia to reach through the private sector in regard to finding an appropriate cure to fight the avian flu.

However, as it turns out, the private sector was utilizing virus strains from Indonesia for a commercial benefit before asking for consent and approval. Indonesia was not compensated, and the international community did not bring forward any alternative other than to negotiate directly with the private sector rather than through official international avenues (Fidler, 2008). In this regard, Indonesia was at odds with the international community over sharing virus strains and samples from the country with the World Health Organization, stating its disinterest was due to vaccine and medicine for the virus not being distributed (Supari, personal interview, September 6, 2019).

### ***Laws, Access to Health and Intellectual Property in Indonesia***

Indonesia's journey towards achieving greater access to health is a balance between protecting pharmaceutical patents in line with its standards through TRIPS as well as its intentions to provide drugs at a lower cost (Utomo, 2009). However, at its essence, Indonesia is a country that has gone through a process of struggle in developing its health system, especially as a "developing country recently hit by a severe financial crisis" (Thabrany, 2009). Indeed, as a country that craved much-needed reform, both within the creases of post-Sukarno years, as well as, after the posthumous death of Suharto's New Order, the harrowing fight to obtain financial and political stability often took the centre stage as compared to issues of healthcare and social development. Health was, in fact, made a politically dangling chain, with healthcare given to Indonesia's poor because of the social unrest that occurred in 1997 (Pisani, 2017). Hence, this jumpstarted Indonesia's ambitious journey in paving the way towards universal healthcare in 2013, opening a Pandora's box of political motivations and interests to boot. On the subject of compulsory licensing, according to Velsquez (2004), Indonesia represented a recent case that had issued compulsory licensing, particularly for antiretroviral drugs.

Although Indonesia's Constitution does not explicitly state its intentions to increase the access to health within the country, it does entail that every person has the right to live in an environment that realizes "physical and spiritual prosperity" (Article 28H, Indonesian Constitution, 1945). However, the country's main concern regarding public health can be understood through Indonesia's 2009 Health Law which underlines that every person is entitled to health as well as the right to receive access to resources within the scope of health. From the perspective of intellectual property, Indonesia has shown its compliance to the TRIPS agreement by looking towards four specific laws from 1961 until 2001 (Respaty,

2004), one of the laws that continues to become increasingly relevant within Indonesia's intellectual property ecosystem is the country's Patent Law of 2001. Unfortunately none of the laws - although supposedly a direct form of compliance within TRIPS - stipulated parameters that took into account the danger that such an agreement bared without proper national interpretation. During formal discussions conducted by academics and public officials to evaluate the development of the country's Patent Law, the issue of health within the scope of intellectual property was only brought up in the context of counterfeit medicines (BPHN, 2001) and not in the instances of reliving patents for the importance of public health, as alluded through TRIPS and the Doha Declaration.

Under the scope of health law in Indonesia, the comprehensive foundations that formulate the country's interpretation of intellectual property in the context of bringing forward accessible medicine and health technologies are not explicitly combined or stated in any legislation specifically concerning health. For example, Law No. 4 1984 concerning Infectious Diseases underlines the importance of treating and containing such diseases but does not address its relationship with the private sector that might have access to such medicine. In addition, even during the plight of avian flu, Presidential Decree No. 7 2006, which actually established the basis for the country's response towards the disease, does not give leeway or explanation as to how a cure might be provided - in consideration of the interests of the private sector.

Even if the cure had been manufactured, usually it belongs to the patent holder; in this case, the pharmaceutical company held the exclusive right for 20 years. Drugs that have been granted a patent cannot be produced and marketed by other pharmaceutical companies without the consent of the patent owner. In Indonesia, a patent for a drug lasts 20 years. If the patent has expired, it cannot be extended and the drug can be produced by other pharmaceutical companies, both in the form of generic drugs and branded generic drugs. The large variety of drug prices circulating in pharmacies and on the market has caused uncertainty for the public in obtaining the drugs needed. In order to provide correct and transparent information on drug prices for the public, the Government, through the Ministry of Health, enacted the Minister of Health decision concerning Highest Retail Price (Het) in Medicine Label. In 2017, Pharmacies and other Health Service Facilities are compelled to use the Pharmacy Net Price plus Value Added Tax (VAT) as the highest benchmark price. But in order to guarantee the availability and even distribution of generic drugs, drug manufacturers can add a maximum distribution fee of 5% to 20%, depending on the region. Although only applied to generic medicine, this regulation is to provide the patient, the idea of drug price increasing access to health and medicine and to curb the greedy practice of the pharmaceutical company.

Indonesia amended their Patent Law in 2016, where the government was given authority to determine expensive pharmaceutical products and biotechnologies that can alleviate public health crisis, and since has the discretion to carry out their own individual patents for the purpose of national security or in cases where there is a strong and important need

among society. To give greater detail to Indonesia's 2016 Patent Law, particularly to how it affects greater access to health, the Indonesian government, through the Ministry of Law and Human Rights, issued a Ministerial Regulation in 2018 that specifically addressed compulsory mandating that a compulsory license may be issued by the Minister through the fact that the patent holder carries a patent that might place society at a disadvantage. According to Indonesia's legal scope, a compulsory license is non-exclusive in nature and, as aforementioned, is issued by the relevant Minister.

### ***Government Response to the H5N1 Pandemic***

The Indonesian government gave the advice to abstain from contact between humans and poultry as well as keeping clean and practising healthy ways of life. The government also sought to stockpile the Tamiflu vaccine. However, it turned out the drug was purchased by developed countries first - a concept known as stockpiling. Later, it was discovered that the countries who bought it had never experienced an outbreak of avian flu. So, at that time, the government sought to import the vaccine from India who had a license from Roche (Siti Fadilah Supari, personal interview, September 6, 2019).

For more than fifty years, the countries who had pandemic outbreaks had voluntarily been given virus samples to the World Health Organization Collaborating Centre (WHO CC) to create a seed virus, which will be sent along to the vaccine manufacturers, which are located mostly in the industrial countries. The process is conducted under the auspices of the Global Influenza Surveillance Network (GISN) and does not offer any compensation to the countries providing the sample. Further, the vaccine that is patented will be commercially distributed to the countries who need the vaccine. Makarim Wibisono, the Indonesian Ambassador and Permanent Representative to the United Nations, has also stated that GISN had become the root causes of a diplomatic struggle that would later be initiated by Indonesia to fight for a more equitable way of virus sharing. (personal interview, September 18, 2019)

In this regard, the WHO treated the H5N1 virus with the same rules as the Seasonal Flu Virus. Countries that have experienced avian flu outbreaks in humans must submit the H5N1 virus to the WHO CC and are only told to wait for confirmation of the diagnosis of the virus sent. However, after that, the status of data sequencing was known. One thing that was known was that the virus was stored by WHO in the Los Alamos National Laboratory in New Mexico (Siti Fadilah Supari, personal interview, September 6, 2019). After that, the Minister of Health of Indonesia, at that time Siti Fadilah Supari, sent a letter to the WHO to request that the WHO shall disclose its findings in regard to data sequencing of the virus. On August 8, 2006, it was noted that Indonesia began the transparency of DNA sequencing data from the H5N1, namely by sending the data to the "Gene Bank," besides the WHO itself. At the same time, the laboratory of Los Alamos was closed, and the data sequencing was further stored at the Global Initiative on Sharing All Influenza Data (GISAID) and the Bio Health Security (Siti Fadilah Supari, Personal Interview, 2019).

Since December 20, 2006, Indonesia no longer sends avian flu virus specimens to the WHO CC. as long as the mechanism of the sharing system still following to the extent of the GISN. As for vaccine supply of H5N1, the Health Ministry of Indonesia had signed a Memorandum of Understanding on of February 7, 2007 with a foreign company called Baxter, as the government saw the company being more favourable in terms of cooperation as compared to the WHO. By March 27-28, 2007, the High-Level Meeting on Responsible Practices for Sharing Avian Influenza Viruses and Resulting Benefits was commenced to equalize the world perception of the injustice of the GISN mechanism created by WHO. After the meeting, the Jakarta Declaration was coined with the Terms of References being crafted to draft a just and transparent virus sharing method.

Makarim Wibisono then reiterated that, after a long debate and personal efforts by the Minister of Health, what was brought forward was World Health Assembly Resolution Number 60.28 on the “Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits”, which has already been enacted and will be further used as a guideline for the international community to build a transparent and fair mechanism of virus sharing (personal interview, September 18, 2019). During the deliberations, it also emerged that the WHO had the Virus Terms of References, which contain guidelines that had been created in March 2005. However, the TOR was eventually removed by the WHO on April 18, 2007. This means that from March 2005 to April 18, 2007 WHO CC had violated its own provision in virus sharing. According to the TOR guidelines crafted by the WHO Advisory Board in March 2005, in conducting virus sharing, stakeholders should make use of a Material Transfer Agreement (MTA) from the country who has sent the virus, as a sign that everything that must be licensed by the country as the virus owner. However, during that period WHO CC with the protection behind WHO’s GISN, did not follow the provisions that had been made in advance (Chan Chee Khoon and Gilles de Wildt, 2008).

A variety of diplomatic efforts was commenced in order to change the GISN mechanism of virus sharing, including a meeting with John Lange, then U.S. Avian Influenza and Pandemic Ambassador, in the context of the Inter-Governmental Meeting during December 2008. Nevertheless, it can be concluded that there was a polarity of views towards Indonesia’s decision in terms of the concession of virus sharing to the WHO CC. In this sense, the virus shall be shared without any requirements for the sake of global health security. First, genetic resources that are benefited by both parties include the virus sharing mechanism, and this is deemed to be unjust, not transparent and unequal. Finally, on May 5, 2011, the World Health Assembly had coined a final resolution to the struggle with the Indonesian government - the WHA resolution number 64.8. This resolution established a framework for multilateral cooperation in world preparedness to deal with influenza pandemics, especially virus sharing mechanisms, access to vaccines and other benefits as well as the Standard Material Transfer Agreement (SMTA) (Siti Fadilah Supari, personal interview, September 13, 2019).

## ***Benefit Sharing and Transfer of Technology***

As already mentioned, Indonesia had intensively tried to balance the outcome of sharing the influenza virus specimen to the GISN by various diplomatic efforts. The practice that had been applied for more than 50 years was considered to be an unjust mechanism, where in this case, the state who is the sender of the virus would get no compensation for the sake of what is meant by 'Public Health.' The sender of viruses, in this instance, are developing countries like China, Vietnam, and Indonesia (Chan Chee Khoon and Gilles de Wildt, 2008). The avian influenza case as an example had demonstrated the affluent "High-tech" countries and poor agriculture-based countries. The ongoing practices had to be deemed as lacking equality in terms of the technological aspect of vaccine manufacturing (Endang R. Sedyaningsih, et al., 2008).

With regard to this, Indonesia had ratified the Convention on Biological Diversity (CBD) by Law No. 5 of 1994 on ratification of the United Nation Convention on Biological Diversity. It is clearly stated in Article 15 of the Convention that the practice of sharing biological specimen and viruses that abides by Indonesian national law, which means there is a must in the use of a Material Transfer Agreement (MTA) for every transfer of genetic resources, which is at this instance is the virus sample. Further, it is comprehensible that in exchange for the genetic resource, a transfer of technology among the contracting parties is essential and that such transfer must be done to the extent of the creation of the CBD, thus it creates a mechanism that would be called a benefit-sharing (United Nations Convention on Biological Diversity, 1992). This provision was the one that WHO tried to avoid, as mentioned in the previous subchapter.

## **Singapore's Experience**

### ***Singapore's Successful Swine Flu Solution***

Over the last decade, Singapore has only experienced two pandemics: The Severe Acute Respiratory Syndrome (SARS) in 2003 and the H1N1 influenza (Swine Flu) in 2009 (MOH, 2014). These two cases serve as a lesson as to how a country can successfully overcome a potential public health crisis in an effective and efficient manner. Swine flu, in particular, served as a huge challenge in Singapore where on May 27, 2009 a then 22-year-old woman picked up the virus after visiting New York (The Star, 2009). By the end of September 2009, it was estimated that at least 270,000 persons had been infected by pandemic influenza A H1N1 in Singapore (Cutter et al., 2010). In this instance, the government established several countermeasures in consideration of the laws in place, intellectual property and distinct technology in the country which were able to minimize crisis and issue enough medicine to solve the problem.



## *Laws, Intellectual Property and Access to Health*

Singapore does not explicitly acknowledge access to health and health rights in its Constitution. However, given that Singapore follows the common law system, one can rely on precedence as well as statutes. In this regard, Singapore follows principles that reach back to their very own interpretation of the Hippocratic Oath, which is sworn by all doctors vowing to uphold all ethical standards in their profession (Jeyaretnam, 2001). Essentially, as Calvin Ho, an Assistant Professor of Bioethics and Law from the National University of Singapore, states that Singapore's health law is characterized based on medical activities and professionals such as regulations on doctors to nurses (Ho, Wai-Loon C., telephone interview, September 17, 2019). Furthermore, Singapore's commitment towards promoting access to health is based on the country's policy practices, such as the case within the country's Healthcare Bill. In addition, legislative efforts culminated in making sure that "Singaporeans always have access to good quality and affordable health care." Health Minister Gan Kim Yong stated that "after all [healthcare] is integral to an inclusive society" which culminated in the 2020 Healthcare Plan (Yong, 2009).

However, back in 2006, Singapore complied with the Anti-Counterfeiting Trade Agreement (ACTA) which, in the pursuit of stronger measures of intellectual property rights, also brought forward a darker undertone that could disadvantage stakeholders because it would decrease the access towards generic drugs in developing countries (Lexchin, 2013). In addition, Singapore, alongside with other ASEAN Member States like the Philippines and Vietnam, has also complied with the measures and terms of the TPP which can also deter the country from accessing drug prices that are cheaper (Kapczynski, 2011). Singapore's priorities were not instilled under the area of public health (Brookings, 2017). Indeed, even the late Lee Kuan Yew stated that Singapore's own interests as a new state were vested in its need to seek international recognition for Singapore's independence, defense and the economy. In regard to intellectual property rights, particularly patents of the relevant health products, Singapore still respects them, by referring to the application of the Doha Declaration in its Patents Act<sup>1</sup>. In general, the government and any party authorised in writing by the government of Singapore may make use of a patented invention, to the extent of restricted use of a public, non-commercial purpose or during a national emergency or other circumstances of extreme urgency.

Further, in regard to any relevant health product<sup>2</sup>, such stakeholders may import and

<sup>1</sup> Singapore's Patent Act has been enacted since 1994 and was revised in 2005, in the interpretative section of the Act, it is stated that the Doha Declaration was taken into account during the revision of the law.

<sup>2</sup> According to Section 2 of the Patents Act, relevant health product may be interpreted as stipulated in Paragraph 1(a) of the Decision adopted by the General Council of the World Trade Organisation on 30th August 2003 on the implementation of paragraph 6 of the Declaration on the TRIPS Agreement and Public Health adopted in Doha on 14th November 2001. The term that is used is "pharmaceutical product," which is any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address public health problems as recognized in paragraph 1 of the Declaration. It is understood that active ingredients necessary for its manufacture and diagnostic kits needed for its use would be included



make use of such products in the name of public interest, if Singapore is in the state of a national emergency or other circumstances of extreme urgency. Such measures can only be taken, if the government has given the Council for TRIPS a relevant notification regarding the relevant health product, and it can only be done for public non-commercial purposes or during a national emergency or other circumstances of extreme urgency (Patents Act of Singapore, 2005). On the other hand, even this notion has its barriers. For example, Singapore's bilateral Free Trade Agreement with the U.S., crafted in exchange for better export-import deals, mandates that patented products belonging to the U.S. (which includes medicines) would enjoy prolonged ownership and stricter application regarding the flexibilities of TRIPS (WHO, 2008).

### ***Technology: Singapore's Own Emergency System***

Singapore has its own pandemic emergency system called the Disease Outbreak Response System; a framework that categorizes public health emergencies on the basis of a color code system with the four levels being green, yellow, orange and red. Green indicates that the disease is mild, yellow means that the disease is severe but is currently occurring outside of Singapore, orange means that the disease is severe and is able to spread from person to person but has not been spread within Singapore and thus is contained, and red indicates that the disease is severe and is spreading widely.

The Health Minister of Singapore at that time, Khaw Boon Wan, has made it clear that regarding the swine flu, the government would make a million doses of Tamiflu vaccine (the vaccine for H1N1) available to the public, with the price being around 20 SGD to 40 SGD (The Strait Times, 2009). There were two vaccines imported which were the Panvax H1N1 Vaccine by CSL Limited, Australia and the Pandemrix H1N1 Injection by GlaxoSmithKline Biologicals from the United Kingdom. These vaccines would then be distributed by the Ministry of Health to local doctors and clinics and being used in accordance with the official guidance (HSA, 2009). It was known that by 2011 there was no patent of vaccine made available in Singapore, where the only thing patented were the means of diagnosing the H1N1 disease filed by the Agency for Science, Technology and Research (WIPO, 2011). No manufacturers of the were vaccine domiciled in Singapore, thus, the government had to import the vaccine from above-mentioned two countries.

Singapore, with its tenacity to establish a healthcare system that can accommodate all Singaporeans, has started to move in a more digital fashion, enabling information technology in its communication of better and more effective healthcare systems (WHO, 2018). The country is also a strong model for international property rights, which is largely due to the lack of cases and united patent bill (WIPO, 2016). In addition, Singapore has positioned itself as an intellectual property hub, with plans to develop such a notion by the Singaporean government starting from 2017. However, the country's aspect on social services is not a blanket deal that other countries from the United Kingdom or Indonesia enjoy--where they have access to healthcare that utilizes a single player system. Indeed,

Singapore focuses more on emergency care and what can be defined as “catastrophic illnesses” like cancer. Hence, Singaporeans need to prove that they are below a certain income threshold before they can receive more affordable options for health care (Ho, Wai-Loon C., telephone interview, September 17, 2019).

Hence, what becomes an important notion for Singapore is that the government understands that infrastructure needs to be created to detect whether or not there is potency towards a particular health crisis. In Singapore’s case, instead of directly finding ways to make sure that patents can be overlooked, they are creating the necessary infrastructure that can assist in preparing for a public health crisis. This is, of course, a luxury that cannot be afforded by all countries - especially ASEAN member states. However, Singapore’s pragmatic approach can act as a lesson for ASEAN countries to prepare for crisis by establishing technological systems that serve as the foundation of effective planning, despite barriers that can potentially be seen in patents.

## Malaysia’s Experience

### *Of Aids and Assertion: Malaysia’s Determination to Cheaper Drug Prices*

HIV which results in AIDS is seen by the WHO as a country that has been concentrated with the disease, increasing since it was reported in 1986 (Mondal & Shitan, 2013). Indeed, from this situation, at the other end of the spectrum we see that there are number of drugs under patent that treat HIV/AIDS which include ciprofloxacin (Bayer), fluconazole (Pfizer), foscarnet (Astra), ganciclovir (Syntex), and albendazole (SmithKline) (Boulet, Perriens, Renaud-Thery, 2000). For comparison, 150mg of the drug fluconazole costs \$55 in India without patent protection whereas in Malaysia it costs \$697 (Nwobike, 2006). Although Malaysia’s government has entered into negotiations with the private sector to lower drug prices for HIV/AIDS, the fight for cheaper drugs has been a tug-of-war, with prices successfully dropping in 2004 but only to be on the rise less than ten years later (The Star, 2013); once again, due to the barriers provided by patents. Older drugs might have dropped but newer drugs that have been deemed more effective to fight AIDS/HIV have multiplied in costs more than 10 times for Malaysia (NBC News, 2013). However, Malaysia’s efforts to issue compulsory licenses provide hope to other middle-income countries that in the face of international pressure, such actions are possible and indeed in 2004 Malaysia comprised of one of the four countries that were successful (Westerhaus & Castro, 2006).

### *Laws, Intellectual Property and Access to Health*

When it comes to health legislation in Malaysia, there is no inherent notion that points out that health is a fundamental right. However, Malaysia’s Federal Constitution has underlined the concept of the right to life which could be interpreted in many aspects and extending towards the quality of life (Fundamental Liberties, Part II, Malaysian Federal Constitution). Although the subject is debatable, the law’s communication of the right

to life could be linked to the right to health (Kaur, Sharon., email interview, September 17, 2019). Malaysia has complied to TRIPS, as well as the Doha Declaration, and since international law is communicated through national legislation, compulsory licenses were issued under the Patent Act of 1983. According to Dr. Tay Pek San who is an Associate Professor for Intellectual Property Law at the University of Malaya (email interview, September 20, 2019), the purpose of patent law is to give the patent owner exclusive rights that are specific towards the usage of an invention that allows the invention to disclose and acknowledge such creations to the public. If there were no exclusive rights, then there would be little incentive for inventors to justify the time, effort and economic resources that were utilized to produce such innovations.

Dr. Tay describes patent law as a balancing act, where the access towards the invention is restricted to the need to pay should one use such an invention. She acknowledges that this paradigm, in reality, produces a premium on drugs which are priced higher than what the population from developing countries can afford (email interview, September 20, 2019). There is leniency within Malaysian Patent laws under Section 84 of the Malaysian Patents Act 1983 which provides authority to the government to exploit a patented invention under certain circumstances, with Section 49 detailing compulsory licenses (San, Pek T., email interview, September 20, 2019).

Following Malaysia's membership to the TPP agreement, concerns were made that it would extend patents and limit access to health (Gleeson, Lexchin, Lopert, & Kilic, 2018). However, Dr. Tay has asserted that Malaysia's Office for Intellectual Property has proposed amendments regarding the Patent Act of 1983, which includes the potential for compulsory licenses to be issued on the basis of public health problems (email interview, September 20, 2019). This is an effort towards the accession to the Budapest Treaty on International Recognition of the Deposit of Microorganisms and to empower the TRIPS Agreement which indicates that the country is interested in maintaining their patent law within international developments.

In this regard, technology through this aspect refers to the medical devices, drugs, processes and system which have acted as a balance between intellectual property rights and access to health. Technology, in the case of Malaysia, is seen as a pricey commodity that can open and assist the treatment of HIV/AIDS, should the prices of the drugs be reduced through the notion of compulsory licensing. Even though in Malaysia technology is currently just the product that is used to treat HIV/AIDS, Dr. Tay is confident that it can also serve as a solution to better healthcare within the country (email interview, September 20, 2019).

Although the government was offered substantial discounts by GlaxoSmithKline and Bristol-Myers, they instead chose to utilize the flexibilities that were available to TRIPS and decreased the cost of three patented medicines by 81% (WHO, 2014). The Government of Malaysia believes that it should realize its right to put into action compulsory licensing through directly negotiating with the pharmaceutical companies (MOH, 2010). Hence,

the negotiation process was realized through the form of cabinet directives that amended domestic intellectual property laws that then allowed generic drugs to be imported from India and brought to public hospitals (Wise, 2006).

However, the Malaysian government's decision to issue compulsory licenses was met with opposition from the private sector and although Malaysia (in line with the TRIPS Agreement) offered a four percent compensation to the pharmaceutical companies in question, which they refused, trying to avoid creating an international precedent on the matter (WHO, 2014). Afterwards, almost in an act of classic dominance, the U.S. entered into a bilateral free trade agreement with Malaysia, that caused the country to further discourage the usage to issue compulsory licenses again (WHO, 2014). Despite this notion, Malaysia serves as an example for middle-income countries that have continued to utilize compulsory licenses even though they have to balance their rights with international commitments and the barriers found in other trade agreements (Grillon et al., 2018). In order to promote the intersection between technology, access to health and intellectual property rights, Malaysia developed to be an active voice within the region advocating for compulsory licensing. In a general sense, one can argue that Malaysia, alongside other member states in the region of ASEAN, can build a bloc and utilize available resources together by pooling and fostering partnerships with each other and building a strategy in which health is superior to trade (Kaur, Sharon., email interview, September 17, 2019).

### ***The Road (Less) Taken: Utilizing Technology to Balance Access to Health and Intellectual Property***

Efforts to instill intellectual property rights as a form of protection for inventors cannot prevail in the face of human rights and access towards health. In this instance seesaw diplomacy is shown prominently throughout the research where there is a clash between innovators needing incentives and people needing the best available medicine in an affordable manner. The international community, in an attempt to be cautious to the ownership of medical technology, has instead provided opportunities for pharmaceutical companies to find loopholes and to undermine developing countries. Furthermore, international agreements, such as TRIPS, seem to become only useful when it is not a burden to wealthy countries, which often times leads to international pressure. In addition, agreements developed by the WTO, in coordination with member states, clearly do not engage with human rights in significant or impactful ways, as much of the agreements is left to member states to interpret at the national level. Thus, what could be perceived as a flexibility for developing countries, can in fact prove to be a frozen clause on paper rather than a way to enact real compromises for the access to health. Furthermore, the international community does not provide an appropriate incentive that can serve as an alternative or an option for patents being lifted (WHO, 2008).

In a regional sense, it can be deduced that most ASEAN member states have largely followed the TRIPS agreement; most likely due to the fact that no other document of

international legislation comprehensively guarantees access to health in the context of a public health crisis. ASEAN as an institution has unfortunately failed to create a strong link between access to health and intellectual property rights, focusing instead on retaining mundane rhetoric that does not necessarily bring productive dialogue to the table. This is disappointing because in retrospect, should there be a more public form of advocacy regarding the relationship between access to health and intellectual property rights, perhaps ASEAN member states could focus on pooling resources, information and advanced technology when it comes to the health technology. However, in a way, this is understandable due to ASEAN's non-interventionist nature and the fact that agreements, such as TRIPS, can be interpreted differently by each sovereign country.

What becomes a present notion is that many scholarly writings focus on the balance of intellectual property rights and access to health but provide mostly approaches that center around international trade agreements and domestic laws that are relevant only to the scope of intellectual property rights. The missing link within these two notions is how they can be catered through the prism of international human rights law, particularly given the most recent discourse around business and human rights. At the root of the problems arising from the lack of a better relationship between access to health and intellectual property rights is a disunited stance of developing countries with regard to challenging the current system – a system that does not benefit the poor but sustains the wealthy. Indonesia's experience serves as a lesson for ASEAN, where challenging the system and fighting for the rights of a nation should become the norm. Indeed, although the country faced controversy because it refused to build a coalition, this ultimately led Indonesia to be acknowledged as diplomatic force to be reckoned with, worthy of receiving compensation and recognition. Indonesia has given the notion that there cannot be accessibility without fair play.

For Singapore, it can be inferred from the case of the 2009 Swine Flu pandemic outbreak in where Singapore implements the Section 57(1) of the Patents Act, where the government at that time had imported the Swine Flu vaccine as the countermeasures of the Government on fighting the 2009 H1N1 pandemic outbreak in Singapore. It is deducted that there was a condition close to national emergency as the DORSC had been turned into the orange indicator or it can be determined that the Government had done an action that has been done for non-commercial public interest, which was for the sake of public health of Singaporean citizens. As the Patents Act stipulated that the Government may do anything towards the health product, the Government then distributed the vaccine to local doctors and clinics having an affordable price around 20 SGD to 40 SGD. In retrospect, Singapore has offered a glimpse on and has served as a model to what technology, access to health and intellectual property rights can do when there is the necessary infrastructure in place. Technology does not only serve as an object or product that is being patented but rather, a system was put in place that prepared the country of an impending health crisis and the time and contingency that was given allowed Singapore to gather the resources needed, despite facing similar issues regarding patent principles and rules.

Malaysia on the other hand, was a hybrid between Indonesia and Singapore. Although it did not specifically address the need for health in its Constitution (much as Singapore did not as well), the country utilized the law to strengthen the country's position at the first place and made its stance consistent to what it had agreed upon in prior international commitments. Furthermore, like Indonesia, the country sought to stand up for its right to obtain better access to health; perhaps not in a way which directly challenged the international community but rather by choosing to directly negotiate with pharmaceutical companies, which proved to be successful in 2004 with the issuance of compulsory licensing for greater access to medical technologies.

Throughout this chapter, technology has two reflections where on the one side it acts as the product or device that is currently being contested and on the other side, technology is utilized as a potential catalyst for change, as we see in the Singaporean and Indonesian cases and their assertion to the Convention on Biological Diversity. Indeed, technology should be elevated as an influencer within all aspects of the subject because a guarantee of technological development can provide the people with greater access to health services. In this instance, health technology has to be taken advantage of whilst guaranteeing the safety of patients through relevant regulatory corridors (Basir, S., email interview, September 18, 2019). Furthermore, technology should serve as an innovator and must follow through the agreements of the World Health Assembly such as Resolution 71.7 that recommends for all health ministers to utilize digital technology in the integration of systems and infrastructures (Basir, S., email interview, September 18, 2019). Thus, technology, with the support of the WHO and ASEAN, can become the solution to balance the seesaw diplomacy experienced by countries such as Indonesia, Singapore and Malaysia.

However, technology cannot be the only way to solve the clash between intellectual property rights and access to health. First, there must be clear principles of transparency, equality, and fairness (Supari, S.F., personal interview, September 13, 2019). At the same time it must be ensured that there is a balance between affordability and accessibility (Mboi, N., personal interview, September 18, 2019). Indeed, as an example, when Dr. Nafsiah Mboi was Indonesia's Health Minister, she understood the importance of developing technology to close the inequality gap when it comes to access to health and hence this period oversaw the development of e-procurement, e-distribution, and e-learning as integral tools within Indonesia's Health Ministry, serving as a foundation to providing better healthcare for all. However, if the principles of accessibility and affordability are not adhered to, it would be very difficult to strike a balance between public and private interests. In Mboi's view, technology is a part of the solution but not in its entirety. Rather, technology can serve as a bridge between accessible and affordable health for all (personal interview, September 18, 2019).



## Conclusion

The aim of this chapter is to first, understand the relationships and responses that Southeast Asia offers when it comes to intellectual property and access to health and, moving from such understanding, to analyze the experiences of Indonesia, Singapore and Malaysia in balancing intellectual property rights, access to health and technology. In a nutshell, the three countries had distinct qualities regarding the ways in which they handled a particular health challenge whilst balancing access to health, intellectual property and technology. Indonesia's capacity was to act as a challenger and almost an aggressive counterpart to an increasingly out-of-touch international community that for all accounts and purposes, threw away transparency and placed potential commercialization as a dangling norm. Singapore's healthcare system, although limited, had a sound infrastructure that was able to face a public health crisis by leveraging the technology and systems they had ready to gather the resources needed. Malaysia also stood firm for its international commitments and rights, even when it meant receiving a backlash from the private sector.

Regionally, it is difficult to argue that ASEAN has played its part in sustaining influence in the matter, when in fact the relationship between access to health, intellectual property and technology has been ignored widely. What is clear is that, in order to balance the seesaw diplomacy existing between access to health, intellectual property rights and technology, member states within ASEAN must 1) adhere to the rule of law and align with beneficial international commitments, 2) prioritize access to health besides commercialization, and 3) utilize technology as a way to promote fairness, equality and transparency that can boost the accessibility and affordability of health-related technologies, products and systems.

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## CHAPTER 6

### **Sex, Crime and Deceit: Women and Child Trafficking and Sexual Abuse in the Internet Age in Cambodia and Thailand**

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#### **Abstract**

This chapter uncovers the interplay between the Internet and non-Internet processes of sex trafficking among women and children. By using the “Triple A Engine” model of access, affordability and anonymity, it argues that Internet use increases the ability to exploit a greater number of victims across geographic boundaries by pimps and clients as well as widens the choices made for the use of the Internet by victims alike. The chapter argues that in Cambodia and Thailand, the Internet has provided another channel through which sex trafficking and other sexual abuses have thrived, thereby violating the rights of victims. Women and children form the investigative focus of the study as it follows the Palermo Protocol, which frames the issue of human trafficking as a women’s and children’s issue.

#### **Introduction**

The 20th century has seen a massive breakthrough in technologies. Foremost among these technologies is the rise of the Internet since the introduction of the World Wide Web (www) in the 1990s (Leiner, Cerf, Clark, Kahn, Kleinrock, Lynch, Postel, Roberts and Wolff 1997). Technological changes have brought on social, economic, business and philosophical transformations in the world, “extended[ing] ... informational and interactive capabilities” (Cho, de Zuniga, Rojas and Shah 2003). The Internet has led to a wide array of online sexual behaviours, such as the use of explicit sexual material, otherwise known as cybersexual consumption, and seeking out sexual partners for a transitory relationship (Griffiths 2000, 2001, 2012). The use of Internet pornography has seen on the rise in recent decades in part because of ease of access given that greater numbers of people are able to access the Internet (Buzzell 2005). The use of Internet pornography also varies by mode: they could include images, videos, sexually explicit games, and chat rooms (Short, Black, Smith, Wetterneck, Chad and Wells 2012). In contrast to offline sexual activity, online sexual material can be accessed anytime and anywhere and at virtually no cost or at a relatively low cost incurred, primarily to access bandwidth since it has “migrated from print to digital media” (Chawki and Wahab 2004, p. 11).

In the Internet age where technology has accelerated communication, a range of criminal activities or cybercrimes has also been on the rise. Of growing concern has been the abuse of the Internet for vice or criminal activities. Some sources have asserted that digital technology has fuelled the sex trafficking of children worldwide; as sex predators are now more active in navigating the Internet in search of victims. Others have claimed that the Internet has been hijacked to fuel the business of human trafficking in the way of recruiting women and children for the sex trade, aside from the trafficking of drugs, and the proliferation of gambling, pornography, and terrorism (Väyrynen 2003; Cullen-DuPont 2009).

As both Cambodia and Thailand have become increasingly global through the use of cyber technologies, this chapter investigates the role of the Internet in the trafficking of women and children for sexual exploitation in these two countries. The focus is on women and children since they are more likely to fall prey to becoming victims of sexual crimes compared to men; while taking the position that children are more likely to being coerced into the sex industry since they are more helpless and unable to extricate themselves from an exploitative situation and neither are they capable of giving consent unlike women because of the former's age or emotional development; in contrast to women who, following Lim (1998), could choose sex work out of their own volition (Montgomery 2001, p. 81). Moreover, women and children are the investigative focus of the study as it follows the Palermo Protocol, which frames the issue of human trafficking as a women's and children's issue (Shoaps 2013).<sup>1</sup> With that in mind, the aim of the chapter is to uncover the interplay between Internet and non-Internet processes of sex trafficking among women and children. The Internet, in this case, refers to all forms of communication using the "electronic communications network that connects computer networks and organizational computer facilities around the world" (Merriam Webster, as cited in Agrawal 2009, p. 210). By non-Internet processes, the author means 'traditional channels' characterised by the trafficker or even the pimp or broker who has face-to-face contact with the victim whom he/she recruits; conversely internet processes might be referred to as non-traditional channels. The chapter argues that non-traditional channels or Internet processes of recruitment of victims for sexual exploitation have accelerated sex trafficking since these new technologies have had the effect of ensuring that which Cooper (1998, p. 187) calls the "Triple A Engine": access, affordability and anonymity; and thereby "traffickers [are able to] increase their ability to exploit a greater number of victims across geographic boundaries" (Latonero 2011, p. 12).

Given this backdrop, the chapter seeks to examine the Internet as a technological tool for communication or a "channel for transmitting data" (Abbate 2017, p. 10): (1) for facilitating the recruitment and movement of trafficked women and child victims within the countries of Cambodia and Thailand and across borders; and (2) to connect with potential clients locally and transnationally. By Internet, I refer to a broad range of communicative

<sup>1</sup> Note that this has been deemed to be problematic since this position ignores the possibility of men being trafficked as well.

technologies although not limited to social network sites (SNSs) or social media platforms such as Facebook and Instagram; online real-time video streaming apps (such as TikTok and Bigo Live); job recruitment websites; messaging services (such as email and messenger); chat rooms; and so forth.<sup>2</sup> The chapter seeks to answer the following questions:

- (1) has there been an increase in trafficking for sexual exploitation through the use of technological means among perpetrators within a country or/and outside the country?
- (2) has the Internet accelerated the proliferation of trafficking for sexual purposes across national borders and if so, how has it achieved this end, with the assumption that prior to the emergence of the internet, sex trafficking tended to be largely restricted within national borders?

In an attempt to answer these questions, I propose the model of “Triple A Engine: access, affordability, and anonymity” to understand the choices made for the use of the Internet on both the part of traffickers and clients, as well as victims alike. In this case, pimps and traffickers exploit this platform to achieve their ends because of the minimal risk of prosecution resulting from the unregulated nature of the Internet (Kunze 2010). Women victims themselves might use the Internet although for the purposes of locating employment, especially since the Internet provides for access to information fairly easily and swiftly.

Fieldwork was conducted in the months of June and July of 2019 after a preliminary review of the literature was undertaken. The qualitative research method of data collection was used as it was felt that it would yield answers to the questions that were posed at the onset of the research. In addition to consulting secondary resources such as articles and reports, face-to-face interviews were conducted with a total of 21 human trafficking experts working in various organizations based in Bangkok and Pattaya (Thailand) and Phnom Penh (Cambodia); as well as high level government officials and law enforcement personnel from Thailand and Cambodia. I also spoke to an expert based in Singapore who works in the area of the Internet and the sexual exploitation of children. These interviews were especially useful since the narratives either confirmed, updated or debunked the literature I had read before undertaking fieldwork. As I do not speak Thai, a research assistant from Thailand who speaks the language was engaged to conduct one interview under my guidance. The interview was later transcribed by the research assistant. Given the sensitivity and privacy issues surrounding the topic, research ethics was strictly adhered to and the confidentiality of the research data as well as the names of the experts and the organizations they come from are being strictly guarded in that the data will not be shared. When citing my respondents, I have used pseudonyms to conceal their actual identity.

<sup>2</sup> One of the key features of these communication tools is that they allow for individuals to communicate with their social network; although at the same time, it allows for strangers to communicate with one another. Another key feature is that such communicative technologies require that the individual(s) upload a profile including a photo/video as well as descriptors such as age, location, interests and so forth (Boyd and Ellison 2007). Currently, the most popular device used to access the Internet is a smart or mobile phone.

## Sex Crimes and the Internet: The Broader Literature

Chawki and Wahab (2004) have opined that various kinds of cyber technologies have been used for a host of activities for the purpose of sexual exploitation either to promote or sell sexual images or services (cf. Akdeniz 2001, as cited in Chawki and Wahab 2004), of which websites have been identified to be the most common for the distribution of sexual materials (Akdeniz 1999, as cited in Chawki and Wahab 2004). The ease of Internet communication has facilitated trafficking and now traffickers can find their victims online (David, 2000, as cited in Davy 2012). Kristine Hickie (2018, p. 97) remarks that sex trafficking, a “pernicious form of violent victimisation is not new...what has changed [however] is the role of emerging technologies in relation to how, when and where sex trafficking flourishes in society.” Hughes (2014) reiterates that digital communication technologies are widely used for sex trafficking and less so for labour trafficking. She maintains that the interactions between gender, the use of the Internet and sexual exploitation have created an ideal situation for the exploitation of women and girls for sexual purposes.

That the speed at which trafficking for sexual exploitation has increased has been ascertained by some scholars. Tan, Khan and Rahim (2014) have echoed the point that because the Internet access transcends borders, it essentially accelerates transnational crime. Mark Latonero (2011, p. iv) has suggested that the onset of online technologies have given traffickers the “unprecedented ability to exploit a greater number of victims and advertise their services across geographic boundaries” which would have never occurred before. In other words, the traditional means of seeking victims would have been time-consuming and a lengthy process would have had to travel to purchase women and children to be trafficked for sexual exploitation (Kunze 2010). A similar conclusion was drawn by others (Quayle and Taylor 2002; Taylor and Quayle 2003) who have said that with the development of the Internet, the purchase of pornography and the exchange or purchase of child sexual abuse images has been made much easier and quicker; while prior to the rise of the internet, traffickers would have resorted to transmitting hard copies of sexual materials of the victims. But as Internet communication technologies have become more prevalent, “increasingly, the business of human trafficking is taking place online and over mobile phones” rather than traditional forms of recruitment (Latonero 2012, p. iv).

Because trafficking in persons is a crime, Latonero (2011) argues that the traffickers are forced to work underground. Furthermore, it has been pointed out that the unregulated nature of the Internet allows traffickers to “...use this platform for criminal purposes with minimal risk of prosecution” (Kunze 2010, p. 242). Hughes (2005) has said that there are fewer risks involved when traveling to poorer countries where pornographers can abuse and exploit women and children for the purposes of pornographic production. Communication technologies are then appropriated to transmit live images around the world with little impunity.

Beside the Internet has been crucial for recruiting sex workers (Turshen 2019). Victims might be lured through employment opportunities such as fashion modelling only to be deceived into sex work. Popular Internet platforms used to “meet” victims include chat rooms, spam mail, Internet dating sites and marriage agency (Sykiotou 2007).

## **Sex Trafficking and Sex Crimes in Southeast Asia**

Trafficking for involuntary sexual exploitation is the most common form of trafficking in the world. Samarasinghe (2003) has said that almost half of international sex trafficking numbers involve women from South and Southeast Asia; while others have described Southeast Asia as a hub for sex trafficking (Perry and McEwing 2013). Given the size of the sex industry in the Greater Mekong Subregion (GMS), it would not be far-fetched to conclude that a percentage of these workers are forced into sex work and are victims of trafficking (Trajano 2018). The general consensus is that sex trafficking is a problem in the region, stemming from the fact that it is a “lucrative economic enterprise”: in Cambodia and Thailand alone, it has been reported that it has raked in US\$181 million (UNODC 2013), making it the second most profitable business in the region and in the world, after the smuggling of drugs (Michael 2013). Samarasinghe (2005, p. 167) remarks that the “illegality of the sex trade does not obviously preclude it from being a sizable revenue earner to the governments” in this region. The proliferation of trafficking for sexual purposes has been associated with the thriving sex tourism industry in the two countries, especially that of Thailand (Davy 2014), although the latter is not necessarily ranked the highest among countries with a sex trafficking problem.

In the GMS, sex trafficking occurs within and across countries. That more girls and women were found to be victims of sex trafficking stems from multiple factors; with poverty, indebtedness and unemployment being the key drivers, spurred by the uneven economic development within and across the countries in the GMS (Blackburn, Taylor and Davis 2010). Within Thailand, those most likely to work in the sex industry include women coming from Myanmar who form the bulk; and a smaller number consisting of women from the ethnic minority groups from the upland reaches of the country who tend to be marginalized and find it difficult to procure waged work (Beyrer 2001) as well as poor rural Thai women. The wealth inequalities between Thailand and its neighbours as well as within Thailand have been a contributing factor to trafficking for sexual exploitation resulting in those with less money wanting to have more money, and thereby finding themselves being “pushed” into sex work for a living. On this matter, Davy (2014, p. 794) says that among “children ... [they] are clearly much more vulnerable and helpless against the established structures and vested interests in the sex sector, and are thus more likely to be[come] victims of debt bondage, violence, exploitation or trafficking” in contrast to adults. And it is this very staging of the victimization of child trafficking that has led to institutional and non-governmental actors to want to curb the problem of trafficking of children for sexual exploitation (Lainez 2010). That aside, it is worth noting that while women may be in sex work willingly, there is still the possibility of being “deceived into the industry



through coercion” and be subjected to violence and/or debt bondage (Lim 1998, p. 14). Falling into sexual exploitation thus could occur, especially if the victim lacks knowledge on how and where to find employment and is more easily manipulated.

Scholars in the past have described how the region was marked by the “practice of selling [of] women” which might have contributed to trafficking for the purposes of sexual exploitation. Mueke (1992) describes how men could sell their daughters for labour to relieve the family of poverty. The cultural expectation that daughters provide financial support to their families is so strong that some women get involved in sex work seeing it as a way for them to fulfil this role (Derks 2008). To this end, the constant supply of young women to feed the demand for the sex trade has kept sex trafficking going. Because sex work is illegal in Cambodia, it is not surprising then that recruiters/pimps resort to “abduction, kidnapping of girls, and giving false promises of legal employment” (Samarasinghe 2005, p. 174). In turn, young women are forced to work to pay off their debts, and they end up in the sex sector with little chance of coming out of it.

Some sources have estimated around 225,000 women, including children, are trafficked across international borders every year, a figure cited by many organizations such as the International Organization for Migration (2001) as well as academics (Emmers 2004, as cited in Betz 2009). But it must be noted that the actual figures vary greatly; as others such as Sorajjakool (2013) have maintained that estimates from researchers and non-profit groups have cited figures closer to tens of thousands, an estimate he uses to describe the extent of sex trafficking found in Bangkok and Chiang Mai catering both to local and foreign clientele. In reality, however, such claims as to the actual numbers of trafficked persons in the region or, for that matter, Thailand and Cambodia are difficult to pin down because of the clandestine nature of trafficking since it involves “intimate, private activity of sexual relationships, compounded by the stigma attached to prostitution” (Samarasinghe 2008, p. 15).

The emergence of the Internet has had a significant impact on the structure and volume of women and girls who join the sex trade in Southeast Asia, let alone become trafficked into the industry (cf. Samarasinghe 2003). With thousands of porn sites available on the Internet, there are women from Thailand, the Philippines, Vietnam and Cambodia who have entered the online pornography trade. The affordability and easy access to global communication technologies allow users to carry out these activities in the privacy of their homes. And as pointed out by Samarasinghe (2003, p. 97) traffickers use the Internet to fuel the “demand sector of the sex trade” given the efficiency of the new communicative technologies available these days.

## The Case of Cambodia

As the economy of Cambodia grows, access to communicative technologies has seen an explosion in recent years. The number of Cambodia’s Internet users has swelled over the



years: in 2018, 12.5 million were able to access the Internet (Sok 2018). Subscription to mobile data has also risen in recent years with some people owning two subscriptions; bringing the total number of subscriptions in the country to more than 25.8 million, according to a respondent. According to Im Vutha, TRC spokesman, Facebook is the most popular internet platform with users numbering to 7 million in Cambodia, up from 4.8 million in 2017. The use of the Internet is so common that a respondent muttered that “even the motor or taxi driver here knows how to use the Internet.”<sup>3</sup>

The rise in the use of communicative technologies in recent years has no doubt facilitated sex trafficking in the country. In 2018, a respondent recalled that based on police documented figures, there were a total of 108 trafficked victims, both for sex and labour trafficking. Of that number, 71 were classified as sex trafficking cases. Although the numbers have actually gone down over the years, the problem has not completely disappeared. In Cambodia, local and ethnic Vietnamese women and girls were found to be transported from the rural areas to Phnom Penh, Siem Reap, Poipet, Koh Kong and Sihanoukville where they have been found to be forced into sex work in venues such as beer gardens, massage parlours, salons and karaoke bars (cf. Busza 2004); in other words, sex work is hidden in the entertainment industry and is often just one of the services on offer. It cannot be found in brothels since sex work is illegal in the country. Another venue in which informal sex work takes place is the “sex coffee shop.” While on the outside, the coffee shop may look like any other coffee shop customers may stop and indulge in for a coffee and snack; however this is only a front that the proprietor uses while engaging in sex-related illegal activities. At the back of the coffee shop is a small room in which is found a bed. At these coffee shops, male customers might be approached by the waiter if he wants sex. Charya who works in law enforcement in Cambodia explained that: “Usually the customer is asked this question indirectly such as: “do you want a beautiful girl? ... we have a beautiful girl ... she can go out with you ... you can sleep with her ... only 100 riel for one night ... they will say: you can bring her out although they might have a bed or room in the coffee shop.”

Charya who works in law enforcement in the area of anti-trafficking for more than 15 years described a case in which a Vietnamese woman was trafficked into sex work in Cambodia. Coming from the border areas in Vietnam, she was promised a job as a waitress at a restaurant through a contact in Cambodia with whom she had briefly met. In this case, it is common for a range of communicative technologies such as Skype, Facebook, Line, Whatsapp or just email to be used to keep up contact across borders. On arriving into Cambodia, however, she found herself in debt bondage as she was made to pay for her passageway to Cambodia and was forced into sex work. Her lucky escape came when she slipped a note into the hands of a motor driver<sup>4</sup> to tell him that she needed help. Nowadays, unlike the past, he explained how job advertisements are posted on the

<sup>3</sup> Interview date: 2 July 2019.

<sup>4</sup> A motor driver refers to motorcyclists who provide transportation on their motorbikes for a small fee. Some drive tuk tuk motorcycles which pull along two-wheeled carriages in which can fit 2-4 people depending on how large is the carriage.

Internet either on Facebook or job-related websites (such as bongthon.com, pelprek.com, and hring.com)<sup>5</sup> rather than featured in the newspapers. In fact, it is more common these days that the younger people choose to find employment opportunities on these websites rather than through the newspapers or word of mouth. However, little does the victim know the risks of securing employment via the Internet as she communicates with individuals whose intentions she does not know. In such cases, among those coming from Vietnam, victims tend to use undocumented migration channels, such as brokers who visit the villages in the hope of recruiting individuals in search of work, rather than using formal and legal arrangements endorsed by the state to secure work, some of which could involve meeting middlemen on social media who promise them work, which in turn increases their vulnerability to being trafficked.

Another form of sexual exploitation that has emerged in Cambodia in recent years is the phenomenon of “forced marriages”; in which typically the victim—usually a young woman is introduced to a foreign man (more commonly a Chinese) and promised a “good life” in a foreign land.<sup>6</sup> Typically these arrangements start offline: she is shown a picture of a handsome, young man, only to realise on reaching China that she is forced to marry a man usually many years older than her, only to be forced into domestic work, or at worse, sex work in the destination country. While initially some of these women may go into these marriages freely and thus might not be trafficked as such, there is the element of deception. Moreover, some of them have turned out to have entered “fake marriages”; as in a well-publicised case described by a respondent in which the victim ended up being sold to “her husband’s” friend on reaching China. This form of cross-border trafficking, usually involving middlemen or brokers (in both Cambodia and China), has risen in recent years and is facilitated by the use of mobile phones, mobile applications and email such as Yahoo or Gmail, adding to the ease of communication across national borders. In some instances, Sothun, a respondent explained that the young woman might have been forced into the marriage against her will, with the broker in Cambodia earning a handsome fee (of about US\$500-1000) from the marriage he/she had arranged for his/her Chinese client.<sup>7</sup> In other instances, the middleman or broker was a relative who had no knowledge that the victim was later going to be sold into sex work in China; in such cases, the groom himself may be operating within a sex trafficking syndicate back in China, using Internet platforms such as Facebook to make the initial contact with a broker in Cambodia, according to a respondent.<sup>8</sup>

Trafficking for sexual exploitation across national borders, however, is less common than sex trafficking within Cambodia itself, according to a respondent who works in law

<sup>5</sup> These are popular job sites in Cambodia where employers can post jobs while potential employees may communicate with the former or upload a CV for potential employers.

<sup>6</sup> Interview date: 2 July 2019.

<sup>7</sup> Interview date: 2 July 2019.

<sup>8</sup> Interview date: 2 July 2019.

enforcement.<sup>9</sup> A distinct form of sexual exploitation that has emerged with the rise of the Internet is that of sextortion, although not considered sex trafficking per se since it does not involve the movement of the victim although the elements of deceit and force are evident.<sup>10</sup> Children and young adults from the age cohort of 12-25 years were found to be most vulnerable to falling victim to sex predators who they “meet” on the internet. Several respondents described how the sexual exploitation would start off. In all cases, the perpetrator befriends the victim through the different social media platforms such as messenger, telegram, Line, Skype and Whatsapp; although Facebook was the most common “meeting point” in cyberspace. The pattern is the same in all the social media: the offender first posts a picture of himself and in most instances a picture of a young, good-looking man is uploaded on his Facebook account. He then seeks out a target (usually a female) and sends a message to the victim. The victim then accepts his or her request for a friend and then over time a relationship builds after a few days or weeks of chatting. Usually after a lapse of time which could be several weeks or months, the nature of the relationship transforms into a sexual one. It is during this period that the perpetrator spends time “grooming” the victim and in most instances, the victim is clueless about the perpetrator’s intentions.

A respondent working in a local NGO in Cambodia described a typical scenario in which the victim meets the perpetrator online:

These days the man extorts money from the girl ... the man [sex offender] who are mostly local men tend to use fake accounts to attract girls ... after weeks or months, pictures between them [victim and perpetrator] are shared ... sometimes of a sexual nature ... there was a case of a 14 year old girl ... she was still in high school ... her father noticed her strange behaviour and later discovered that she had been giving her pocket money to the man ... the father made a police report and the man was arrested ... he was 26 years old.<sup>11</sup>

While the perpetrator was given a three year imprisonment sentence in this case, in many instances, a respondent said that justice is usually not served and the perpetrator moves on to his next victim. The grooming cycle starts afresh with the new victim and it is at the point at which the victim is most vulnerable (that is, after nude pictures had been shared with the perpetrator) that the perpetrator begins to extort money. A common scenario is that the perpetrator threatens to circulate the nude pictures the victim would have shared with him online. In this case, the victim and perpetrator may not even have met offline and the funds would have been transferred via banking apps such as e-Wallet.

<sup>9</sup> Interview date: 2 July 2019.

<sup>10</sup> It is important to note that although sextortion would not be counted as a trafficking offence per se, this social phenomenon was mentioned as an emerging problem in the world concerning the sexual exploitation of children in the U.S. Department of State’s Trafficking in Persons (TIP) Report of 2017.

<sup>11</sup> Interview date: 3 July 2019.

There have been instances in which the online exploitation continues until the victim stops handing over money and cut off all ties with the perpetrator, hoping that her mistake will not be revealed to others in her social network or family; in this case, they are more likely to choose not to report these crimes because of the resulting embarrassment that could arise should relatives and friends come to hear of the predicament the victim has found herself in. According to the same respondent mentioned earlier on, women mostly in their late 20s and 30s have fallen victim to such Internet crimes but would rather choose to let the incident pass. Their fear partially stems from the fact that currently in Cambodia there lacks an institutional or legal mechanism to protect the welfare of such victims and many do not think that seeking the help of the police is a solution.

All the respondents I spoke with for the study cited how sextortion has been on the rise in Cambodia together with the increase in internet scams. A small study involving 220 children and young adults undertaken by a local NGO in Cambodia attempted to understand their Internet behaviour (Action Pour Les Enfants Cambodia 2019). Out of the total sample, 117 said that they had met in person the people whom they had previously gotten to know on social media, indicating that close to half of the young people who used the Internet actually ended up meeting offline after several weeks of becoming online friends. In that same study, 70 percent had the experience of receiving sex videos or pictures containing nudity, indicating the extent to which youth are exposed to sexual material via the Internet.

Since increasing numbers of children have easy access to social media, their vulnerability to sex traffickers has become a growing concern to the state and society at large. This point was echoed by a high level government official who speaks about the vulnerability, especially of children whose parents are unable to track the movements of their children:

Now the concern is that children have cellphones ... they can communicate and exchange pictures very quickly ... they can take those pictures and sell them ... foreigners also can contact them more easily ... sometimes this is done so smoothly [sic] that it is difficult for the police to arrest the perpetrator ... now the home is no longer a safe haven ... children go into their rooms and shut the door ... they use social media and connect with people whom they don't know and their parents don't know what they are doing.<sup>12</sup>

The Internet has been shown to connect the perpetrator of sex crimes with victims even across countries. In this case, online platforms have served to facilitate communication. Facebook, for example, has been around in Cambodia since 2006/2007, facilitating not only communication across borders but also the exchange of pictures and so forth. In fact, children from Cambodia have also been known to be victims for the production of child sex materials. Usually the broker/pimp (Khmer; *chmounh kandal*) convinces parents to give up their child who is later sexually exploited and images taken and sold on the

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<sup>12</sup> Interview date: 8 July 2019.

sex market, sometimes working through the hidden web.<sup>13</sup> A respondent from an NGO working on the sexual exploitation of children in Phnom Penh described a case involving a foreign national who was later convicted and imprisoned:

Ninety-nine percent of cases of sex crimes against children in Cambodia involve a male traveller ... they are usually paedophiles ... they either come here and contact a middle man who helps him find victims ... there are also clear cases of internet facilitated crimes ... we have found cases where the initial contact is made through the internet before the offender buys a flight ticket ... in one of our cases, a US national met a Cambodian taxi driver whom he kept in touch via Skype on his return home ... he returned to Cambodia later where he sexually abused the victim who was an under aged girl ... and pictures of the sexual act were taken and saved in a memory stick ... after which it was mailed to the US.

Although it was not known if the perpetrator had circulated the pictures among his friends via the Internet or sold the pictures online, it was clear that the Internet was used to facilitate a sex crime; Kiri mentioned that the perpetrator in his 60s was in active communication via the Internet with the middleman who was back in Cambodia. It was some months later after the crime that the US law enforcement stepped in and the perpetrator was arrested to which he agreed to pay a compensation of US\$40,000 to the victim for damages and rehabilitation. Unfortunately the prosecution of the middleman and his female accomplice has dragged on and they are yet to be prosecuted, according to my respondent, Vannavan.<sup>14</sup> In a similar case, he mentioned that the FBI in the US became involved. The perpetrator had been sexually abusing his Cambodian girlfriend's daughter and sharing his experiences via peer to peer network in the deep web, akin to Facebook in the surface web.

Other cases have been brought to light in the past in which the Internet played an instrumental role in connecting the pimp and the buyer. In 2008, a Japanese man was arrested for arranging child sex tours for Japanese men visiting Cambodia (ECPAT 2008). He was found to manage a website which allowed his clients to select the child of their preference before arriving in Cambodia (see also UNODC 2013). Some have remarked that the Internet is an effective means through which the sex tourism industry thrives since the information can be accessed in any part of the world by the offender (Jeffreys 1999). The worldwide web with its millions of sites and chatrooms enable sex tourists to transmit information about the best places for child sex exploitation or for that matter sex work. The typical sex tourists include foreign businessmen, tourists, expatriates working in the tourist industry, and even NGO employees (World Vision 2009, as cited in Blackburn et al.

<sup>13</sup> The hidden web, or otherwise called the invisible web or deep web, is "the dark side of the internet whose contents are not indexed by any standard search engines like Google or Yahoo or Bing" (Deep Web 2019). According to the website [deepweb-sites.com](http://deepweb-sites.com), only a 4 percent of the web is visible to the public and the rest of the 96 percent are hidden.

<sup>14</sup> Date of interview: 3 July 2019.

2010). Some foreigners plan visits to the area with the overriding intention of participating in a sex tour (Blackburn et al. 2010).

The sexual exploitation of children in Cambodia is well known as the country has gained a reputation for being a haven for child sex tourists from both Asian and Western countries (Peters, 2007; Samarasinghe, 2003) fuelling what Brown (2007) describes as the “virginity trade.” That young girls are first sold because of their virginity tends to be the first instance in which they are first exploited (UNODC 2013). But that aside, the sex sector as a whole has continued to thrive as the Cambodian government continues to promote traditional tourism as a source of much needed economic growth in spite of sex work being illegal. Prior to the 1960s before the emergence of the Internet, Cambodia saw far fewer sex business operations; neither were there organized activities around the buying of sex (Taylor et al. 2006, as cited in Blackburn et al., 2010). Since then, the numbers of sex offenders have only been on the rise. In 2016, 17 sex offenders were arrested in Cambodia, eight of whom were from Australia, Belgium, India, Netherlands, South Korea and the United States, while 21 victims were rescued. In 2017, there were 30 victims (Promchertchoo 2017). While some offenders may find jobs in Cambodia and then groom their victims and subsequently are arrested for sexually exploiting a child, there are still those who make trips to the country as tourists with the intent of purchasing child sex. It is among the latter group that the Internet becomes a tool that they employ to connect them with pimps.

## The Case of Thailand

As in Cambodia, sex trafficking is well alive in Thailand and involves the movement of young girls as well as boys from the rural areas to the cities. Traffickers tend to target poor families in the remote rural or border areas, many of whom come from the ethnic minority groups, usually enticing parents to let their children move to the urban areas with them, promising that their children would work in “legitimate jobs” in the cities (such as low-skilled jobs in hotels and restaurants) and whose remittances could go a long way in helping the family back home. Usually the traffickers tend to offer some kind of monetary help to the parents as well in the hope that the latter would accept their proposition. Once in the cities, a respondent by the name of Sokharoth said that it is not uncommon for traffickers to connect with clients who might want sexual favours from under aged girls or boys. It is in locating clients that he says the Internet plays a critical role. In his own words:



I think traffickers prefer the old-fashioned way<sup>15</sup> to recruit victims [that is they go to the rural areas to find them] ... but the Internet plays an important role in communicating with clients or future clients ... for example, social media (such as Facebook, Line, etc.) have been used as a tool to contact [or reach out to] clients mostly through private groups and pages.<sup>16</sup>

In Thailand, a young girl below the age of 18 is considered a trafficked victim if she sells sex, according to the law. A respondent who works in law enforcement spoke about his experience in these “rescue attempts”; most of which dealt with teenage girls around 15-17 years old. He went on to explain that:

I used to talk to the girls who we rescue ... I ask them: how do you come to Thailand? ... they say that a middle man goes to the Mae Sot ... Tai Kilek ... and from there he goes into the village ... it takes one day by motorcycle to the border ... then the girls return to the border with their parents ... and they sell sex at the border ... there is no debt bondage and they are not trafficked ... they get the money and pay their parents ... the customers sometimes ask for virgins ... that is stage one ... then these girls go further into Thailand when we find them.<sup>17</sup>

Facebook, followed by Instagram, tend to be the more common social media platforms through which traffickers get to know their victims. The possibility of traffickers locating victims is great especially since 40.7 million people out of a total population of 66.6 million in Thailand have access to the internet (Clement 2019). Facebook continues to be a big draw with 50 million users, half of whom are female; moreover, 13 million Thais are on Instagram; 4.7 million use Twitter; and 2.4 million are users of LinkedIn (Bangkok Post 2019). In a study conducted by an NGO in Thailand, it was found that teenagers spend on average of six hours a day on the Internet but had little knowledge about the dangers they might encounter. The bulk of the 1,518 teens who participated in the study said that they used Facebook, following by Line for communication (Internet Foundation for the Development of Thailand and Child Online Protection Action Thailand 2019). Sirinan who works at the NGO described cases in which victims meet the offenders through a broker who, in turn, using online technologies attempts to reach out to potential clients looking for sex with under aged children.<sup>18</sup> Brokers use the opportunity to distribute pictures of the potential victims via various platforms on the Internet from which the client makes a selection. The client then flies into Thailand to meet the victim for a tryst at a hotel arranged by the broker. In some cases, the broker receives 60 percent of the fee while the child receives 30 or 40 percent, depending on that which had been negotiated.

<sup>15</sup> In other words, traditional means of recruitment which would include the trafficker going out to meet individual(s) whom he or she may recruit for the purposes of sexual exploitation.

<sup>16</sup> Interview date: 10 July 2019.

<sup>17</sup> Date of interview: 13 July 2019.

<sup>18</sup> Date of interview: 24 June 2019.



The respondent goes on to explain that this forms of securing clients means that “the broker can make customers all over the world.”<sup>19</sup> In other words, the Internet provides a reasonably easy and cheap platform to reach out to clients of which the payment for Wifi is the only cost incurred.

Whatever the social media platform used, the *modus operandi* of the trafficker is predictable, whether or not the perpetrator’s objective is to extort money from the victim or exploit the victim for sexual purposes: he or she starts off by ‘grooming’ the victim who then takes the sincerity of the trafficker for granted. Over time, a friendship develops and trust grows, in spite of the victim not knowing the intention of the trafficker. A respondent who works as a Public Prosecutor on sex trafficking cases said that in some cases, the girls have ended up falling in love with the perpetrator, believing that a genuine romance had developed.<sup>20</sup> On occasion, however, the trafficker deceives the young girl and poses as a woman so as to build a quick friendship.

Similar to Cambodia, the problem of sextortion is an emerging concern affecting children and young adults, although it does not involve the movement of the victim. Young women have been found to be drawn into friendships that they develop online with strangers who promise them fame and huge sums of money. A respondent working in a local NGO said that:

Usually the sex offenders ask for nude pictures of the victims to be sent to him ... they say to the victim: I could use it and make you a “superstar” later ... some children fall for it and believe it ... others are promised good jobs ... after a few weeks of chatting ... then they [sex offender] take[s] it [the picture] and uses it to blackmail the victim ... there have been cases where the pictures are sold to a pornography website.

While some girls might went into sex work voluntarily, they are still considered trafficked victims only because of their age. They are “pushed” into the sex industry by their own need to fulfil social concepts of duty to family (Anstadt 2013) and, in this case, we can speak of the ‘voluntary victim’ (cf. Vijayarasa 2015). And by the time the authorities find and question these young women, the typical reply would be that they “want to stay in sex work ... almost all of them say: it is better they sell sex and get very little money than staying at home where they have no money.”

Increasingly in Thailand, Burmese women, who were teenagers when they were found to have gone into the sex industry freely, giving their consent in most instances; for the most part among them, they have come to see sex work as a genuine means through which they are able to help their families back in Myanmar who are in need of their financial support and to come out of the sector easily if they desired to do so. However among those from

<sup>19</sup> Date of interview: 24 June 2019.

<sup>20</sup> Date of interview: 28 June 2019.

Laos who enter Thailand with their parents who take on jobs in the informal sector; it is not uncommon in some instances for the traffickers to meet these young girls online in chat rooms and promise them work in the cities, according to a respondent.

The recent case of an employee of a TV station who had abused more than forty boys and girls ages 12 to 14 emerged. According to a respondent, Thasaporn, the perpetrator blackmailed children using a fake profile on Facebook and uploaded nude pictures of them on the Internet with the intent of generating money for himself. She went on to say that even children from wealthy homes have fallen victim to such Internet scams. Foreigners reaching the shores of Thailand only to exploit children sexually are also not uncommon. A respondent described that Pattaya tends to be a popular destination for sex tourism. Some children are trafficked into the industry but little do they know that they are being (sexually) abused: instead it is not uncommon for them to see the traffickers as “uncles” who shower them with food and other gifts. In 2017, there were 17 sex trafficking cases and eight online pornography cases (Ministry of Social Development and Human Security 2017). Moreover, five cases of sex trafficking occurred in South Korea, Japan and the Middle Eastern countries, with Thais being trafficked abroad into the sex industry.

### **“Catching the Perpetrators”: The Role of the Internet and Beyond**

[In Thailand] you should not be surprised if the doorman or a staff were to ask you if you want to have sex with a young girl or boy ... some hotels will also have a pimp knock on your door in the evening.

(Thai Public Prosecutor aged 55)<sup>21</sup>

Although Thailand has for several decades earned a reputation for being a destination for sex tourism, in recent years its government has been proactive in cleaning up its image through cracking down on sex tourism openly found in its go-go bars, beer bars, massage parlours, karaoke bars and bathhouses. Although these venues may be licensed to provide entertainment- and leisure-based services (a well-known fact is that they also operate as informal brothels), individuals are still traveling to Thailand to purchase sex, especially to engage in illegal sexual acts such as sex with children. Sex trafficking has been recognized to be a problem in Thailand and the global attention it has gained has been periodically shone on the country which has brought about improvements to the situation compared to what it was 20 or so years ago. In 2015, Thailand became signatory to the ASEAN Convention Against Trafficking in Persons, Especially Women and Children or ACTIP (US Department of State 2016): which is the region’s first binding instrument on trafficking in persons (Equality Myanmar 2016).

<sup>21</sup> Date of interview: 28 June 2019.

In 2008, Cambodia passed the Law on Suppression of Human Trafficking and Sexual Exploitation (ECPAT International and ECPAT Cambodia 2014; UNODC 2014); which was later revised in 2017 to improve victim identification and to enhance law enforcement. As in Thailand, Cambodia has also signed ACTIP. The Cambodian government has made tremendous progress in improving the public justice system's response to trafficking in persons, especially the sexual exploitation of children, over the past two decades. As a result of these improvements, some have argued that many children have been protected from sexual abuse (Williams 2016). Furthermore, the Cambodian government has been proactive in developing and entering into MOUs and bi- and multi-lateral agreements with their neighbouring countries in the region and beyond on cross border investigations and prosecutions for cases of both sex and labour trafficking (Williams 2016). As far back as 2003, a Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking was signed. The Memorandum mandated that both countries "undertake necessary legal reform and other appropriate measures to ensure a legal framework for preventing trafficking in conformity with the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the Conventions on the Elimination of All Forms of Discrimination against Women and other international human rights instruments" (International Labour Organization 1996-2014).

The greatest push for undertaking greater action against the sex tourism industry both in Cambodia and Thailand comes from the Trafficking in Persons or otherwise known as the TIP Report. Released annually by the U.S. State Department, the TIP report ranks countries according to four tiers based on their compliance with standards outlined in the Trafficking Victims Protection Act (TVPA) of 2000.<sup>22</sup> Based on the report, Thailand remains in Tier 2<sup>23</sup> since the country has "not fully compl[ie]d with the TVPA's minimum standards" the US government recognises the government's "commitment to and continued progress

<sup>22</sup> The Trafficking Victims Protection Act (TVPA) of 2000 was passed to provide for both the implementation of the Palermo Protocol in the US and to fill gaps in the country's law. In 2000, Congress passed the bipartisan TVPA and it was later signed by President Clinton on October 28 (Alliance to End Slavery and Trafficking (ATEST) 2019).

<sup>23</sup> The TIP Report ranks countries according to four tiers (US Department of State 2019, p. 36-37). Tier 1 includes countries whose governments fully comply with the TVPA's minimum standards. Tier 2 includes countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring the country into compliance with those standards. The third tier, otherwise called, Tier 2 Watchlist includes countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards. In these countries, (a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or there is determination on the part of the government to undertake significant efforts to bring the country into compliance with minimum standards based on commitments of the government to take additional future steps over the next year. The fourth tier or Tier 3 includes countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.

in preventing and suppressing all forms of human trafficking” in the past year through stronger law enforcement and prosecution of wrongdoers, victim protection and care, and prevention of human trafficking (Royal Thai Embassy, Washington DC, 2019). The TIP Report (2019, p. 454) further commends the Thai government for making arrests in a number of major sex and labour trafficking networks and that “law enforcement officials cooperated with foreign counterparts to investigate Thai traffickers abroad and foreign suspects in Thailand; these efforts resulted in the arrests of suspected traffickers in Cambodia, Malaysia, and the United States.” However, the report also highlights that while the Singapore government continues to investigate 20 officials suspected for their involvement in child sex trafficking, it failed to report investigating or prosecuting immigration officials who facilitated these trafficking cases by accepting bribes at border checkpoints.

Cambodia, in contrast to Thailand, was ranked in the Tier 2 Watch List<sup>24</sup> category, suggesting that it has some way to go towards meeting the minimal standards outlined in the TVPA. The Report concludes that while the Cambodia government continues to prosecute and convict traffickers; increases law enforcement training; and takes steps to raise awareness on and incentivizes safe migration, it has not adequately collected or shared key information on law enforcement efforts. Moreover among other drawbacks, corruption has continued to persist, posing an impediment to law enforcement operations, criminal proceedings, and victim service provision; and that the “authorities did not issue formal guidance allowing the use of undercover investigative techniques in anti-trafficking operations—a factor that continued to impede officials’ ability to fully hold sex traffickers accountable (US Department of State, 2019, p. 126). One respondent from the law enforcement department was candid about his thoughts in this regard, admitting that corruption exists among police officers who may be “bought over” or “silenced” by the sex offender; related to this, it is uncommon to find parents of the victim dropping charges, presumably because someone had paid them not to report the case to the authorities.

Worldwide, countries have legislations under which perpetrators, distributors and peddlers of pornographic material may be prosecuted. Such legislation apply to offences who use the Internet. Thailand and Cambodia have similar laws so as to protect the victim. Section 287 of Thai Penal Code outlaws pornography as well as pornographic-related businesses (Shytov n.d.). Section 4 of the 2008 Anti-trafficking in Persons Act 2551 defines “exploitation” to include the “production or dissemination of pornographic materials” but it does not cover the distribution, import, export, offer, sale or mere possession of child pornography. However, the Child Protection Act (2003) (Article 26(9)) prohibits threatening, inducing, or encouraging or even allowing a child to “behave in a pornographic manner”, whether for the purpose of financial gain or any other (ECPAT n.d.). There is the Computer Crime Act (2007) which aims at preventing and suppressing the use of the computer to disseminate pornographic materials and criminalises any person committing

<sup>24</sup> See footnote 5.

such an act. However, how these provisions become interpreted and applied in different situations is left open (ECPAT n.d.). Further progress was made in after 2007. In December 2015, the Penal Code was amended to create new offenses of possessing, sharing and distributing child pornography. Both the Computer Crime Act B.E. 2550 (2007) and the Penal Code were amended in 2015 to introduce new provisions to cover possession of child pornography (Liberty Asia 2017). In that same year, the Thai Internet Crimes Against Children Task Force was established by the Royal Thai Police aimed at combatting child sex trafficking and the sexual exploitation of children taking place online (Liberty Asia 2017).

In Cambodia, the Law on Suppression of Human Trafficking and Sexual Exploitation of 2008 (TIPSE Law) does not criminalise the possession of ‘child pornography’ without the intent to distribute. Likewise, article 41 of the Law does not address the distribution, sale, lease, displaying, projection or presentation of child sexual abuse materials (CSAM) in private places, nor the consumption, access and viewing of such materials through the use of communication and information technologies (APLE and ECPAT 2018). Finally, the law does not prohibit the solicitation of children only for sexual purposes, including ‘online grooming’. That said, the Cambodian Government is currently examining the draft of a cybercrime law, which would address CSAM and ‘online grooming’, by criminalising the possession of CSAM in a computer system or on a computer-data storage medium.

However as technologies evolve, criminals are quick to adopt them to pursue their criminal activities. While law enforcement agencies have become skilled in the use of digital technologies and forensics to combat such serious cybercrimes involving the trafficking of children that technologies keep evolving makes it difficult to locate the perpetrator and make an arrest. The development of new types of communication tools and devices keeps the race going between traffickers and law enforcement. A favourable aspect of the Internet is that it enables data mining, mapping, and advanced analytics and, in turn, strengthens the anti-trafficking goals of prevention, protection, and prosecution since the trafficker/sex offender leaves behind his/her fingerprints on the Internet as a result of the activity he/she engages in. Given this scenario, the possibility of successfully tracing traffickers/sex offenders increases, although their activities could become more complicated should the trafficking and exploitation occur transnationally. For this to happen, however, there needs to be an increase in understanding of how traffickers utilize online spaces and how they engage with online networks (cf. Mendel and Sharapov 2016).

Thus as much as communicative technologies may be co-opted by pimps to locate clients/customers and for sex offenders to locate victims, the governments of Cambodia and Thailand have turned this liability into an asset by using technology to monitor criminal activity in their fight against the sex trafficking. With the rise in cybercrimes in Cambodia and Thailand, law enforcement establishments have co-opted the Internet to strengthen their anti-trafficking goals of prevention, protection, and prosecution. A law enforcement staff in Cambodia spoke about his work and the techniques and tools the Unit he heads has used to fight cybercrime and sex trafficking. He explained that having the relevant

technological tools and software is critical to tracing the IP address and identifying the sex trafficker who is using the Internet to locate his or her victims. Thus in spite of the complexities that have emerged with the Internet as an added space for sex traffickers to exploit, it has been deemed as a double-edged sword: while the Internet could be used by the traffickers/offenders themselves to connect to victims, it is a liability to child-sex offenders since there is always the risk that the activities of the sex offender can be tracked by the authorities (UNODC 2013). In fact, because the trafficker leaves behind his/her fingerprints on the Internet as a result of the activity he or she engages in, the possibility of successfully tracing sex offenders using the Internet is fairly high; although some respondents remarked that tracking these activities could become more complicated especially should the trafficking occur across national borders. In cases of sextortion, for example, if pictures of the victim have been posted on the Internet and the authorities take it down, there is no guarantee that those same pictures will pop up in some other website, especially if the Internet Provider (IP) is based outside the country.

Another online effort to address child sex trafficking is found in the work of the Internet Foundation for the Development of Thailand.<sup>25</sup> To stem sex trafficking, the Foundation runs a hotline through which any child or adult could report any suspicious activity or activity of a sexual nature which is deemed inappropriate. Students learn about this hotline through the programmes organised by the Foundation so as to keep children “safe” while using the internet and other digital communication tools. In Cambodia, Action Pour Les Enfants, otherwise known by its acronym APLE<sup>26</sup> runs a similar hotline.

On a number of occasions, the Thai authorities have conducted several successful sting operations, making arrests for illegally selling sex on any digital or online communication platform such as Facebook or Line after monitoring these communication platforms. In 2016, 50 young women aged 25-26, mostly students, were caught selling sex online (Thailand News 2016). Police learned of the group and arranged to meet four of them at a hotel, promising each woman US\$258 (8,000 baht).<sup>27</sup> On showing up at the hotel, they were promptly arrested.

The larger-scale social media companies like Facebook have also come forward to protect children from sex traffickers/offenders and are quick to act on a report of a sexual abuse, especially if child pornography is involved as it is fully aware that the platform provides an ideal site through which sex might be sold. There are closed groups to which the potential client must join if he or she wishes to purchase sex. Only if the victim is below 18 can a

<sup>25</sup> The organization aims to create a safe environment for Internet users. It is active in running talks for youth and students, raising awareness on the dangers lurking in the Internet.

<sup>26</sup> Established in Phnom Penh, Cambodia as an international NGO to protect children against travelling sex offenders, APLE has assisted the police with investigations into street-based child sexual abuse and exploitation and provided pro-bono legal support to victims and their families since 2003. As APLE gained more knowledge and expertise in combatting child sexual abuse, its operations expanded to other cities beyond Phnom Penh (APLE 2003-2019).

<sup>27</sup> This is the exchange rate at the time of writing on 4 August 2019.



report be submitted to Facebook to have the page shut down. A respondent from Thailand said that if it was found by Facebook that the individuals selling sex were above 18 years of age, no action would be taken by the company, suggesting that Facebook “takes the trafficking of children for sexual exploitation seriously.” Unlike the smaller companies that may not have the resources to have a “trust and safety team” and thus are more open to abuse, as one other respondent explained.<sup>28</sup> In fact, Facebook have stepped up their privacy settings to prohibit others from contacting a child through their platform (International Centre for Missing & Exploited Children 2018). For example, according to Facebook’s Terms of Use, those under 13 are prohibited from using the platform which serves to protect the child from potential sex offenders or paedophiles. Convicted sex offenders are similarly prohibited, as in those who have previously had an account disabled for violation of Facebook’s terms or policies. Facebook also uses artificial intelligence-based facial recognition technology tools known by the police to flag an image of a child who has been identified as a sex trafficked victim and within three to five seconds, the photo tool is able to flag the image if it has been uploaded on Facebook, as a respondent explained (see also Smith 2019).

One other digital platform that might have been used to sell sex in Thailand is Craigslist.<sup>29</sup> The personal section or Craigslist Personals through which one might find casual encounters with strangers has been shut down since 2018, according to a respondent from Thailand. The move to shut down Craigslist was the result of the Senate in the United States approving the congressional bipartisan legislation called the Stop Enabling Sex Traffickers Act in an attempt to combat sex trafficking, assuming that Craigslist had been used in the past by traffickers to locate their victims (O’Brien 2018; Salinas 2019).

The financial industry has also become involved in combating the trafficking of children for sexual exploitation although in Southeast Asia, this kind of effort has been slow to take root. Eighteen organizations including Bank of America, American Express, Mastercard, AOL, Yahoo and Microsoft have come together to form the Financial Coalition Against Child Pornography. The aim of the coalition is to “share information about websites that sell child porn and stop payments passing to them” since the Internet has made child pornography a multi-billion dollar industry (BBC News 2006). A respondent explained that: “while in some countries PayPal, Visa, Mastercard and the banks are working closely with the authorities to track offenders who purchase images or the ‘live streaming’ of sex trafficked children,”<sup>30</sup> Thailand and Cambodia have some way to go in terms of getting their financial institutions involved in stemming the problem of sex trafficking.

In an age where cellphone ownership has become a near universal especially among the young and middle-aged population of Cambodia and Thailand, the choices made for the use of the Internet to connect with others is taken-for-granted. The factors of access,

<sup>28</sup> Date of interview: 25 July 2019.

<sup>29</sup> This is an American online classified advertisements website with sections devoted to jobs, housing, for sale, items wanted, services, community service, gigs, résumés, and discussion forums.

<sup>30</sup> Interview date: 25 July 2019.



anonymity and affordability make Internet use the logical means of connectivity—a trend no different from those who choose to use the Internet for purposes of the sexual exploitation of others—or any other activity in which one desires to connect with others. In Cambodia and Thailand, the use of the Internet—a non-traditional means of connecting with people—for sexual exploitation is thriving because it meets the needs and wants of a range of actors in the sex trafficking complex. Pimps/recruiters are able to capitalise on the Internet to reach out to clients—literally, the world has become their oyster with the worldwide web (WWW). Their pool of customers has expanded beyond geographical boundaries while still serving a local clientele. Clients miles away who are looking out for sex in these countries are concomitantly looking at the Internet as another space to fulfil their want/need. Moreover, the reach is instantaneous in spite of the distance. Sex offenders operating on the various social media platforms also have a wider pool of victims to lure. In fact social media such as Facebook gratifies both the sex offender and victim: the sex offender has the opportunity to connect with a potential victim while the victim thinks she or he has met someone whom they can trust. If the “relationship” is not going in the right direction, it is easy for either party to drop it and move on, especially since the Internet gives the person a sense of anonymity.

For anyone seeking waged work, the Internet has proven to be the ‘place’ to go since the majority of employers now use it to advertise jobs. As connectivity is instantaneous, women now seek out work through this channel, which has come to replace traditional venues of advertising. Because of the anonymity and there is no way of validating that the ‘employer’ has a legitimate job; in this sense, the Internet carries an element of risk. One could argue that when a recruiter goes into the rural areas with the promise that there are jobs in the cities, he or she could very well be operating in a similar way: lying about a job back in the city when it might not exist. But the human contact means that the recruiter’s identity is revealed. Using the Internet has the added advantage in this case as the recruiter can forever hide his or real identity from his/her victims. In fact, sex offenders seeking out youth to sexually abuse succeed from being caught on the Internet because of being able to “hide” behind the keyboard and never revealing his/her real identity. Thus the Internet serves its purpose well.

## Conclusions

The Internet has spurred the proliferation of sex trafficking and other abuses of a sexual nature since its emergence in Cambodia and Thailand. This is because the Internet provides not only instant access and affordability, but more importantly anonymity, especially in the context of a criminal activity, which is the case with sex trafficking and sexually exploiting others and, in turn, violating the rights of those who have become victims. In short, the Internet provides for fertile ground through which sex trafficking may thrive since it underscores the very features of the “Triple A Engine” model of access, affordability and anonymity. While there has been the recognition that each person has the right to access the Internet, equally important is that laws are in place or in the process of being

emplaced to stem the use of the Internet to sexually exploit others. Because increasingly the rights of women and children have been violated as a result of these new communicative technologies, the Internet has come under the radar of the governments of Cambodia and Thailand, respectively, calling for legislation and measures to be in place to protect the victims involved. In this case, protecting the victim means protecting their rights which may be seen as the first step towards acknowledging that these governments want to make the Internet a safe space for all.

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## CHAPTER 7

### The Right to Be Me, Queerly Cyberly: Cyber Crime and Queer Individuals in Malaysia

*Collin Jerome*

#### Abstract

Much has been written about the various aspects and dimensions of cyber crime, but much more needs to be known about its adverse impact on lesser-studied groups of Internet users, namely, the queer individuals. This chapter aims to address this knowledge gap by examining queer individuals' views on the cyber crimes they had personally experienced and/or observed. These views were gathered from 132 respondents via surveys (e.g., questionnaire and interview) and analyzed both quantitatively and qualitatively to investigate the prevalent forms of cyber crime perpetrated against them, the underlying causes and consequences, as well as the prevention of those crimes. This chapter also examines cyber crime in regard to queer individuals' right to identity in the cyber world and draws on poignant examples from the respondents to elucidate the argument.

#### Introduction

The exponential growth of the Internet and its ability to render a wide range of services has made it the fastest-growing medium of communication today. It was estimated that there were 4.1 billion Internet users in the world in 2018, with Asia accounting for the vast majority of the users.<sup>1</sup> While the widespread use of the Internet allows people to engage in more communication, interaction, and transactions online than ever before, many individuals continue to experience a host of Internet-related issues and problems. Cyber crimes are one of them and they are as rampant as many other activities engendered by the Internet. Wall (2011), a leading scholar in the field, went so far as to describe, “the rise of the Internet as both a *perceived ‘crime problem’* and also as a *conduit for criminal activity* [emphasis added]” (p. 88). This statement rings true given the current situation today, where cyber criminals abound and becoming increasingly aggressive and more technologically sophisticated in using the Internet to carry out their crimes. Thousands of people around the world have fallen prey to cyber crimes, and there is no sign of it stopping, as many studies and reports have shown. The 2018 European Union for Network and Information Security (ENISA) Threat Landscape Report, for instance, found that phishing was among

<sup>1</sup> There were 4.1 billion Internet users in the world as of December 2018, compared to 3.9 billion in and 3.17 billion in late 2017. Asia had the most Internet users, accounting for 49% of the world's Internet users. China had the most Internet users of all countries, accounting for almost 20% of Internet users worldwide. For more detailed information, visit <https://hostingfacts.com/internet-facts-stats/>

the top 15 cyber crimes, with 75% of the European Union's (EU) member states disclosing cases of phishing.<sup>2</sup> This is supported by the 2019 Webroot Threat Report indicating phishing attacks continued to be one of the most popular ways for cyber criminals to attack both businesses and consumers, with the number of phishing sites detected growing 220% between January and December of 2018.<sup>3</sup> While there are many other reports and studies on cyber crimes, they all converge upon the same conclusion: cyber crimes are here to stay, and almost anyone can be a cyber criminal so long as there is access to and sufficient knowledge of the Internet.

On a related note, much has been said about the various aspects and dimensions of cyber crimes: from cyber crime and society (Yar, 2013), cyber crime and security (Johnson, 2016), cyber crime and business (Moskowitz, 2017), cyber crime and criminology (Jahankhani, 2018) and cyber crime and its victims (Martellozzo & Jane, 2017). These studies, however, have mostly focused on cyber crime in relation to Internet users living in Euro-American cultures. Given the widespread use and impact of the Internet, much more needs to be known in regard to lesser-studied Internet users living in other parts of the world, whose lives are not only irrevocably enmeshed in technologies but are still deeply entwined with multi-various cultures, religions and traditions.

Internet users in Malaysia are a case in point, especially queer Malaysians who, like other non-queer Malaysians, rely on the Internet for various purposes and reasons. Of particular importance is the use of the Internet as a platform for their self-identification that revolves around queer sexual orientation, gender identity, and gender expression. Despite some studies on queer individuals in Malaysia, there is still a knowledge gap with regard to the pervasiveness and causes of cyber crime against queers in present-day Malaysia, as well as the adverse impact of such crimes on their self-identification in the cyber world<sup>4</sup>. Therefore,

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<sup>2</sup> Other top cyber threats include Web Based Attacks, Denial of Service, Botnets, Data Breaches, Identity Theft, Information Leakages, and Cryptojacking. This report has been prepared by the European Union Agency for Network and Information Security (ENISA), which operates as a center of network and information security expertise for the EU and its member states, as well as its citizens and private sectors. The 2018 ENISA Threat Landscape is the seventh in a series of ENISA reports analyzing the latest cyber threats based on open source material. The data presented in this report were elicited from information found on the public domain over a one-year period between 2017 and 2018. Full details, including the final report can be found at <https://www.enisa.europa.eu/publications/enisa-threat-landscape-report-2018>

<sup>3</sup> This report has been prepared by Webroot Inc., a U.S.-based private company that provides Internet security to consumers and businesses across the globe. The 2019 Webroot Threat Report presents information about what the company has learned about threat activity throughout 2018 and compares the data with those from previous years, all of which were gathered from 67 million real-world sensors around the world using its patented machine learning models. More information about Webroot and its work can be found at [webroot.com](https://www.webroot.com). Full details, including the final report, can be found at [https://www-cdn.webroot.com/9315/5113/6179/2019\\_Webroot\\_Threat\\_Report\\_US\\_Online.pdf](https://www-cdn.webroot.com/9315/5113/6179/2019_Webroot_Threat_Report_US_Online.pdf)

<sup>4</sup> There are many studies examining the lives of queer individuals in Malaysian from various dimensions: ethnicity, race, religion, sexuality, and gender. See for instance the works by Baba (2001), Goh (2012), Khartini (2005), Jerome (2013), Lim (2015), Mohd Sidik (2015), Peletz (2009), Teh (2008), Zainon & Kamila (2011), Wai & Singaravelu (2017), and Yuenmei (2012).

this chapter seeks to address this gap in knowledge through an examination of the views expressed by queer Malaysians on the cyber crimes they had personally experienced and/or observed.

Equally important, this chapter attempts to address issues surrounding the protection of queer Malaysians from such crimes due to the fact that, despite the existence of cyber crime laws in Malaysia, concerns abound as to whether those laws provide sufficient and effectual safeguards for its queer citizens against criminal depredations which in turn enable them to self-identify as queer *cyberly*. These concerns include (1) Are these laws adequate to prosecute cyber criminals and protect queer Malaysians from cyber crimes? (2) What, exactly, are these crimes, their causes and effects on queer Malaysians? (3) To what degree do these crimes affect queer Malaysians to identify themselves as queer in the realm of cyber space? (4) How can queer Malaysians protect themselves from cyber crimes that are perpetrated against them on the basis of their queerness, and in the process, defend and claim their rights to self-identify as queer *cyberly*? (5) How can advanced technology and the Internet help queer Malaysians to protect their rights and freedom as queer citizens *cyberly*?

These concerns deserve to be taken seriously in view of the current situation facing queer Malaysians, which Thilaga Sulathireh, the co-founder of Malaysia's transgender rights activist group *Justice of Sisters*, describes in terms of the "rapidly shrinking spaces for LGBT people - offline, online, everywhere" due to "state-sponsored homophobia and transphobia" and "increased discrimination, harassment and violent hate crime against the LGBT community" (Ellis-Petersen, 2018). To complicate matters, cyber crimes against queer individuals in Malaysia often coincide with certain periods that are imbued with politics (e.g., election campaigns) and religion (e.g., fasting month) where both ethnic and religion-based politics are inflamed. Taking all the above points into consideration, the chapter's examination of queer Malaysians and cyber crimes will be guided by the following questions: (a) What types of cyber crime do queer Malaysians experience and what are the perceived or underlying causes? (b) What are the effects these crimes have on queer Malaysians' material conditions of everyday life (e.g., income, health, well-being, security, living standards) and their self-identification as 'queer' in the cyber world? (c) How can queer Malaysians protect themselves from cyber crimes perpetrated against them on the basis of their queerness and, in the process, defend and claim their rights to self-identify as 'queer' in the cyber world?

This chapter will examine the views expressed by queer Malaysians on the cyber crimes they had personally experienced and/or observed and draw upon the range of real-life examples that they recalled to illustrate the argument. To conclude, this chapter discusses the implications of the findings and provides guideposts for future research, policy and practice. A key novelty is the uncovering of valuable insights into the lives of the lesser-studied queer individuals outside the Euro-American context (i.e., Malaysia) and how these insights may shed some light on the central theme of this book: the nexus between technologies (i.e., the Internet) and human rights (i.e., the right to identity), particularly

the challenges and opportunities arising from such nexus in the context of Southeast Asia/ASEAN.

## Cyber Crime: A Brief Review

As mentioned earlier, cyber crimes are as rampant as many other activities engendered by the Internet. All it takes is someone with access to and sufficient knowledge of the Internet to execute his or her criminal intention. Like many other advanced technologies in our modern world, the Internet along with the crimes it breeds are complex and rapidly evolving, thus, explaining the ‘impossibility’ of a commonly-agreed on description of what cyber crime ‘really’ means, what it ‘actually’ constitutes, who a cyber criminal ‘really’ is, and whether anyone can ‘qualify’ for the role, and so on, despite many attempts at doing so. Some scholars in the field, such as Pastor-Satorras and Vespignani (2007), even went to the extent of contending that, “the Internet is such a rapidly evolving system that sometimes the effort put in its study might appear to be as extenuating and futile as Sisyphus’ pursuit” (p. 226).

Putting this argument aside, it suffices to say in this chapter that cyber crime, “is any illegal activity performed on an information network, such as the Internet” (Chambliss, 2011, p. 156)<sup>5</sup>. Used alternately by many scholars in the field with the term Internet crime, Chambliss (2011) groups cyber crime into two categories: *Internet-assisted crime* and *internet-enabled crime* (p. 156). Internet-assisted crimes are those committed when the Internet or other information network is used. But Chambliss expounds that internet-assisted crimes can also be carried out offline, such as during identity theft and fraud. Internet-enabled crimes, on the other hand, come into being as the result of the Internet. *Hacking* and *pharming* are common examples of such crimes (p. 156). Despite the absence of a generally accepted classification of Internet crimes, these crimes can be (at the most basic level) grouped into four general categories as shown in the table below.

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<sup>5</sup> Chambliss goes on to explain that computer crime, which is often incorrectly referred to as computer crime, refers to, “any illegal activity that is perpetrated through the use of a computer” (p. 156). “For example, making illegal copies of a CD would be considered a crime, as a computer is necessary to perform the action. However, if one were to illegally download music from the Internet, this act would be considered an Internet crime, as use of the Internet or other information network is necessary to perform the download” (p. 156).

Table 1. Basic Categorization of Cyber Crimes

Category	Definition	Common Types
Online assault	Involves violence perpetrated via the Internet, such as threats or unwanted sexual advances that result in an emotional response on the part of the victim (e.g., feelings of worry or fear).	Cyberbullying Cyberstalking Online sexual exploitation of children
Online fraud	Involves deceit or a breach of confidence online in an effort to profit financially.	Auction fraud Lottery/inheritance scams Nigerian letter schemes Phishing (posing as a legitimate business in an effort to convince victims to divulge valuable information such as bank account numbers and passwords)
Online theft	Involves the use of the Internet to steal information, property or money from its rightful owner.	Identity theft Piracy
Online intrusion	Involves the use of the Internet to invade, harm, or otherwise infect another individual's online space, computer programs, or computer systems.	Hacking Sending out viruses or worms

Note. Adapted from *Crime and criminal behaviour: Key issues in crime and punishment* (p.160), by W.J. Chambliss, 2011, Thousand Oaks, CA: Sage Publications. Copyright 2011 by Sage Publications.

One particular focus of interest here is cyber bullying. Introduced to the world as a new type of crime in October 2006, cyber bullying (which is similar to cyber stalking), “is typically described as continued harassment and torment with the use of an electronic communications device, most often via the Internet. The main difference is that “cyberbullying most often involves adolescents as victims and/or offenders” (Chambliss, 2011, p. 159). This is especially true in the case of queer youths, a point to which we shall return when discussing cyber crimes victimization.

Cyber crimes can be perpetrated by literally ‘anyone’ whether individually or collectively, depending on the crime type, the level of sophistication, violence, and so on. Regardless of the various roles they play (e.g., hackers, fraudsters, programmers), many cyber crime perpetrators exhibit some common characteristics traits: “at least a minimal amount of

technology savvy”, “[a] disregard for the law or a feeling being above or beyond the law”, “an active fantasy life”, and “a ‘control freak’ and/or a risk taking nature” (Shinder & Cross, 2008, p. 93). Cogent here are the perpetrator’s “strong motivations” for carrying out malicious activities. “Most cyber criminals”, as Shinder & Cross (2008) contend, “are strongly motivated, but motivations range from just wanting to have fun to the need or desire for money, emotional or sexual impulses, political motives, or dark compulsions caused by mental illness or psychiatric conditions” (p. 94).

Furthermore, the techniques or *modus operandi* used by these perpetrators vary depending on the types of crime committed, ranging from “data manipulation”, “computer virus”, “denial-of-service attacks”, “retail scam”, and “phishing” (Moore, 2014). The same applies to the reasons for executing those crimes, encompassing “financial”, “intellectual”, “emotional”, “curiosity”, and “deviant behavior” (Shinder & Cross, 2008, p. 28). Victims of cyber crimes also differ including individuals who are either “new to the Net”, “naturally naïve”, “disabled, or disadvantaged” (Shinder & Cross, 2008, p. 108) inasmuch as the crimes’ have diverse impacts, ranging from “real, material harms”, “immense psychological stress”, and “reputational damage” (Martellozzo & Jane, 2017, pp. 12-13). It is also important to note that women and children are those most affected by various forms of cyber crime (e.g., cyber stalking or cyber bullying), mainly perpetrated by men (Hill & Marion, 2016; Howell, 2016).<sup>6</sup> Furthermore, numerous studies have shown that specific groups of people are often targeted by cyber criminals, notably those who perpetrate hate speech, hate crime and hate-related violence in the cyberspace. These specific groups of people, or more specifically cyber crime victims, include the elderly (Munanga, 2019), the ill and disabled (Day, 2017; Walker, 2019), members of certain targeted racial and religious groups (Awan, 2016; Siddique, 2018), as well as lesbian, gay, bisexual, and transgender (LGBT) individuals (da Silva Pereira & de Matos, 2015; Nurse & Bada, 2019).<sup>7</sup>

Given the widespread impact and serious outcomes associated to cyber crime, governments throughout the world have intensified (and continue to intensify) prevention efforts through legal and legislative measures. Such legislation includes laws related to “computer crime, internet crime, information crimes, communications crimes and technology crimes”, as well as laws that, “create the offences and penalties for cybercrimes” (Michalsons, 2019). Laws governing cyber crime are already in place in many nations around the world, according to Munk (2018).

<sup>6</sup> But Howell (2016) goes on to contend that, “while it remains, both statistically and historically, that the vast majority of cybercrimes have been committed by men, there are also a number of documented instances of women and children committing cybercrimes. Often, however, the crimes committed are ‘softer’ in nature, more pernicious, less shocking, and therefore less newsworthy (Cassim 2011, pp. 128-131)” (p. 595).

<sup>7</sup> Munanga (2019) maintains, “the US Federal Bureau of Investigation (FBI, 2018) reports that cybercrimes against individuals age 65 and older are rapidly increasing. The Washington State Office of the Attorney General (Washington State Legislature, n. d.) decries the same issues relating to cybercrimes, Internet fraud, and crooked telemarketers, and encourages victims to contact the Internet Complaint Center’s IC3 unit at the FBI”.



The (United Nations) has provided an overview over the cybercrime legislation worldwide. The UN states that 138 states have enacted cybercrime legislation. Of these, 95 states are developed and transition economies. Yet, 30 countries still have no cybercrime legislation in place. A total of 9% of the states have developed draft legislation, 19% of the states have no legislation in place, and finally, 1% of the states have not provided any data regarding their cybercrime legislation (p. 241). Despite the disparities between countries, concerted efforts have been made (and continue to be made) to implement cyber crime legislation at various levels: local, national, regional, and global (e.g., the European Union Cyber Security Strategy). Some countries even went to the extent of enacting specific cyber crime laws such as the U.S. Cybersecurity Information Sharing Act (2015), China's Cybersecurity Law (2016), and Malaysia's Computer Crime Act (1997) in accordance to their contextual needs and specific purposes of preventing and combating cyber crimes.

The latter, for instance, is one of the several laws governing the cyber space in Malaysia that includes, among others, the Communications and Multimedia Act 1998 (CMA), Malaysian Communications and Multimedia Commission Act 1998, and Digital Signature Act 1997. These laws, which come under the purview of relevant ministries and enforcement agencies, create offences and impose penalties for cyber criminal activities that threaten the country's economic development and stability, social order and racial harmony, the protection of information and intellectual property, as well as those that breed terrorism (Majid, 2013). The Malaysian Communications and Multimedia Commission, for example, is tasked to enforce legislation and execute advocacy campaigns against cyber crimes as part of its role and authority in regulating Malaysia's broadcasting industries, ICT, and telecommunications in accordance to the Communications and Multimedia Act of 1998 (MCMC, 2019).<sup>8</sup> CyberSecurity Malaysia is another government agency that provides numerous services and programmes related to cyber security in line with its aim to "help reduce the vulnerability of digital systems, and at the same time strengthen Malaysia's self-reliance in cyberspace" (CyberSecurity Malaysia, 2019).<sup>9</sup>

Although both of these agencies provide various mechanisms for combating cyber crimes, including designated platforms to handle complaints from the general public about cyber criminal activities (e.g., MCMC Hotline, *Cyber999*), there are still those who face difficulties in lodging complaints and even sharing information about cyber crimes they had personally experienced and/or observed due to a number of reasons. Of particular focus are queer individuals who fear of being caught and prosecuted for reporting cyber crimes perpetrated against them on the basis of their queer sexualities and genders, which remain subject to criminalization, illegalization, and condemnation in Malaysia. A brief discussion of why this is, who queer Malaysians are and their predicaments will enable us to understand their

<sup>8</sup> More information about the Malaysian Communications and Multimedia Commission and its work can be found at <https://www.mcmc.gov.my/home>

<sup>9</sup> More information about CyberSecurity Malaysia can be found at <https://www.cybersecurity.my/en/index.html>

experiences with cyber crimes and the effects that these crimes have on their material conditions and everyday life, as well as their self-identification as ‘queer’ in the cyber world.

## Queer Individuals in Malaysia

The purpose of this section, as mentioned earlier, is to provide some background and contextual information about Malaysia’s queer individuals to refer to when discussing their experiences with cyber crimes. Like many Malaysians, Malaysia’s queers rely on the Internet for their daily lives. Of particular importance is the use of the Internet as a platform for their self-identification that is organized around queerness (i.e., queer sexual orientation, gender identity and gender expression). But before elaborating on this further, it is important to discuss briefly the process of self-identification among the people living in present-day Malaysia.

Malaysia is one of the fastest growing developing countries in Southeast Asia. Long known for its multiethnic, multicultural, multireligious, and multilingual society, it is currently home to nearly 32.6 million people, comprising 69.3% Bumiputera (i.e., predominantly Malay and smaller indigenous groups in East and West Malaysia), 22.8% Chinese, 6.9% Indians and 1% others (Department of Statistics, Malaysia 2019).<sup>10</sup> Islam is the country’s official religion while Malay is the national language as stipulated in the Federal Constitution. Other religions are constitutionally permitted in practice, as well as the use of other languages, so long as these do not encroach upon Islam and the Malay language, both of which are official and essential markers of Malay identity in Malaysia.

Malays in Malaysia are legally defined in terms of the three important markers of Malayness: Islam, Malay language, and culture. Article 160 of the Federal Constitution states that, “Malay is a person who professes the Muslim religion, habitually speaks Malay, [and] conforms to Malay custom” (Ali, 2008, p. 2). This definition, however, is too simplistic and limited to capture the nuances of Malayness and the multitude of factors that contribute to the everyday lived experiences of being Malay in Malaysia (Martinez, 2006; Milner, 2008; Thompson, 2007). What it means to be Malay, of being and becoming Malay, conjures different meanings to different Malays living in Malaysia (and even beyond). A Malaysian Malay sense of identity is not only expressed through cultural and religious emblems of Malayness, but is always already mediated by a multitude of factors that are not explicitly spelt out in the constitution. This is affirmed by many scholars in the field such as Eric Thompson (2007) who contends that factors such as, “gender, sexuality, ethnicity, race, class, religion, age, and place all intersect at the crossroads of (Malaysian Malay) identity” (p. 15). A Malay man, for instance, can identify himself as a young, urban, educated, middle-class, gay individual in relation to others and to the world. Such a notion of identity attests that legal, constitutional markers of Malayness inflict upon and/or intersect with

<sup>10</sup> For more information on Malaysia’s current population estimates visit the Department of Statistics Malaysia’s official website at <https://www/dosm.gov.my/v1>

a myriad of factors in the production of Malaysian Malay identity. The same then can be said of people from other ethnic communities in Malaysia, where ethnicity is one but not the only factor that contributes to their act and process of self-identification in present-day Malaysia (Holst, 2012).

But being Malay, Chinese, Indian or Malaysian for that matter, especially for individuals whose identities and lives are built around queerness, is a never a straightforward process. This is because being queer in the modern, Muslim-majority Malaysia is not easy for many queer individuals, taking into account the socio-cultural, religious and legal sanctions against queer lives and bodies both in real and virtual worlds. The fact that queer Malaysians remain subject to government surveillance both online and offline because of their queerness makes studying them in relation to cyber crimes all the more important. Inasmuch as Malaysia is regarded as a multiethnic, multicultural, multireligious, and multilingual nation, it is also home to a plethora of queer sexualities and genders. Terms such as lesbian, gay, bisexual, transgender, transsexual, transvestite, and queer, as well as abbreviations such as lesbian, gay, bisexual, and transgender (LGBT) and people like us (PLU), are used locally to describe not only queer sexualities and genders, but also individuals and communities whose identities and lives are molded around these sexualities and genders.<sup>11</sup> For the purpose of our discussion, the term ‘queer’ will be used as an umbrella or collective term to describe Malaysia’s sexual and gender marginals, following Vargas’ (2010) usage of the term to refer to, “people who are gay, lesbian, bisexual, transgender, transsexuals and/or intersexual” (p. 37).

It is important, however, to note that there are no equivalent words for the above-mentioned terms in Malay and other local languages. A variety of terms either formed from Malay or borrowed from English have been used by queer Malaysians for self-identification and self-expression. These include “pondan and bapok for effeminate Malay men; gay and gay boy for gay Malay men (str8 for straight acting gay men and gay lembut for effeminate gay men); bisek for bisexual Malay men; pengkid and tomboi for butch Malay lesbians and femme for feminine Malay lesbians; mak nyah for male-to-female Malay transsexuals and pak nyah for female-to-male Malay transsexuals” (see Baba, 2001; Slamah, 2005; Teh, 2008; Jerome, 2013a, 2013b). Other terms formulated from local vernaculars, as Phang (2015) posits, are also used in everyday discourse such as songsang (inverted), lelaki lembut (soft men), wanita keras (hard women), bapuk, ah kua (specific forms of transgenderism) (p. 362). Many of these terms, as Phang adds, “reveal the slippage between same-sex sexual attraction and gender non-conformity, representing the vague, fluid and unbounded ways many Malaysians view the myriad manifestations of non-normative gender and sexual expression” (p. 362). This is especially true in the case of the “invisible” group

<sup>11</sup> It is also important to mention the plethora of normative sexualities and genders various forms of heterosexual identities for example mat rempit, mat motor, bohjan, and bohsia (see Lim, 2006). Furthermore, it is important to take note that it was not until the ban of Seksualiti Merdeka, Malaysia’s first sexuality rights festival, that the term “LGBTIQ” became popular in the media, even though the organizers themselves more frequently employed “LGBTIQ”, adding intersex and queer (Pang, 2015).

of Malaysian men in Lim's study (2015), "who - although straight identified and gender socialized to eroticize and have sexual relations with natural-born females - also secretly have sex with transsexuals and/or feminized gay men, incidentally or occasionally" (p. 183). While acknowledging the significance of the above-mentioned terms in the lives of queer Malaysians, particularly with regard to their self-identification and self-expression, their identity formation processes remain fraught with difficulties and challenges due to three reasons.

First, queer sexualities are religiously forbidden. This is particularly true in the case of queer Malaysians of Islamic faith, as Islam forbids homosexuality on the grounds that it is an abominable crime and the most heinous of human sins (Shamsudin & Ghazali, 2011). The Divine punishment of the Prophet Lut's (Pbuh) people, because of their engagement in homosexual conducts, has sunk deep into the Malaysian Muslim psyche; to the extent that homosexuality is always already equated with punishment and condemnation. Although Islam (i.e., "classical Islamic law") acknowledges the existence of the four human genders: heterosexual male, heterosexual female, khunsa (intersex) and mukhannath (effeminate men), the latter is forbidden because of the tendency or disposition to homosexuality (Zainuddin & Mahdy, 2016; Hashim & Mat Nor, 2018; Abdul Rahman, 2018). This is not because the mukhannath, as Hashim and Mat Nor (2018) maintain, are normally sexually attracted to men, but because they are physically and naturally male, such attractions are forbidden in Islam regardless of their gender self-identification as female.

Second, queer sexualities and genders are subject to secular and religious laws. Gay Malaysian men who are found guilty of engaging in "sodomy" can be prosecuted under the secular law, or more specifically, Sections 377A and 377B of the Malaysian Penal Code for committing a "carnal intercourse against the order of nature." Section 377B, as inherited from British colonial rule, explicitly states that, "[w]hoever voluntarily commits carnal intercourse against the order of nature (i.e., the insertion of the penis into the anus or the mouth of another person) shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping". Gay Malay men and lesbian Malay women who are arrested for engaging in same-sex sexual activities can be charged and punished under the Sharia law, or more specifically, Sections 25 and 26 of the Syariah Offences (Federal Territories) Act 1997 for engaging in *liwat* (sodomy) or *musahaqah* (lesbian sex). Mak nyah, on the other hand, are liable to a hefty fine and/or to imprisonment under Section 28 if they are charged with wearing women's attire or posing as a woman for "immoral purposes" in public (Syariah Criminal Offences 1997, p. 17). The Malaysian National Fatwa Council had issued a *fatwa* (religious decree) against *pengkid* and *tomboy* on the premise that cross-gendered appearances and same-sex sexuality among Malay Muslim women are haram (religiously prohibited) in Islam.

Third, queer sexualities and genders are subject to social condemnation. This is particularly evidenced in the case of Malay individuals whose identities and lives are shaped around queer sexualities and genders. Such individuals are often condemned by the larger Malay

Muslim society as being un-Malay and un-Islamic for failing to adhere to the teachings of Islam and to actualize their *fitrah* (innate and unalterable natural disposition) as Muslim men and women for engaging in homosexual behaviors (e.g., *liwat* (sodomy) and *musahaqah* (lesbian sex)). The actualization of *fitrah*, which is conceived through, among others, the fulfillment of cultural-religious expectations of masculinity/femininity, as well as the social-familial pressures for marriage, are crucial to the dominant heteronormative configuration of Malay Muslim subjectivity. The failure to actualize or fulfil one's *fitrah* often calls into question one's identity as Malay and Muslim within the dominant Malay Muslim society (Suliza, 2006; Jerome, 2013a, 2013b).

The above-mentioned reasons attest that identity formation is not an easy process for queer Malaysians, as it comes with risks and challenges, given the “powerful” factors and forces affecting this very process that is central to establishing their sense of self and identity based on queerness. While this raises the question as to whether it is materially possible for queer self-identification and self-expression to take place (or even have a place) in Malaysia, it is important to point out that many queer Malaysians are able to make the “impossible” possible through queerness that functions both as a position and a strategy. This dual functionality of queerness follows Rivera-Servera's (2012) explanation of the term ‘queer’ as both a position and a strategy:

As a position, “to be queer” describes the lived experiences, identities, desires and affects of subjects who practice or entertain the possibility of practicing sexual or gender behaviours outside heteronormative constructs. As a strategy, “to act queer” refers to the set of practices engaged by queers themselves in their creative navigation of everyday life in a heteronormative society, although being queer is not a precondition to acting queerly. (p. 27)

Such strategies may include queer subjects' “everyday practices such as dress, speech, gesture, and of course sex, to more formal presentations of self in public contexts such as the theatre or the dance club”, as well as “ways of reading or seeing the world from a queer perspective” (Rivera-Servera, 2012, p. 27). The “creative navigation of everyday life in a heteronormative society”, in addition to the range of strategies that Rivera-Servera elaborates, finds resonance in the lived experiences of queer Malaysians who concoct ingenious ways, mechanisms, tactics and strategies to circumvent the prohibition and condemnation of queerness, which in turn enables them to embrace and express their queer selves. Self-disclosure is one of the strategies that queer Malaysians adopt in their coming out process as reported in the study conducted by Wai and Singaravelu (2017). They found that their queer respondents - namely gay men and lesbians of Chinese and Indian descents who had come to terms with their respective same-sex orientation and sexual attraction - used the disclosure strategy in a variety of ways and for various reasons: from coming out completely to disclosing on a need to know basis, from verbally direct disclosure (e.g., I like women) to verbally indirect disclosure (e.g., I do not plan to get married).

Queer Malaysians, particularly those from the Malay community, adopt the *self-adjustment* or *self-adaptation* strategy in navigating their everyday lives that continue to be governed by the powerful forces of tradition and religion. The gay Malaysian Muslim respondents in Mohd Sidik's (2015) study, for instance, identified themselves as "gay" and "muslim" by means of adjusting their responses to their immediate surroundings (e.g., family members, peers, the authorities, spaces). This was made possible through their acts of, "rebellious, conforming, innovating, retreating or merely keeping up appearances" (p. 135) that did not necessarily pose a direct threat to the very forces of tradition and religion by which their lives in particular, and the lives of many Malays in Malaysia in general, are ruled. The respondents also adopted the self-adjustment strategy (as well as a strategic self-representation method) by being semi-open about their sexual identities in open public spaces without being targeted by law enforcers, and by lying low during hunting seasons and coming out of their hiding when they think it was safe to do so.

Apart from the above-mentioned strategies, many queer Malaysians also turn to the Internet or the cyber space for self-identification and self-expression that may be easily effectuated in the actual, physical world, given the above-mentioned prohibition and condemnation of queerness. This is especially evidenced by the number of queer Malaysians who turn to many popular social media sites (e.g., Facebook, Instagram, Twitter) and queer social networking platforms (e.g., Moovz, Hornet, Grindr) for such purposes. It is in the realm of cyber space that many queer Malaysians can meet other queer individuals for comfort, support and encouragement, as well as for accomplishing a host of other purposes being out online. This concurs with the reflection of scholars on the ways new digital technologies, such as the Internet and mobile devices, have fundamentally changed the way queer individuals communicate and live in this fast changing world (Binnie 2004; Bell & Valentine 2003; O'Riordan & Phillips 2007). Of particular importance is how these technologies have made information about queer lives and experiences more accessible to queer people around the world and created a "safe haven" or a "home" in which they can meet each other and find comfort solace from various locales, even from the spaces that prohibit queerness on legal, social or religious grounds.

While the Internet *facilitates* the queer identity formation process, it can also *complicate* it in varying ways and may have an adverse impact on queer individuals' lives and their sense of identity and place in the world. This is especially true in the case of those who had personally experienced cyber crimes targeted against them on the basis of their queerness. Many queer Malaysians have fallen (and continue to fall) prey to these crimes - particularly queerphobic cyber bullying, harassment and vigilantism. One well known case is that of Azwan Ismail, which involved the public disclosure of his homosexuality. Azwan was the first Malaysian Malay Muslim who publicly announced his homosexual identity via YouTube in conjunction with the "It Gets Better in Malaysia" project organized by Seksualiti Merdeka in 2010. His video, which was inspired by Dan Savage's "It Gets Better" video project, where American LGBT adults convey encouraging messages via YouTube to LGBT teens in America who are struggling with bullying and intolerance, received huge public outcry,



to the extent that Azwan faced prosecution by the police and religious authorities and received numerous threats of violence and murder both online and offline, as a result of declaring his homosexuality. To make matters worse, several Malay political leaders, who lambasted Azwan for insulting Islam, failed to speak against these violent threats that had already put his life in danger. The fact that this is just one of the several known cases, and that there are probably more such cases that go unreported daily, due to many reasons (e.g., victims being afraid of the repercussions or they just do not want to report such cases to the authorities), makes it more urgent than ever to examine queer Malaysians' experiences with cyber crimes - a point to which we shall now turn.<sup>12</sup>

## Queer Malaysians and Their Experiences with Cyber Crimes

As mentioned before, this chapter sets out to address the gap in existing research by examining lesser-studied groups of Internet users outside the Euro-American context, namely, queer individuals in Malaysia in relation to their views on the cyber crimes they had personally experienced and/or observed.

The views were elicited from 132 respondents with varied backgrounds over a 12-week period (May - July 2019) using survey methods (e.g., questionnaire and interview) and being analyzed to investigate prevalent forms of cyber crimes perpetrated against them, the underlying or perceived causes and consequences, as well as the prevention of those crimes (see Table 2).<sup>13</sup> Crimes against queer individuals have continued to rise over the past decades, given the rising trend in cases and incidences of such crimes (hate crimes and hate-related violence in particular) targeting queer individuals across the world (Parker,

<sup>12</sup> Another case involves Numan Affi Saadan, who resigned from his position as the interim press officer at Malaysia's Youth and Sports Ministry following the backlash and threats he received from local authorities and netizens over his LGBT activism. This openly gay Malay man is the president of Pelangi Campaign, Malaysia's LGBTIQ+ civil society organization, and the organizer of the 'Big Gay Iftar (breaking the fast)' in Bangsar Kuala Lumpur during the Holy Month of Ramadan. See Mei Chu's (2018) article on the controversy at <https://www.thestar.com.my/news/nation/2018/07/09/lgbt-activist-numan-affi-quits-as-syed-saddiq-press-officer/>

<sup>13</sup> The survey was conducted online for 12 weeks between May and July 2019 through a public (non-password protected) link. A total of n=132 queer Malaysians who took the survey, which primarily recruited through snowballing referrals, with the survey link sent to their distribution list. Because actual hard data on queer population in the national and administrative datasets, an online survey considered the best way to access a sizeable number of respondents. The online element also allowed respondents to provide anonymous and confidential responses. The survey was designed by the researcher and drew ideas from the 2013 GLSEN Out Online Survey, the 2018 UK National LGBT Survey, the 2013 Survey of LGBT Americans, and the 2018 MCMC Internet Users Survey. The multi-part survey (i.e., *Background Information, Online Behaviour and Activity, Experiences of Being Online as Internet Users, Experiences of Being Out Online, and Personal Opinions*) gathered both qualitative and quantitative data. Informal talks and open interviews with some informants were also conducted to further validate the survey findings. These investigative methods were designed by taking into consideration the principles and elements of gender analysis (e.g., vulnerabilities and empowerment), as espoused by SIDA (2015), which include among others, norms of gender, other social variables, quantitative and qualitative data, vulnerabilities and empowerment.



2017; Peterson & Panfil, 2013; Perry & Franey, 2017). This trend is likely to continue due to the proliferation of the Internet that helps accelerate the crime rate in both cyber and physical worlds.

The Gay, Lesbian and Straight Education Network (GLSEN), for instance, found that queer youths who participated in its 2013 study had personally experienced cyber bullying and harassment on the basis of their queerness.<sup>14</sup> These youths were nearly three times more likely than their non-queer peers to have been bullied or harassed online, and four times as likely as their non-queer counterparts to say they had been sexually harassed in the cyberspace. Additionally, one in four of these queer youths claimed they had been bullied online specifically because of their sexual orientation or gender expression. The queer youths' experiences with cyber bullying and harassment had adverse effects on their academic performance and psycho-social functioning, as evidenced by their lower grade point averages (GPAs), lower self-esteem and higher levels of depression. The U.S. Centres for Disease Control and Prevention (CDC), on the other hand, revealed that queer youths who took part in its 2017 nationwide study were *more likely* to be electronically bullied (i.e., cyber bullying through electronic media) than their non-queer peers.<sup>15</sup> In other words, queer female youths (lesbians and bisexuals) were more likely than their non-queer female counterparts to have been electronically bullied, while queer male youths (gays and bisexuals) were more likely than their non-queer male cohorts to have been bullied by means of electronic communications such as texting and social media networking. Furthermore, both queer and non-queer youths who were involved in this study claimed that they were more likely to experience electronic bullying as a result of having sexual relations with only the same sex or with both sexes, unlike their peers who only had sexual contacts with the opposite sex. These studies are among many others that have been conducted over the years, but the focus has mainly been on Euro-American queer youths and adults, leaving little or almost no information about their queer counterparts elsewhere who had experienced (and possibly are currently experiencing) similar crimes, albeit in different ways and to varying degrees. The queer individuals from Malaysia who partook in the study presented in this chapter might be able to address the absence of information through their personal experiences of cyber crimes.

Queer Malaysians experienced some of the "common" crimes committed against them as encountered by many ordinary or regular Internet users in Malaysia. A majority of queer Malaysians in the study had personally experienced spam and malware or malicious code in the past year, in addition to phishing, DDOS/DOS, fraud, and cyber harassment (see Table 3). Such experiences resonate with those of ordinary Malaysians who mostly encountered fraud, malware or malicious code, cyber harassment, and spam while being online, as reported by Malaysia Computer Emergency Response Team (MyCERT) under

<sup>14</sup> More information about GLSEN can be found at <https://www.glsen.org/press/study-finds-lgbt-youth-face-greater-harassment-online>

<sup>15</sup> More information about U.S. CDC and its work can be found at <https://www.cdc.gov/lgbthealth/youth.htm>

the purview of CyberSecurity Malaysia. But things took a different turn when queer Malaysians shared their personal experiences with cyber crimes, particularly cyber bullying and harassment, which were targeted against them because of their queerness. One third of queer Malaysians in the study claimed that they had experienced being bullied or harassed for being out as “queer” online (either being completely or partially out in the cyberspace) through various online sharing platforms, such as social media sites, group and private messaging (see Table 3). What it means by being out as “queer” online for many queer Malaysians follows Dzurik’s (2018) description of the coming out and being out online approaches engendered by many queer individuals elsewhere (especially queer youths). Such approaches include creating an online queer profile and posting information related to one’s queerness online, as well as interacting and networking with other queer individuals in the realm of cyber space (p. 193). But these very approaches “backfired” when many queer Malaysians in the study who were out online had been mostly bullied or harassed on their social media sites by cyber bullies, comprising “presumably” non-queer and queer visitors to these sites.

The main reason for this was the bullies’ (especially non-queer ones) disgust towards queerness and queer individuals for openly and unashamedly expressing their queer selves online (see Table 4). The bullies often resorted to insults, denigrating comments, derogatory words, and even threats of violence and/or death to express their deep disgust and repugnance at queerness and queer individuals. This is evidenced by the experience of Respondent 48, a Chinese lesbian in her early 20s, who claimed that she was often insulted and denigrated by bullies who visited her social media site because of her masculine tomboyish outlook and traits. Some of the insulting and denigrating comments she had received being posted by the bullies in response to her online statuses and photos include:

Hoi, u r gurl but wan become boi. BáiChī!

Hey, you are a girl, but want to be a boy. Idiot! (my translation)

No penis but pretend have penis. How you main ah, use dildo is it?

You don’t have a penis but you pretend to have one. How do you make love, do you use a dildo? (my translation)

Respondent 9, a Malay transwoman in her late 20s, admitted that she often became the target of cyber bullies whom she believed to be ‘presumably’ heterosexual male and female visitors to her social media site based on their online names and profiles. These bullies wrote derogatory remarks on her social media site that were filled with derogatory words/phrases, such as *babi punya bapak* (filthy transgender), *pondan cilake* (damned pondan) and *puki jadian* (artificial vagina or woman) to demonstrate their deep disgust towards her trans-ness. To make matters worse, she also received several threats of violence and/death by some of the bullies whom she claimed resorted to religion to justify their intended against her. As two of her cyber bullies wrote:

Cilake punya pondan! Baik ku bakar idup-idup, cicang lumat-lumat!  
Damned pondan! I'd better burn you alive, cut you up into pieces! (my translation)

Species Lut nihi... Allah laknat! Baik ko baca balik Surah al-A'raf, kasi insaf sket!

You belong the Lut species, damned by Allah. You'd better reread Surah al-A'raf and repent! (my translation)

Such a remark reminds us of the religious prohibition of queerness as discussed earlier in relation to homosexuality and the Malaysian Muslim community, where homosexuality and other transgressive forms of sexuality and gender are always already equated with Divine punishment and condemnation. This is attested by Abdul Rahman (2018), a publicly-identified, self-proclaiming Malaysian Muslim transgender, who contends that many Malay Muslims in Malaysia agree that homosexuals, or more specifically, lesbian, gay, bisexual and transgender (LGBT) individuals “deserve punishment because of these three main beliefs: (1) LGBT *di laknat Allah* (LGBT is cursed by Allah), (2) LGBT berdosa/haram (LGBT is sinful/haram), and (3) LGBT bertuhankan nafsu (LGBTs are lustful)”. These beliefs, as Abdul Rahman further contends, disregard her self-identification as a transgender in spite of her contention that “LGBTs do not chose [sic] to be who they are. I know because I am one. I am a transgender and a Muslim. Being a transgender has nothing to do with lust. It is my gender identity. I did not chose [sic] to be a transgender.” It is not completely inaccurate for us to say, then, that the cyber bullies of the above-mentioned Malay transwoman used religious precepts (e.g., the condemnation of Prophet Lut's clan, the Surah) against transgressive forms of gender to legitimize their bullying.

It is also important to highlight other causes of bullying and harassment experienced by queer Malaysians in the study for being out online on their social media sites. These include the cyber bullies' feelings of repugnance towards the views or opinions that queer Malaysians shared or posted online (most of which were related to their sense of queer identity, sexual and relational desires) and the bullies' envy and resentment of queer Malaysians' successes, social statuses, popularity, and even physical beauty. Some queer Malaysians admitted that they were often derided or mocked by other queer individuals or queer visitors who visited their social media sites as the result of the prevalent stigma and discrimination within the queer Malaysian community. Respondent 108, a Chinese gay man in his early 50s, opined that he was often ridiculed by younger gay men who visited his gay social media site because of his age and physical outlook, as shown on his online profile.

Some of these men, young ones like to call me 'old ah kua' (gay), 'ED' (erectile dysfunction), 'Taxi Driver', and 'Pedo(phile)'. They don't like old gay man like me. Some are racist, they don't like Chinese men because of our filthy kulup (foreskin)”.

Respondent 108's experiences of bullying resonates those of older, aging gay men, who experience stigmatization and discrimination by younger gay men due to the valorization of youthfulness by the gay community as many studies have shown (see Kimmel & Messner, 2013). Many young men find older gay men repulsive as potential sexual partners (van Wormer, Wells, & Boes, 2000), with some using gay words/slang to show their repulsion to stigmatize the latter as "aunties", "dogs", "toads" and "trolls" who congregate in "wrinkle rooms" (Dynes, 2016, p. 25).

As mentioned in the earlier sections, the consequences of cyber crimes can be diverse, ranging from "real, material harms", "immense psychological stress", and "reputational damage" (Martellozzo & Jane, 2017, pp. 12-13) to poor academic performance, lower self-esteem and higher depression among queer youths who were affected by cyber bullying and harassment (GLSEN, 2013). Queer Malaysians in the study had experienced a range of untoward side effects of cyber bullying and harassment that were committed against them by the cyber bullies (see Table 4). Many were emotionally affected, as they cited feeling hurt by the offensive words and remarks from the bullies, as well as feeling sad, low, demotivated, and despairing. Others reported having had lower self-esteem and confidence, higher levels of stress and even the inability to find sexual partners due to the stigmatization and discrimination by other queer individuals. Some queer Malaysians even went through self-question or "why/why me?" moments, while others conjured up the idea that they would withdraw from social media for good. Some of these effects were captured in a statement made by Respondent 27, a Malay transwoman in her late 20s, "(The bullying affected me) emotionally mostly. I never felt so down, so low in my life. Sometimes, I question why I should be the way I am, why am I born this way, why should I be born at all. . .?"

While acknowledging the disparaging effects on the above-mentioned remarks, some queer Malaysians in the study were "least" affected by cyber bullying or harassment, as they took the matter 'positively' rather than 'personally' (see Table 4). Some queer Malaysians even stated that they did not care or felt anything about it, while others asserted that they would not change despite the negative remarks on their sexuality or gender identity that they expressed through social media. Interestingly, the experience of being bullied or harassed online on the basis of queerness had made these queer Malaysians even 'stronger and wiser' as expressed by Respondent 30, a gay Chinese man in his late 40s:

The experience of being mocked at because of who I am makes me even stronger, wiser, and prouder. I don't do stoop that low to retaliate, just like I used to do back then. The experience made me reflect on my own words and actions. I am not always right you know, so I try my best to be the best version of myself.

Despite the invariable effects cyber bullying or harassment had on queer Malaysians in the study, it is important for us to understand how this type of cyber crime is intricately linked

to the opportunities and threats in being out online that these individuals experience daily in present day Malaysia (see Table 5). As discussed in the earlier sections, identity formation processes for many queer Malaysians remain fraught with difficulties and complications due to social, religious, and legal prohibition and condemnation. However, many queer Malaysians claimed that the Internet provided them the avenue for opportunities for expressing their queer selves online, despite these prohibitions and condemnations. This was evidenced by the ways the Internet allowed them to ‘connect’ (e.g., interact, communicate, network, socialize, meet) with other queer individuals online by identifying themselves as queer online. Another great opportunity that the Internet provides queer Malaysians with, albeit the crimes that it engendered, are the ‘limitless’ possibilities for self-expression, in addition to the ability for doing almost anything online with much greater ease and freedom. These include accessing information, doing business, getting an education, exchanging ideas, raising awareness and voicing concerns, and getting the acceptance and understanding needed for self-identification and self-expression, as well as having the ability to embrace and empower themselves in doing so. As Respondent 61, a Malay lesbian in her late 20s explained, “Those who are outline have their own reasons for doing so, probably ease and freedom, also the anonymity and the fact that there are other LGBTIQs on the internet. Whatever the reason, it’s really a place we can embrace out true selves and empower others to do so.”

Nevertheless, other queer Malaysians in this study believed that the major threat to their act of self-identification online is society’s (mis)perception which inadvertently led to a host of other threats such as discrimination, stigmatization, condemnation, harassment, hatred and homophobia. Such threats as many queer Malaysians claimed bred the bullying or harassment perpetrated by the cyber bullies. Other queer Malaysians felt otherwise, claiming that the threats came from the authorities themselves for putting in place laws that prosecute queer individuals for their queerness, rather than prosecuting cyber criminals who bullied or harassed them online. Respondent 3, a Chinese gay man in his late 20s claimed, “Sometimes I worry getting exposed or caught by authorities when using apps like Blued, Grindr etc. I heard the news say government is doing monitoring so I a bit worried actually”. While some queer Malaysians claimed that the threats remained deeply rooted in the society’s deeply-ingrained heteronormative religious and cultural norms, many of them believed that such threats were attributed to the hate, discrimination, misunderstanding and misjudgment that existed among or within the queer community, as Respondent 27, a Malay transwoman in her late 20s lamented:

People around you and who know who you are. Most do not and cannot accept your identity, maybe because they don’t understand or don’t want to understand. I also have trans friends who bully other trans because of jealousy and feelings of dissatisfaction of physical beauty. Sometimes I question why they act this way. I thought support should come from within the trans community but really it is the other way round.

Furthermore, a number of queer Malaysians cited that the freedom and limitless possibilities the Internet presented to them could backfire due to a number of reasons: firstly, queer individuals continued to be at risk of being found out or outed by others online, which could be made viral by others due to hate and so on; secondly, the right to self-expression and being different remained elusive due to this and other host of factors; and thirdly, the issue of safety and privacy (e.g., whether it is really safe to be out online and keeping one's queer identity private). Some of these were captured in a statement made by Respondent 79, a Chinese lesbian in her late 40s:

The limitless possibilities of making connection and so on can also be a drawback. This is because many can use this advantage to meet their own needs and in the end, we become the victims of their schemes.

The experiences of queer Malaysians of/with cyber crimes that we have examined so far shows that such experiences were formed through a prevalent form of cyber crime, namely cyber bullying and how these very experiences produced different effects in different queer individuals. The same can be said of the connection between this prevalent form of cyber crime affecting queer Malaysians and the opportunities and threats in expressing queerness in the cyber space. That is, while many queer Malaysians claimed that the Internet provides boundless opportunities for queer self-identification in spite of cyber bullying and other forms of cyber crime engendered by it, many more argued that Malaysians' (mis)perception of queerness that helped breed queerphobic cyber bullies was the biggest threat to their efforts and even rights to self-identify as 'queer' online. To some extent, these contrary opinions make sense, given the diversity of queer Malaysians and most importantly, the different degrees of threat or danger (Yar, 2013) and damage in terms of time, resources, or reputation (Mehan, 2014) that came with the cyber crimes they had encountered. This prompts us to think about the prevention efforts that queer Malaysians would recommend preventing and combating these crimes based on their unique positions and varied experiences.

## Queer Malaysians and Their Prevention of Cyber Crimes

Given the widespread and detrimental effects of cyber crime, efforts have been made at various levels (and with differing degrees of success) to prevent and combat them. Such efforts, among others, include, "defining cyberbullying adequately, developing clear rules and policies regarding cyberbullying, and encouraging the reporting of cyberbullying" (Agatston, Kowalski, & Limber, 2012, p. 68). Cyber crime prevention efforts have been directed to the general population and the at-risk groups by educating them about cyber crimes and the avenues through which they can empower themselves to fight cyber criminal activities. One of these is social media and how it has been used to facilitate various cyber crime prevention efforts targeting social media users (more specifically the youths) that include providing media education for young people with a focus on the use of



technical and communicative means to counter cyber criminals (e.g., deleting and blocking threatening messages) (McGuckin et al., 2013).

Queer Malaysians in the study believed that they could prevent and protect themselves from these crimes and, in the process, defend and claim their right to self-identify as 'queer' in cyber space. This, they claimed, could be achieved through various prevention efforts and most importantly, by exercising their own agency and potentials for effectuating change both at the individual and collective level (see Table 6). Many queer Malaysians recommended that members of the larger Malaysian society and members of Malaysian queer community to change their (mis)perception of queerness as a way of preventing cyber crimes - a change that could be effectuated through education and awareness campaigns. As Respondent 17, a bisexual Bumiputera woman in her 40s, explained:

Awareness campaign and education for the general public...so that they know people like us do exist and we are not any different from other Malaysians. I know this may not be possible especially in our country...But we have to do it, otherwise people can bully us like nobody's business. Cyber bullying can kill!

In regard to the change among/within the Malaysian queer community, many queer individuals in the study called for all members - regardless of age, race, ethnicity, sexuality, and gender - to learn to respect, accept, and understand each other by/through various means including getting rid of stigmas, discrimination, stereotypes, and double standards that exist within the community that valorizes youth and other standards of physical beauty. As Respondents 13, a Chinese gay man in his late 20s posited:

PLUs need to change their mindset. It's not all about being young, fit and handsome you know...You can have your standards but don't condemn others who don't meet them. We also need to provide correct information about PLUs to Malaysian public... so that they won't call us sexual predators! As PLUs we also need to present a good image of ourselves to society. Sometimes we ourselves portray negative images. This makes it harder to change people's perception on us.

Moreover, queer Malaysians recommended having or putting in place laws and policies that could protect them as Internet users who used the Internet for self-identification and self-expression, and a host of other purposes. Many of them felt that they had the right to self-identify as 'queer' in the cyber space, being the 'only' space left for them. To do so, as Respondent 73, an Indian gay man in his late 20s explained, "It's already difficult to be who you are in the public... We only have the Internet now."



While some queer Malaysians called for all members of the Malaysian queer community to “fight together” to stop the hate, prejudice, and the threats brought upon by cyber bullying, others had recommended cautionary measures to reduce the risk of such crime. These include “be(ing) careful”, “choos(ing) (social media) platforms wisely”, “don’t expose too much”, “protect yourself and your information”, “be(ing) prudent and critical”, and “don’t be out or be out only to people you know”. Several queer Malaysians even provided some sound advice on being out online as respectively expressed by Respondents 125 and 129.

Respondent 125, a Bumiputera bisexual man in his late 20s:

One’s person should protect and ensure every data and personal details are hidden from public and ensure that if the person keen to meet up with someone new from social apps, take every precaution. And if sex involves, make sure use protections and get health status checked every 3 months.

Respondents 129, a Bumiputera gay man in his late 30s:

Help each other as we are one LGBTQ+ family, do not attack each other as we need each other to stay strong and grow together in the community that still do not accept LGBTQ+ so be responsible in helping our LGBTQ+ family as our future depend on our cooperation to make it possible to happen just like what had happened in Taiwan which legalized the union of LGBTQ+ and I trust and believe one day that can happen to us too but still long way to go.

It is, however, necessary to point out that all the above-mentioned cyber crime prevention initiatives and measures were recommended by queer Malaysians who participated in the study and that many (if not all) of these efforts had never seen the light of day due to the prohibition and condemnation of queerness in present day Malaysia. The ‘harsh’ and politically constrained conditions and circumstances in which queer Malaysians live out their lives daily make it even harder for them to exercise their basic right to identity (and even embrace and solidify it, whether in the realm of cyber space or the physical world) which is not recognized in their own country. This is evidenced by Malaysia’s official long-held beliefs and renewed stances towards queerness ranging from “LGBT is haram” (Zahid, 2019), “Malaysia cannot accept same-sex marriage or LGBT rights” (Pillai, 2018), and “Malaysia has no gay people” (Palansamy, 2019). Although the rights of every Malaysian, regardless of race, religion, age, sex and gender, are protected by legal provisions in the Federal Constitution of Malaysia, these rights are not absolute and they are subject to, among others, morality, public order and security of the country. Having said all of this, the question that needs to be asked is: Can queer Malaysians identify themselves as queer and claim and defend their rights to do so?

## Conclusion

Cyber crime has become a widespread phenomenon affecting the lives of millions of people due to the proliferation of the Internet that facilitates its rapid and unprecedented growth worldwide. While cyber crime has been thoroughly explored in recent decades in terms of prevalence, correlates, consequences, and prevention efforts, much more needs to be known about it in relation to the lives of lesser-studied groups of Internet users, namely, queer individuals outside the Euro-American sphere. Focusing on the unique experiences of these individuals may not only enable us to examine the similarities and differences in their encounters with cyber crimes, but to clarify certain questions about the ways in which these crimes affect their lives, livelihoods, and well-being.

We have so far discussed this gap in existing research (and also the gap in our knowledge) by focusing our attention on the discussion of queer individuals in Malaysia and their experiences of cyber crimes from three vantage points: the prevalent forms of cyber crime perpetrated against them, the underlying causes and consequences, and the prevention of those crimes as recommended by queer Malaysian themselves. In regard to the prevalence of cyber crimes, we found that queer Malaysians experienced 'common' types of crime committed against them by cyber criminals, including spamming, malware, phishing, DDOS/DOS, and online fraud - all of which were similarly experienced by regular Internet users in Malaysia. We also discovered that queer Malaysians were mostly affected by cyber bullying or harassment, a type of cyber crime directed towards them on the basis of their queerness and, more specifically, the ways they expressed their queer selves and queerness online.

Our examination of queer Malaysians' views of their experiences with cyber bullying revealed that cyber bullies often resorted to the technique or *modus operandi* of leaving comments filled with insults, denigrating and derogatory words, even threats of violence and/or death. These comments, as queer Malaysians viewed them, were motivated by the bullies' deep disgust and repugnance at queerness, which appeared to be main underlying cause of their queerphobic cyber bullying. The examination led us to the discovery of effects of cyber bullying on queer Malaysians, which were largely of a psycho-social nature, ranging from their feelings of sadness and vulnerability and lower self-esteem to higher levels of stress. However, we also learned that some queer Malaysians, who experienced cyber bullying as the result of their expression of queerness online, were not influenced (or let themselves to be influenced) by the detrimental effects of the crime. This was evidenced by the way these queer individuals viewed and evaluated a negative situation (e.g., the aftermath of cyber bullying) through a positive vision (e.g., taking it with a grain of salt).

Nevertheless and albeit the invariable impacts that cyber bullying had on queer Malaysians, we uncovered the intricate link between this crime and queer identity formation process, particularly in light of the opportunities, threats and challenges of/in being out as 'queer' online for queer Malaysians. Many queer individuals who participated in the study accrued

that, despite the proliferation of cyber crimes, the Internet provided great opportunities for being out as 'queer' online; chiefly in terms of connectivity and the ease and freedom to do almost anything that the real, physical world cannot offer. Such opportunities, however, as a majority of queer Malaysians lamented, may well be thwarted by the biggest threat to the process of queer self-identification online (and even offline) - that is, the (mis)perception of queerness by the larger Malaysian society, in addition to the local, social, religious and legal prohibition and condemnation of queerness.

Queer Malaysians in the study did offer us a glimmer of hope in their final views on the prevention of cyber crime and more specifically, cyber bullying. Many of them expressed optimism that they could prevent cyber crimes and, in the process, defend and claim their right to be 'queer' online through various recommended initiatives and measures ranging from changing society's (mis)perception of queerness to revising the way queer Malaysians view their own members of the local queer community; from calling for laws and regulations that protect queer Malaysians to taking precautionary measures to queerly cyberly. It is important to mention that queer individuals who partook in the study are not representative of the broader queer population in Malaysia. It is, then, hoped that future research will include a larger number of queer Malaysians across wider geographic areas in order to determine the full scope and nature of cyber crime against them, as well as to examine the 'true' extent of these crimes, their multivariate causes and consequences (e.g., physical, psychological, financial) and the effectiveness of prevention efforts. Finally, while local in scope and confined to queer Malaysians, the study presented in this chapter manages to shed valuable insights into the cyber crime phenomenon affecting the lives of queer individuals outside the Euro-American realm. These insights may enable us to better understand the complex relationship between technologies (i.e., the Internet and the crimes it engenders) and human rights (i.e., the right to identity, the right to be queer online in light of these crimes), and the challenges and opportunities arising from such relationship in the context of 'queer' Southeast Asia/ASEAN.

## Disclosure Statement

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Table 2. Demographic Characteristics of Respondents

Gender Identity	%	n
Male (cisgender)	71.2	94
Female (cisgender)	20.45	27
Transgender woman	8.33	11
Sexual Orientation		
Gay	56.8	75
Lesbian	15.1	20
Bisexual	15.1	20
Heterosexual	6.8	9
Pansexual	3.7	5
Asexual	1.5	2
Other	0.7	1

Age		
15-19	4	3
20-24	28	37
25-29	31.8	42
30-34	10.6	14
35-39	15.1	20
40-44	4.5	6
55-59	2.2	3
Ethnicity		
Malay	43.1	57
Chinese	31	41
Indian	4.5	6
Other Bumiputera	19.6	26
Other	1.5%	2
Religion		
Islam	43.9	58
Buddhism	21.2	28
Taoism	1.5	2
Christianity	29.5	39
Hinduism	3	4
Other	0.7	1
Place of Residence		
Urban	92.4	122
Suburban	6.8	9
Town/Small	0.7	1
State of Residence		
Selangor	21.9	29
Federal Territory Kuala Lumpur	19.6	26
Johor	3.7	5
Melaka	0.7	1
Negeri Sembilan	1.5	2

Perlis	0.7	1
Perak	2.2	3
Pulau Pinang	9	12
Federal Territory Putrajaya	1.5	2
Sarawak	38.6	51
<b>Education</b>		
Degree	45.4	60
Diploma	45.4	60
Malaysian Certificate of Education/ Malaysian Higher School Certificate	8.33	11
Other	0.7	1
<b>Employment</b>		
Employed	42.4	56
Self-employed	32.5	43
Full-time students	24.2	32
Unemployed	0.7	1

\*transgender women

Table 3. Respondents' Online Experiences

Had experienced being a victim of cyber crime as a regular internet user in the last 12 months	%	n
Yes	82.5	109
No	12.8	17
Prefer not to say	4.5	6
<b>Type(s) of cyber crime experienced as a regular Internet user in last 12 months*</b>		
Spam	82.5	109
Malware	79.5	105
Phishing	75	99
DDOS/DOS	50.7	67
Fraud	29.5	39
Cyber harassment	28	37

Content related	22.7	30
Vulnerabilities report	21.9	29
Hacking and intrusion	9.8	13
Other	1.51	2
<b>Being out as 'queer' online in the last 12 months</b>		
Completely out online	15.9	21
Partially out online	27.2	36
Partially out online but more out offline/in person	21.2	28
Not out online	15.1	20
Not out online but more out offline/in person	9	12
More out offline/in person	3.7	5
Prefer not to say	7.5	10
<b>Online sharing platforms used for being out online in the last 12 months**</b>		
Social media	90.5	77
Group messaging	85.8	73
Private messaging	110.5	94
Email	49.4	42
Forum	18.8	16
Other (e.g., blog/personal website)	3.5	3
Other (e.g., gay apps)	10.5	9
<b>Had experienced cyber crime (e.g., cyber bullying) for being out online in the last 12 months</b>		
Yes	33.3	44
No	41.6	55
Prefer not to say	25	33

\*Refer to the glossary in Appendix 1

\*\*Based on n=85 who were out online

Table 4. Perceived Causes of the Cyber Crime (e.g., Cyber Bullying) Experienced and its Consequences

Perceived causes of the cyber crime experienced*	%	n
One's queer identity, sexual orientation, gender identity and gender expression	63.6	28
One's queer-related views or opinions that he/she shared online	18.1	8
One's mistreatment by other queer individuals due to their preferences in finding sexual partners	11.3	5
One's personal successes, popularity, or physical beauty as shown online	6.8	3
<b>Consequences of the cyber crime experienced*</b>		
Hurt	27.2	12
Sad and demotivated	9	4
Low self-esteem and confidence	6.8	3
High level of stress	4.5	2
Self-questioning (e.g., why me?)	6.8	3
Having thoughts of withdrawing from social media	2.2	1
Difficulty in finding sexual partners online	4.5	2
Did not take it personally, looked at it positively	22.7	10
Did not care and felt nothing	6.8	3
Would not change despite the bullies' remarks	6.8	3
Became much stronger and wiser	2.2	1

\*Based on the n=44 who experienced being bullied online

Table 5. Opportunities and Threats Presented by the Internet for Being Out Online

Opportunities presented by the Internet for being out online	% n
The ability to connect, interact, communicate, network, socialize, meet with other queer individuals online	35
Limitless possibilities for self-expression online	17
The ability to do almost anything for being queer online with greater ease and freedom (e.g., accessing information, raising awareness, voicing concerns, getting acceptance and understanding for being queer, embrace and empower queer selves)	27
A 'better' place to be discreet, private and anonymous with one's queer identity	3
More constrains than possibilities, as it is better to be out offline instead	5
Threats presented by the Internet for being out online	
The (mis)perceptions of queerness by the larger Malaysian society, leading to cyber bullying directed at queer individuals	40
The authorities, the existing laws and regulations that monitor and prosecute queers being out online	10
The deeply-rooted religious and cultural norms against queerness	5
The hate and discrimination that exist among or within the queer community due to the valorization of youth and standards of physical beauty	13
The limitless possibilities presented by the Internet for queer self-expression online (e.g., risk of being found out or outed, risk of being viralled by others, safety and privacy issues for being out online)	14



Table 6. The Respondents' Recommended Cyber Crime Prevention Efforts

Recommendations	n
Members of the society and the queer community must be able to change their perception of queerness	29
Members of the queer community should learn to respect, accept and understand each other (e.g., get rid of personal preferences, stereotypes and double standards).	18
Put in place laws and policies to protect queer individuals as Internet users who use it to express identity	8
Members of queer community must fight together to stop the hate, prejudice, and the threats of cyber bullying against queer individuals	11
Queer individuals must be cautious or practice caution when being out online (e.g., "be careful", "choose social media platforms wisely", "don't expose yourself too much", "protect yourself and your information", "be prudent and critical", and "be out to people you know or don't be out at all")	12
Impossible to overcome cyber bullying against queer individuals for being out online (e.g., "not sure if you can change people's perception", "difficult to change people's mindset", "hard to change the situation", "cannot do anything about it")	7

#### Appendix 1: Types of Cyber Crime Experienced in the last 12 Months

Spam (i.e., junk email)
Fraud (i.e., identity theft, stolen bank account, stolen passwords, stolen intellectual property)
Hacking and intrusion (i.e., a potential unauthorized attempt to enter a computer, system or networks to access information and manipulate or render a system unreliable or unusable)
Cyber harassment (i.e., a wide range of behavior usually intended to disturb or upset and sometimes can be found threatening or disturbing)
Malware (i.e., various form of harmful software that intentionally designed to harm computer, network and server)
Phishing (i.e., a fraudulent attempt to obtain sensitive information such as credit card details)
DDOS/DOS (i.e., an attempt to make online service unavailable with traffic from multiple sources)
Content related (i.e., any offensive, orally improper and against current standards of acceptable behavior including nudity and sex)
Vulnerabilities report (i.e., a flaw in a product that makes it vulnerable to be attacked by using privileges on the user's system, regulating its operation and compromising data on it)

Adapted from MCMC Internet Users Survey 2018.

## CHAPTER 8

### Engaging the Trolls: Reactions of ‘Netizen’ and Philippine Human Rights Organizations on Extrajudicial Killings

*Karl Arvin F. Hapal*

#### Abstract

This Chapter problematizes the prevalence of anti-human rights content and the explicit support for the war on drugs on Facebook. The chapter asks the following questions: How are human rights understood and articulated in social media sites such as Facebook? What are moral categories embedded in this understanding? What are its implications to the notions of human rights and justice? Finally, what are the opportunities and constraints it poses to human rights work in the Philippines? This chapter provides an analytical explanation to understand the explicit support for the war on drugs in social media despite its horrific consequences by tapping into a retributive moral framework of *salvaging*, in which it posits a nation as *dapat or necessary* or right of saving from an impending crisis brought by illegal drugs.

#### Introduction

During the 2016 presidential campaign, then Mayor Rodrigo Duterte announced that if elected, he will eradicate crime and illegal drugs during the first three to six months of his presidency. This announcement is predicated on the claim that the Philippines is becoming a “narco-state”. The impending crisis brought by illegal drugs according to candidate Duterte, “is a clear national security threat... an invasion of a new kind... [and] a war against our families and children” (Philippine Daily Inquirer, 2016). If elected, Duterte promised to take a hardline stance against the illegal drug menace, mobilizing both the police and the military to eliminate drug lords, cartels, pushers and other criminal elements.

Candidate Duterte made it very clear, “if you are a [drug] pusher or a kidnapper, I will really kill you. They think I am joking. But why would I joke about that” (Corrales, 2016)? Drawing from deep-seated frustrations and the perceived ineptness of his predecessor – President Benigno “Noynoy” Aquino III – Duterte sold the idea that the nation needs saving from an impending crisis which, in turn, required drastic, if not radical action. As sociologist Randy David (2016) observed, “Duterte promises just one thing: the will and leadership to do what needs to be done – to the point of killing and putting one’s own life on the line.” Duterte sold the idea of change. By the end of the presidential campaign, Duterte’s tough and brash image propelled him into the presidency.

Apart from Duterte's ability to resonate with and tap into the fears and aspirations of the Philippines' voting population, his strategy to use social media proved to be crucial in his electoral success. Teehankee & Thompson (2016, p. 129) observed, "Duterte's presidential campaign was the first to make full use of the power of social media." Using sites such as Facebook, Twitter, and Instagram, Duterte's campaign was effective in spreading their message to a wider audience and, in turn, build support. However, the report entitled *Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation* claimed that the social media activity surrounding the Duterte campaign was part of a concerted effort, "to spread and amplify messages in support of his policies" (Bradshaw & Howard, 2017, p. 15).

The impact of social media in politics and public discourse in the Philippines is undeniable. Virtual discussions in these platforms have arguably shaped, not only the electoral fortunes of politicians but also public opinion on key issues such as human rights, illegal drugs, and extra-judicial killings. A report published by the Newton Tech4Dev Network observes however that throughout and immediately after the campaign, Duterte's social media campaign and its followers "have debased political discourse and silenced dissidents in their vociferous sharing of fake news and amplification of hate speech" (Ong & Cabañes, 2018, p. 1). These are exemplified by social media contents justifying Duterte's war on drugs and its vitriolic interaction with opposing opinions.

Currently, social media sites are not known for open, tolerant and meaningful discussions or even impassionate political debates. Instead, it has seemingly become a troll infested cesspool where users threaten or endanger others with dissenting opinions, a platform where the value of human rights is openly ridiculed and, a tool that is weaponized to serve political interests. Moreover, it has served to justify the bloody war on drugs. This is unlike its purported character in the early 2010s when social media sites were regarded as a platform for the free exchange of ideas – a digital public sphere from a Habermasian perspective.<sup>1</sup> Unfortunately, as Cabañes and Cornelio (2017, p. 231) observe, "there are, regrettably, no signs that social media will be any less virulent any time soon... social media in the Philippines continues to be a site for animosity and spite."

The support for the war on drugs in social media sites is certainly a cause for alarm, especially for human rights organizations. This lends the anti-drug program legitimacy despite its horrific and inhumane consequences. Equally concerning is the inability of some human rights organizations, not only in terms of harnessing the platform, but also putting their messages across to a wider audience when others, such as the Duterte campaign, have clearly have. Egay Cabalitan, a founding member of HR Online and advocacy officer of Task Force Detainees of the Philippines (TFDP) explained this difficulty. He said, "they

<sup>1</sup> Political events such as the Arab Spring in 2011 have led some observers to highlight the democratizing potential of social media and digital technologies.

[human rights organizations] did not know what to do. It is something new. There was nothing like this before.”

How did social media sites assume a vitriolic character – a platform where the war on drugs is justified and skepticism towards human rights is fermented? And, why have Duterte’s rhetoric and policies gained and maintained traction on social media when others, such as human rights organizations have not? Ong and Cabañes (2018) have attributed the vitriolic character of social media content as the work of what they call the “architects of networked disinformation” – an organized propaganda machinery spewing fake news, hate speech, and manipulative content. This point has been corroborated by reports that indicate that has Duterte employed “troll armies” and that his political allies, private public relations firms, influencers and paid individuals were all part of a loose network of manipulation and disinformation (Etter, 2017).<sup>2</sup> In the Philippines, the use of social media proved to be effective given the relatively high level of internet penetration and use of social media platforms (Gonzales, 2019). As Williams (2017) wrote in his report on Duterte’s use of troll armies for his campaign, “the Philippines seem to be tailor-made for this type of propaganda machine.”

While this interpretation provides a probable explanation of how and why Duterte’s policies (e.g., the war on drugs) have gained and maintained its appeal, I contend that it provides an incomplete picture. Consider, if one accepts the explanation that the vitriolic character of social media content was the work of organized “troll armies”, one risks viewing the platform as no more than an arena easily manipulated by powerful and resource-backed agendas. In effect, it delegitimizes the engagements of people in social media as the product of a conscious and targeted attempt to shape public opinion. As Cabañes and Cornelio (2017, p. 239) pointed out, “the virulence of trolls would have not gone viral if it were simply reliant on campaign strategies.” In other words, the torrent of anti-human rights content is but a partial explanation for the support for Duterte’s war on drugs in social media sites. The support for the war on drugs in social media would not be possible if it was not “congruent” with how people view and hope to shape their milieu. Without

<sup>2</sup> The use of social media and analytics is not a unique phenomenon to the Philippines. In their study, Bradshaw and Howard (2017), claimed that the use of social media to shape public opinion is a global phenomenon affecting at least 28 countries. Ong and Castañeda (2018) on the other hand claimed that, “no technology has been weaponized at such an unprecedented global scale as social media.” Perhaps the most prominent example of leveraging the power of social media to manipulate public opinion involves the Cambridge Analytica scandal where it allegedly harvested personal data from Facebook users without their consent. The data was subsequently used to build psychographic profiles to guide the “bombardment” of political content to “persuadables” to influence voting behavior in the United States (Rosenberg, Confessore, & Cadwalladr, 2018). Consequently, there is reason to believe that Cambridge Analytica had some influence in the 2016 presidential elections in the Philippines (Gutierrez, 2018). In the Philippines, the use of social media proved to be effective given the relatively high level of internet penetration and use of social media platforms (Gonzales, 2019). As Williams (2017) wrote in his report on Duterte’s use of troll armies for his campaign, “the Philippines seem to be tailor-made for this type of propaganda machine.”

this congruence, a “subscription” and subsequent engagement to any political content or position would not be possible (Hapal, 2018). The virulence of Duterte’s anti-illegal drug rhetoric therefore relies solely not in the elaborate and well-funded propaganda machines and troll armies, it is also founded on its resonance with a social imaginary of what Filipino society ought to be.

In this chapter, I do not exclusively view the vitriolic character of social media sites and content as the result of its subjection by propaganda machines, troll armies and, networks of manipulation and disinformation. Instead, I also consider that social media sites and its content are laden with meanings which may provide a glimpse of how human rights is understood, articulated, challenged or even undermined. This, as alluded by Cabañes and Cornelio (2017), provides the foundation for the virulence of anti-human rights sentiment and support for the war on drugs despite of its horrific consequences. Overall, I ask the following questions: How is human rights understood and articulated in social media sites such as Facebook? What are moral categories embedded in this understanding? What are its implications to notions of human rights and justice? Finally, what are the opportunities and constraints it poses to human rights work in the Philippines?

I begin my examination of social media by moving away from both a structural/institutional and idealized reading of social media. Briefly, a structural/institutional reading of social media focuses on how content is created, administered, and distributed in social media. This reading considers the infrastructures of support and resources by which content is spread, such as how “troll armies” are raised, function and operate. An idealized reading of social media on the other hand, extolls it as a space laden with democratizing and emancipatory potentials, a virtual public sphere in a Habermasian sense. Instead, I pursue a re-reading of social media by first viewing it as a site of laden with meanings, contention, and debate manifested in the form of discursive content and their interaction. Offhand, I argue in this section that the anti-human rights sentiment in social media do not necessarily reflect the work of troll armies alone but is also a reflection of its resonance with moral categories that are invoked as *dapat* or right.

In the next section, I then attempt to surface these moral categories by examining the case of Kian delos Santos, a minor who was murdered by police officers claiming to perform anti-illegal drug operations. Specifically, I examined the comments section of a news article posted in Facebook on Kian’s funeral march; a symbolic event of public outrage over the excesses of the government’s war on drugs. Kian’s case will be briefly juxtaposed to the case of the self-proclaimed drug lord and former municipal mayor, Rolando Espinosa. Offhand, the cases of Kian and Espinosa do not only reflect moral justifications surrounding the war on drugs, they also reveal that cases of extra-judicial killings are perceived and treated differently. In many ways, the cases of Kian and Espinosa reflect the polarization of classes in Filipino society.

Finally, I examine the social media responses and strategies of human rights organizations before and immediately after Duterte's anti-drug campaign was launched. Specifically, I examine the case of Human Rights Online (HR Online), a volunteer-based organization whose main advocacy and competence is centered around digital advocacies and literacy. HR Online is populated by staff and volunteers from different human rights organizations that are part of the Philippine Alliance of Human Rights Advocates (PAHRA) and In Defense of Human Rights and Dignity Movement (iDEFEND) network. Currently, HR Online serves as the backbone of the PAHRA and iDEFEND's online and offline campaigns.

The data presented in this chapter is drawn from three main sets of data. In examining the EJK cases, the chapter drew from Facebook posts from ABS-CBN, a mainstream news site. The specific posts for Kian delos Santos and Rolando Espinosa were chosen mainly due to the number of comments it featured. Overall, a total of 2,052 comments were manually coded, reviewed and organized into themes. The organization and analysis of the comments drew inspiration from Fairclough's "critical discourse analysis" which contends that text (e.g., Facebook comments) may be subjected not only to interpretation but, more importantly, re-contextualization in wider socio-historical processes. The second set of data drew from group discussions with the founding members of HR Online Egay Cabalitan, Jerbert Briola and Rommel Yamson. Three rounds of discussions were conducted with the founding members of HR Online. These discussions were later transcribed and organized into themes. Data was organized in a chronological manner – pre and post Duterte response and social media strategies. Finally, the chapter also drew from my personal knowledge as a former researcher for a local human rights organization. In this capacity, I managed the organization's website and social media account. I also had several conversations with the members of HR Online and the wider PAHRA network. Departing from said organization, I continued to pursue conversations and discussions about the state of human rights in the Philippines with members of the PAHRA network whenever possible.

## Understanding the Vitriol in Social Media

To shed light on the analytical tools that will be used to explain the toxicity in social media sites, let us consider the case of Mocha Uson and juxtapose it with a personal anecdote. Mocha Uson was a former sexy star turned blogger and rabid supporter of Duterte. During the campaign trail Mocha accompanied Duterte in many sorties, promoting her candidate through entertainment and defending him from critics. After the elections, Uson was appointed as an assistant secretary of the Presidential Communication Operations Office (PCOO). However, Mocha became infamous for her erroneous claims and was later dubbed the queen of fake news.

In 2017, Inquirer reported, "Mocha shared a post of a Duterte supporter which claimed that a young girl was murdered due to the drug problem in the Philippines. She was reportedly outraged as to why the Commission on Human Rights didn't focus on the incident. However, the photo was of a nine-year-old Brazilian girl who was raped and

murdered in 2014. BBC called her on it and she later took down the post” (Arias, 2017). Despite being exposed on multiple occasions about her erroneous claims and gross misrepresentation of events, Mocha’s popularity did not waver, at least from her base of support. Furthermore, exposing Mocha’s erroneous posts did little to lessen the popularity of the administration’s war on drugs. Instead, it further stoked feelings of resentment and frustration against the perceived ineptness of government and animated some to demanded violent retribution. And, it was not uncommon for contrary views to receive hostile replies, if not threats.

Let us now consider a personal anecdote; an episode in 2015 when I was still a researcher for a human rights organization whose vision was to contribute to the eradication of human rights violations at all levels of society. At that point, we noticed a considerable shift, from human rights violations dealt on perceived enemies of the state to criminals. We discussed whether we should provide services to say, rapists, thieves and murderers who have been tortured or ill-treated. In an informal conversation after our meeting, one of my colleagues said in jest, “it is better off to kill them [criminals].” Another said, “I am fine with children in conflict with the law, they can still change. But, for drug addicts and rapists... I refuse to work with them.”

Mocha is a complicated and politically charged character. This makes the task of interpreting her acts and statements less straightforward. Yet, if we consider her claims without all the political baggage that she carries, it seems that her posts allude to right and wrong categories which frame her worldview. For example, it is quite evident that in her post Mocha claims that it is wrong to rape, kill and take illegal drugs; it is right to punish those who are responsible; and, it is wrong for government, regardless of the agency concerned, to do nothing about it. These right and wrong categories are also present in the conversation I had with my former colleagues. In our conversation, it is implied that it is wrong for a human rights organization to provide services to individuals who committed a crime, especially those who seemingly broke a certain moral threshold like say, drug addicts and rapists.

In an opinion piece, former Supreme Court Chief Justice Artemio Panganiban (2013) published excerpts of a lecture given by human rights lawyer and former law dean of De La Salle University, Jose Manuel “Chel” Diokno on the Filipino concept of justice. In his lecture, Diokno explained, through linguistic exploration, how the Filipino concept of justice and right is a moral concept and intimately linked to the concept of fairness. For the purposes of this chapter, it is best to quote Diokno’s lecture at length (Panganiban, 2013). Diokno said,

Tagalogs, Cebuanos, Ilonggos and Pampangos have a common word for justice: katarungan. The root word of katarungan is tarong, a Visayan word which means straight, upright, appropriate or correct. For Filipinos, therefore, justice is rectitude, doing the morally right act, being upright, or doing what is appropriate.



And since justice includes doing what is appropriate or what is right, it includes the concept of equity, for which we have no native word. In this respect, our language is different from the English language which distinguishes between justice and equity.

We also have a common word for right: *karapatan*. The root word of *karapatan* – *dapat* – has a meaning very close to *tarong* – fitting, correct, appropriate. Our language, therefore, tells us that for us Filipinos the concepts of justice and right are intimately related.

But what word do we use for ‘law’? We use *batas*, which means command – very different in meaning and origin from *katarungan*.

Our language, then, makes a clear distinction between justice and law; and recognizes that what is legal may not always be just.

... our language establishes that there is a Filipino concept of justice; that it is a highly moral concept, intimately related to the concept of right; that it is similar to, but broader than, Western concepts of justice, for it embraces the concept of equity; that it is a discriminating concept, which distinguishes between justice and right, on the one hand, and law and argument, on the other; that its fundamental element is fairness; and that it eschews privilege and naked power.<sup>3</sup>

Drawing from Diokno’s analysis, we can infer that Mocha’s post is founded on what she believes to be *dapat*; that is, what is fitting, correct and appropriate. The view of what is *dapat* (right) is informed by her perspective of what society is (i.e., crime infested society), what it ought to be (i.e., clean society), and how it ought to be achieved (i.e., elimination of bad elements of society). This perspective of what is *dapat* (right) therefore becomes the foundation of not only a moral framework which informs discourse and action but also exclusionary categories which determine which people have human rights or not. Using this perspective, it makes sense why some police officers, based on previous interactions, view punishing or even killing suspected criminals, especially recidivists, as an act of upholding human rights. In this sense, disciplining and killing is the correct and moral thing to do.

But how are these moral constructs and categories constructed? To answer this question, it is useful to think of human rights not in absolute terms; that is, as standards or legal constructs. Instead, it is more relevant to think of human rights as constantly being negotiated, re-negotiated, defined and re-defined (Ife, 2009). In many ways, the concept of *dapat* (right) alludes to human rights as a social construct rather than a legal standard. However, there between the discourse of human rights as a social construct and a legal

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<sup>3</sup> *Italics mine.*

standard are inherent contestations which inform the process of defining human rights. Yet, as Jensen & Jefferson (2009) aptly observe, this debate does not conform to a bipolar model; that is, a debate between what is legal and, therefore, what is standard, and what is morally correct. Instead, the appropriation of human rights discourse flows through what they call “rhizomatic networks” mediated by horizontal and vertical relationships, histories, legal constructs and embedded meanings. Hornberger (2011) further contributes to this point in her exploration of policing practices and human rights in Johannesburg. In her book, Hornberger (2011) suggested that human rights do not only undergo the process of vernacularization or hybridization but are subject to “forgery”. Hornberger explains that in the process of forgery it “reminds us of the relationship between those who have the power to define what is right and wrong and those who do not.” Hence, the concept of *dapat* (right) is not only a function of the interaction between existing moral categories in Philippine society. Instead, it is a negotiated concept subject to horizontal and vertical relationships, histories, embedded meanings and, more importantly, power relations.

Hornberger’s concept of “forgery” is an important point, especially when seen in the light of how Duterte seemingly hijacked the Filipino people’s imaginary to justify thousands of killings and, undermine human rights institutions and organizations. Arguably, Duterte accomplished this by tapping into a moral framework – that is, what is *dapat* (right) – which depicted a nation that needed salvaging from a lurking enemy within society which required radical action. Ironically however, the means of salvaging the Philippines from this threat, meant waging a bloody war against its own people. The Philippine state has been perpetually at war against its people; it is no stranger and has not shied from killing and displacing its own people (Jensen & Hapal, 2015). In many ways, Duterte’s war on drugs is informed and animated by histories of state violence. It is a continuation of the “wars on” a clear and present danger that threatens the integrity of the nation and the well-being of its people. These wars have been waged against the communists, Moro separatists and, then and now, illegal drugs. They required extraordinary measures to salvage the country from an impending catastrophe thereby justifying force and, deadly violence.<sup>4</sup> Duterte, through his rabid ally and former Foreign Secretary Alan Peter Cayetano, addressing the United Nations General Assembly in 2019, tapped on the discourse of salvaging when he claimed, “we are on track in salvaging our deteriorating country from becoming a narco-state” (Cepeda, 2018). Nonetheless, inasmuch as the war on drugs was a legacy and consequence of the Philippine state’s histories of violence, Duterte’s brazen and callous rhetoric partly allowed the anti-drug campaign to assume an even more violent and deadly character. Duterte’s sharp departure from his predecessor’s *matuwid na daan* (righteous path) unleashed the violent potentialities of “vengeful agents of death (Jensen, Modvig, & Hapal, 2013, p. 48).”

<sup>4</sup> During the late 1980s and until the 1990s, the term salvaging was used colloquially to refer to an act of extra-judicial killing. Most of the victims were perceived enemies of the state, criminals and erring police officers.

## **War on Drugs and Reactions on Extra-Judicial Killings in Facebook: The cases of Kian delos Santos and Rolando Espinosa**

Upon assuming the presidency, Duterte wasted no time delivering on his grisly campaign promise. Immediately, the Philippine National Police (PNP) launched its anti-illegal drugs campaign called Project: Double Barrel (Philippine National Police, 2016). The project was to be implemented using a two-pronged approach: the implementation of Project Tokhang and Project High Value Target (HVT). Tokhang, a combination of the Cebuano words *tuktok* (knock) and *hangyo* (plead), “involves the conduct of house to house visitations to persuade suspected illegal drug personalities to stop their illegal drug activities” (Philippine National Police, 2016, p. 3). While OPLAN Tokhang projected a compassionate face towards drug personalities through knocking and pleading, human rights advocates have criticized it as an affront to constitutional rights of Filipinos and prone to abuse (e.g., corruption and violence). Project HVT on the other hand, targets high-level illegal drug personalities and syndicates. By October 2016, nearly four months after assuming the presidency and the launch of Project Double Barrel, Rappler (2016) reported that “over 3,500 alleged drug users and pushers have died – more than half of them victims of extrajudicial killings or vigilante-style executions... some 700,000 have voluntarily surrendered to law enforcers.” In 2019, human rights organizations claim that the death toll of Duterte’s war on drugs has claimed 27,000 lives (Tomicruz, 2019). The government has repeatedly refuted this statistic by claiming that either these homicides were still under investigation, drug deals gone wrong or were the result of rivalries between drug syndicates. Recently the Philippine Drug Enforcement Agency (PDEA) stated that between July 2016 to June 2019 only 5,526 deaths resulted from 134,583 legitimate anti-drug operations (Tomicruz, 2019). Notwithstanding the difference between the claims of human rights organizations and the government, the extent and profound impact of the war on drugs to families, communities, and the nation is undeniable.

Despite of the controversies, intense debates and more importantly, its horrific consequences, the war on drugs seems to enjoy popular support. The Social Weather Station’s (2018) second quarter 2018 survey on the satisfaction with the Duterte administration’s campaign against illegal drugs indicated a net satisfaction rating of +65 points (78% satisfied, 9% undecided, and 13% dissatisfied). Since assuming the presidency, the lowest net satisfaction rating with the Duterte administration’s war on drugs was +63 during the 3rd quarter of 2017. This dent in the anti-drug campaign’s popularity coincided with the murder of 17-year-old Kian Delos Santos (see discussion below). Alongside the popular support for the anti-drug campaign, Duterte has also enjoyed high approval ratings. In June 2019, Pulse Asia Research (2019) indicated an 85 percent approval rating for Duterte while the Social Weather Station’s (2019) survey registered a net rating of +68 points (80% satisfied, 9% undecided, and 12% dissatisfied). However, as sociologist Nicole Curato (2017) warns, “one must not conflate public support for Duterte... with support for the war and support for the killings. Instead, public opinion is more complex, nuanced and negotiated” (p. 26).

If public opinion surveys reflected strong support for the war on drugs, how did Facebook users in social media reacted to specific cases of killings resulting from the war on drugs? Let us take the case of Kian de los Santos, a 17-year old who was murdered on the night of the 16th of August 2016.<sup>5</sup> The perpetrators, police officers anti-drug operations in Barangay 160, Caloocan City. The police officers claim that they were sweeping the area for drug suspects when shots were fired against them. This led them to pursue the shooter and return fire. The police then managed to kill the shooter who was later identified as Kian delos Santos. At the scene of Kian's murder, a .45 caliber pistol, four pistol cartridges; and plastic sachets containing a crystalline substance, believed to be methamphetamine, were recovered. The police claim that Kian's family was involved in illegal drugs and that he was acting as a drug runner. However, based on close circuit television (CCTV) footage and eyewitness accounts, Kian was "manhandled, handed a gun, told to run, and shot at" (Rappler, 2017). Prior to his death, Kian's father, Saldy recalled that he simply sent his son on an errand to clean their store while he went to shop for supplies. Upon Saldy's return, their neighbors told him that Kian was taken by the police.

The Duterte administration was initially unfazed by the death of Kian – there was no stopping the war on drugs the President said. The police claimed that collateral damage is a necessary reality in the anti-drug campaign and what happened to Kian was an isolated incident. Allies of the president, such as the Minister of Justice, Vitaliano Aguirre, also dismissed Kian's death as an issue blown out of proportion (Morallo, 2017). However, the testimonies of eyewitnesses and CCTV footage made it difficult to ignore the brutal and shameless actions committed by the police officers. Soon after, investigations were undertaken by law enforcement agents and legislative bodies. A crucial forensic evidence was the finding of both the Public Attorney's Office (PAO) and PNP that Kian was most likely killed while he was kneeling. Later, then PNP Chief, and now Senator, Ronald "Bato"<sup>6</sup> dela Rosa remarked that what happened to Kian was "overkill." Five months after Kian's death three police officers and one civilian were indicted for murder. On 29 November 2018, the court found the three police officers guilty of murder. They were sentenced to be imprisoned for 20 to 40 years without parole. Kian was laid to rest on the 26th of August 2016. Hundreds of supporters and individuals from sympathetic groups and organizations joined Kian's funeral march. The funeral march served as a symbol of protest against the excess of the administration's war on drugs.

Immediately, it was quite apparent that, despite the irregularities surrounding Kian's death, the comments sections reflected overwhelming support for the Duterte administration and the war on drugs. Many pointed out that while Kian's death was tragic, the war on drugs is not inherently wrong. One comment said, "the war on drugs is not wrong but drugs itself and those who distribute it... is Kian's death still the fault of the government?" However, many also pointed out that there is a "right" way to neutralize suspected drug

<sup>5</sup> For a complete timeline of events related to Kian delos Santos' death, see: <https://www.rappler.com/newsbreak/iq/217663-timeline-justice-trial-kian-delos-santos>

<sup>6</sup> Translation: rock.

personalities without resorting to bloodshed. According to another user, “it is not wrong to eliminate all drug pushers, but there is a right way... if he/she does not stop with his/her vice and he/she resisted arrest, he/she should be shot.” The user continued, “but if he/she did not resist arrest, put him/her in jail, give them a second chance... if Kian was indeed a drug runner, he should not have been killed, he was defenseless.” Based on these comments, what happened to Kian was not necessarily the administration’s fault or was the result of the flawed intentions and designs of the anti-drug campaign. Instead, it was the fault of a few erring police officers, and if found guilty should be punished. This conditional support for the war on drugs resonates with public opinion polls which indicate that about nine out of 10 respondents say that it is important to keep illegal drug trade suspects alive (Social Weather Stations, 2017). Consequently, about 73 percent of Filipinos worry about becoming victims of EJK (Social Weather Stations, 2017). The popularity of Duterte’s war on drugs and expressions of wariness by Filipinos draw from it being a righteous and necessary program, albeit with an implicit understanding of its violent and indiscriminate violent potentialities.

What was surprising, however, were the comments on Kian and his family. Many Facebook users accused or insinuated that Kian was guilty. This is despite of the evidence presented in investigations and public hearings all pointing to the fact that Kian was murdered. While some did not agree with his murder, many believe that there was no other reason why the police were pursuing Kian apart from his involvement in illegal drugs. One Facebook user asked, “if Kian was not involved in drugs, why was he the target of the police?” In any case, whether Kian was guilty or not, many still blamed him and his family for being victimized. One user said, “the one that should be blamed that must be the parents because he is a drug runner for them, his father is also a user.” Another said, “why is your son out all of the time? It is already dark, and he is still outside. That is why that happened to him.” Others insinuated that Kian’s mother and father were poor parents. One user said, “please tell the mother that she can still bear a child... that is what she should do but this time, make sure that they raise the child properly.”

While most of the comments were critical of Kian and his family, there were a few who sympathized. However, many still felt that the issue was blown out of proportion. Others believed that the issue was being used to advance a particular political agenda. A user said, “I pray for his soul to be in a better place. But [the] media and the opposition party are taking advantage of his unfortunate death.” Because of the perception that Kian’s death was being politicized, many also commented about how other much bigger issues are being overshadowed. One user said, “son of a bitch, only few people attended the funeral march of those massacre victims perpetrated by drug addicts in Bulacan. The issue got blown out of proportion because of the opposition.” Another said, “Kian had it better, he got famous... unlike the soldiers who are fighting in Marawi and died, nobody asked justice for them.” This disdain for the perceived disproportionate attention given to the case generated many sarcastic comments about how Kian was being treated as if he was a saint or a hero. One user said, “Kian is so lucky because he was made a saint, his funeral

is like Cory Aquino's." This sarcastic remark of Kian being treated as a saint was rather prevalent and, for a lack of a better term, creative. One user even created a prayer which appropriated the words of Hail Mary, it stated:

Oh, hail blessed Kian  
You are so famous in the media  
The CBCP<sup>7</sup> and LP<sup>8</sup> is so sympathetic to you  
You are the most blessed pusher  
Your father and uncle are blessed too  
Saint Kian, patron of pushers  
Pray for the pushers and addicts  
Now and whenever they die

Why were the comments on Kian and his family so critical and condescending? This question becomes more puzzling when juxtaposed with the comments given to the self-confessed and self-surrendered drug lord, Mayor Rolando Espinosa.<sup>9</sup> On 5 November 2016 around 3:00 AM, Albura Mayor Rolando Espinosa was killed by police operatives while in detention in the Baybay City Provincial Jail. According to the police, operatives from the Criminal Investigation and Detection Group (CIDG) Region 8 of the PNP, headed by Supt. Marvin Marcos, went to Baybay City Provincial Jail to serve search warrants to Mayor Rolando Espinosa and Raul Yap. Allegedly, Espinosa and Yap then opened fire at the police which in turn led the police to return fire. By the end of the skirmish Espinosa and Yap were dead. The controversial death of Rolando Espinosa led to the suspension of the CIDG operatives. According to Senator Panfilo Lacson, the death of Espinosa was premeditated considering all the circumstances. Testimonies from an inmate also indicate that there was no gunfight and that the police planted the gun found in Espinosa's possession. The CCTV footage, strangely enough, were also nowhere to be found.

While many comments about Rolando Espinosa's death dealt with elaborate conspiracies about why he was killed and who were behind it, what was striking was the sympathetic attitudes of Facebook users. According to one user: "All I [can] say is may you rest in peace. May the Lord forgive you and receive you in his kingdom. Sad. I am not mad at you. You surrendered. You already know that your safety is no longer secured. [And], anytime you might be killed. But still for the last time you did the right thing. So sad." Many also claimed that Espinosa had the right to due process and that he should have been given a second chance at redemption. Redemption in this sense entailed coming clean regarding his knowledge of the illegal drug trade, as well as the extent of his involvement. As one user said, "it is sad to think that many are happy because of Mayor's death. It is true that he is involved in drugs, but we have something called due process." These sympathetic

<sup>7</sup> Catholic Bishop's Conference of the Philippines.

<sup>8</sup> Liberal Party.

<sup>9</sup> For a complete timeline of events related to Rolando Espinosa's death, see: <https://news.abs-cbn.com/focus/v2/11/17/16/the-fall-of-the-espinosas>



comments were made despite of the knowledge or belief that Espinosa was intimately involved in the distribution of illegal drugs in the country.

Arguably, embedded in the popular support for the war on drugs is the narrative that the campaign is executed by “powerful and vengeful agents, organized in strict hierarchies of death... [that] resembles the narrative about the strong, effective but gruesome military organizations under Marcos” (Jensen, Modvig, & Hapal, 2013, p. 41). I argue that it is this assertion that “violence is meted out in predictable, effective and almost scientific ways” that provides the war on drugs its moral appeal (Jensen, Modvig, & Hapal, 2013, p. 42). It is this narrative of predictability and effectivity that makes all the violence intelligible and somewhat acceptable. Furthermore, it is difficult to argue against a society-wide cleansing campaign as long as the innocents are kept safe – in this context, the war on drugs is the righteous (*dapat*) thing to do. As many Facebook users commented in the post on Kian’s burial, “you have nothing to fear if you are not doing anything wrong.” Consequently however, if one is doing something wrong or is perceived to, one must face scorn and retribution from society and the state – it is an act of righteous (*dapat*) salvaging. In different ways, despite of sympathetic comments or the lack thereof, many Facebook users explicitly or implicitly acknowledged that Kian and Espinosa “had it coming”. It is this retributive moral framework that has led us before to believe that “victimizable” individuals – that is, youth unemployed or out of school males – are especially vulnerable due to the lack of protective factors at the family level, community and institutional level that can shield them from the threat of violence from the state (Jensen, Modvig, & Hapal, 2013, p. 45).

Kian and Espinosa’s cases also illustrates that not all EJK cases are treated equally. Partly, the sympathy given to Espinosa was not only informed by a sense of injustice, but also of regret. His death effectively stripped Espinosa the opportunity to tell all about what he knows about the drug trade in the country. In other words, Espinosa was seen as something that was of value. However, unlike Espinosa, Kian was seen as either collateral damage or another nameless casualty in the war on drugs. This might explain the deeply sarcastic remarks about the attention given to Kian’s case. Ironically, Espinosa was more of a “good victim” as compared to Kian (Jensen, Kelly, Andersen, Christiansen & Sharma, 2017). The repentant drug lord was easier to “valorize” than a minor who allegedly had ties to illegal drugs. But perhaps, it is not only about Espinosa’s value. Perhaps, it is also an issue of Kian’s lack of value – his class. Kian coming from an urban poor community in Caloocan City was seen, not only as a nameless casualty, but part of a “disposable” population whose people have been stunted, stuck, displaced, and killed by its own state. In this sense, the scornful attitude of Facebook users towards Kian reflects an embedded contempt for the obvious targets of the war on drugs – the poor.



## Online Strategies, Initiatives and Challenges of Human Rights Organizations: The case of Human Rights Online

Human rights organizations have incessantly criticized the bloody campaign, citing it as unjust, ineffective and anti-human rights. Amnesty International (2019) criticized that the war on drugs as “a war on poor Filipinos that has undermined the rights of millions... police continue to kill with total impunity... [perpetuating] human rights violations and abuses in the country” (p. 41). The cases of Kian delos Santos and thousands of nameless victims illustrate the excesses and abuses committed in the name of the anti-drug campaign. The police on the other hand have continuously justified their actions by highlighting the efficacy of the campaign in curbing crime (Tupas, 2019) and that cases of human rights violations were isolated incidents performed by rotten officers. According to the PNP, the “nationwide crime rate from July 2016 to June 2018 dropped 21.48 percent compared to the same period from 2014 to 2016 (Macapagal, 2018).” While most types of crimes dropped across the board, the rate of murders saw an increase of 1.50 percent and, in Metro Manila murders increased 112 percent. Recently Duterte’s admitted that the drug problem has worsened (Villanueva, 2019) but, there seems to be no indication that the war on drugs will cease any time soon.

With the seeming popularity of the war on drugs, how did human rights organizations respond before and immediately after the campaign was launched? And, given the potency of digital platforms such as social media, how did they respond and utilize these to forward their advocacies? In this section, I focus on the responses, initiatives and challenges faced by HR Online in implementing their human rights campaigns in social media. HR Online is a volunteer-based organization whose main advocacy and competence is centered around digital advocacies and literacy. HR Online is populated by staff and volunteers from different human rights organizations that are part of the Philippine Alliance of Human Rights Advocates (PAHRA) and In Defense of Human Rights and Dignity Movement (iDEFEND) network. HR Online was founded by Egay Cabalitan, Jerbert Briola and Rommel Yamson, the main respondents for this study. Currently, HR Online serves as the backbone of the PAHRA and iDEFEND’s online and offline campaigns. For the purposes of brevity, I will be referring to the PAHRA and iDEFEND network as human rights organizations in this section.

As mentioned earlier, Egay Cabalitan, founding member of HR Online and advocacy officer of Task Force Detainees of the Philippines (TFDP), described the onslaught of anti-human rights content as surprising to human rights organizations. He said, “human rights organizations did not know what to do. It is something new. There was nothing like this before.” Caught off guard, human rights organizations witnessed, not only social media’s immense contribution to Duterte’s presidential bid but also the rise of a public relations (PR) machinery designed to manufacture content, comments, and virtual engagements which were all geared towards undermining their political and “ideological” opponents. However, what was especially surprising for the human rights organizations

was not only the proliferation of fake news, troll accounts, attempts to revise history and attacks on human rights and the organizations advocating for it but also the seemingly popular support for these types of content online and offline.

Prior to the 2016 elections, many human rights organizations have neither acknowledged nor fully appreciated the potency of digital technologies in campaigns. Many human rights organizations thought lowly of social media campaigns. And according to Cabalitan, successful campaigns such as the so-called Million People March in 2013 were seen by human rights organizations as an isolated case.<sup>10</sup> The Million People March was a massive demonstration participated by about 400,000 people in protest of the misuse and plunder of legislative funds, popularly known as pork barrel. Two months after the protest, pork barrel was deemed unconstitutional by the Supreme Court. Cabalitan recalled, “many expressed their skepticism” of how social media could be the main organizing platform for such a huge demonstration. Many among the human rights organizations still appreciated and used social media for their personal use. However, only few have acknowledged its importance. This, according to Cabalitan, led some organizations to create Facebook pages or even hire a dedicated communications staff. However, he further notes that some of these actions were performed in compliance with their funding agencies, while others did not exactly understand how to utilize the platform effectively.

In any case, the proliferation of anti-human rights sentiment before and immediately after the elections made human rights organizations reflect on what went wrong and how they could have done things better. One of the realizations was that overall, the human rights organizations, while having common aspirations, were differentiated. Organizations were focused on fulfilling their own mandates. However, as soon as the killings coupled with attacks against human rights institutions and organizations began, it became apparent that establishing an alliance to directly address the issue of EJK and anti-human rights sentiment was necessary. Hence, through the leadership of the Philippine Alliance of Human Rights Advocates (PAHRA), the In Defense of Human Rights and Dignity Movement was formed (iDEFEND). iDEFEND is a grassroots and multi-sectoral movement which aims to defend and uphold the rights and dignity of Filipinos through government engagement, education and public action. Since its establishment in 2016, iDEFEND has been at the forefront of combatting EJK in the Philippines. Its role was also invaluable in the passage of a resolution sponsored by Iceland in the United Nations Human Rights Council which mandates an independent investigation of the alleged crimes in relation to the war on drugs.

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<sup>10</sup> The Million People March was a series of protests against the continued use of discretionary funds by members of Congress, popularly called pork barrel. In 2016, a series of investigations exposed the various mechanisms by which legislators abuse their discretionary funds. The investigations “drew the attention and curiosity of the Filipino people... [and] facilitated a widespread airing of sentiments and disgust over the issue through micro-blogging sites such as... Facebook and Twitter (Viray & Viray, 2015).” Soon after, these discussions turned to a call for action against the use of the pork barrel system. Peachy Rallonza-Bretana, one of the organizers of the event, claimed, “no group is organizing this... [and it is] snowballing at great speed.”

It must be noted that while the creation of iDEFEND served as a symbolic gesture of unity between and among human rights organizations within the PAHRA network, it does not necessarily entail a complete congruence of perspectives and strategies among the members of the network. For example, in terms of implementing online campaigns, some organizations “wanted to fight trolls with trolls, while others were thinking of tapping hackers as an option” said Cabalitan. This prompted debates not only due to its resource demands but more importantly its ethics. Broadly, there were also debates on how to deal with the Duterte administration. While some members were inclined to call for Duterte’s ouster, others were quite apprehensive of this approach as it might compromise their organization’s position in terms of working with government agencies that they have had productive relationships with in the past.

Another realization was that human rights organizations needed to take social media and other digital technologies more seriously if it were to combat anti-human rights sentiments that continue to proliferate in various social media platforms. However, it became apparent that as a collective, human rights organizations were sorely lacking in terms of skills, resources and infrastructure. As Cabalitan explains, “we were far behind compared to the opponent. While we were still learning and studying the behavior of the people online, the opponent was already using the frustrations and dissatisfaction of the public for their own advantage.” Despite the lack of skills, resources and infrastructure, the members of HR Online Philippines took on the challenge because they were more ready than anyone in the community of human rights organizations. HR Online, established in 2009, was the brainchild of communications, advocacy and campaigns staff of various human rights organizations who were attuned to digital technologies. Founding members such as Egay Cabalitan, Jerbert Briola and Rommel Yamson all believed that digital technologies would one day shape the political landscape of the Philippines. Their goal was to popularize human rights news articles through the blog-style content aggregator. As an aggregator, HR Online aimed to amplify the reach of the websites of human rights organizations by posting links to their news, articles or any relevant information. HR Online was designed to be a one-stop shop for online users looking for anything related to human rights in the Philippines. However, members such as Cabalitan, Briola and Yamson attend to the demands of managing the HR Online website alongside their work for their respective organizations. Nonetheless, with their experience in HR Online, the founding members became the backbone of the communications committee of iDEFEND.

Spearheading the communications of iDEFEND, members of HR Online were at the forefront of both online and offline campaigns, public demonstrations and media engagements. HR Online was also responsible in facilitating various trainings for human rights organizations to build capacities on online campaign strategies and digital activism. In recent years, HR Online has also facilitated the conduct of several digital security trainings, especially given the increasingly aggressive online surveillance of the government and the alleged existence of an “online tokhang list” or a list of dissenters in social media and other digital platforms. More importantly, HR Online has since taken an active role in

assisting their partner human rights organizations with their respective online campaigns. For example, in 2017, Balay Rehabilitation Center (Balay) launched the event “*Martial law noon... at ngayon?* [Martial law in the past... and today?]” (Balay Rehabilitation Center, 2017). The activity, held during the 45th year anniversary of the infamous declaration of martial law by then President Ferdinand Marcos, sought to revisit the past and draw parallel lessons for the present. Survivors of human rights violations during the period were present during the event and so were millennials which prompted exchanges between them. The encounter between the millennials and so-called *millenniors*<sup>11</sup> culminated with a protest using angry emoticons which symbolized their rage against injustice in the past and in the present (i.e., extra-judicial killings). The event “*Martial law noon... at ngayon?*” was largely organized via Facebook. In the end, about 100 millennials attended the activity, many of whom were university students. Most, however, were unaware about Balay and its advocacies prior to the activity. While the participation on the part of millennials may be attributed to growing discontent against the injustices of the past and the present the activity demonstrated the potency of online campaigns in terms of actual and virtual engagements.

Despite of the successes of social media launched events such as “*Martial law noon... at ngayon?*”, it has not necessarily translated to an increase in following or engagements in say, Facebook said Cabalitan. The translation of online campaigns to engagements and offline mobilizations cannot be readily attributed to the lack of content in social media nor its messaging. Instead, Cabalitan explains that attaining a significant number of audiences in social media is difficult, as “people’s online persona and space are identified by their online behavior.” Cabalitan continued, “if he or she is not aware about human rights issues he or she will not search about human rights, their exposure would be limited to whatever they are interested in like games or funny memes.” What Cabalitan alludes to is what Quattrociocchi, Scala and Cass, Sunstein (2016) refer to as “echo chambers in Facebook”; that is, online communities of “[polarized], largely closed, mostly non-interacting communities centered on different narratives” (p. 14). Drawing from cognitive scientists Van Bavel and Pereira (2018), echo chambers effectively diminish what they call “cognitive dissonance”, reinforce feelings of belonging, distinctiveness and, contribute to epistemic closures. And, while echo chambers or the tendency towards “tribalism” may be considered hardwired to our social psychology, the virtual structure of social media may contribute to the accentuation of this tendency (Van Bavel & Pereira, 2018).

Viewing social media as echo chambers may explain the perpetuation of anti-human rights rhetoric and the support for the war on drugs as evidenced in the case of Kian delos Santos examined above. Moreover, it also explains the critical, if not vitriolic comments for Facebook users who publish opinions counter to the dominant sentiment. However, as Ong & Cabañes (2018) note, these echo chambers are in many ways engineered using

<sup>11</sup> A play of words combining the term millennials and seniors. Millennials referred to veterans of the martial law period, mostly aging 60 years and above. Adopting the term *millenniors* served as a symbolic act of reaching out to their younger counterparts.

manipulative content and disinformation. But perhaps, the most crucial point in the engineering of these echo chambers is how Duterte, by drawing from the narrative of a country in need of salvaging from illegal drugs, effectively committed the “*forgery*” of human rights by undermining its value in society (Hornberger, 2011). In this forgery, Duterte effectively sold the idea that a society-wide cleansing of drug addicts and pushers is only but *dapat* (right) in the name of keeping the innocents safe. Curato (2018) alludes to this “forgery” when she argued that, “underpinning Duterte’s penal populism are seemingly opposing, yet mutually reinforcing, logics of the politics of fear and the politics of hope” (p.106).

The inability to penetrate virtual “echo chambers” poses a clear challenge to human rights organizations, however, it is not the only obstacle in implementing an effective and far-reaching social media campaign. Perhaps, the problem of human rights organizations with respect to online and social media campaigns may also relate to its history and repertoires of action. While human rights work in the Philippines may be traced further in contemporary history, many organizations point to the Marcos regime (1965-1986) as the genesis of their work. Human rights work during the Marcos regime was characterized by militant action and the struggle for civil and political rights. The legacies of human rights work during this era are still felt until the present through its perspectives, strategies, and repertoires of action. This, according to Cabalitan, can be clearly seen in terms of how human rights organizations in the present continuing to focus on civil and political rights.

The ouster of Marcos in 1986 proved to be a watershed moment, not only for human rights organizations but for non-governmental organizations (NGOs) in general. The widening of democratic spaces entailed the broadening of repertoires, which included non-combative and transformative approaches. This allowed the pursuit of policy and legislative advocacies apart from mobilizations and protests. Since the opening of the so-called democratic space, human rights organizations had experienced successes in the transformative advocacies. Some human rights organizations are not only occupied with transformative advocacy agendas. Most have strong service provisions, community or center-based components integrated in their human rights work. This might explain their reluctance to acknowledge or use social media, the lack of resources they allocate to it and their subsequent difficulties in utilizing the platform.

For example, Balay Rehabilitation Center (Balay) has a rather strong advocacy and campaign component which has led to important victories such as the passage of landmark legislation Anti-Torture Law of 2009. Through its advocacy, it has also contributed in the reform agenda in detention centers and in the field of human rights violations monitoring and peace. Likewise, Balay is also present in urban poor communities and detention centers, providing psycho-social support and facilitating legal redress for victims of human rights violations. While Balay has recognized the importance of social media for its advocacy, it has faced difficulties concretizing its desire for an effective social media campaign due to the demand of the work at hand and the lack of resources. As in many human rights

organizations, social media campaigns in Balay are secondary to face-to-face advocacy work and service delivery.

While the utilization of social media continues to be relatively weak among human rights organizations, conversations about its potentials and probable strategies continue. For example, some members within the iDEFEND alliance proposed to organize their own keyboard warriors to combat anti-human rights content in social media. However, Cabalitan argues that “the HR community must level their expectations... some would want to see immediate results and changes [but] all of these require preparation, planning and funds.” Cabalitan continued to explain, “you cannot expect to organize people through social media... a regular person cannot be [effectively] reached through online platforms. If a person is not aware of human rights, he or she will not search about human rights online. ...their online exposure would be limited to whatever they are interested in such as games and funny memes.” Cabalitan finally claimed that offline organizing is still invaluable in terms of conscientizing people and building a base of human rights advocates – that is how a keyboard army would be built Cabalitan claimed. Yamson further explained, “social media campaigns are sweeping... shotgun approach. It cannot be sustained because everything goes by very fast. This is the reason why grassroots organizing must be sustained. Online and offline organizing must go hand in hand.”

However, HR Online members also pointed out the relative weakness of human rights organizations in social media might not necessarily be due to the platform itself or the manner by which it is utilized. The relative weakness of human rights organizations in social media seems to be also affected by how human rights is framed and conveyed, and inter-organizational dynamics. For example, HR Online founding member Rommel Yamson said, “perhaps it is the messaging... there seems to be a disconnect on the language of human rights that does not transcend to ordinary people.” He continued, “the narrative... for the longest time has been the current administration is the worst administration... it has always been like that.” Yamson alludes to the inability of human rights organizations and the wider progressive bloc’s inability to provide intelligible and palpable alternatives to poor people. Cabalitan made a similar point, he said, “human rights organizations have focused more on civil and political rights (CPR) because they were born out of martial law; these issues are mainly the concerns of political activists. The issues closer to the stomach are economic social and cultural rights (ESCR).” This seemingly selective focus on human rights does not only affect how human rights is framed and understood by both the people and members of human rights organizations. According to Cabalitan, because of this “[human rights organizations] tend to separate the different kinds of human rights, but in fact they should be concerned with all human rights for all.”



## Human Rights Work, Social Media and Online Platforms: Initial Lessons

According to Cabalitan, “we aim to launch HR campaigns in social media to reach a wider audience...we will continue to engage with mainstream media but also include bloggers and social media influencers.” He continued, “we need to upgrade our methods, approaches and practices.” Human rights organizations recognize that the ability to use social media more effectively is paramount. Cabalitan’s comment alludes to the ongoing and urgent struggle to promote human rights standards, values and principles on the one hand, and the fast approaching 2022 election on the other. There is no reason not to believe that the same tactics employed in 2016 will be used to politicize people’s frustration about poverty, security, and peace and order in the Philippines. One might even surmise that given the lessons of 2016 and the increasing sophistication of analytics the use of social media would be more prevalent and intense in ensuing the political and ideological battle. But how can human rights organizations hope to counter the continued attempts to undermine human rights, especially when the playing field is already lopsided?

It is unrealistic to expect human rights organizations to perform the function of PR firms like those that ran Duterte’s campaign and continue to push for their populist agenda. Human rights organizations are neither designed nor structured for these purposes. Should human rights organizations abandon social media then? The answer, it seems, is not as straightforward. On one hand, the lack of resources, infrastructure, and key influencers may diminish the impact of their social media campaigns. In many ways, these campaigns will face an uphill and frustrating battle against a well-funded machinery. Nonetheless, the potency of social media continues to be attractive. To address the question, perhaps it is worthwhile to take a counter-intuitive approach as this chapter has adopted in attempting to explain how human rights is understood in social media. That is, perhaps the solution does not necessarily lie in implementing an elaborate and resource-backed social media campaign rivaling that of Duterte and his supporters. Perhaps, human rights organizations should focus on making human rights intelligible and congruent enough where ordinary people could buy-in and subscribe.

As I have elaborated in the sections above, making human rights intelligible lies in making it congruent with the foundational moral framework of Filipinos. This moral framework is far from static and may be subjected to manipulation and “forgery”. The relative malleability of this moral framework poses both an opportunity and constraint for human rights organizations. As Duterte’s rise to power has demonstrated, the subjection and forgery of human rights and, by extension, the moral framework informing it, is clear and present. After all, the anti-human rights discourses would not gain traction and currency if it was not embedded. Yet, it also opens pathways for counter-hegemonic approaches to promote human rights through communication and education. Hence, regaining the integrity of human rights in the Philippines does not solely rely on developing further skills and



capacities to utilize social media. It also lies with the ability to contest the content and discourse that circulates within it and convince people to believe in human rights.

Indeed, Duterte was able to play with the “politics of anxiety and hope”, yet without the moral framework and lived experience to tap into, his rise to power would have been unlikely (Curato, 2016). In this sense, the problem of anti-human rights sentiment in social media is not necessarily borne out of the proliferation of trolls, but it is the moral framework by which many Filipinos frame and shape their world. Does this mean to say that Filipinos are inherently anti-human rights? Absolutely not. However, as discussed earlier, human rights and justice in the Philippines have undergone the process of vernacularization, hybridization, and even forgery – its meaning shifted, molded, shaped and interacted with moral frameworks of society. And, in the spaces of negotiating human rights, what is supposed to be *dapat* (right) is not based on a standard but on rationalization – a process that is contested, negotiated and, more importantly, power laden. Hence, the challenge goes beyond social media. It is a challenge towards rebuilding human rights that accounts for dignity, especially those deemed disposable by our current society.

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## CHAPTER 9

### **Workers' Rights in the Digital Economy: Assessing the Impacts of Technology Usage by Go-Jek and Grab in Indonesia**

*M. Falikul Isbah*

#### **Abstract**

This chapter explores the human rights impacts of the technological usage on workers of the on-demand transportation industry in Indonesia, looking into Go-Jek and Grab services. This industry as a new business model resulted from the current Internet-based technological discoveries and innovation applied in smartphones. From the fieldwork in three cities of Indonesia, namely Jakarta, Medan, and Mataram, this study found potential abuses of workers' rights that have received little attention. Guided by the conceptualisation of the existing norms, guiding principles and indicators of human rights in business, this study found inconsistencies in respecting workers' rights, for instance, the lack of workers' representation, the lack of work accident protection and broader social security, negative impacts of the algorithm-based order distribution, unlimited working hours and cultural or religious constraints for female workers.

#### **Introduction**

In today's world, we are exposed to new Internet-based technological discoveries, which transformed many aspects of our life. One of the most striking transformations is the way jobs were distributed, as well as how workers are compensated and controlled. There are two categories of this new business model from the way it is distributed by the company and conducted by the workers: the first is web-based micro task, such as freelance marketplaces (e.g., Upwork), microtask crowd work (e.g., AMT, Clickworker), and content-based creative crowd work (e.g., 99designs), while the second is location-based, such as accommodation (e.g., Airbnb), transportation (e.g., Uber, Lyft), delivery (e.g., Deliveroo), household services (e.g., Taskrabbit), and local microtasking (e.g., streetsport) (Berg, Rani, Furrer, Harmon, & Silberman, 2018, p. 4). Workers in both types of jobs are hired to perform a certain short task, not a permanent or long-term job (Vallas, 2018, p. 1). In Indonesia and some countries of Southeast Asia, the location-based model seems to grow much more than the web-based micro task model.<sup>1</sup>

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<sup>1</sup> The most growing businesses of the digital economy in the region are e-commerce, logistics, ride-hailing and food delivery services. Southeast Asia's digital economy is to create 1.7 million jobs by 2025, hrmasia.com, November 22, 2018 (<http://hrmasia.com/southeast-asia-digital-economy-1-million-jobs-2025/>)

In Southeast Asia, motorbike ride hailing is found in Indonesia, Thailand, Vietnam, and the Philippines, while countries like Malaysia and Singapore are not accustomed to motorbike taxi service, but conventional taxi and ride-hailing car service. Therefore, only on-demand car-taxi is available in those countries. Grab is likely the more dominant player in the region (Chandler, 2019), while Go-Jek, which was Indonesia-based, is expanding regionally, such as towards Singapore, Vietnam, Thailand and Malaysia (Desk Editor Insider, 2019; Rahman, 2019; Russell, 2018; The Jakarta Post, 2018b). Recently, Go-Jek's expansion to Malaysia has ignited a resistance from taxi companies in the country, as was expressed in a controversial public statement by a Malaysian taxi company boss stating that Go-Jek is only suitable for poor people in Indonesia.<sup>2</sup>

Responses of governments in the region are varied. The Thai government, for instance, has been clear in declaring the legality of digital platform-based transportation services, including motorbike taxi; although in practice drivers of ride-hailing face protests, sometimes even hostile treatments, from conventional taxi, or conventional motorbike taxi drivers, such as in some places in Indonesia and Thailand (Rudi, 2016). In Thailand, there are two players, Grab and Get (a local brand of Go-Jek). Nine million users have downloaded Grab apps, while Get apps have downloaded by 500 thousand smartphone users. In the Philippines, the same service has operated with Angkas as the brand, but its legality is still in the process (Cepeda, 2019). In fact, Go-Jek has attempted to operate in the Philippines, but the expansion was constrained by a minimum 60% of local share-holding ownership (Franedya, 2019), while Grab has operated since 2015, beginning with GrabCar (Agence France-press, 2015). In Vietnam, motorbike taxi services were operating over the last few years, but their legality remains unclear (Tram, 2016).

The growth of this industry is made possible by a massive and widespread access to the Internet, especially through smartphones usage. A 2017 data published by digital economy consulting companies Hootsuite (<https://hootsuite.com/>) and Tech in Asia shows that 51% or 132.7 million people out of Indonesia's 262 million total populations have Internet access and 40% of them are active social media users.<sup>3</sup> The mobile subscriptions of 371.4

<sup>2</sup> The verbatim statement by Shamsubahrin was, "These are poor countries, we are a rich country. Our young people are not like Indonesia. If Indonesia's young people are good, they would not go overseas to find jobs. Gojek is only for poor people like in Jakarta," Gojek 'only for the poor' resistance in Malaysia is part and parcel of expansion, The Jakarta Post, August 29, 2019 (<https://www.thejakartapost.com/news/2019/08/29/gojek-only-for-the-poor-resistance-in-malaysia-is-part-and-parcel-of-expansion.html>)

<sup>3</sup> Hootsuite is a consulting company, founded in 2008 and based in Vancouver, Canada, providing services in social media management for business marketing through giving teams the platform, advice, personalized training, and advanced analytics. Meanwhile, based on the official description on its website, Tech in Asia is "the largest English-language technology media company that focuses on Asia. From the latest news to the hottest trends and the boldest startups to the strongest titans, we cover everything tech in the region. Our goal is to build and serve Asia's tech and startup community. Apart from producing and delivering quality editorial content, we connect brands with early adopters via Studios, our advertising agency unit. We organize tech conferences and events across Asia, and we operate the region's go-to startup and technology jobs marketplace."



million surprisingly exceed the population number, meaning that a significant proportion of Indonesians use more than one mobile number. A parallel development also occurs in other Southeast Asian countries. 65% of the region's population use Internet connection, 63% of them are active social media users, and mobile subscriptions have exceeded the population number by 132% (Hootsuite & We Are Social, 2019). That backdrop has inspired entrepreneurs to create digital platforms which mediate workers and consumers in providing various personalised services, from motor-bike and car hailing, massage, home cleaning, to food delivery.

The data discussed here was collected through fieldwork in Jakarta, Medan, and Mataram for a duration of three weeks, from the mid of June to early July 2019. Jakarta was chosen as it represents the city with the largest number of workers, Medan was chosen to represent a medium-size city in the western region of Indonesia, and Mataram to represent a small-size city in the eastern region of the country. Those three cities also reflect the gradation of worker numbers in this industry. In addition, based on the recently released regulation on tariff (Kementerian Perhubungan, 2019a), those three cities also represent different price zoning. Medan, the capital city of North Sumatera province is part of Zone I, Jakarta is part Zone II, and Mataram, the capital city of Nusa Tenggara Barat province is part of Zone III. As will be discussed further, the zoning implies a different level of market potential, cost of living in the city, as well as broader demographic and employment landscape across the three cities.

Table 1: Demographic Context of Research Sites

Type of data	Jakarta	Medan	Mataram
Population	10.7 million	2.2 million	468.509
Unemployment rate	5.13%	7.86%	6.7%
Poverty rate	3.47%	9.11%	9.3%
Regional monthly minimum wage	4 million rupiah	2.9 million rupiah	2 million rupiah

Source: Adaptation from the Indonesian Bureau Statistic's data and other official media releases by the respective local governments of the three cities.

In each city, I interviewed ten respondents drawing from both Go-Jek and Grab motorbike riders. The aim was not to provide a comparative assessment of Go-Jek and Grab but to explore the narratives of the workers concerning the two companies' policies, as well as gaps with regard to government regulations. The data collection and analysis were conducted based on my exploration of the existing norms, guiding principles, and indicators of human rights in business. Based on Universal Declaration of Human Rights (1948), the International Covenant of Economic, Social and Cultural Rights (1966), ILO's Declaration on Fundamental Principles and Rights at Work and Its Follow-up (1998), ILO's Decent

Work Indicators (2013), and the UN Guiding Principles on Business and Human Rights (2011), I will formulate concepts concerning workers' rights. Given the fact that this research is conducted on a new business model resulting from technological innovation, the concepts also take into account current discussions on the impacts of technology on this business model and the workers in it.

**Go-Jek and Grab in Indonesia**

In Indonesia, the pioneer of this business, as well as the current dominant player, is Go-Jek - an online application-based motorbike and car transportation service. Launched in 2010, the Go-Jek application has now been downloaded by 40 million users in 200 cities of this country. It claims to serve 10 million users weekly and to cater for 95% of food delivery services (Purnell, 2017). Following Go-Jek, there are some similar platforms in the sector, such as Grab and Uber (the latter having stopped its operation in Southeast Asia in 2018 due to tight competition against Go-Jek and Grab) (Goel & Lim, 2018). Table 1 shows the services offered by the Go-Jek application. The availability of those services varies in different places, but the first seven are likely to be found in all cities where Go-Jek operates, except GoBluebird. To ease the purchasing or paying for these services, Go-Jek provides GoPay as its financial technology service integrated in the Go-Jek apps.

Table 2 shows the services offered by Grab application. All of those services are available in all cities where Grab operates. To purchase or pay for those services, Grab provides OVO as its financial technology service integrated in the Grab apps. Unlike Go-Pay, however, OVO is a digital payment service company, which is not under the management of Grab, but Grab has a portion of share in it.<sup>4</sup>

Table 2: Services offered on Go-Jek Apps, as of August 2019

No	Service Title	Service Description
1	GoRide	Motor-bike taxi
2	GoCar	Car taxi
3	GoFood	Food shopping and delivery from partner merchants
4	GoBluebird	Car taxi serviced by the conventional taxi Bluebird
5	GoSend	Mail and logistic shipping/postal
6	GoPulsa	Purchasing mobile phone credit

<sup>4</sup> Andri Suherman and friends initiated OVO with initial investment from Lippo Group. Presiden Direktur PT. Visionet International (OVO), Adrian Suherman: “Jangan Bersaing, Mending Kerja Sama”, Sumatera.bisnis.com, June 07, 2018 (<https://sumatra.bisnis.com/read/20180607/250/803752/presiden-direktur-pt-visionet-internasional-ovo-adrian-suherman-jangan-bersaing-mending-kerja-sama>))

7	GoBills	Paying bills of electricity, health insurance, cable TV, multifinance, etc.
8	GoShop	Purchasing goods from shops
9	GoBox	Truck pick-up and delivery of goods
10	GoMassage	Massage service
11	GoClean	Cleaning houses and properties
12	GoFix	Fixing household equipment
13	GoLaundry	Laundry
14	GoGlam	Make-up and hair-do services
15	GoTix	Purchasing tickets of cinema, concert, touristic theme park, etc.
16	GoAuto	Car repair
17	GoMed	Doctor consultation

Source: Adapted from the Go-Jek apps by the author.

Table 3: Services Offered on Grab apps, as of August 2019

No	Service Title	Service Description
1	Car	Car taxi
2	Bike	Motor-bike taxi
3	Food	Food purchase and delivery
4	Delivery	Logistic shipping and postal

Source: Adapted from the Grab apps by the author.

The emergence of Go-Jek and Grab is not without challenges. In general, they have received positive responses from consumers that are delighted with the convenient services and cheaper price. However, there has been a strong rejection by the long-established conventional transportation service providers, who feel that their market is being taken away. As a result, due to the pressure from companies and drivers of conventional transportation service, the Indonesian Ministry of Transportation banned the ride hailing businesses in 2015, as they were considered not meeting the standard requirement of public transportation (Jakarta Post, 18 December 2015). However, President Jokowi withdrew the ban and supports the existence of Go-Jek as an alternative and reliable transportation (CNN Indonesia, December 18, 2015). Such mixed responses from the government show that there was dubiousness affecting decisions of the policy makers. Therefore, there is a strong need to develop a better understanding regarding the on-demand transportation sector to inform policy makers in creating good public policy.

Currently Go-Jek is expanding beyond transportation services, to include food delivery, logistics, mobile payments, and other on-demand services. The rapid business development of Go-Jek in Indonesia is mostly acquired through filling the gap left by ‘traditional’ taxi industries and looking into the changing consumption trends and culture of the society (cf. Posen, 2015). This trend, especially in the Indonesian context, can be interpreted as a result of several intertwining factors, from the poor infrastructure of public transportation, the extreme traffic jams and congestion in many major Indonesian cities that make motorbike the best option, a large portion of the population working informally, to the lifestyle of being accustomed to have personalized services (The Jakarta Post, 2018a). Nonetheless, whether on-demand transportation platform will fully replace the ‘traditional’ taxi industry or not, remains an unanswered question for the future. However, it is evident that their existence has significantly disrupted the business of the ‘old players’ in the transportation sector, creating tensions among drivers on the road.

Studying this sector in the Indonesian context is economically very important, as it provides a significant picture in the country’s new employment landscape. Recent research by Fanggidae et al. (2016) noted that Go-Jek has evidently become a promising new source of income for many people and an opportunity to increase their quality of life. The research recorded more than 300.000 Go-Jek drivers in Indonesia and the number keeps increasing. Among 200 drivers surveyed in Jakarta, 82% were satisfied with their income because it was higher than their income from previous job, although more than half of them still earned less than Jakarta’s minimum wage. The majority of drivers were also satisfied with their flexible working hours although many of them have excessive working hours (Fanggidae et al., 2016).

In a broader picture of the Indonesian employment landscape, people who work in informal sector account for as much as 69,02 million or 57.03% of the total working population (Badan Pusat Statistik, 2016). This is a very large proportion compared to other more economically developed countries. Most drivers working for on-demand transportation platforms are those who have previously juggled work in the informal sector. However, their job as Go-Jek drivers does still position them in the informal sector with the same informal working conditions, albeit now under large platform companies. This chapter seeks to explore the impacts of the technological usage by platform companies on the human rights of the workers in this industry in Indonesia. It aims to answer the following questions: 1) what are the profiles of workers in this industry? 2) what are the potential workers’ rights abuses and the adverse impacts to them in this job? 3) what have the Indonesian government and platform companies done to protect, respect, and remedy potential workers’ rights?

## Digital Economy and Its Impacts on Workers

Several studies have discussed this business model in regard to its history and position in the capitalist economy (e.g., Vallas, 2018), employment relations in which platform companies treat workers as partners or independent contractors and its impacts on workers (e.g., Cherry & Aloisi, 2016; Malos, Lester, & Virick, 2018), and inadequacy of existing regulation to the business model (e.g., Collier, Dubal, & Carter, 2018; Natour, 2016; Stewart & Stanford, 2017).

Vallas (2018, pp. 4–5) noted that the platform economy, especially in the context of United States (U.S.), has its roots in a wave of massive investment in Internet start-ups in the mid-1990s. Although much investment in the dot.com era was not successful enough, it generated further technological discoveries on how services and goods can be marketed online. In short, the platform economy is part of a broader financialization in the capitalist economy. The other milieu paving the idea of outsourcing every single task is the “retail revolution” in which giant retailers rely on production sites and distribution points placed throughout the planet. To govern and control such global value chains, they developed technology such as bar codes, computerized inventory systems, and satellite technology, in order to ensure the production and distribution process, goods quality control, as well as consumer satisfaction. Giant on-site retailer such as Walmart and Target and website-based retailer such as Amazon are exemplary models of this “retail revolution”. The platform economy has learned from their business model in developing a technology of governance, but it uses the technology to match workers and end-users.

Meanwhile, many recent literature (e.g., Cherry & Aloisi, 2016; Malos et al., 2018) discuss the employment relations applied in the platform economy, in which platform companies treat workers as partners or independent contractors. Such employment relations lead to further problems in ensuring workers’ rights. Natour (2016) coined the “governance gap” and Flanagan (2017) coined the “regulatory deficit” to describe the inadequacy of the existing regulatory frameworks. For example, most labor laws in most countries define employment relations as an agreement between employer and employee on a certain task with agreed wage within a certain period of time. The relation lasts for a relatively long period, based on an agreed contract by the two parties. In contrast, employment in the gig economy is less secure and precarious (Lewchuk, 2017).

Based on their study on Uber in the U.S, Collier et al. (2018) point out that Uber is disrupting regulatory regimes, but there is no deregulation and instead new entrants capture and align the existing regulation for their interest. To address the situation, Flanagan (2017) proposed an eclectic approach to strengthening regulation and safeguarding the rights of consumers and workers or service providers regardless of their employment status, for example, by pushing hourly rates. Stewart & Stanford (2017) suggested policy makers to be creative and ambitious in better protecting workers by strengthening and expanding existing regulatory frameworks governing the gig economy. The options are enforcement of

existing laws, clarifying or expanding definitions of ‘employment’, creating a new category of ‘independent worker’, creating rights for ‘workers’, not employees, and reconsidering the concept of an ‘employer’ (Stewart & Stanford, 2017, pp. 429–431).

## **Business, Human Rights, and Technology: A Proposed Conceptual Framework**

As noted by Waagstein (2017), the debate on whether business enterprises have to be responsible to ensure human rights norms and values can be dated back to the 1970s. It was an extended topic on corporate social responsibility, which required companies to be socially aware of the development and welfare of the community. However, business and human rights then conceptually culminated in a report written by the U.N. Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises by Professor John Ruggie, entitled “Protect, Respect and Remedy: A Framework for Business and Human Rights”, which was based on his extensive research and consultations with governments, business, and civil society on five continents (Ruggie, 2008).<sup>5</sup> The report was then developed into an operational document titled “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (United Nations, 2011).

To what extent have the Guiding Principle been adopted and implemented in Indonesia and Southeast Asian countries? According to Waagstein (2017, p. 2), there has not been a particular law or regulation enacting the Principles into practice. However, Indonesia has several laws, including Human Rights Law (1999), that regulates the protection of human rights of others. Some efforts, however, have been done, for instance, by the Indonesian National Commission on Human Rights (Komnas HAM). In 2017, Komnas HAM published a National Action Plan on Business and Human Rights or the NAP BHR (Komnas HAM & ELSAM, 2017). The document lays out methods and processes that the government and business enterprises should comply with. For the government, the Commission urges towards the establishment of a solid law instrument for implementing the United Nations Guiding Principles on Business and Human Rights (UNGPs). The method is, among others, by aligning all laws and their derivative regulations, at both national and local government level, to be in line with the UNGPs. The second method is creating a compliance standard for assessing human rights compliance of business enterprises in their activities. If they meet the standard, they will be able to obtain a human rights certificate. Following this standard, there must be a reward and punishment scheme. An example of reward or incentive would be easing business permits and related procedures for corporations passing a human rights assessment, while a punishment scheme is not clearly explained in the document (Komnas HAM & ELSAM, 2017, pp. 27–55).

<sup>5</sup> The report was catered to the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The document I used for this study is dated April 7, 2008.

For business enterprises the National Action Plan (NAP) provides a map of potential human rights violations. The first identifies potential adverse impacts to certain groups of workers (e.g., women, disabled, migrant workers, child workers and those who are part of minority groups) due to higher levels of vulnerability. The second are potential impacts on the environment in the form of deforestation, food security, and pollution. The last are potential impacts on vulnerable communities such as aging groups, local ethnic groups, small and landless farmers, fishermen, and other vulnerable groups. Therefore, Komnas HAM urges business enterprises to create internal guidance and policy to avoid business practices that would threaten human rights; to conduct a periodical assessment for identifying, preventing, and mitigating human rights violations; to provide remedy mechanisms for victims; and to conduct periodic meetings with the government, Komnas HAM, NGOs, and communities to share their experiences and challenges in ensuring respect for human rights (Komnas HAM & ELSAM, 2017, pp. 59–68).

How far has that NAP being implemented by the government and adopted by business enterprises? So far, there has not been any rigorous survey to answer this question. Nonetheless, this chapter benefits from reports by NGOs, such as Oxfam Jakarta, the International NGO Forum on Indonesian Development (INFID), and the Indonesian Human Rights Committee for Social Justice (IHCS), which organised public discussion and policy advocacy on business and human rights. Nevertheless, there has been almost no study or policy discussion on the on-demand transportation industry with a special reference to business and human rights. As an exception, there was a study by an NGO named Perkumpulan Prakarsa which surveyed the situation of the on-demand motor-bike taxi workers using ILO's Decent Work Indicators in Jakarta and Surabaya (see Fanggidae et al., 2016). Therefore, this study aims to fill the gap by identifying the situation of workers' rights based on fieldwork data gathered through interviews.

There are at least three advantages of a rights-based perspective on studying jobs in the gig economy. First, it will prevent us from falling into a 'legal trap', which often challenges scholars with a question whether existing regulations fit, or not to assess the fate of workers in the gig economy. Second, human rights are universal norms relevant and applicable across countries, and hence, the framework of this study can be extended to any other country for future research agendas. Third, the results of this research can inform policy makers and platform companies with a dedicated human rights perspective that they can adopt or reflect upon in future regulation and decision-making.

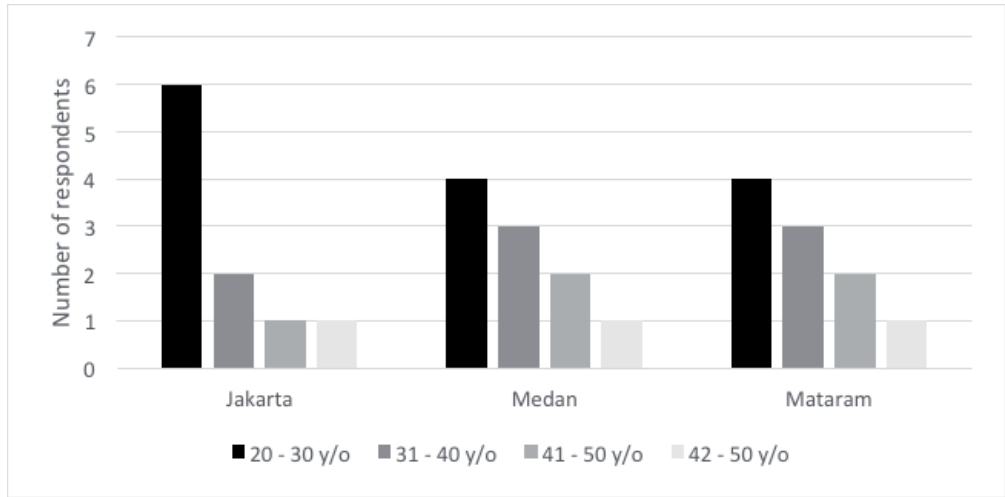
## **Who are the On-Demand Motorbike Taxi Riders?**

Based on interviews with ten respondents in each city, most workers in Jakarta, Medan, and Mataram were in their 20s and 30s. In Jakarta and Medan, a number of them are either graduated from secondary vocational schools, dropped out from universities or are still studying at university level while pursuing this job. In Mataram, many of them only have junior high school education. This picture reflects a broader demographic structure



of those cities. In Jakarta, four million of its 10.1 million population is aged 20-39 years old. A current statistic shows that 25% of its working population is related to trading and small-business enterprises, while 65% of them work as employees in the formal sector. It is also a fact that 43% of workers in Jakarta hold senior secondary school certificates (Badan Pusat Statistik Provinsi DKI, 2018). This is also reflected in the majority of Go-Jek and Grab drivers, which are holding said school level certificate.

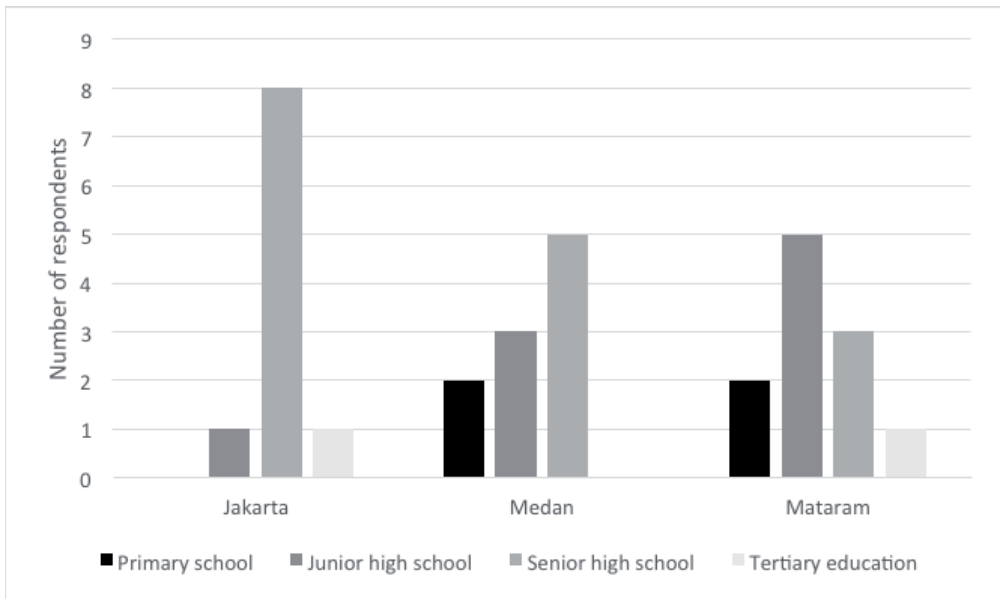
Figure 1: Age Cohorts of Respondents



Source: adaptation from interviews by the author

A similar picture was also found in Mataram. Most of the unemployed in this city are at the age of 20-24 (29%) and 25-29 (14%) out of its 355 thousand population. Among the three cities surveyed, Mataram has the lowest level of average educational level as evidenced in the fact that 25% of its population has no school certificate at all (Badan Pusat Statistik Kota Mataram, 2019). It was not surprising that many of the workers interviewed in this city were junior high school graduates (with one person having completed only elementary school). Inhabited by 2.2 million people, Medan is the largest city in Sumatera. The available data from the local statistics bureau reveals that 972,000 people are working, while 101,000 are unemployed (Medan, 2019). Unfortunately, the data does not provide a more detailed figure on age distribution of workers and unemployed populations.

Figure 2: Educational Level of Respondents



Source: adaptation from interviews by the author

A study by Fatmawati et al. (2019) pointed out that most workers in this sector are young workers and that they are experiencing a process of “de-skilling” and/or being in a “skill trap”. De-skilling happens when a worker is employed for a job under his/her qualification or skill competencies, while skill trapping happens when a worker does not have any opportunity for skill, career, and income upgrading throughout their working life. This job, indeed, entangles workers in those two processes. For example, many workers have the qualification of skilled factory machine operators as they graduated from secondary vocational schools majoring in engineering. By working as ride-hailing drivers, their skill is not used. According to Fatmawati et al. (2019), this fact can generate seriously negative impacts, both for the workers’ individual opportunity to have better living standards in the future and for the broader labor market to provide skilled workers in the future.

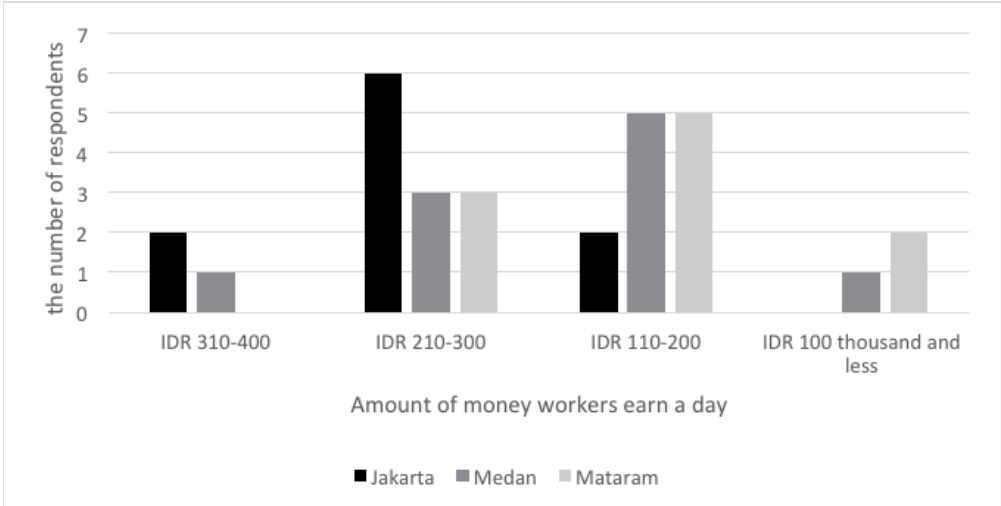
### ***Why do they work for Go-Jek or Grab?***

Based on the collected data, there are several reasons of why these respondents work for Go-Jek or Grab. Some of them took this as their first job after graduating from secondary schooling, while some others took this job after a series of job changes. It is important to note that almost all of their previous jobs provided them with a salary level of regional minimum wage. They considered this job as an opportunity to earn above their previous income, and many of them can meet this expectation, despite the much longer working hours. Most of the workers working in the gig economy work as full-time workers, while a few of them work part-time or as a side-job. They start working from early morning, 6am

or 7am, expecting to get passengers who are school students, or workers commuting to their schools or workplaces. The majority stopped working after 6pm or some even around 9pm, meaning that they were on roads more than 10 hours. However, they did not see this long working hour as a serious burden as they could relax when they wait for consumers.

Larger cities like Jakarta seem to provide an opportunity to earn more compared to smaller cities like Mataram. In Jakarta, some workers claimed to be able to earn up to 400,000rupiah, while the highest amount I found in Medan and Mataram was 250,000 rupiah. Nonetheless, workers in the three cities are able to earn a minimum of 100,000 rupiah a day. In average, they spent between 40,000 rupiah and 70,000 rupiah for fuel and meals. Almost all of them face the burden of bank credit installments, ranging from 500,000 to 1.5 million rupiah a month, for the motorbike they use for this job. Depending on the amount of the monthly installment, credits last from one to four years. They said that a good motorbike is needed to ease their task carrying passengers. If they ride a not-so good motorbike, they would feel more exhausted. According to the respondents I interviewed, the maximum usage of the motorbike to be registered for this job is 10 years, but I could not find this condition on both Go-Jek and Grab websites.<sup>6</sup> However, my observation found that most of the motorbikes that were used were less than five years of production year.

Figure 3: Average Amount of Money the Workers Earn per Day



Source: adaptation from interviews by the author

<sup>6</sup> I could not find that information on Go-Jek and Grab's websites, but the following Internet sources confirmed that information: You are here: Home / Gojek / Syarat Tahun Motor Gojek Terbaru, Khusus Pendaftar Baru! Syarat Tahun Motor Gojek Terbaru, Khusus Pendaftar Baru!, infokerjakuu.com, June 27, 2018 (<https://infokerjakuu.com/syarat-tahun-motor-gojek/>); Perhatikan Syarat dan Tahun Motor Untuk Daftar Grabbike, infokerjakuu.com, July 27, 2018 (<https://infokerjakuu.com/syarat-tahun-motor-grabbike/>)

The amount of money earned differs across the cities due to the different levels of living costs and regional minimum wage. In Jakarta, the current minimum wage is almost 4 million rupiah a month; it is almost 3.5 million rupiah in Medan and only 2 million in Mataram. On average, the workers' gross earnings are above their respective regional minimum wage. From that amount, however, they spent operational expenses. This is different from the amount earned by employees of manufacturing industries or other conventional employment sectors; they are likely to spend less.

Across the three cities, workers held the same opinion that they feel it more difficult to earn the same amount of money compared to two years ago or before when they started this job. When they joined this job, they saw an opportunity to earn money easier in comparison to their struggles in previous jobs. According to a respondent, Agus, a worker in Jakarta, July 28, 2019, "...in the past, I could get 300 thousand rupiah from 7am to 5pm easily. Now, to get the same amount I have to go back home at 9pm."

The changing situation was a result of, first, the changing bonus scheme implemented by both Go-Jek and Grab. It seems that both companies tended to provide a generous bonus scheme to riders and low prices to consumers when they start to operate in a city. After some time, when the market has developed, they change both the bonus scheme and the price. This is a simple business strategy to attract potential workers to join the business and to attract potential consumers to be addicted with their services.

The second factor affecting workers' potential income is the "price war" between Grab and Go-Jek. Sometimes, one of the two companies implement discounted prices in certain areas to increase its captive market. In such a situation, workers of the platform company which does not implement the discount, would lose some of their opportunities to get passengers. Before making an order, some passengers would compare the prices of Go-Jek and Grab on their mobile phones and then choose the cheaper one.

The third factor is the increasing minimum tariff set by the government. As will be discussed later in this chapter, from July 1, 2019 onwards, the government has implemented a new regulation on minimum and maximum tariff calculation based on trip distance. When consumers perceive the tariff as too expensive, it will reduce the number of orders, which automatically reduces workers' potential income. On this issue, workers in Mataram raised great concerns and complaints, probably because of the potentially lower figure of available passengers when compared to Jakarta and Medan.

The fourth factor is the increasing number of workers in all cities. This job is easy for whoever can ride a motorbike, and both Go-Jek and Grab are likely to accept all new applicants to be their partners. From their business calculation, the more workers they have, the more money they can earn from them. However, the workers have to compete among themselves to get passengers in the field. In Mataram and Jakarta, all workers

complained about this issue; “You see...there are more riders than passengers” Imam, a worker in Mataram, complained.

The actual number of workers is unknown. When I asked this question to an officer of Go-Jek management in my previous research, they just provided me with a proximate number of about one million riders. Parts of the reasons are that the platform company recruits workers every day and it is hard to verify how many workers are active and inactive. Many workers are still registered in the system, but they are not active due to unknown reasons. Therefore, this number does not precisely reflect the number of workers who actively work in the field, as many workers quit the job without noticing the company. Moreover, the Indonesian Ministry of Transportation claimed to not be able to prohibit platform companies to recruit more riders, as they do not have legal basis to delimit partnerships conducted by private sectors with their partners (Al Hikam, 2019).

## **Potential Abuses of Workers’ Rights**

From the fieldwork, I found the following issues as most often raised and complained over by the respondents. Indeed, it is not easy to find a solution, as the nature of work in this industry is mediated by digital applications workers are not located in a designated workplace, and the communication between companies and workers is mediated by an algorithm. It is not a conventional nature of work as in “traditional jobs”. My account here is based on the respondents’ verbal information during the interviews and my own observations in the field, in reference to the existing human rights norms, guiding principles, and indicators discussed in the conceptual framework.

### ***Lack of Labor Union and Workers’ Representation***

One of the basic workers’ rights is to form a union, to be represented in negotiation and consultation, and to have collective bargaining. In the media, I found Gabungan Aksi Roda Dua (GARDA) as the most often mentioned labor union representing the motorbike taxi riders in media citation (Tribunnews.com, 2019a). However, throughout this research, I did not find a rider claiming to be affiliated to the labor union. It seems that GARDA was active in opinion making, but not so solid in member consolidation. Furthermore, I found that the workers have only loose association, mostly based on their working area or places of hanging out (while they wait for passenger orders). They do not have a proper organization, such as labor unions in the manufacturing or other sectors. Based on the data collection, there are three reasons for this. First, it is hard to gather interested members as they work in constant mobility, moving from one place to another. Second, the number of riders is huge and scattered, especially in large cities like Jakarta and Medan. It is very hard to gather a significant number of them to form a union. Third, most workers based out of Jakarta did not see any chance to change the companies’ policies as all policies are made in the companies’ headquarters located in Jakarta.

Based on their experience of protest before the local management such management could not make any response or decision and was only promising to forward the issue to the central headquarters in Jakarta. In addition, conducting dialogue or protest before local governments was also useless as they did not have any authority to do anything regarding this industry. This situation illustrates a complex challenge for forming a labor union and a just mechanism of social dialogue. The fact that the workers were located everywhere but the decision-making is centered in Jakarta is an on-going challenge, especially to create new mechanisms for channeling workers' aspirations.

### ***Work Accidents in “Partnership” Relations***

We must understand that motorbike riding is risky and prone to accidents. In the three cities of my fieldwork, I found at least one worker out of the 10 interviewees stating to having had at least one accident in their work. Although the accidents did not cause major injuries, drivers were injured, transported to hospitals, and had to rest or not work for several days. In such cases, I found different situations among workers, as illustrated in the following story of Ridwan and Andi.

Ridwan, a 39-year-old worker of Go-Jek in Mataram, illustrated how workers have to bear the risk by themselves. One day Ridwan picked up a female passenger wearing a long Muslimah style gown. He had insisted the passenger to be mindful with her gown. Sadly, in the middle of their trip the bottom part of the gown tangled up to the chain of Ridwan's motorbike. His motorbike suddenly stopped in the middle of road and they both fell from the motorbike. Both Ridwan and his female passenger were seriously injured and had to be transported to a hospital. When they were in hospital, someone from the Go-Jek management of the Mataram office visited them, but they did not follow up on that visit with any financial support or insurance coverage. Both of them had to pay their medical expenses by themselves. A different story I found in Jakarta. Andi, a 23-year-old rider of Grab, told me that he had an accident once with his passenger. Grab covered all medical expenses and his passenger got the same support. He explained that Grab implemented a life insurance by debiting Rp. 15,000 per month from his Grab account. However, it does not cover damages of his motorbike. It turned out that what Andi received was a cover provided by his insurance, not by Grab.

The stories above illustrate the real impact of “partnership” relations in this industry. As we understand that the relation between the workers and the platform companies is based on “partnership” not employment relations. The situation forces the workers to bear the job risk by themselves, while the companies are free from the responsibility to guarantee job safety. This shows a need of policy improvement regarding the guarantee of safety for both workers and consumers in this industry in light of the “partnership” relation. A minimum prevention would be to integrate the life insurance to the fund paid to the company. Hereby, there would be no workers left without any protection.

## *The Negative Side of Algorithm-Based Order Distribution*

The distribution of passenger order in this industry is based on an algorithm, as in those who perform better tend to get more orders. This is fair and accepted by all workers I interviewed. To perform well, they have to accept every order coming up to their Go-Jek or Grab account and not being picky. Normally, riders prefer orders of short trips because then they can complete them quickly and get many orders done. Such situation is created by the bonus scheme, which is calculated based on points. One trip is counted as one point. When they reach a certain number of points, they will earn a bonus of a certain amount of money. The more trips they can reach, the more bonuses they can obtain. The bonus is a substantial element of income expected by riders.

A problem arises, when the order they receive comes from passengers located in faraway places. In a city with notorious traffic congestion like Jakarta, picking up a passenger located more than two kilometers from the position of the rider is hard. Moreover, if they are late to reach the passenger, the passenger may be unhappy or even cancel the order. Unhappy passenger can be the beginning of further disaster for the workers. After the service, the passenger could give them a low rating. The rating from consumer is available on the apps right after a ride is completed in the form of stars, from one to five stars, and a column for a written comment. In some situations, riders are prone to get low ratings or bad comments. A group of riders whom I interviewed in Jakarta complained about this issue. They could not understand why the algorithm system often distributes an order to riders in a faraway place, although there were many riders around the passenger.

It is very dilemmatic if we get an order from a faraway location, say 2 kilometers from our position. Possibly it takes more than 10 minutes to get there as we have to go through a very busy traffic. If we take that order, there is a risk of being complained by the consumer as he/she waits for too long. Conversely, if we do not take that order, our performance drops and it reduces our next chance to get order... (Andi, Jakarta, July 27, 2019)

## *The Dilemma of Unlimited Working Hours*

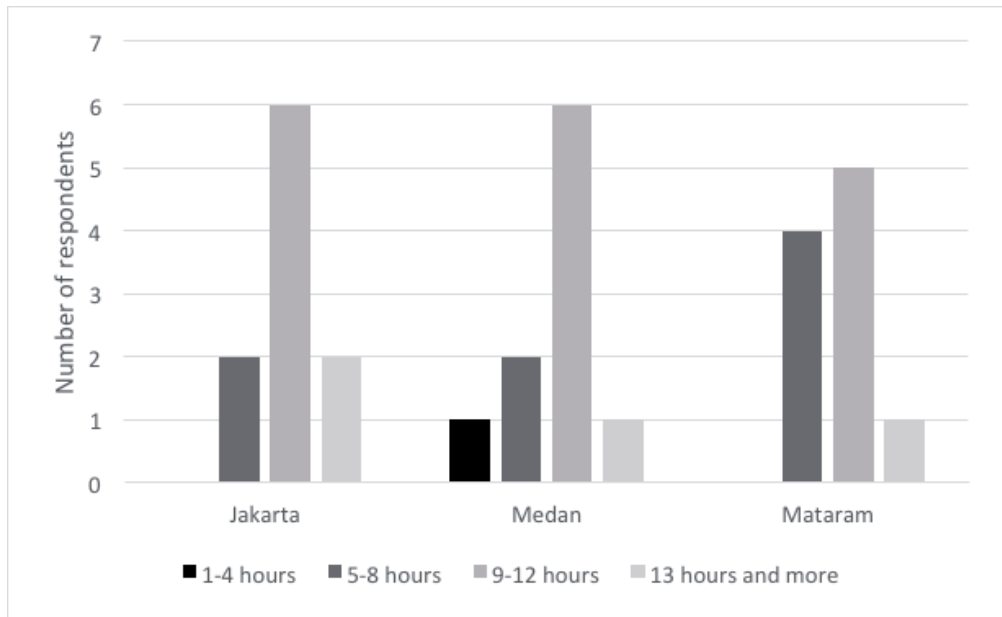
Most workers work for more than eight hours - a normal maximum working hour set in ILO's Decent Work Indicators.<sup>7</sup> Some workers spent up to 15 hours a day on the road. The workers did not want the companies to limit their working hours, as it can hamper their opportunity to earn more money. Their main reason was that they are not always riding a motorbike but sometimes hang out waiting for orders by the roads. However,

<sup>7</sup> International Labour Organisation (2013), Decent Work Indicators: Guidelines for Producers and Users of Statistical and Legal Framework Indicators. Table A on Measurement of Decent Work, the document outlined Decent Working Time with a statistical indicator: Employment in Excessive Working Time (more than 48 hours per week) (p. 15). It means that the maximum working time is eight hours a day and six days a week.



unlimited working hours can affect personal and family welfare or well-being of the workers (ILO's Decent Work Indicator, Number 4). When I asked the workers about how they managed their family time, I found that most of them did not find having time for family very important.

Figure 3: Average Time Spent on the road



Source: adaptation from interviews by the author

### *Cultural or Religious Constraints for Female Workers*

It is not known how many percent of female workers are in both Go-Jek and Grab, but I am sure there are some as I saw them on my daily life in Indonesia. During my fieldwork, I succeeded to interview only one female worker in Medan. She told a similar story to what I have heard previously from other female riders I encountered.<sup>8</sup> The story is that sometimes male passengers canceled the order they received after they understand that the riders were female. The reason was not obvious; probably some passengers were not comfortable to be on a motorbike with a female rider either for cultural or religious reasons.

<sup>8</sup> In 2018, I conducted a research on the nature of work in the on-demand transportation industry in Indonesia. One of my particular focuses was the emotional aspect of the workers' in their relations with consumers and platform companies.

## What the Indonesian Government and the Companies Have Done to Ensure Workers' Rights

In the early operation of the on-demand motorbike taxi in December 2015, the Indonesian government banned its operation based on a legal reason that two-wheel motorbike did not meet the criteria as public transportation as stated in the Public Transportation Law (Number 22/2009). The ban immediately triggered public reaction, especially from the workers of the industry. As a result, a day later on 18 December 2015, the Minister of Public Transportation withdrew the ban based on the reason that there was a huge gap between the public demand for public transportation services and the availability of public transportation. In the media, the Minister stated that it was a temporary permission until decent public transportation services are available (Praditya, 2015).

This incident shows a legal dilemma faced by the Indonesian government, as well as a regulatory deficit in the Indonesian legal system. Until now, there are no clear regulatory bases and frameworks governing this industry. What the government does is moderating the contested interest among the digital companies (Go-Jek and Grab), the workers, and the consumers. From 2015 to 2019, the industry operated without any binding regulation, while there were several mass protests by the industry's workers complaining about the changes of price and bonus schemes imposed by the digital platform companies.<sup>9</sup> The changes were partly a result of a "price war" between Grab and Go-Jek in attracting as many consumers as possible. The changes made it harder for workers to earn money compared to previously (Zaenudin, 2018). Most of the protests were also held before the government including the Presidential Palace, not only the company offices (Ramadhan, 2018).

In order to respond and mediate the tension, the Minister of Transportation released two regulations, regardless of the legality of the on-demand motorbike taxis. The two were released at the same time. The government took this action based on its discretion right stated in Law Number 30/2014 on Government Administration. According to the government that law provides them a right to govern anything that has not been regulated or to release a regulation to solve problems faced by the public (Afriyadi, 2019). The first is the Rule of the Minister of Transportation Number 12/2019 on "the protection for the safety of riders of motorbikes used for public transportation" (Kementerian Perhubungan, 2019b) and the second is the Decree of the Minister of Transportation

<sup>9</sup> For example, in August and September 2019, workers in several cities organized mass protest refusing the recent change of the bonus/incentive scheme. In the previous scheme, workers who accomplished 12 trips a day received 85 thousand rupiah, 16 trips would add another 30 thousand, and 19 trips additional 60 thousand rupiah. With the accomplishment of 19 trips, workers would receive an accumulation of those bonuses or 250 thousand. Meanwhile, the new scheme will give them 175 thousand rupiah for 19 trips. Driver Online di Semarang Demo Minta Perubahan Skema Insentif, Kumparan.com, August 2, 2019, (<https://kumparan.com/@kumparannews/driver-online-di-semarang-demo-minta-perubahan-skema-insentif-1raTLeuJ6hy>)

Number 348/2019 on Estimation Guidelines for Apps-based Motorbike Taxi Service (Kementerian Perhubungan, 2019a).

The first Rule sets certain safety standards on the motorbike and the rider. In Chapter III and IV, the Rule defines the relation between riders and platform companies. Important points to note are, first, the relation between the two defines that the riders rent the digital application, which enables them to gain passengers. For this rental relation, the digital platform, as the owner of the app, can charge a certain amount of rental fee. It is important to note, at this point, that the relation between the two is not an employment relation (as traditionally defined as a relation between employer and employee) but a partnership in which the riders rent the digital app from the digital platform company.

Chapter III provides some basic definitions to calculate the amount both the riders and company can get from their business partnership. Direct costs are costs for every spending by the riders, from the motorbike, Internet cost, fuel, to insurance, while the indirect cost are the amount that the riders have to pay to the platform company as their rental cost for the digital app. Then, the Ministry released a more operational guideline to calculate the rental cost in the Decree of the Minister of Transportation Number 348/2019 on Estimation Guidelines for Apps-based Motorbike Taxi Service.

The Decree divides the operation of the industry into three service areas and introduces the so-called Bottom-Line Price and Top-Line Price as follows:

Table 4: Price Zoning, Implemented from March 1, 2019

Zones	Top-Line Price	Bottom-Line Price	Minimum price paid by passenger (for service below 4 kms)
Zone I (Sumatera, Jawa but excluding Jakarta, Bali)	Rp. 2,300/km	Rp. 1,850/km	Rp. 7,000 – Rp. 10,000
Zone II (Greater Jakarta)	Rp. 2,500/km	Rp. 2000/km	Rp. 8,000 – Rp. 10,000
Zone III (Kalimantan, Sulawesi, Nusa Tenggara, Maluku, Papua)	Rp. 2,600/km	Rp. 2,100/km	Rp. 7,000 – Rp.10,000

Source: Adopted from the Decree of the Minister of Transportation, Number 348/2019 on Estimation Guidelines for Apps-based Motorbike Taxi Service. The creation of the table was by the author.

This pricing guideline was a result of consultation and negotiation of the Ministry of Public Transportation with both rider representatives and platform companies. During the public consultation, riders actually proposed Rp. 3,000/km for the price before agreeing on the price formula in the table above.<sup>10</sup> The Decree also sets the maximum amount that can be acquired by the platform companies at 20% of the amount paid by passengers. The minimum price is aimed to prevent “price war” among the platform companies in getting passengers. During this research, however, either Go-Jek or Grab still applied prices below that minimum price through discounted rates. For example, during my fieldwork in Medan in early July 2019, I compared the prices of those two platforms whenever I needed the service. I found Go-Jek charged only Rp. 5,000 for a ride of less than four kilometers, while Grab charged around Rp. 11,000. In contrast, in Yogyakarta, Grab tends to charge lower prices. In such cases, the platform companies cover the price gap, so the riders will receive the normal amount of fee. This can be explained by the categories of services that they offered. Their services are not only ride-hailing, but also food delivery, massage, and financial technology. The more consumers are becoming familiar and addicted to their services, the better for their broader and long-term services. Therefore, providing subsidy for long term is a worthy investment.

This shows that both platform companies are able to adjust the minimum prices set by the Decree through giving discounts. The companies play with discounts in accordance with their market acquisition in certain areas, and the two companies remain in “price war” up to now. However, workers of both Go-Jek and Grab across the three cities hold diverse opinions on who is better in providing opportunity to earn more money. Some viewed Go-Jek as the better option, while others thought the opposite. Many said both companies are the same. The amount of money that can be earned depends on how hard and how long they work. Related to the pricing issue, a study by Lee ((2017) explained how algorithms work in pricing by determining dynamic and fluctuating prices based on the supply of the service and the demand of the consumer order in certain spatial locations. Based on his simulation, the author indicated, “that even when a market is competitive in the symmetric sense (identical platforms), prices can bifurcate into two or more distinct bands of prices for different locations” (p. 33). Therefore, policy interventions or authority monitoring is still needed to ensure fair pricing, as algorithm-based pricing does not fully guarantee fairness.

The second important point in the Rule is about sanctions and termination in the “partnership” relations between the riders and the platform company (Chapter IV). The Rule obliges the company to set a standardised procedure and conditions where the company may apply sanctions or termination of “the partnership”. In this part, the Rule

<sup>10</sup> Tarif Baru Berlaku Seluruh Indonesia, Driver Ojol: Ini yang Ditunggu-tunggu, Detikfinance, August 30, 2019 (<https://finance.detik.com/berita-ekonomi-bisnis/d-4686613/tarif-baru-berlaku-seluruh-indonesia-driver-ojol-ini-yang-ditunggu-tunggu>)

states clearly that the relation of the two is “a partnership”. It is important to note that those two Rules do not mention anything about occupational accidents or broader social protection schemes for the riders. Instead, it positions insurances (for the vehicle, riders, and passengers) as part of the direct costs, which has to be covered by the riders not the platform companies. This means that all risks, either affecting the riders or their passengers, are under the responsibility of the riders.

However, some associations of riders such as GARDA and GASPOOL (Gabungan Admin Shelter Pengemudi Ojek Online) have positive comments on those two regulations, since at least those had provided a legal basis for their work. They have set standardised procedures of how they work such as clothes, standardised conditions of motorbikes, and other conditions to ensure the safety.<sup>11</sup> There were resistances among the riders to regulate working hours because they worried that it would impede them to earn adequate income (Tribunnews.com, 2019b).

## Conclusion

This research was designed against the backdrop of a regulatory gap with regard to existing legal frameworks, namely labour law and public transportation law, in Indonesia and other Southeast Asian countries. These laws do not provide a basic definition of the employment relation and business processes applied in the on-demand transportation industry. In Indonesia, meanwhile, there have been some efforts to contextualise the UN Guiding Principles on Business and Human Rights. However, this research found that those efforts are far from being implemented. What I found is that the government, after negotiations and agreements with platform companies and some public consultations with workers, has released two regulations ensuring the safety, service standards, and tariffs (Kementerian Perhubungan, 2019b, 2019a). Nonetheless, those regulations do not set workers’ rights, standardised protection or social security cover. Furthermore, it is interesting to note that both regulations do not mention the Indonesian Labor Law Number 13/2003 as one of the references or considerations. Instead, those laws labelled the relation between the workers and platform companies a “partnership”. Thus, the workers we discussed here hold legal ambiguities that need to be set out clearly in the Indonesian legal system.

Against such legal situation, bringing in the framework of business and human rights, this research offers the following findings: (a) the lack of labor unions and adequate mechanisms for workers’ representation in consultation and bargaining with platform companies, (b) the lack of integrated insurances for work-related accidents, (c) algorithm-based order distribution sometimes led workers to pick up passengers from faraway places, and (d) there lack of a limit of working hours may be unsafe or harmful for workers’ long term health. However, health experts should assess the impact of this work model to the long-term health situation of workers. For example, the government can assign a team of

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<sup>11</sup> Examples of their positive responses in media are Kurnia (2019) and Tribun Bandar Lampung (2019).

health or medical expert to conduct a thorough study on this, then the government can discuss the results with workers' and companies' representatives as the basis for further regulation regarding working hours.

In conclusion, the business and human rights framework has helped us to unravel potential human rights abuses and adverse impacts to workers as explained above. This is important, as a recent policy response by the Indonesian government has too overtly emphasized the price issue. Broader workers' rights have not been considered adequately. A further cross-country study in some Southeast Asian countries where the same job is available is needed to find lessons or best practices of how to strengthen workers' rights and possible ways to formulate work, accident protection, as well as broader social security and other issues raised in this study.

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## ABOUT SHAPE-SEA

The Strengthening Human Rights and Peace Research/Education in ASEAN/SEA Programme (SHAPE SEA) is funded by Swedish International Development Cooperation Agency (SIDA) and the Norwegian Centre for Human Rights, University of Oslo started its activities in April 2015. This program envisioned a Southeast Asia where the culture and values of human rights, peace and democracy are instilled through widespread research and teaching in higher education. It was premised on the assumption that building regional cooperation on human rights and peace in higher education would contribute to the promotion and protection of human rights and sustainable peace for all peoples in Southeast Asia. We believe that the threats to human rights, whether in rising populism, shrinking civil society space, increased racism, or the impunity enjoyed by human rights violators, cannot be effectively addressed unless there are evidence-based knowledge and highly skilled network of experts (or champions) in the region.

The overarching objective was to contribute to the improvement of human rights and peace situation in Southeast Asia through applied research and education. The strategy of the programme was to directly involve and engage universities to play a more significant role in promoting human rights and peace by contributing research and by increasing the knowledge of human rights and peace by incorporating them into university education.

Shape-sea has indeed, in a number of ways through its activities, innovated the landscape of human rights promotion and peace building through research and education in the region. It has tapped a significant number of scholars (58 projects in total) to do studies on human rights and/or peace at the local, national and/or regional levels. Another endeavor is research projects initiated by programme. Themes such as Authoritarianism in Southeast Asia, Human Rights and Peace Education, and Technologies and Human Rights were comprehensively tackled by both leading and emerging scholars based in the region. Furthermore, through its annual publication entitled, Human Rights in Southeast Asia Outlook, Southeast Asian scholars, for the first time, were given the opportunity to assess critical human rights and peace issues in all eleven Southeast Asian countries.

In summary, the following Programme Outputs from 2015 to 2019 were achieved:

58 research projects, ranging from support for MA and PhD theses to regional-level research, were supported and finished.

204 university-based scholars from 10 countries were trained on human rights and peace research design and methodology.

109 lecturers from 70 universities and two government institutions from 13 countries were trained on teaching human rights.

1008 scholars, academics and members of civil society participated in national seminars and regional dialogues on various critical human rights and peace issues



6000+ joined the national seminars through live streaming.

The SHAPE-SEA website was created to host open source materials, including the Human Rights Textbook, the Human Rights Outlook, Research Outputs- Academic Papers, Policy Briefs, among others.

12 books were published and made available as open source on the SHAPE-SEA website. SHAPE-SEA published books have been downloaded 10,000+ number of times. In addition, SHAPE-SEA has served as a platform for the SEAHNRN series which has been downloaded 14,000+ times.

17 policy briefs are published on the website.

Co-organized two (2) international conferences on Human Rights and Peace in Southeast Asia in 2016 in Bangkok and in 2018 in Manila, with the Southeast Asian Human Rights Studies Network (SEAHNRN).

7 lecture tours were organized with academics from 10 universities.

Conducted 7 high-level outreach at the ASEAN level to promote human rights and peace research and education.

We have supported the development/ refinement of new courses on human rights in partner universities. One of which, Human Rights in ASEAN, will now be offered yearly to the Master of Law students at Pannasastra University in Cambodia.





In this globally interdependent world, new developments in digital technology are increasingly changing ways in which individuals and societies interact with each other. As a region with some of the fastest growing economies, Southeast Asia witnesses a rapid growth in new technologies, some have referred to as the “Fourth Industrial Revolution” – offering innovative sources of value and opportunities previously unobtainable. Due to its “disruptive” quality, such sheer development also unprecedentedly affects various aspects of humans’ daily lives, most notably, the promotion and protection of human rights.

*How do we understand the nexus between (new) technologies and human rights? To what extent can the former be used to promote the latter? And which themes and issues, pertaining to such interconnectivity between technologies and human rights, are relevant in the Southeast Asian context?*

SHAPE-SEA’s Exploring the Nexus between Technologies and Human Rights: Opportunities and Challenges in Southeast Asia highlights various relevant issues pertaining to the role of (new) technologies in the promotion (and suppression) of human rights in the region. In this groundbreaking book, Southeast Asian experts discuss both the regulatory aspects of the technology-human rights interconnectivity as well as the function of technology as a “tool” to promote (or suppress) human rights activism. The volume’s eight original contributions range from the conceptualization of Southeast Asian “digital rights”, the debate on the “right to be forgotten” in Indonesia, Malaysia, and Singapore, digital workers’ livelihood in Indonesia, cyberbullying of sexual minorities in Malaysia, to the role of digital “trolls” in the Philippines’ notorious “war on drugs”. While not exhaustive of all the relevant themes, these are very good indicators of the issues that are pertinent to the region, making the book one of the first to provide a starting point on which to expand our understanding of the role of technology on human rights in the Southeast Asian context.



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