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The Global Campus Human Rights Journal (GCHRJ) is a peer-reviewed scholarly journal, published under the auspices of the Global Campus of Human Rights as an open-access on-line journal.

Aim: The *Global Campus Human Rights Journal* aims to serve as a forum for rigorous scholarly analysis, critical commentaries, and reports on recent developments pertaining to human rights and democratisation globally, particularly by adopting multi- and inter-disciplinary perspectives, and using comparative approaches. It also aims to serve as a forum for fostering interdisciplinary dialogue and collaboration between stakeholders, including academics, activists in human rights and democratisation, NGOs and civil society.

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The Global Campus of Human Rights

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Editorial: Volume 8

This year's volume of the *Global Campus Human Rights Journal (GCHRJ)* reflects the shifting landscape of human rights in a world marked by turbulence, contestation, and resilience. Issues 1 and 2 together reveal how human rights discourse operates across diverse geographies and themes from courts and constitutions to prisons, classrooms, and borderlands. Human rights are always shaped by power yet continually invoked by those demanding justice.

Issue 1: Human Rights in an Age of Fragmentation and Resistance

The first issue of Volume 8 is closely tied to current developments, where human rights face profound challenges worldwide. From widening geopolitical fractures to the rise of authoritarian populism, the universality of rights is increasingly questioned, even as people across the globe continue to mobilise a rights-based language in their daily struggles.

Several contributions in this issue illustrate these dynamics. One article examines the evolving jurisprudence of the Inter-American Court of Human Rights on the right to a healthy environment, highlighting how courts adapt established legal theories to address global crises. Another assesses the difficulties faced by Kenya's Superior Courts in adjudicating the rights of sexual minorities, underscoring that judicial independence is both contextually fragile and counter-majoritarian in nature.

Other contributions reveal the denial of rights in more private or domestic contexts. An analysis of India's Citizenship Amendment Act and the National Register of Citizens show how law simultaneously constructs inclusion and exclusion, with grave consequences for minorities. Similarly, a study of marital rape narratives in Egypt challenges entrenched cultural norms that normalise gender-based violence.

This issue also situates rights debates within global policy frameworks. An article on refugee education in Bangladesh contrasts local failures with the promises of the Sustainable Development Goals. Another dissects EU-Pakistan treaty dynamics, exposing structural asymmetries in their implementation. Meanwhile, a contribution on suicides in Italian prisons situates this crisis within the larger security conundrum of punishment and calls for dignity centred alternatives to carceral responses.

A recurring theme across these submissions is that human rights are neither fixed nor assured. They are frequently contested and constantly renegotiated in courts, legislatures, and public spaces. Yet the emphasis on accountability, equality, and dignity demonstrates how resilient rights discourse remains – functioning both as a moral compass and a legal framework, even amid fragmentation.

Issue 2: Human Rights Amid Resistance, Memory, and Migration

The second issue explores the changing terrain of human rights, where struggles for justice are bound up with contested histories, fragile democracies, and new patterns of displacement. These contributions remind us that while rights aspire to universality, their enactment is always mediated by political, historical, and socio-economic conditions.

The opening article addresses the criminalisation of environmental defenders in Latin America, showing how they often pay with their freedom or even their lives. Framed against the Escazú Agreement, the piece evaluates both the promises and shortcomings of regional mechanisms meant to protect defenders. Similarly, an article on Brazil's "right to truth" illustrates that without reckoning with past atrocities, authoritarian wounds cannot heal, and democratic futures remain at risk.

Historical continuities are also evident in the discussion of "colonial aphasia" and U.S. policies toward Nicaraguans, where displacement and intervention reverberate across generations. This theme of forced mobility continues in an analysis of Burmese migrants, refugees, and stateless people in Mae Sot after the 2021 military coup a stark reminder of how conflict and authoritarian resurgence displace communities.

The vulnerability of minorities in entrenched democracies is examined in an article on the Korean minority in Japan, which evaluates international obligations alongside persistent exclusionary practices. Questions of belonging and self-determination also emerge in a study of Gilgit-Baltistan, a region caught in the legal and political limbo of disputed sovereignty, where fundamental rights remain constitutionally unprotected.

Further contributions highlight how transitional justice can reproduce new dilemmas. An article on compulsory military training interrogates the militarisation of youth education, raising questions about reconciliation, memory, and the purposes of justice after conflict. Another situates today's multinational corporations as the "descendants of chartered companies", linking contemporary corporate power to a deeper history of colonial exploitation and insisting on renewed responsibility for persisting global inequalities.

Taken together, these articles capture the tense balance between progress and regression in global human rights practice. Memory and truth, migration and membership, corporate responsibility and ecological justice: each reflects the dual struggle for rights, both forward-looking and backward facing. This is a call to action that demands confronting legacies while resisting contemporary encroachments on dignity and autonomy.

Overall, GCHRJ volume 8 demonstrates that the role of scholars, practitioners, and activists is to ensure that rights do not remain abstract promises but become lived realities. Such critical engagement is essential if human rights are to retain their relevance and transformative power. As Editors, we are proud and hopeful to have provided a platform for these voices and narratives, and we reaffirm our commitment to fostering this culture of human rights centred discourse.

Thank you!

Ravi Prakash Vyas, Chiara Altafin & Mariana Hadzijusufovic, Chief Editors
Ashlesha Joshi, Managing Editor

Eduardo A. Estrada Vargas. "The Inter-American Court of Human Rights' progressive interpretation of the right to a healthy environment." (2024) 8 *Global Campus Human Rights Journal* 01-12
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The Inter-American Court of Human Rights' progressive interpretation of the right to a healthy environment

*Eduardo A. Estrada Vargas**

Abstract: *The article examines the development of the right to a healthy environment by the Inter-American Court of Human Rights through a progressive interpretation of the American Convention on Human Rights. The Court exercises this through an evolutionary approach, lex specialis interpretation, the pro persona principle, the effet utile principle, and a broad use of external sources. It also introduces the Inter-American jurisprudence on environmental protection through the Advisory Opinion OC-23/17 on Environment and Human Rights, which recognised the environment as "fundamental to the existence of humankind", and landmark decisions in the cases of Lhaka Honhat Association (Our Land) v. Argentina and La Oroya Population v. Peru, broadening the scope of interpretation beyond civil and political rights to include State obligations such as prevention, precaution, cooperation, and procedural rights, access to information and public participation. The ongoing Advisory Opinion on Climate Emergency and Human Rights is expected to contribute to developing international environmental law through an innovative, clear, and well-argued decision, setting high standards for seeking justice. It will have important implications for the development of public policies and plans for mitigation, adaptation, and prevention in relation to climate change, as well as the protection of the right to a healthy environment, the right to food security, the right to adequate housing, and the protection of the self-determination of Indigenous people.*

Keywords: *environment; human rights; Inter-American jurisprudence; American Convention on Human Rights; State obligations.*

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1. Introduction

The Inter-American Court of Human Rights (IACtHR or the Court) has emerged as a leading institution in the development of international environmental law and the Inter-American jurisprudence environmental jurisprudence. The Court has considered the American Convention on Human Rights (ACHR) (OAS 1969) as a living instrument and has promoted its evolutionary interpretation, for example, by recognising the right to a healthy environment as an autonomous and fundamental right.

The analysis of the article begins with the evolutionary interpretation of the ACHR, the founding treaty of the IACtHR, following the provisions of Article 29 on the rules of interpretation of the instrument and the Vienna Convention on the Law of Treaties (VCLT) under Articles 31 and 31 on the general rules of interpretation of treaties. In this respect, the provisions under Article 29 of the ACHR reveal the application of the *pro persona* principle, the interpretation *lex specialis* of the ACHR, the principle of effective application (*effet utile*), and the use of external sources of international law.

The methodological approach of the article presents the development of the right to a healthy environment through the Inter-American jurisprudence supported by external sources of environmental law and human rights. It also explores a case study methodology focusing on the cases of *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina* and *La Oroya Population v. Peru*, which declared the violation of the right to a health environment (RHE) in relation to civil and Indigenous populations. The analysis also presents the *Advisory Opinion OC-23/17 on Environment and Human Rights*, which established the obligations on States to respect and ensure the rights to life and personal integrity in the context of environmental protection.

In addition, the forthcoming *Advisory Opinion on Climate Emergency and Human Rights*, requested by Chile and Colombia, will extend the progressive interpretation of the ACHR's environmental jurisprudence, particularly in relation to current living conditions and the protection of vulnerable groups. It will have important procedural implications for the development of public policies and plans for mitigation, adaptation, and prevention of climate change, as well as for the protection of the rights to a healthy environment, food security, housing, and self-determination.

2. Rejecting originalism: The Inter-American Court of Human Rights' progressive interpretation of the American Convention on Human Rights

The IACtHR has developed a distinctive approach to the interpretation and application of the ACHR and other Inter-American and international

human rights instruments. It includes the evolutionary interpretation of the ACHR, seen as a "living instrument" keeping pace with the evolution of times and current living conditions, following the provisions under Article 29 related to the rules of interpretation and under Articles 31 and 32 of the VCLT on general rules of interpretation of treaties (IACtHR 2005).

In *grosso modo,* Article 29 of the ACHR is a provision exclusively applicable to the interpretation of the provisions of the same Convention concerning the enjoyment of the rights and freedoms established therein, international agreements and internal laws of the State Parties, the American Declaration of the Rights and Duties of Man, and other related treaties (Estrada Adán 2015).

It means the interpretation of the ACHR through Article 29 is referred to as *lex specialis* in matters of interpretation and constitutes a wide margin of action for the Inter-American judges, under the notion of interpreting a provision of the ACHR and achieving the desired effect of its creators, resulting in the application of the *pro persona* principle, the principle of effective application (*effet utile)*, and the evolutionary interpretation. The *lex specialis,* therefore, is a clause open to teleological interpretation, to the object and purpose of the treaty according to Article 31 of the VCLT (Estrada Adán 2015).

A closer examination reveals the application of the *pro persona* principle, which implies that the rule or interpretation most favourable to the people should be preferred and that the broadest sense should be used to protect human rights (Lixinski 2010). For example, in the case of *Hacienda Brasil Verde Workers v. Brazil*, the IACtHR expressed that Article 29 of the ACHR "does not permit an interpretation that limits the enjoyment of rights" and that the principle requires "the interpretation of the human rights recognised in the American Convention in the light of the most protective norm to which the persons under its jurisdiction are subject" (IACtHR 2016).

Furthermore, the Court relies on a broad use of external sources through a study of comparative law, e.g., the European Court of Human Rights' case law, customary international law, and the *corpu iuris* of international human rights law, which includes international treaties. Author García Maia presents a tripartite typology of the IACtHR's adoption of external sources in accordance with Article 29 of the ACHR and Article 31 of the VCLT. First, through norms binding on the State Party; second, by norms not binding on the State Party; and third, through soft law, e.g., United Nations resolutions, thereby not relying solely on hard law (Garcia Maia 2023; Lixinski 2010).

For example, in the *Advisory Opinion on Environment and Human Rights* (2017), the IACtHR supported the recognition of the right to a healthy

environment under Article 26 of the ACHR through the norms of the international *corpus iuris*, the Protocol of San Salvador under Article 11, the American Declaration, and the Organization of American States (OAS 1948) Charter derived from the economic, social, educational, scientific, and cultural provisions. In addition, external sources reinforced the interdependence and indivisibility between civil and political rights, and economic, social, and cultural rights, as they must be understood integrally and comprehensively as human rights, with no order of precedence, and enforceable before the competent authorities (para. 57).

Over the past decade, the IACtHR has expanded its jurisdiction in areas not initially foreseen in the ACHR, such as environmental rights, by repeatedly invoking international treaties and declarations using Article 29 of the ACHR as a buckler. This expansion has been possible through the evolutionary approach of the ACHR, which is seen as a living instrument, following the application of the *pro persona* principle, the *effet utile* principle, and the use of external sources.

3. Legal recognition and relevant content

The initial jurisprudence of the IACtHR starts with the obligation of States with respect to the protection of collective property of Indigenous people through the protection of healthy environment in connection with civil and political rights, along with the protection and access to the Indigenous communities' natural resources and traditional lands needed for the preservation of the environment, their survival, and preservation of their *modus vivendi* (Ferrer Mac-Gregor and González Domínguez 2024).

For example, in the case of *Saramaka People v. Suriname* (2007), the Court considered that logging concessions in Suriname had damaged the environment and deteriorated their traditional lands and natural resources, part of their communal property rights, hence in violation of Article 21 in relation to Article 1(1) of the ACHR (para. 154). Similarly, in the *Yakye Axa Indigenous Community v. Paraguay* case, the Court found a violation of communal property to the Indigenous community and considered that the deprivation of their land and natural resources had a negative impact on the right to health, access to clean water, nutrition, and food (paras. 163–69).

Subsequently, in the case of *Kawas Fernández v. Honduras* (IACtHR 2009), the Court declared a violation of the right to freedom of association in relation to the obligation to respect rights under Articles 16(1) and 1(1) of the ACHR. Mrs. Kawas Fernández was the president of an association promoting the establishment of public policies on environmental protection and carried out activities to raise awareness of natural resource preservation through education and reporting of environmental degradation (paras. 151–55).

Considering the violation of the right to freedom of expression, the Court highlighted the importance of protecting human rights defenders and to create legal and factual conditions to let them freely perform their duties, e.g., human rights monitoring, reporting, and promotion, which in this case were related to the protection of the environment (para. 146).

In a different direction, *Claude Reyes et al. v. Chile* (IACtHR 2006) was a case related to the denial of access to public information concerning a deforestation project on the Condor River with potential environmental degradation. The Court found the State of Chile responsible for violating Article 13 of the ACHR related to freedom of thought and expression for the refusal of information from State authorities and the lack of mechanisms to guarantee the right to access public information (Calderón Gamboa 2017).

In addition, the Inter-American Tribunal supported its arguments on the right to freedom of expression and the right to access public information with provisions from the International Covenant on Civil and Political Rights (ICCPR 1966) and the Universal Declaration of Human Rights, which establish a positive right to seek and receive information (IACtHR 2006a, para. 76).

However, until 2017, with the *Advisory Opinion OC-23/17 on the Environment and Human Rights* (IACtHR 2017), requested by the State of Colombia, the IACtHR recognised the right to a healthy environment as autonomous and not derived from civil and political rights, expanding its scope and limits and paving the way for the decisions of upcoming cases.

The Advisory Opinion addressed the general considerations of the RHE and essential components of the environment such as forests, rivers, and seas, as well as the interrelationship between human rights and the environment, the human rights linked through the substantive and procedural rights, the autonomy of the RHE, and the individual and collective connotations. In addition, the Court expressed the importance of a healthy environment as "fundamental for the existence of humankind" (IACtHR 2017, para. 59).

It also addressed the State obligations to respect and ensure human rights to life and personal integrity in the context of environmental protection, and divided it into four, as follows: 1) obligation of prevention, which expresses the duty to regulate, supervise and monitor, require assessment, and to prepare contingency and mitigation plans; 2) exercise of the precautionary principle; 3) obligation of cooperation, which comprises the duty to notify, to consult and negotiate, and to exchange information; and 4) the procedural obligation, comprising the access to information, public participation, and access to justice (IACtHR 2017, paras. 51–90).

To that extent, after the *Advisory Opinion on Environment and Human Rights*, the IACtHR recognised the right to a healthy environment by

applying provisions from Article 11 of the Protocol of San Salvador stating that "everyone shall have the right to live in a healthy environment and to have access to basic public services". The Protocol also reiterates that "States Parties shall promote the protection, preservation, and improvement of the environment" (OAS 1988).

In addition, it declared that the RHE is enshrined under Article 26 of the ACHR related to progressive development of economic, social, and cultural rights, as well as the obligation of the States to achieve the "integral development" of their citizens emerging from Articles 30, 31, 33, and 34 of the OAS Charter (IACtHR 2017).

Nevertheless, the direct justiciability of the RHE in this decision was criticised by the concurring opinion of Judge Humberto Sierra Porto, as he classified the "consideration on the direct justiciability of the right to a healthy environment . . . exceed the purpose of the Advisory Opinion", who explained that "exceeds the Court's competence in the specific case" (IACtHR 2017, paras. 6–9). Luckily, in the *Lhaka Honhat* case, the Court finally declared a violation of Article 26 of the ACHR concerning the RHE, thus paving the way to developing environmental jurisprudence.

4. From *Lhaka Honhat* to *La Oroya*: Landmark environmental rulings of the Inter-American Court of Human Rights

The case of *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina* (IACtHR 2020) concerns the international responsibility of Argentina for the violation of the rights to communal property, food, water, a healthy environment, culture, and access to justice of 132 Indigenous communities settled in two plots of land in the province of SALTA, in breach of Articles 8, 21, 25, and 26 in relation to Articles 1 and 2 of the ACHR.

The *Lhaka Honhat* case is considered a landmark decision since, for the first time, the Court autonomously examined the rights to a healthy environment, adequate food, water, and cultural identity under Article 26 of the ACHR in relation to Article 1(1) on the obligation to respect rights (IACtHR 2020). The Court considered that illegal logging and various activities carried out by the *Criollo* population were affecting environmental rights, in particular the traditional means of obtaining food and access to water, and thus their cultural identity.

The Court established the direct justiciability of economic, social, cultural, and environmental rights in the Inter-American system of human rights and referred to the content and scope of the RHE based on the *Advisory Opinion OC-23/17*. Moreover, it addressed the protection of the right enshrined in the Constitution of Argentina under Article 40 stating that "every inhabitant enjoys the right to a healthy balanced environment"

and the interdependence between the environment and human rights, particularly to the rights to a healthy environment, to adequate food, water, and cultural identity and specifically concerning Indigenous people (IACtHR 2020, paras. 203–204).

Furthermore, the Inter-American Tribunal pointed out the obligation to prevent, respect, and to guarantee the enjoyment of the RHE extending it into the "private sphere" to prevent further violations from third parties (IACtHR 2020, para. 207).

Regarding the obligation to prevent environmental damage, the Court recognised it as part of customary international law entailing the State obligation to adopt necessary measures *ex ante*, prior to the environmental damage. To that extent, the Court listed several measures that States should consider, as follows: 1) regulation; 2) supervise and monitor; 3) environmental assessments; 4) creation of contingency plans; and 5) mitigation when damage occurs (IACtHR 2020, para. 208).

With regard to the reparation measures relating to the RHE, food, water, and cultural identity, the IACtHR ordered to the State of Argentina to conserve the surface and groundwater in the Indigenous lands, to avoid its contamination or to rectify it, to guarantee permanent access to drinking water, to avoid the continuation of the loss in forestry resources, and to provide permanent access to adequate food, as well as the creation of a community development fund to ensure its execution (IACtHR 2020, paras. 333–34).

In the case of *La Oroya Population v. Peru* (2023), the Court declared the international responsibility of the Peruvian State for the multiple abuses of the human rights of 80 inhabitants of the community of La Oroya, as a result of the mining and metallurgical activities of a metallurgy complex company, which caused the contamination of the air, water, and soil, in violation of the victims' rights to a healthy environment, health, life, and personal integrity. The Court concluded that the State was responsible for the breach of Articles 26, 5, 4.1, 8.1, 13, 19, 23, and 25 of the ACHR in relation to Articles 1 and 2 of the ACHR.

For the first time the Inter-American Tribunal established standards for the RHE in a contentious case that does not involve Indigenous or tribal communities and even went as far as to refer to environmental protection as a *jus cogens* norm and the principle of intergenerational equity. Additionally, it delved deeper into the Inter-Americanisation of the Escazu Agreement on Access to Information, Public Participation and Justice in Environmental Matters (López 2024), (UN 2018), as well as the differentiation of the protection of the rights of children, women, and the elderly regarding contamination related to the substantive elements of the RHE. Regarding the procedural elements the Court also analysed the importance of the access to information and political participation.

It is important to highlight that the Court offered some measures that States should consider in order to hold companies accountable and to adopt a good corporate governance concerning human rights based on the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework (UN 2011), Principles 15 to 24 and the case of *Miskito Divers (Lemoth Morris et al.) v. Honduras*, such as: 1) suitable policies for the protection of human rights; 2) due diligence procedures for the identification, prevention, and remedy of human rights abuses; and 3) procedures for addressing human rights abuses in the context of business operations, particularly with respect to vulnerable groups (IACtHR 2023, para. 111).

As for the reparation measures related to the guarantees of non-repetition, the IACtHR ordered the harmonisation of regulations setting air quality standards based on those of the World Health Organization in order to prevent further damage, including adequate access to information through a monitoring system of air, soil, and water quality; access to specialised medical care for those affected by pollution; the adoption and implementation of measures to ensure that the activities of the metallurgical complex are carried out on the basis of environmental human rights standards; and the design and implementation of permanent environmental training for judicial and administrative officials, covering international and national standards on environmental protection, health, access to information, and political participation, to ensure due diligence obligations (IACtHR 2023, 335–55).

5. New approaches: *Advisory Opinion on Climate Emergency and Human Rights*

The IACtHR is developing an Advisory Opinion that will change the perspective on climate emergency and human rights, as requested by Member States Colombia and Chile on January 9, 2023. Both countries are facing the consequences of climate change, including the increase in droughts, floods, landslides, and fires, among many others. In this respect, the phenomenon highlights the need for a human rights-based response guided by the principles of equity, justice, cooperation, and sustainability and the need to develop Inter-American standards on the matter (IACtHR 2023).

During the hearings held in Barbados and several cities in Brazil in April and May 2024, the Court received 265 written submissions and more than 150 oral interventions from States, international organisations, academics and scientists, members of civil society, Indigenous peoples, Afro-descendants, Indigenous communities, children and youth, and many others. (IACmHR 2024).

Notably, a new precedent has been set for the participation of all members of civil society, Indigenous communities, the public and private

sectors, and academia from all OAS Member States working together to face climate change in massive historical hearings held in two different countries.

The key points of the request are related to State obligations in response to the climate emergency with a human rights approach, as follows: 1) the State obligations deriving from the duty of prevention; 2) to uphold the right to life and survival; 3) a differentiated approach concerning the rights of children, new generations, Indigenous peoples, Afro-descendants, and environmental land defenders; and 4) the obligations deriving from consultation, judicial procedures, and access to justice (IACtHR 2023).

The opinion will be a strong asset to the evolutionary approach of the Court to interpret the ACHR, and it will contribute to the development of international environmental law and international law. Furthermore, it shall provide guidance on the human rights violations related to climate emergency that can be brought before the Court, setting a legal framework for future contentious cases, and it will provide a legal pathway for the people and communities to bring climate-related cases before the Inter-American Tribunal (Open Society 2024).

Furthermore, the decision shall have important implications for the development of public policies and plans for mitigation, adaptation, and prevention in relation to climate change, as well as the protection of the right to a healthy environment, the right to food security, the right to adequate housing, and the protection of the self-determination of Indigenous people. Therefore, the opinion is expected to be clear, innovative, and well-argued, setting high standards for other regional and domestic courts to cite legal complaints (Open Society 2024).

6. Final remarks

The IACtHR has demonstrated an innovative approach to the right to a healthy environment through a progressive interpretation of the ACHR and the landmark judgments, *Lhaka Honhat v. Argentina* and *La Oroya v. Peru*, expanding the substantive and procedural elements of the RHE developed in *Advisory Opinion OC-23/17*, as well as to establish it as an autonomous right within the expansion of judicial environmentalism beyond civil and political rights.

The ongoing *Advisory Opinion on Climate Emergency and Human Rights* requested by Colombia and Chile represents a significant turning point in Inter-American jurisprudence, by integrating principles of equity, justice, and sustainability and by receiving an extensive participation of civil society and State institutions. The Inter-American Tribunal has the opportunity to set out a transformative precedent to address climate change with a human rights approach and to raise awareness of this phenomena.

Ultimately, the IACtHR plays a crucial role in leading environmental progress through its distinctive approach, considering the current living times, the use of external sources, the *pro persona* principle, and the evolutionary interpretation of the ACHR. The *Advisory Opinion on Climate Change and Human Rights* will contribute to the development of international environmental law and international law, as it is expected to be an innovative, clear, and well-argued decision, setting high standards for seeking justice.

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A counter-majoritarian dilemma? Interrogating the decisions of Kenya's Superior Courts on sexual minorities

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Abstract: *Before promulgating the Constitution of Kenya in 2010, the process was marked by controversies over sexual minority rights. Specifically, the religious elites and culturalists opposed it, fearing that the new Constitution would promote LGBTIQ rights. Some proponents of the new Constitution contended that it safeguarded majoritarian values, which are assumed to be anti-LGBTIQ rights. This pre-constitutional promulgation debacle raises three key questions. The first question is whether Kenya's transformative Constitution protects LGBTIQ rights, and if so, to what extent? The second question is whether it creates a counter-majoritarian dilemma in adjudicating sexual minority rights. The third question is whether sexual minority rights can be fully realised within Kenya's constitutional democracy in the face of majoritarian intolerance. This paper explores these questions by analysing six decisions concerning the rights of sexual minorities from Kenya's Superior Courts. As doctrinal legal research, the paper relies on primary data from sources, including the Constitution, case law, and statutes. It also draws from secondary data from wide sources, including published papers and books. It finds that, like all other rights, the Constitution of Kenya fully protects the rights of sexual minorities to the extent that limitations are legally justifiable, legitimate, and necessary. It also finds that, in its architecture, the Constitution of Kenya is counter-majoritarian in that it protects vulnerable and minority members of society. Similarly, a counter-majoritarian dilemma has not emerged in the judicialisation of sexual minorities, unless Parliament enacts anti-sexual minority legislation, which again must pass constitutional muster.*

Keywords: *religion; culture; counter-majoritarianism; constitutional democracy.*

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1. Introduction

Before the promulgation dust settled on the Constitution of Kenya (2010), three petitions were lodged before the High Court on lesbian, gay, bisexual, trans, intersex, and queer (LGBTIQ or sexual minority) rights in quick succession. It was not an inconceivable scenario given the contention that surrounded sexual minority rights during the 2010 constitutional-making process. These petitions, therefore, sought to enforce LGBTIQ rights and clarify the extent to which sexual minorities would enjoy their rights under the Constitution. In the first petition, the High Court was invited to determine whether sexual minorities have the right to associate and form an organisation (*EG v. Non-Governmental Organisations Co-ordination Board & 4 others* 2015), which it concurred with. The decision eventually reached the Court of Appeal (*Non-Governmental Organizations Coordination Board v. EG & 5 Others 2019*) and the Supreme Court (*NGOs Co-ordination Board v. EG & 4 others 2023*) through appeals. The Court of Appeal and the Supreme Court upheld the High Court decision. In the second petition, the High Court was invited to determine the constitutionality of penal provisions criminalising same-sex activities (*EG & 7 Others v. Attorney General* 2019). Its decision, which affirmed anti-sodomy laws, is pending appeal. In the third case, petitioners sought the High Court to determine the constitutionality of a non-consensual anal medical examination to prove homosexual-related charges. Its decision (*COI & Another v. Resident Magistrate - Kwale Court & 4 Others* 2016), which affirmed an anal examination as part of a medical examination to find evidence was not a violation, was overturned in the Court of Appeal (*COI & another v Chief Magistrate Ukunda Law Courts & 4 others* 2018).

Using the aforementioned decisions, this paper adopts doctrinal legal research grounded in case law analysis to examine the extent to which the Constitution protects sexual minorities rights. It also assesses whether the Superior Courts experienced counter-majoritarian difficulty. It concludes with propositions on how sexual minority rights can be realised in Kenya's constitutional democracy despite the intolerant majoritarian environment. To achieve its objectives, the paper is divided into seven sections as follows.

After this introduction, section two shifts the focus to how religion and culture interplayed during the constitutional-making process. It spotlights some arguments and positions taken during the constitutional review process and the referendum. The paper in section three examines the extent to which the new Constitution protects the rights of sexual minorities. Sections four and five discuss the six cases related to sexual minority rights while examining how courts navigated through the majoritarian cultural and religious undertones to safeguard or constrain sexual minority rights. It also illuminates the existing opportunities. Section six interrogates the constitutional architecture, particularly whether it creates a counter-

majoritarian dilemma. Section seven, which is the conclusion, summarises the above discussion and findings to make some recommendations.

2. Religion and culture during the constitution-making process

As noted in the introduction, the constitutional clauses perceived as promoting the rights of sexual minorities became highly contentious during Kenya's 2010 constitutional-making process, with the contention spilling over to the subsequent referendum.

In the first formal constitutional review conference, various speakers held divergent views over homosexuality (Constitution of Kenya Review Commission Report 2003). One speaker alluded that homosexuality negated public morality (Constitution of Kenya Review Commission Report 2003, 130). Another speaker blamed the "American traditional liberal" notion for labelling blacks, lesbians, gays, and gypsies as minorities, when "being gay is behaviour, and race is not" (Constitution of Kenya Review Commission Report 2003, 22). However, another appeared to counter these arguments by framing homosexuality as one of the evolving societal ideas (Constitution of Kenya Review Commission Report 2003, 247). These three speeches set the tempo on the contentions over sexual minority rights during the drafting and, inevitably, the final constitutional document. As a result, some of the constitutional clauses that came into scrutiny were the equality and non-discrimination clause (Article 27), the family clause (Article 45), and the reproductive health right clause (Article 43).

On the equality and non-discrimination clause, the contention was whether "sexual orientation" should be explicitly listed in the prohibited grounds for discrimination under Article 27(4) of the Constitution. Although it was finally not explicitly listed, the language and framing of Article 27(4) of the Constitution suggested that the listed non-discrimination grounds were non-exhaustive. The open-ended nature of this clause, coupled with the inclusion of the ground "sex" on the list, gave opponents of the new Constitution the grounds to argue that it promoted gay rights.

On the family clause, the contention was whether it outlawed same-sex unions. During the constitutional review process, some delegates had proposed that women-to-women unions that culturally existed in some Kenyan communities be protected, while other same-sex unions be outlawed (Constitution of Kenya Review Commission Final Report 2025, 120, 401, 421). At the end, Article 45(2) of the Constitution only explicitly recognised heterosexual marriages but did not outlaw same-sex unions. Those opposing its passage were not comfortable with its framing. Indeed, as this author argues (Nyabuti 2024, 7), the language and

framing of Article 45(2) of the Constitution, which reflects the outcome of negotiations and compromise, does not outlaw same-sex marriages, as the Ugandan Constitution does.

As would be expected, most of those who were opposed to the passage of the new Constitution cited religious and cultural reasons, particularly on family values. Their religious and cultural stance had another dimension to it. Based on numerical strength and centrality in Kenyan societies, religion and culture constitute critical demographic constituents in Kenya's democratic process. Kenya's population is approximately 47.5 million (KNBS 2020, 21). About 85.5% of these are Christians, while 11% are Muslims and 2% include Hindus, Sikhs, and Baha'is (USDOS 2023, 2). A significant 5% of Kenyans also adhere to various forms of traditional beliefs (USDOS 2018, 2).

Against Kenyans' high religiosity (The Network for Religious and Traditional Peacemakers 2019, 9) and conservative cultural inclinations, the political class opportunistically teamed up with the church leadership to oppose the passing of the new Constitution. The church urged its followers to reject the new constitution for promoting gay rights contrary to religious and cultural values (Orago et al. 2022, 124). Despite this opposition from the church leadership and a section of the political class, the Constitution was overwhelmingly passed by 67% while 30% voted against it (Kenga 2016, 14). Although the Constitution was promulgated and operationalised, the majoritarian religious and cultural undertones continue to play out during the adjudication of sexual minority rights.

3. Does the Constitution safeguard the rights of sexual minorities?

This paper argues that the 2010 Constitution protects and promotes sexual minority rights. For starters, it incorporates the international law regime as part of Kenya's laws (Articles 2(5) and 2(6)). The international human rights law leads in recognising and protecting the rights of sexual minorities. For instance, the Human Rights Committee, which monitors and enforces the International Convention on Civil and Political Rights (ICCPR), has interpreted the right to privacy under the ICCPR to prohibit discrimination based on sexual orientation and protect the sexual autonomy of individuals, including sexual minorities (*Toonen v. Australia*).

The Constitution also introduces human rights norms into the national values and principles (Article 10) that should constitute Kenya's moral, social, and political fabric. The national values and principles are particularly important in creating "constitutional morality," which, this paper argues, overrides social majoritarian morality. In this context, the constitutional morality standard is derived from constitutional obligation to the State, its organs, and officials to promote dignity, equity, social

justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised.

The Bill of Rights also appreciates that fundamental rights and freedoms belong to each individual (Article 20). Sexual minorities enjoy them as individuals. It recognises other rights and fundamental freedoms (this includes sexual minority rights) not in the Bill of Rights (Article 19). The Bill of Rights outlaws arbitrary limitations of human rights (Article 24). It also provides for the protection of vulnerable groups (Article 21). Since the framing of Article 21(3) of the Constitution is non-exhaustive on the groups, this paper argues that the sexual minority group forms part of the vulnerable groups whose needs the State is bound to address.

Significantly, the Constitution protects sexual rights. Firstly, the rights to equality and non-discrimination on grounds including sex (Article 27). This paper argues that "sex" in this respect imputes different sexualities and sexual orientations. Secondly, the Constitution protects a person's inherent dignity (Article 28). Constraining the rights of sexual minorities without legal justification, legitimacy, and necessity robs them of their dignity as human beings. Thirdly, it protects a person's privacy and expression (Articles 31 and 32). Fourthly, it protects the right to the highest attainable reproductive and sexual rights (Article 43). Finally, while it provides for the right to marry a person of the opposite sex through consent (Article 45), it does not outlaw same-sex unions. The paper has singled out and classified these as sexual rights because they have been construed and applied to promote sexual minority rights by different courts in the Global South. For instance, the High Court of Antigua and Barbuda has expanded the language and meaning of freedom of expression to encompass the sexual choices of consenting adults, while its St. Christopher and Nevis counterpart expanded expression rights to include having sexual intercourse. In the same way, the High Court of Botswana held that criminalising the only mode of sexual expression for sexual minorities through anti-sodomy laws deprive them of their self-worth, thus infringing their right to dignity (Nyabuti 2024, 7).

In the Kenyan discourse, scholars also proffered diverse interpretations regarding the protection of sexual minorities. Mutua (2009) argued that the Constitution's silence on homosexuality does not imply outlawing it. It was, thus, inevitable that cases on some of these provisions were to be lodged before the Superior Courts, to test the varying arguments relating to sexual minority rights. Otherwise, the protections would remain meaningless and unenforceable. In this respect, the next two sections delve into decisions of the Superior Courts, in which these arguments have been presented, to assist in gauging the extent to which the Constitution protects sexual minorities.

4. The decisions of the Superior Courts on the rights of sexual minorities

This section recapitulates the decisions of the Superior Courts on sexual minorities. It captures the brief background, the arguments, the issues, and the courts' determination. At the periphery, it summarises the court's reactions to religious and cultural undertones.

4.1. *EG v. Non-Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR

The petitioner applied for the registration of non-governmental organisations (NGOs) dealing with matters of LGBTIQ persons. The NGO Board rejected the proposed name reservation for three reasons. Firstly, the proposed name was inconsistent with Section 162 of the Penal Code, which criminalises gay or lesbian liaisons. Secondly, sexual orientation was not listed as a prohibited ground of discrimination in Article 27(4) of the Constitution. Thirdly, same-sex marriage was not permitted by the Constitution. The petitioner sought the intervention of the High Court to enforce sexual minorities' rights to non-discrimination and association under Articles 27(4) and 36 of the Constitution, respectively.

In a three-judge bench (Lenaola, Mumbi, and Odunga J.A.) decision, the High Court held that "every person" in Article 36 of the Constitution includes all persons, despite their sexual orientation. The respondents contravened Article 36 of the Constitution in failing to accord just and fair treatment to sexual minorities seeking registration of an association of their choice. Finally, it held that the non-discrimination grounds under Article 27(4) are not exhaustive. Sexual orientation can, thus, be construed as a non-discrimination ground. The High Court directed the NGO Board to reserve and register the petitioner's NGO.

In dismissing the majoritarian religious and cultural undertones, the High Court observed that "the Constitution reigns supreme, regardless of popular views", and that "(to) cite religious beliefs as a basis for imposing limitations on human rights would fly in the face of Article 32 of the Constitution." It also noted that there existed a "right to assemble even of those whose sexual orientation that is not socially accepted" and it had the duty "not to substitute these views and beliefs with constitutional provisions." or rely on "the moral convictions" or "the moral and religious views of Kenyans."

4.2. *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* [2019] eKLR

The High Court decision was appealed to the Court of Appeal. The five Court of Appeal Judges wrote separate judgments. Three judges concurred

(Waki, Koome, and Makhandia J.J.A.) with the High Court, while two dissented (Musinga and Nambuye, J.J.A.).

Justice Waki agreed with the High Court that the right to associate under the Constitution is enjoyed by every person, including sexual minorities. He observed that LGBTQ people are persons. He did not delve into non-discrimination issues. But he made two other significant observations. Firstly, the Penal Code does not criminalise LGBTIQ persons. It only criminalises "unnatural offenses," "attempts to commit unnatural offenses," and "indecent practices between males" (sections 162, 163 and 165). Secondly, it would be living in denial if Kenyans assume that there is no significant share of LGBTIQ persons. He recommended an honest conversation that reflects the society that the Constitution constructs as an "open and democratic society based on human dignity, equality, equity, and freedom."

Justice Koome agreed with the High Court's finding. The learned judge found that "every person" encompasses persons who are gay and lesbian. There is no justifiable legal limitation to restrict their right to associate. Firstly, being gay or lesbian is not a criminal offence. Secondly, heterosexuals can commit the penal offence of carnal knowledge against the "order of nature" (section 162). Finally, the penal provisions were enacted to criminalise homosexuality. There could be heterosexuals and homosexuals who decide not to have sex. She wondered who supervises consenting adults, including heterosexuals, on how they go about such personal matters as sexual intercourse! She dismissed arguments influenced by religious and cultural majoritarianism as absurd, one-sided, and selective. She also observed that LGBTIQ is not responsible for moral decadence and family breakdowns (violence, divorces, and separations).

Justice Makhandia concurred with the High Court's interpretation of Article 27(4) of the Constitution to include sexual orientation as grounds for non-discrimination. He also agreed that every person under Article 36 of the Constitution includes sexual minorities. The learned judge held that the Constitution protects marginalised groups who cannot defend themselves through democratic processes. The Bill of Rights protects both people we like and dislike. Similarly, the homosexual state is not criminalised, but sexual acts that are against the order of nature.

Justice Nambuye dissented. The learned judge held that the right to association is not absolute. It is subject to limitations such as the Penal Code. Finally, she disagreed that the grounds for non-discrimination under Article 27(4) of the Constitution can be construed to include sexual orientation. She suggested that the same can only be introduced through constitutional amendments.

Justice Musinga also dissented. He held that Article 27(4) of the Constitution excluded sexual orientation as a non-discrimination

ground for the purpose. Some sexual orientations, like paedophilia, are not permitted under the law. He held that the right to association is not absolute. Since sodomy and lesbianism are criminalised, the NGO Board's decision was justified. He proposed that deep-seated constitutional, moral, and religious ideologies on the decriminalisation of sodomy and lesbianism can only be decided by referendum or Parliament.

4.3. *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019)* [2023] KESC 17

The Court of Appeal decision was appealed to the Supreme Court. Three judges concurred with the High Court and Court of Appeal decisions (Mwilu, Wanjala and Njoki S.C.J.J.) while two judges dissented (Ibrahim and Ouko S.C.J.J.).

In the majority decision, the Supreme Court held that every person under Article 36 of the Constitution included LGBTIQ persons. They could not be denied the right to associate unreasonably. The NGO Board failed to demonstrate how LGBTQI persons were criminals or were the only persons capable of committing the offence of unnatural acts. Similarly, the Penal Code did not distinguish between homosexual and heterosexual offenders (sections 162, 163 and 165). The NGO Board's limitation of the LGBTIQ persons' right to associate based on sexual orientation is unconstitutional. "Sex" under Article 27(4) of the Constitution connotes sexual orientation of any gender; whether heterosexual, lesbian, gay, intersex, or otherwise. The grounds are also not exhaustive. Non-discrimination grounds can be construed to include sexual orientation, too.

Justice Ibrahim reasoned as follows. Laws are a reflection of societal morals. The Director had the discretion to reject the reservation of a name that is inconsistent with the laws. The Penal Code criminalises homosexual relationships (sections 162 and 165). The proposed LGBTIQ NGO promotes banned activities. Thus, refusing to reserve the name was not illegitimate as long as the penal provisions remained valid. He proposed that the decriminalisation of same-sex activities can only be done through amending the law or the constitution. Finally, based on the history of the constitutional-making process, sexual orientation was a contentious issue. It cannot be read now under Article 27(4) of the Constitution.

Justice Ouko found that the Director of the NGO Board did not breach Article 36 of the Constitution as long as they decided in good faith by rejecting the proposed names owing to a prevailing penal system that outlawed acts associated with the proposed names. The learned judge reasoned that "sex" as used under the Constitution refers to a person's sexual anatomy based on sex chromosomes; a state of being male or female. Article 27(4) prohibits discrimination on the grounds of sex, not sexual orientation.

There is one issue the court appeared to agree on unanimously. The case was not on the morality or constitutionality of same-sex marriage. It was about the right to association and non-discrimination of sexual minorities. Unlike the Superior Courts beneath it, the Supreme Court steered off from religious and cultural undertones.

4.4. *COI & another v Resident Magistrate - Kwale Court & 4 others* [2016] eKLR

In this petition, the petitioners faced criminal charges before the Subordinate Resident Magistrate Court at Kwale (Criminal Case No. 207 of 2015), which gave orders for their anal examination. The charges included practicing an "unnatural offense" contrary to section 162(a) as read with section 162(c) of the Penal Code and committing an "indecent act" with an adult contrary to section 11(a) of the Sexual Offences Act.

In its decision, the High Court held as follows. Firstly, neither the Penal Code nor the Sexual Offences Act was on trial. Secondly, the mouth and anus are alimentary canal systems; not sexual organs. Thirdly, it observed that if the "modern man and woman" find these body parts to be sexual, then medical science has to rediscover new methods of accessing other body parts for medical forensic and curative examination. Until then, medical examination over heterosexual or sodomite sexual offences will be carried out on those parts of the body most connected with; the sexual act with the vagina, or sodomy with the anus. Finally, the court observed that even in defilement and rape cases, a medical examination is done on the vagina to establish penetration. This is not only intrusive too but also the vagina is an intimate part of the victim's body. In the end, the High Court dismissed the petition.

Interestingly, the judge's inference to "modern man and woman" and "medical science or knowledge" together with his expressed attitude and tone when determining whether the anus and mouth are sexual organs while at the same time admitting his "limited knowledge in biology" may point out to his subconscious inclination to majoritarian religious and traditional dispositions that might have influenced his reasoning.

4.5. *COI & another v Chief Magistrate, Ukunda Law Courts & 4 others* [2018] eKLR

The two petitioners appealed against the High Court to the Court of Appeal. In a three-judge-bench unanimous decision (Koome, Karanja and Visram J.J.A.), the Court of Appeal framed issues for determination as whether the anal medical examination was lawful and violated the appellant's rights, and whether such obtained evidence can be admissible during trial. To determine the lawfulness of the anal examination, the Appellate Judges discussed extensively the right to dignity, which is central to every human being,

regardless of status, position, mental, or physical condition. They interlinked the rights to dignity and privacy with unlawful searches and forced medical examinations. The Appellate Judges held that, firstly, section 36 of the Sexual Offences Act is limited to sexual offences. Secondly, the anal medical examination was done about the penal offence of unnatural acts (section 162). Thirdly, the appellants were not arrested for the unnatural act. There were neither complaints nor reasonable explanations as to why they were suspected of committing the offence. Finally, the trial court had no reason to make the order for the appellants' anal medical examination. The examination was unconstitutional, unnecessary, and unreasonable. The issue of consent was neither here nor there. The appellants' consent did not even qualify to be voluntary. It allowed the appeal and set aside the High Court decision.

In this appeal, there were no cultural and religious undertones. Neither did the Appellate Judges delve into the unfamiliar territory of science like the High Court Judge. It was purely based on human rights. Importantly, the decision was not appealed against. So, it remains the ruling jurisprudence in Kenya.

4.6. *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2019] KEHC 11288 (KLR)

In this case, the petitioners challenged the constitutionality of sections 162 and 165 of the Penal Code that criminalised homosexuality. The arguments and counter-arguments intersect science, philosophy, religion, culture, and human rights. The parties contested whether the penal provisions violated Articles 27 (equality and freedom from discrimination), Article 28 (human dignity), Article 29 (freedom and security of the person), Article 31 (privacy), and Article 43 (economic and social rights, specifically health) of the Constitution.

In the three-judge-bench decision (Aburili, Mwita, and Mativo J.J.), the High Court first admitted that the Penal Code does not define the phrases "unnatural offenses" and "against the order of nature." However, they held that the phrases have been clearly defined in law dictionaries and judicial pronouncements. Thus, the provisions were not vague, ambiguous, or uncertain. The High Court also drew other conclusions. Firstly, sections 162 and 165 of the Penal Code do not target LGBTIQ. Secondly, no evidence was adduced to support how these penal provisions violated the LGBTIQ's right to non-discrimination and the highest attainable health, even though they probably may have been. Thirdly, the court held that decriminalisation of adult consensual same-sex activities would contradict Article 45(2) of the Constitution, which recognises marriage of the opposite sex. The judges clinched their reasoning as follows: "(In as much) as the Court of Appeal in the EG case agreed with the High Court that sexual orientation could be read in Article 27(4) of the Constitution as one

of the prohibited grounds for discrimination, the Court was emphatic that the reading would depend on the circumstances of each case. In our view, the circumstances of this case do not permit the reading because to do so would defeat the purpose and spirit of Article 45(2) of the Constitution."

The judges did not delve into issues of culture and religion. The High Court decision has been appealed against the Court of Appeal. The appeal will possibly end at the Supreme Court.

5. Taking stock of the decisions of the Superior Courts

This section discusses three aspects of the decisions of the Superior Courts in light of their success, misses, and opportunities they pose.

5.1. Successes

The decisions have made significant achievements in the protection of sexual minority groups.

Firstly, they shed light on the enjoyment of the Bill of Rights for sexual minority groups. The Supreme Court has now set a binding precedent that LGBTIQ persons have the right to join or form associations. It paves the way for the registration of their NGO with preferred names and objectives. Such NGOs will, no doubt, carry out activities that promote and champion their rights. It would not be surprising to see Gay Pride events in Kenya soon. The Supreme Court also included sexual orientation as a ground for non-discrimination. Sexual minorities can now demand non-discrimination through public and private institutional policies, laws, and actions based on their sexual orientation. This might lead to the mainstreaming of sexual minorities as opposed to exclusion. Finally, investigative agencies and medics can now not conduct anal examinations since it infringes the right to privacy, dignity, and interrelated rights.

Secondly, the Court of Appeal decision in the *COI* case was not appealed. It remains the law. It binds all courts except the Supreme Court and perhaps the Court of Appeal. Critically, the decision renders sections 162, 163, and 165 of the Penal Code redundant. Even before the decriminalisation of same-sex activities, sexual minorities could not be intimidated by obsolete penal offences.

Thirdly, it is evident that almost all Superior Court decisions on sexual minorities have been a success. It speaks to the progressiveness and liberal attitude of the majority of Superior Court Judges.

Finally, the grey areas on the enjoyment of constitutional rights by sexual minority groups are being eliminated; the human rights approach tone is being set, and counter-majoritarian difficulty is minimised.

5.2. Misses

However, the Superior Courts have missed some marks too. For instance, the High Court in *EG & 7 others* failed to decriminalise adult consensual same-sex conduct. They failed to appreciate that Article 45(2) of the Constitution provides for marriage, and not relationships or conduct. It is silent on adult consensual same-sex conduct. Worse, the unanimity of the decision by the judges, who were considered bold, progressive, and liberals, set a bad tone for the impending appeal(s). The High Court dented its reputation for creating ground-breaking jurisprudence. It worries more that the three-judge bench took an originalist interpretative approach. It is also inconceivable why the High Court failed to adhere to the doctrine of *stare decisis*. The Court of Appeal's *COI* case decision had rendered sections 162 and 165 of the Penal Code obsolete. No criminal charges can be sustained based on the section because anal medical examination evidence is not allowed. As the Court of Appeal pointed out, it is unimaginable how one can go to supervise adults in their bedroom for evidence! The High Court was bound to at least follow the decision, if not take a cue from the Appellate Judges' line of reasoning. Finally, almost all the Superior Courts made missteps in overly emphasising that same-sex "acts" are different from same-sex "states." This approach leaves room for the continued criminalisation of same-sex acts, even when, in light of the *COI* case, the penal provisions became redundant.

5.3. Opportunities

In the same breath, the decisions of the Superior Courts create opportunities for the rights of sexual minorities and social movements.

Firstly, there exists an opportunity before the Court of Appeal to decriminalise same-sex conduct. The Supreme Court and the Court of Appeal have set the pace in this regard. Both the *EG* case (that ended up at the Supreme Court) and the *COI* case set good jurisprudential trajectories. The High Court Judges in the *EG & 7 others* case argued that the Court of Appeal found that non-discrimination on sexual orientation depends on circumstances. The Supreme Court was unequivocal. The Court of Appeal has the opportunity to set the record straight. Of course, the composition of the bench will be critical.

Secondly, the Superior Court decisions have provided a glimpse of the judges' philosophies and inclinations. In the Supreme Court, it is easier to know the originalists and conservative-inclined judges. Some more judges may retire or quit. Appellants must be strategic in the timing of appeals.

Finally, the Superior Court's decisions on sexual minorities provide fodder for how to navigate against majoritarianism.

6. Does the Constitution create a counter-majoritarianism dilemma?

The counter-majoritarian dilemma relates to the tension between democratically elected representatives in the legislature and unelected judges when exercising powers to nullify legislative actions (Daniels and Brickhill 2006, 376). Ideally, the elected representative's legislative actions reflect the people's will. The sovereign people hold these representatives accountable every five years through the elections. However, the challenge with majoritarian representatives is that they often ignore minority interests during the execution of legislative functions. It thus sets judicial officers, who are unelected, in a dilemma when they protect the minority interests through judicial reviews (Daniels and Brickhill 2006, 377). Hutchinson (2005) agrees that judicial review conflicts with the concept of democracy. It allows unelected judges to invalidate actions taken by representative branches of Government. Daniels and Brickhill observe that the tension is aggravated since judicial decisions are final unless they are countered through subsequent legislative amendments or a higher judicial overrule. This constitutionalism, they argue, is akin to anti-democracy.

There are other perspectives on the discourse. For instance, Daniels and Brickhill also argue that counter-majoritarianism through the judiciary can be emancipatory to minorities. Majoritarian legislation, policy, and actions may be influenced by populism and a lack of sobriety. It thus requires judges to protect the people from their passion and violence. In the normal discourse, the majority often makes decisions that disfranchise the minorities. Racial, sexual, and ethnic minorities need protection from the majority. In this respect, the majority rule without constitutional constraints turns out to be an antithesis to democratic ideals. Mutua (2009) concurs that Constitutions are not meant to protect only individuals who are liked and to leave unprotected those who are unpopular, or those the majority may find morally objectionable. A person's identity, especially if it exposes them to ridicule, attack, or discrimination, must be the reason for constitutional protection. Constitutions protect individuals from the tyranny of the State and oppression from their fellow human beings.

The argument that can favour judicial counter-majoritarianism can also be approached from this perspective. The Government exists in three arms. The arms counter-check each other for balance and accountability. In this context, courts should check the arms' democratic processes for failure or malfunctions (Hutchinson 2005, 11). In such instances, Hutchinson argues that the courts reinforce the representation of disenfranchised and vulnerable classes. Put differently, the courts act as guardians of the vulnerable, disadvantaged, and powerless class. Indeed, there is almost a near consensus preposition that legal structures and hegemonies often reinforce inequalities, construct race, gender, sexuality, and class with prejudice, and are sluggish to change (Hutchinson 2005, 22).

Finally, Dorf (2010) theorises counter-majoritarian theory in three ways. Firstly, from the prism of representation-reinforcement, the counter-majoritarian approach protects the long-term systemic losers in the political process, often minorities and the marginalised. Secondly, the originalism approach in constitutional interpretation misses the mark. Past popular views cannot reflect the present realities. Finally, living constitutionalism paves the way for democratic experimentation. It helps to filter raw opinions from informed opinions.

Considering the above arguments, it may be difficult to suggest that the Superior Courts encountered a counter-majoritarian dilemma.

Firstly, most of the judges who made decisions that stripped sexual minority's protection took an originalist approach. As discussed, the originalist constitutional interpretation approach brings opposite results. Society is dynamic. Popular views change. Again, the raw popular views can change if the holders are informed.

Secondly, the Penal Code is Kenya's colonial inheritance, enacted in 1930. It cannot be argued that it represented popular Kenyan views at the time. At best, it reflected minority tyranny.

Thirdly, the Superior Courts were more engaged in the constitutional interpretation of the Bill of Rights (as to whether it protects sexual minorities). They were not strictly testing the constitutionality of legislative actions.

Finally, can Kenyan elected representatives be said to reflect the people's will? Some differ slightly, given the election rigging and bribery claims during the electioneering period. In parliament, these representatives are often accused of selling their votes to the highest bidder when making crucial decisions. If elements of truth exist in these arguments, the sanctity of some parliamentary legislative mandate diminishes. In such instances, the courts provide an alternative constitutional democratic means to provide checks and balances.

Nevertheless, if Parliament enacts anti-homosexuality legislation, which again must be constitutionally compliant, the Superior Court may encounter counter-majoritarian difficulty when asked to invalidate it. However, as discussed above, other interpretative approaches exist that might be useful for Superior Courts to navigate through that slippery road.

7. Conclusion

The paper sought to address tripartite questions, which may be summarised as whether the constitution safeguards the rights of sexual minorities in the face of the counter-majoritarian dilemma. It examined these questions

through six case laws on the rights of sexual minorities from Kenya's Superior Court. Consequently, it made three findings. The first finding was that the Constitution fully protects sexual minority rights to the extent that limitations are legally justifiable, legitimate, and necessary. The second finding was that, in its architecture, the Constitution of Kenya is counter-majoritarian in that it protects vulnerable and minority members of society. The final finding was that, so far, a counter-majoritarian dilemma has not presented itself in the judicialisation of sexual minorities, unless Parliament enacts anti-sexual minority legislation, which again must pass constitutional muster. Based on these findings, the paper suggests four proposals to enhance the rights of sexual minorities. Firstly, Kenya needs to have a candid conversation on the place of sexual minority groups in modern society based on human rights and democracy. While religious and cultural hegemony may control the conversation and set the rules on sexual minority issues, it must be recognised that they need legislative protections due to their unmatched numerical strength and historical disadvantages. Kenyan society needs to pursue coexistence in different forms, ways, and states. Sexual minorities need no permission under the law to live and enjoy their rights; society and the law should let them coexist. Secondly, the courts should take a proactive role in protecting the minorities and the vulnerable who are disadvantaged by democratic majoritarian processes. The counter-majoritarian approach can be a useful tool to bolster this judicial role. Thirdly, there is a need for heightened civil education and activities around the constitutional protections safeguarded through the decisions of the Superior Courts. Finally, there is a need for sustained strategic and public interest litigation on sexual minorities' rights. For instance, some decisions discussed have been significant in pronouncing their rights to association, non-discrimination, privacy, and dignity. The case for decriminalisation of same-sex relationships is pending appeal. There is a need to employ advocacy tools to influence favourable outcomes. Many more human rights issues affecting sexual minorities need to be litigated to clear the constitutional grey areas hampering their realisation of rights.

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Marital rape normalisation in Egyptian narratives: Challenging popular narratives of marital rape in Egypt

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Abstract: *Marital rape is not considered a crime under the laws of 111 countries around the world (UN Women 2019). As shocking as this might sound to various populations, Egypt not only does not criminalise marital rape by law, but also the culture of victim blaming constantly prevents women from seeking help (Hussein 2021). The main argument of this essay is that dominant narratives of marital rape in twenty-first century Egypt are a vital tool of memory production that preserves the patriarchal society. Hence, legal and social change will only occur when dominant narratives are deconstructed. Marital rape is surrounded by narratives of victim blaming and systematic denial of the existence of rape within marriage. This leads to a backlash against women who speak up and activists trying to bring about justice for marital rape victims/survivors, in addition to the fact that marital rape is still not considered rape by the Egyptian society as it "does not fit the image of the stranger in the dark alley" (Abdelaal 2021). This essay is set to discuss the constructions of narratives on marital rape survivors in Egypt, particularly on different media platforms such as online/newspaper articles, films, or TV series and talk shows. On the other hand, this essay also aims to discuss the ways in which public narratives around marital rape can be changed or are – arguably – slowly changing.*

Keywords: *marital rape; narratives; media; memory; #MeToo; Egypt.*

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1. Introduction

In a country where victims of sexual violence in general are blamed for their own violation more often than not, the idea of a woman accusing her husband of rape is unthinkable; the narrative being that by signing a marriage contract the wife is supposed to "sexually satisfy her husband" and if he forces her to have sex with him it is not considered a crime (OECD et al. 2020). Thus, the construction of the Egyptian "obedient and/or disobedient wife" in public narratives are worth studying in order to understand their impact on the perpetuation of marital rape to date. In this sense, the law does not recognise the problem or respond to it, despite the fact that other forms of gender-based violence such as sexual harassment and female genital mutilation have been outlawed in Egypt, marital rape is still not recognised as a crime under Egyptian law (Tonsy 2021). As I hypothesise throughout this research, the difference in dealing with certain types of violence can be attributed to the public, media, and religious narratives regarding it.

The choice of this topic is inspired to an extent by the strong Egyptian #MeToo campaign by Egyptian women (feminist activists alongside victims/survivors of sexual violence). This campaign took place on social media in July 2020 by publishing testimonies and taking legal actions for victims of sexual abuse to raise awareness and deconstruct harmful narratives on sexual violence including marital rape (BBC News 2020). The campaign spurred an array of debates on marital rape from community members, celebrities, and religious leaders. The main case study on how public and media narratives are beginning to change in Egypt is the video of Nada Adel accusing her former husband of marital rape. Adel is a social media influencer and fashion blogger who used to be married to another influencer called Tamim Younes. In 2021 she took to her Instagram to recount her own experience with marital rape with her former husband. She cries throughout the video while steadily telling her story and encouraging women to speak up and sending support to other victims (Abdelaal 2021). This video is particularly important because it was the first of its kind to take part in the Egyptian #MeToo campaign which had previously focused on other forms of sexual violence.

The primary source to be analysed throughout this essay is "Husband's Control and Sexual Coercion Within Marriage: Findings from a Population-Based Survey in Egypt" by Kaplan et al. (2011). This choice came because it is one of the very few scholarly writings that cover sexual intimate partner violence in Egypt in an objective and inclusive manner. Additionally, a collection of secondary articles will be discussed, such as articles, footage of various media productions, social media posts, and country reports that specifically tackle marital rape in Egypt. These secondary sources are used to explore the constructed narratives on victims of marital rape; this is chiefly due to the scarcity of scholarly texts on the topic at hand. This

study aims to address the gaps in research on marital rape specifically in Egypt and propose methods to challenge its normalisation through media narratives. The analysis will include both scholarly literature and popular media portrayals.

In this sense, Kaplan et al. (2011, 1466–67) begin by highlighting the scarcity of resources on sexual violence within the domestic sphere in the Arab region in general, although studies on the topic have been expanding recently such as Magdy and Zaki (2021) and Yaya et al (2019). The theoretical basis of the study is "patriarchy and male dominance," which resonates with the Middle East and North Africa context, where the existence of such realities condones and perpetuate domestic violence within the marriage institution; the idea of subordination of the wife is prevalent and encouraged by social norms (Kaplan et al. 2011, 1466–67). The available statistics reflect the extent of the normalisation of sexual violence within marriage: one study in Egypt showed that "62.2% of women reported some form of Intimate Partner Violence (IPV), with almost one fifth of these women reporting sexual abuse," while "sexual coercion" is still not considered a crime under Egyptian law (Kaplan et al. 2011, 1467). An interesting choice to highlight and explore here is the use of "sexual coercion" instead of sexual violence and forced sex instead of marital rape throughout this text. Although sexual coercion might be an umbrella term to include sexual assaults and marital rape, it might also be because the questions in the study itself did not use these terms in the interviews with participants, so the authors used "sexual coercion" and "forced sex" for accuracy. In all cases the choice of the terms and the rationale behind it are not indicated in the text, but when speaking about narratives on sexual violence, the choice of words makes an imperative difference. One cannot help but think of whether the choice of not calling this form of violation marital rape is part of the problem, because it avoids using a term that does not exist in Egyptian law.

To put matters into context, this study had a sample of 5,240 women (Kaplan et al. 2011, 1468), while Egypt's population was over 65 million in 2000, when the study was conducted, and has increased every year since then. Hence even if the percentage of sexual violence within marriage might seem low (one-fifth of the total 62.2% who are victims of IPV), the rates of marital rape in the country are much more serious if projected on a bigger scale. Additionally, Kaplan et al. (2011, 1470) confirm that their interviewees were "from slightly richer households," which is important in terms of analysing the survey results, because the authors go on to assert that "poorer women were significantly more likely to report abuse." As per Abdelaal (2021), a more recent study conducted in 2018 showed that 10% of ever-married women in Egypt have experienced marital rape; that is hundreds of thousands of women, and that number only reflects the number of women who have reported the experience. Kaplan et al. (2011, 1474) argue that underreporting is an obstacle in researching

sexual coercion and forced sex; this is firstly due to the lack of an accurate definition for the two terms in the Egyptian context, secondly because sexual coercion and forced sex are socially acceptable in Egypt, and thirdly due to the absence of a legal framework that the victims can resort to when subjected to sexual violence within their marriage.

Building on the existing literature presented above, the objective of this research is to highlight various factors leading to the normalisation of marital rape within Egyptian society and discouraging women from reporting it. Despite the continued efforts by feminist movements, the subject remains severely understudied, and the media portrayal pushes back against any efforts to challenge the mainstream narratives.

2. Media narratives and portrayal of marital rape in Egypt

2.1. Marital rape in Egyptian talk shows

The media plays a pivotal role in Egyptian society. The influence of television, movies, and talk shows can be seen within various communities, even though the extent of its influence may vary from one community to the other. Mecky (2016) confirms that the normalisation of domestic violence allows for crimes of sexual violence to persist; she quotes Magda Adly – a prominent Egyptian feminist – who confirms that "Egyptian film and television dramas include a lot of scenes of violence against women." Hence, the prevalence of violence against women in the media without it even being portrayed as an odd occurrence highlights the acceptability of violence against women in Egyptian society. Adly continues to say that narratives of women on television reinforce violence against women and that the scenes portraying the negative treatment of women are the most common and the most viewed (Mecky 2016). Additionally, Mecky (2016) interviewed Nada Nashaat – an Egyptian feminist lawyer – who affirms that, despite the recent rise in public awareness about domestic violence, there is a lack of a clear definition of domestic violence in the public sphere. For example, marital rape and verbal violence need to also be seen as forms of domestic violence. This is precisely the core of the issue, since the media is quite influential in Egypt and even when sexual violence is becoming unacceptable in media narratives, marital rape remains largely disregarded.

A clear example of the dichotomy in the public discourse between marital rape and rape by an unknown perpetrator can be found in an episode of one of the most popular TV programmes in Egypt. Throughout this episode, Nehad Abo El Komsan – Head of the National Council for Women – speaks about marital rape and its lack of criminalisation and is joined by another lawyer, Alaa Moustafa, to present the "other point of view" for objectivity purposes (Al Kahera Wel Nas 2021). Moustafa states that in the Arabic language, the word rape is defined as taking what is not

rightfully yours, which means that there is no such thing as marital rape because "a woman's guardian (her father) gives her to her new guardian (her husband) when they sign the marriage contract and thus she becomes rightfully her husband's," as opposed to rape carried out by a stranger who is taking what is not rightfully his (Al Kahera Wel Nas 2021). Such discourse promotes the idea that a woman is a man's property and if one owns something then they have the right to do whatever they want with it. Thus, this narrative is exclusive to marital rape unlike other forms of violence against women because the general rationale is that a rapist does not have the right to the victim's body; while in this narrative, a husband does have the right to his wife's body.

2.2 Marital rape in Ramadan TV series

Upon examining popular narratives, it is imperative to study some of the episodes aired during the holy month of Ramadan in Egypt; as it is famous for tens of television series that families and friends vividly follow and always discuss as they have their Iftar. During Ramadan in 2020, two particularly interesting episodes in two different TV series were aired. The first is from a series called *Melouk Al Gad'ana* (which roughly translates to *The Kings of Chivalry*), where one of the male characters rapes his wife as a way of asserting his masculinity because she was trying to escape from an abusive marriage; the viewer sees that he is forcing himself on his wife and the next scene she is just crying in her bed in silence (N. Mohamed 2021). This is never followed by any repercussions, it does not become a major event in the storyline, nor is it mentioned in any other episodes, as if nothing illegal, immoral, or even strange has happened. Unfortunately, this scene might have been too familiar or too inconsequential to the viewer that it is only the above cited article that discussed this scene, it did not even become an issue of public debate, which might be because it deals with marital rape like it is dealt with in the Egyptian reality, a normalised crime. Further to this, Kaplan et al. (2011, 1473) found that a husband's lack of control, whether within the family or in their social and cultural spheres, was indeed associated with increased sexual violence. Sexual violence, and marital rape in particular, becomes a method of asserting male dominance in a relationship, showing that men still have the upper hand, making this portrayal in the series quite accurate.

On the other hand, in another series called *Le'bet Newton* (*Newton's Cradle*), Hana, the main character, does not tell her husband that she got her divorce certificate from her former husband because she is not ready to have sex with him. In this context, Hana knows that once she has the divorce certificate, she would not have an "excuse" not to have sex with her husband. As expected, once he knows she has got her divorce certificate, he tries to make advances and when she rejects him, he explodes into a rage, beats her, and attempts to rape her (Al Monitor 2021). The difference here, is that this series was critiquing marital rape. H. Mohamed (2021a)

argues that "for the first time in the history of Egyptian drama, the marital rape scene does not pass like a normal occurrence ... the husband was shown as the perpetrator despite his inability to comprehend marital rape as a crime." This scene has spurred public debate on marital rape on Egyptian social media, and given the fact that religion plays a vital role in the Egyptian society, many attacked the mere thought that there is rape within marriage. These reactions were based on a Hadith where Prophet Muhammed supposedly once said that if a man invites his wife to bed and she disobeys him, the angels will curse her until the morning (H. Mohamed 2021a). It is worth noting that more progressive Muslims doubt that the Prophet said that or claim different explanations of the words; yet ultimately it is such narratives – which are popular within the Egyptian societies – that change the status of wives who experience sexual violence from victims to perpetrators.

Furthermore, prominent religious figures began engaging with the discussion prompted by the *Newton's Cradle* series, some of them denying the existence of a notion such as marital rape. For instance, Amna Noseir, a Professor of Islamic philosophy, claimed that marital rape can be just insensitivity/discourtesy but not rape because marriage means consent. Noseir continued to argue that it is a woman's duty to satisfy the sexual needs of her husband because men get married to preserve themselves from adultery (Saad 2021). Further to the arguments of religious figures, Abdaallah Roshdy, an Islamic preacher with thousands of social media followers, publicly argued that marital rape is a "heresy from the west." He asserted that it is religiously forbidden for a woman to refrain from having sex with her husband without having "an excuse" and if she does then her husband has the right to punish her (BBC News 2021). Conversely, according to BBC News (2021), some clergymen and Islamic scholars commented on the public discourse that condones marital rape saying that the religious verses that those so-called preachers use are inaccurate and that forcing the wife to have sex is forbidden in Islam, although they rejected the term marital rape and preferred using forced sex instead. Hence, considering the reason why Kaplan et al. (2011) decided to use the term forced sex, it now appears to be that this is a more socially accepted term by the few who actually believe that marital rape is a crime but due to social stigma are still unable to call it marital rape.

3. Changing the narratives and facing the repercussions

3.1 Nada Adel: A survivor who dared speak

Kaplan et al. (2011, 1474) point out that it is essential to understand that a major obstacle when researching sexual violence within marriage in Egypt is the lack of reporting. There are virtually no studies about the social acceptance of forced marital sex in the Middle East; however, the fact that this crime is not recognised under legal frameworks is indicative

of a wider cultural context where victims do not have the legal resources to report marital rape or seek support from their families and communities (Kaplan et al. 2011, 1474). There has been a recent indicative change in the past few months, which started when Nada Adel posted her video on Instagram and spurred enormous public debate between sympathisers and abusers who mocked her and questioned her allegations. One of her critics was her own former husband, who responded with a video on his own Instagram, denouncing her accusations and saying that he and his family had never heard of this incident before (Bassel and Abdulaal 2021). Unfortunately, such a reaction is not even surprising because her former husband is a famous person who comes from the upper class and is a man in a patriarchal society, thus, he thinks he is invincible.

A report by Raseef 22 (2021) presents the abuse that Adel has been subjected to by social media users. The report cites several tweets, comments, and stories where users posted sentences such as "how can we rape you, we cannot even talk to you," "in 2030, Hamada films himself with his wife to prove it was consensual," and "now if she got pregnant, would the baby be a bastard?" This method of adding sarcastic comments in order to discredit Adel's testimony is present in every sexual violence case, however, the sarcasm and mockery are harsher when it is a crime that is yet to become illegal. Abdelaal (2021) argues that disclosing marital rape is even more difficult in many cases due to the social stigma surrounding it and the pressure that the victim faces when speaking up because she is accused of causing "family humiliation" or of harming her children by calling their father out. This is precisely what happened when Adel posted her video: hundreds of social media users shamed and guilted her because her former husband is the father of her child, and her testimony would ruin her child's life.

An important detail that is crucial with regards to narratives of sexual violence, what they reflect and how they spread, is the fact that Younes (Adel's former husband) produced a song called "Salmonella" in 2019 that promotes sexual coercion, threatening, and blackmailing and above all mocks the idea that a women might say no (H. Mohamed 2021b). In that song, Younes explicitly says that he saw a girl somewhere and liked her, hence she has to go out with him, otherwise he threatens her to beat her, ruin her reputation, and wishes she would get salmonella and die; the chorus is "so you can learn not to say no" (H. Mohamed 2021b). The song was horrifying to the point where the Egyptian National Council for Women sent emails to Facebook, Google, and YouTube to remove it, when Younes came out in a video reiterating his utter respect for women and announcing that he will remove the song himself, claiming that it was misunderstood. Therefore, a critical analysis of Adel's case without at least mentioning her former husband's shameful public attitude towards women would be incomplete; in this case the perpetrator is echoing popular narratives about women and their right to consent, he admits

that he believes a woman does not have a right to say no (H. Mohamed 2021b). Objectively speaking, not every person who participates in destructive social narratives of marital rape is a rapist, but after the release of "Salmonella," the video of Adel's testimony did not come as a shock, when a person publicly deprives women of their right to consent, one does not get too surprised when this person is accused of raping his own wife.

3.2 Public debate and controversy over Adel's testimony

Between the support and abuse, a new light emerged for victims of marital rape in Egypt. According to BBC News (2021), public figures began supporting Adel through tweets, Facebook posts, and Instagram stories. Some TV presenters began advocating for her case and others in her position, stressing that marital rape is rape and should be treated as the crime it is. It is also important to highlight that calling for the criminalisation of marital rape is a particularly relevant response to Adel's video where she says that victims "can't complain and don't have a case because there is no [law] to protect me" (Bassel and Abdulaal 2021). It is worth noting that those who began to contest the popular narrative through the digital platforms and even on TV were the minority. Analysing this situation through the work of Kaplan et al. (2011, 1474), this could potentially mean that this support is not representative of the majority of Egyptians who do not belong to the same background and who deny wives any right to objection in marriage.

Some of the public figures whose names were mentioned amongst those who showed support were actually on the sidelines, such as Amr Adeeb who Bassel, and Abdulaal (2021) argues that he was supporting Adel. In the actual episode of his programme, Adeeb said various sentences that are too objective to say the least and at several points was doubtful of women's testimonies. For instance, Adeeb explicitly says that he will not show the video of Adel's testimony or her name or the name of her former husbands because he does not know whether this all happened or not and is unsure which side to believe (El Hekaya 2021). Moreover, Adeeb states that there must be a method for victims to report marital rape to the authorities and that social scientists and legislatures should study this problem; only to end his monologue by saying that a solution for this problem has to be done carefully because otherwise any woman can go to court and wrongfully accuse her husband of raping her without evidence (El Hekaya 2021). Pointing out the contradiction in Adeeb's words is necessary as this doubtful narrative is used by those condoning marital rape by simply saying there is no way of proving that it was rape. Abo El Komsan precisely tackled this point when talking to Bassel and Abdulaal (2021), she confirmed that "sexism encourages society to discount a wife's side of the story and believing that of her husband's." By bringing up false accusations and refusing to show the names or videos, Adeeb did exactly what Abo El Komsan highlighted as a sexist behaviour that discourages women from speaking up.

Unfortunately, Adel's video suddenly disappeared. This could be due to the backlash that her video encountered, threats from her previous husband, or pressure from her family; all of which are consequences that victims often face when reporting marital rape. After publishing her video, Adel turned her Instagram account to private instead of public and has since deactivated and reactivated her account several times. What is even more astonishing is that the videos that various initiatives and public figures posted to support Adel have also disappeared. And there is not even one shred of news covering this disappearance, it is only noticeable if a person is following the story. The only evidence that this video was actually published is the articles and TV programme episodes that are mentioned above. Bassel and Abdulaal (2021) did mention however that Noor El Gohary – an Egyptian lawyer – posted a video engaging with the public debate on Adel's case and asking lawmakers to change the law but the video was deleted, this is the only reported case of the support video being deleted. Due to the overall lack of transparency in the country, it is almost impossible to understand why or how those videos of both testimonies and support have disappeared. Nonetheless, it is evident that the victims are less likely to report marital rape because of the defamation and coercion that they are subjected to, and this is the main explanation for the disappearance of Adel's video.

4. Conclusion

To conclude, the research aimed to explore the constructed narratives around marital rape in Egypt in light of the rise of the Egyptian #MeToo movement in 2020. As displayed above, the research found that there is a scarcity in academic research on marital rape in Egypt, although the few studies that are available on domestic violence in Egypt show that thousands of Egyptian women are subjected to marital rape every year. The primary source that was used throughout this essay was Kaplan et al. (2011), which provided a solid explanation to the types of violence and sexual coercion that Egyptian women face within their marriage. Although their research was more generic than the focus of this essay, it was pivotal to this essay's argument as a substitute to the gap in the literature on marital rape in specific.

In order to explore narratives of marital rape victims/survivors in Egypt, I focused on two scenes of marital rape in TV series, one in *The Kings of Chivalry* and the other in *Newton's Cradle* and the reaction towards them. Through this analysis, it became clear that normalisation of marital rape in social and religious discourse and the lack of regard for a woman's consent in the existence of a marriage contract can be one of the reasons why marital rape is still not considered a crime. The paradox can be seen in the absence of public reaction towards the first scene where marital rape does not have any consequences in the series, as opposed to the public outcry against the scene in *Newton's Cradle* which in a way was condemning marital rape.

The second is the Nada Adel case which stirred public opinion when she recorded a video recounting her experience with marital rape. By examining this case study, it was found that victims of marital rape are subjected through various types of pressure and coercion that prevents them from seeking help and/or legal action, especially in the absence of a law against marital rape. Hence, narratives do have an impact on the fate of sexual violence survivors and although change takes time, narratives of marital rapes are beginning to change in twenty-first century Egypt.

Consequently, the main recommendations with regards to this research's findings are as follows: firstly, publishing more academic research on the topic as it remains largely understudied. Secondly, increasing civil society initiatives that raise awareness on marital rape across all social classes and religious institutions. Thirdly, producing more films, documentaries and TV series that adopt a new narrative that condemns marital rape, because this is a method that has been used thus far to condone marital rape, so it is crucial to utilise it to change the narratives. And finally, working on strong advocacy campaigns to criminalise marital rape in the Egyptian constitution because the law should be the real deterrent against gender-based violence.

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From inclusion to exclusion: Legal and global dimensions of the Citizenship Amendment Act and National Register of Citizens debate in India

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Abstract: *India's Citizenship Act of 1955 was originally rooted in secular and territorial principles. The Citizenship Amendment Act (CAA) of 2019 and the proposed National Register of Citizens (NRC), however, mark a shift toward religiously selective criteria. The CAA introduces religion as a basis for naturalisation, granting expedited citizenship to non-Muslim refugees from Pakistan, Afghanistan, and Bangladesh while explicitly excluding Muslims. Simultaneously, the NRC seeks to verify citizenship status through documentation, disproportionately impacting marginalised communities, particularly those unable to furnish legal records. The CAA and proposed NRC were framed as efforts to protect national identity, especially in Assam, where anti-immigrant sentiments demanded stricter verification. Together, these policies raise concerns about secularism, legal equality, and potential mass disenfranchisement. This paper critically examines the constitutional validity of the CAA-NRC framework, analysing its implications for India's secular identity under Articles 14 and 15 of the Indian Constitution. By drawing comparisons with historical precedents in Myanmar, Israel, and Sri Lanka, the study highlights how exclusionary citizenship policies contribute to systemic discrimination, statelessness, and long-term socio-political instability. Cases from Myanmar, Israel, and Sri Lanka serve as cautionary parallels, illustrating the dangers of embedding religious or ethnic exclusions into citizenship laws.*

Keywords: *Citizenship Amendment Act (CAA); National Register of Citizens (NRC); religious discrimination; national identity; constitutional rights; secularism; India.*

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1. Introduction: The Citizenship Amendment Act-National Register of Citizens framework and its implications

The Citizenship Amendment Act (CAA) of 2019 (Ananda 2024) and the National Register of Citizens (NRC) (Srujana 2024) represent a fundamental shift in India's citizenship policy, raising concerns about secularism, legal equality, and statelessness. The emergence of the CAA-NRC framework is rooted in India's shifting political landscape. The Bharatiya Janata Party (BJP) positioned the CAA as a humanitarian act for non-Muslim minorities in Islamic neighbours. In Assam, historical anxieties about undocumented immigrants, particularly Bengali-speaking Muslims, were reignited post the 1985 Assam Accord, making the NRC a politically charged issue. The CAA is an amendment to India's Citizenship Act of 1955 (Government of India 1955, Government of India 2019), at granting expedited citizenship to Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from Pakistan, Afghanistan, and Bangladesh, provided they entered India before 31 December 2014. However, it explicitly excludes Muslims, marking the first time religion has been used as a criterion for naturalisation in Indian law (Amelia and Kartini 2023).

The NRC, originally introduced in 1951, is a citizenship verification process aimed at identifying undocumented residents. It was first implemented in Assam in 2019, where nearly 1.9 million people were excluded from the final NRC list (Sahoo 2020). While the NRC is currently not implemented nationwide, there are proposals for its extension across India, which raises concerns that millions could be rendered stateless due to lack of proper documentation (Islam 2024).

These policies have triggered widespread debate over their constitutional and humanitarian implications. Critics argue that the CAA violates Article 14 of the Indian Constitution, which guarantees equality before the law, and Article 15, which prohibits discrimination on religious grounds. Furthermore, the NRC, when combined with the CAA, creates a framework where religious identity determines access to citizenship, disproportionately affecting marginalised communities, particularly Muslims.

This paper argues that the CAA-NRC framework institutionalises a religiously discriminatory model of citizenship that undermines India's constitutional commitment to secularism and equality. By examining legal and international ramifications – alongside examples from Myanmar, Israel, and Sri Lanka – this illustrates how exclusionary citizenship policies can lead to statelessness, communal fragmentation, and long-term democratic erosion.

1.1. Methodology

This paper employs a doctrinal legal research approach, focusing on constitutional provisions, statutory interpretation, and judicial decisions

relevant to the CAA-NRC framework. It also adopts a comparative case study method, drawing parallels from Myanmar, Israel, and Sri Lanka to analyse how legal exclusions have functioned in different political and legal contexts. The analysis relies on both primary sources – including constitutional texts, court judgments, and legislative records – and secondary academic literature.

2. The legal and constitutional critique of the Citizenship Amendment Act-National Register of Citizens framework

2.1. Violation of Articles 14 and 15

The Indian Constitution guarantees equality before the law under Article 14 and prohibits discrimination on religious grounds under Article 15 (Constitution of India 1950). The CAA, by excluding Muslims from its provisions, contradicts these fundamental rights (Sahoo 2020). However, the Government justifies this exclusion on the grounds of protecting persecuted religious minorities from neighbouring Islamic States, though this argument fails on multiple levels (Islam 2024).

First, the CAA displays inconsistent humanitarianism by selectively including only non-Muslim religious minorities while disregarding persecuted Muslim communities such as the Ahmadiyyas in Pakistan, the Hazaras in Afghanistan, and the Rohingya in Myanmar (Patitundi 2021). The exclusion of these groups undermines the claim that the CAA is purely a humanitarian measure, instead exposing a selective and exclusionary approach to refugee protection (Amelia and Kartini 2023).

Second, the CAA fails to pass the reasonable classification test under Article 14, which requires that any differential treatment by the State be based on an intelligible classification with a rational nexus to its objective (Constitution of India 1950). By excluding persecuted Muslim groups, the Act fails Article 14's reasonable classification test and arbitrarily discriminates between equally vulnerable populations (Nafeesa-Usman 2022).

Finally, by prioritising certain religions in the citizenship process, the CAA institutionalises religious discrimination, eroding India's constitutional commitment to secularism (Anetherton and Sajoo 2021). If allowed to stand, this shift could establish a precedent for future policies that marginalise minority communities based on religious identity, altering the fundamental principles of Indian democracy.

2.2. The National Register of Citizens: A tool for mass disenfranchisement?

The NRC was originally introduced in 1951 as a mechanism to identify undocumented residents and determine citizenship status. However, its

proposed nationwide implementation has disproportionately impacted marginalised communities, raising concerns about systemic exclusion, particularly for economically disadvantaged populations, indigenous groups, and religious minorities, including Dalits and Bengali Hindus (Islam 2024). The first major update to the NRC occurred in Assam in 2019, resulting in the exclusion of nearly 1.9 million people, many of whom have lived in India for generations, with significant legal uncertainty surrounding their fate (Sahoo 2020).

Reports indicate that 40% of rural Indians lack birth certificates, raising concerns that a nationwide NRC rollout could disproportionately exclude millions (Nafeesa-Usman 2022). Even army veterans and long-time residents were excluded over minor discrepancies (Patitundi 2021). These cases expose serious flaws in verification, risking widespread wrongful exclusion (Amelia and Kartini 2023).

A critical issue with the NRC process is the burden of proof, which rests on individuals rather than the State. Many citizens, especially in impoverished regions, lack the necessary documents to establish their ancestry, placing them at risk of disenfranchisement (Anetherton and Sajoo 2021). This disproportionately affects vulnerable groups, including indigenous communities, migrant labourers, and minorities who may not have formal records of birth or land ownership. Furthermore, the disproportionate impact on Muslims under the CAA-NRC framework exacerbates fears of religious exclusion. While non-Muslim individuals excluded from the NRC may seek relief through the CAA's naturalisation provisions, Muslims in similar circumstances face potential statelessness, effectively rendering them second-class citizens (Islam 2024).

The risk of statelessness looms large, particularly in the absence of robust legal safeguards. If implemented nationwide without corrective mechanisms, the NRC could trigger a humanitarian crisis, leaving millions, particularly Muslims, in legal limbo – without documentation, nationality, or access to fundamental rights. Consequences extend beyond disenfranchisement, affecting voting rights and public services (Nafeesa-Usman 2022). Without due process, the NRC risks creating a stateless underclass, deepening divisions and legal uncertainty (Amelia and Kartini 2023).

3. Comparative analysis: Lessons from global precedents

3.1. Myanmar: The Rohingya exclusion and statelessness

Myanmar's 1982 Citizenship Law (Government of the Union of Burma 1982) excluded the Rohingya Muslim minority from full citizenship, rendering them stateless (Lewa 2009). This legal exclusion facilitated decades of State-backed persecution, marked by systemic discrimination,

movement restrictions, and denial of fundamental rights such as access to education, healthcare, and employment (HRW 2020).

The legal marginalisation of the Rohingya not only exacerbated their vulnerability but also contributed to recurring violence, most notably in 2017, when mass atrocities forced hundreds of thousands to flee to Bangladesh (UN 2018). These actions have been widely condemned as ethnic cleansing. The 1982 Citizenship Law was passed under Myanmar's military regime, embedding racialised definitions of citizenship into law. Domestic courts have not overturned the law, leaving the Rohingya with no legal recourse within the country (Brett and Kyaw Yin Hlaing 2020). However, it has been challenged before the International Criminal Court for violations of international law (ICC 2020).

The parallels between Myanmar's exclusionary policies and India's CAA-NRC framework are concerning. Both policies institutionalise a hierarchical citizenship structure that disproportionately targets marginalised communities (Islam 2024). The NRC's implementation in Assam led to the exclusion of nearly 1.9 million people, many of whom now face an uncertain future, akin to the plight of the Rohingya (Sahoo 2020). By drawing a legal distinction based on religion and documentation status, India risks creating a situation where certain populations – particularly Muslims – are deprived of their nationality, access to State resources, and legal protections, mirroring the trajectory of exclusion seen in Myanmar (Patitundi 2021).

3.2. Israel: The Law of Return and national belonging

Israel's Law of Return of 1950 (Knesset 1950, sec. 1) grants automatic citizenship to Jewish individuals worldwide, reinforcing the State's identity as a Jewish homeland (Gavison 2010). However, it systematically excludes Palestinians, including those displaced during the 1948 Arab-Israeli War and their descendants, from the right to return to their ancestral lands (Masalha 2012). This policy has been widely criticised for institutionalising a legal hierarchy of belonging, privileging one ethno-religious group over others and entrenching demographic imbalances (Abu-Laban and Bakan 2019).

The exclusion of Palestinians under the Law of Return has broader implications for national identity and the principles of equal citizenship. While Israel frames the law as essential for Jewish self-determination, critics argue it denies Palestinians equal recognition and entrenches division (Peleg and Waxman 2011). The international community, including the United Nations (UN), has raised concerns over the law's discriminatory nature and its impact on long-term regional stability (UN 2019). Israel's Supreme Court has upheld the Law of Return as central to the country's Jewish identity (*Rufeisen v. Minister of the Interior* 1962). Despite this, it continues to face criticism from international legal and human rights bodies for creating an ethno-religious hierarchy in citizenship law.

The CAA-NRC framework, though not identical, mirrors similar patterns by redefining Indian citizenship along religious lines, effectively creating a two-tiered system of national inclusion (Islam 2024). By favouring non-Muslim refugees, the CAA sets a precedent where religion dictates citizenship rights (Sahoo 2020). The NRC further compounds these concerns by requiring extensive documentation, affecting marginalised communities (Patitundi 2021). If implemented nationwide, this framework risks institutionalising exclusionary citizenship policies, akin to the disparities seen under Israel's Law of Return, raising concerns about the erosion of secular and democratic principles (Anetherton and Sajoo 2021).

3.3. Sri Lanka: Ethnic exclusion and sectarian conflict

The Ceylon Citizenship Act of 1948 (Government of Ceylon 1948, sec. 5) disenfranchised nearly a million Tamil plantation workers in Sri Lanka, rendering them stateless and effectively stripping them of their basic civil and political rights (Peiris 1974). The Act primarily targeted Tamil labourers of Indian origin, many of whom had resided in Sri Lanka for generations but were denied legal recognition as citizens (Jeganathan 2019). This State-sanctioned exclusion reinforced ethnic divisions, contributing to decades of socio-political instability and exacerbating tensions between the Sinhalese majority and Tamil minority (DeVotta 2004). The Act was introduced during Sri Lanka's early post-independence period, dominated by Sinhalese majoritarian politics. Legal remedies were limited, and full citizenship came only decades later through 1988 and 2003 amendments (Minority Rights Group International 2021; UNHCR 2004).

The legal marginalisation of Tamil plantation workers had far-reaching consequences, particularly in shaping Sri Lanka's ethnic conflict that ultimately culminated in a protracted civil war (1983–2009) (Tambiah 1986). Statelessness left these communities vulnerable to systemic discrimination, economic deprivation, and restricted access to public services, which in turn fuelled grievances and demands for greater political representation (Mampilly 2011).

India risks encountering similar long-term instability if the CAA-NRC framework fosters institutionalised discrimination against marginalised communities. By embedding religious identity into citizenship determination, the CAA-NRC framework may create new social fissures, particularly for populations unable to furnish documentary proof of lineage. Historical precedent from Sri Lanka underscores the perils of legally enforced exclusion, serving as a cautionary example of how citizenship policies can escalate into broader sectarian conflicts if left unchecked.

Each of the cases examined – Myanmar, Israel, and Sri Lanka – demonstrates how exclusionary citizenship policies result in long-term socio-political

instability. Myanmar's legal exclusion of Rohingya Muslims led to mass statelessness and genocide. Israel's Law of Return institutionalised religious hierarchies, marginalising Palestinians. Sri Lanka's denial of citizenship to Tamil plantation workers fuelled ethnic tensions, eventually culminating in civil war. India's CAA-NRC framework exhibits troubling parallels, particularly in its potential to create a stateless underclass and deepen communal divisions.

4. Socio-political implications of the CAA-NRC framework

The CAA and NRC have had profound socio-political ramifications, exacerbating religious polarisation, triggering nationwide protests, and deepening communal divisions. By introducing legal distinctions based on religion, they reinforce a divisive narrative that undermines India's pluralistic ethos (Islam 2024). The policies have drawn widespread international criticism, with organisations such as the UN and the United States Commission on International Religious Freedom (USCIRF) condemning them as discriminatory and in violation of global human rights obligations (USCIRF 2020; UN 2019).

This diplomatic fallout has strained India's relations with Muslim-majority countries and risks damaging its global reputation as a secular democracy. Legal challenges to the CAA and NRC are pending in the Supreme Court of India (Patitundi 2021). Given the Court's historical role in upholding secular principles, a ruling against these policies could set a significant precedent reaffirming India's constitutional values (Anetherton and Sajoo 2021). If left unaddressed, the CAA-NRC framework risks fostering long-term social unrest and undermining the foundational principles of equality and secularism that define the Indian republic.

From an international law perspective, the CAA-NRC framework potentially violates Article 26 of the International Covenant on Civil and Political Rights, which guarantees equality before the law. It may also contravene Articles 1 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Though India is not a signatory to the 1951 Refugee Convention, its exclusionary framework conflicts with global norms of non-refoulement and non-discrimination.

5. Policy recommendations and conclusion

Failure to address the exclusions inherent in the CAA-NRC framework could result in widespread disenfranchisement, deepening religious and social divisions while eroding India's secular democratic foundations. Mounting legal challenges, along with condemnation from international bodies – including the UN and global human rights organisations – underscore the urgent need for policy correction (UN 2019). The framework undermines constitutional secularism and likely breaches India's human rights obligations (USCIRF 2020).

To uphold constitutional secularism and prevent long-term socio-political instability, India must take immediate corrective measures. This includes either repealing or amending the CAA to ensure equal protection for all persecuted minorities, including Ahmadiyyas, Hazaras, and Rohingya Muslims. Additionally, the NRC must incorporate safeguards to prevent mass disenfranchisement, ensuring that citizenship determination does not disproportionately impact vulnerable populations. A more sustainable solution would be a universal refugee law based on humanitarian, non-discriminatory principles.

Beyond legislative action, the role of civil society, legal advocacy groups, and judicial review will be crucial in ensuring that citizenship remains a fundamental right, free from religious bias. Failing to act could entrench discrimination, trigger legal crises, and weaken India's global democratic credibility (UN 2021). Upholding secularism is essential for preserving national unity and international legitimacy (USCIRF 2020).

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Global goals, local gaps: Assessing refugee education in Bangladesh through the lens of Sustainable Development Goal 4

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Abstract: *This study investigates refugee education paradigms and argues that despite the global education policy shift towards the inclusive approach of merging refugees into national education, the local implementation approaches remain discriminatory, results in refugee exclusion, and affects the implementation of Sustainable Development Goals at national level. The study situates this investigation by analysing the educational provisions for Rohingya refugees in Bangladesh. The study examines the reasons and politics in looking for the answer to the question of why despite the involvement of multiple organisations, available infrastructure, and various educational systems, refugee children still lack access to formal education, and the barriers in achieving quality of education for the refugees. This is a qualitative study based on the primary data collected from 35 key informant interviews. The findings of this study provide insights into both academic research and policy analysis in the field of refugee education, by highlighting a protracted refugee situation in Bangladesh that political exclusion can create the ambiance to nullify the human rights of refugees to education, and even after enormous international attention and financial resources, the educational opportunity of a specific group of the population can be repressed, and that can ultimately impact States' targets to SDGs. It is critical to consider refugee in national development planning not just to address the need of refugees, but also to determine how refugees in protracted situations can contribute to national development.*

Keywords: *SDG 4; right to education; refugees; Bangladesh.*

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1. Introduction

The key slogan that presents Sustainable Development Goals (SDGs) as a more comprehensive global development approach is the global commitment to "leaving no one behind" which specially refers to empowering the marginalised and vulnerable populations. SDGs are a combination of 17 goals that United Nations (UN) Member States adopted in 2015 and aim to achieve by 2030 (UN Goal 17). SDGs are considered as a shared blueprint to ensure shared development and a better and sustainable future for everyone by protecting rights and well-being to everyone (UN SDGs 2023). These goals are particularly imperative in addressing global issues that hinders development such as poverty, inequality, discrimination, challenges in health, education, climate change, environmental degradation, human rights violation, access to justice, and peace. By agreeing to SDGs State Parties committed to a shared responsibility in adopting a holistic approach to sustainable development that means integration of economic growth, social and environmental protection, and peace (UNESCO 2014; UN 2015).

However, the most crucial agenda of this global commitment is the inclusion process of marginalised community. Refugees, who constitute one of the most vulnerable marginalised populations, are somehow still ignored in the SDG planning of most States. In fact, in the SDGs reference to refugees is made in SDG 10 which advises reducing inequality. Under Goal 10, Target 10.7 focuses on the "orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies." Indicator 10.7.4 notes the "proportion of the population who are refugees, by country of origin" and Indicators 10.7.2 and 10.7.3 advise recording the number of countries with migration policies that facilitate the orderly, safe, and responsible migration of people and recording the number of people who died or disappeared during the process of migration towards an international destination. In addition to Target 10.7, SDG Target 17.8 provides for data disaggregation based on migratory status (UN Goal 10).

While it is observed that the human rights of refugees are not explicitly mentioned in the SDGs, in each of the SDGs a target for inclusion of everyone is imposed on States which surely applies to address the fundamental human rights of refugees. Access to education and inclusion of refugees in national SDG 4 planning is one of the most critical matters. SDG 4 requires States to "[e]nsure inclusive and equitable quality education and promote lifelong learning opportunities for all" by 2030. Although the foundation of SDG 4 is a combination of Millennium Development Goal (MDG) 2 and the global Education for All (EFA) 2000–15 commitments, SDG 4 is more comprehensive than MDG 2 and EFA. The promise of States of "leaving no one behind" in UN SDGs holds that States will engage in strategic policy formulation and implementation that

may enable eradicating discrimination and inequalities and inclusion of marginalised communities in human development in a wider sense. While the world is currently over halfway to the 2030 target period of SDGs, shockingly poverty, hunger, and more sadly discriminations of various kinds are on the rise (International Rescue Committee 2019b). According to the UN, if no actions are taken in removing discriminatory laws in many countries in the world, it may take 286 years just to close gender gaps in legal protection. In the education sector, due to the impact of decades of underinvestment and discriminatory laws, around 84 million children will remain out of school and 300 million children will drop out before finishing primary school by 2030 (UN 2023; UNHCR 2023a).

Inequalities in the context of refugees is one of the alarming concerns for SDG targets. While the number of displacements has not been controlled, they have been rising for various reasons such as war, conflict, discrimination, suppression, and climate change. Particularly in the post-pandemic world, States in the Global South tend to "normalise" discrimination against the most vulnerable communities, excluding them from global public services like education. Many countries forcefully detain migrants, deny refugee recognitions, and practice discriminatory laws that prohibits refugees to access education, such as in Bangladesh, India, Malaysia etc. From a social justice perspective, it is evident that the plight of refugee children remains a scar on the global development landscape due to socioeconomic inequalities and chronic power imbalance.

Refugee inclusion matters. According to the Human Development Index (2022) and the World Inequality Database (2022), the rate of disempowerment and impoverishment is at a historic high (Human Development Index 2022). This also indicates that global poor societies have not only failed to improve the situation of previous years but also have accelerated the process; there is more impoverishment due to continued discrimination, leaving most of the vulnerable community out of the development agenda, denying rights and disenfranchising certain sections of the population, continuing war, and even causing genocide in recent decades (Denaro and Giuffre 2022, UNHCR 2023b). It is clear that having a discriminatory policy has not resulted in any State saving its resources, making more progress, and increasing their development index position, rather States have to pay for their discriminatory policies in the guise of social, economic, and political unrest. This study investigates refugee education paradigms and argues that despite the global education policy shift towards the inclusive approach of merging refugees into national education, the local implementation approaches remain discriminatory and result in exclusion and impact on SDGs implementation. The study situates this investigation by analysing the educational provisions for Rohingya refugees in Bangladesh. The study examines the reasons and politics in looking for the answer to the question of why, despite the involvement of multiple organisations, available infrastructure, and

various educational systems, refugee children still lack access to formal education, and investigates what the barriers are to achieving the quality of education for the refugees.

The paper is structured as follows. Sections two to five present the literature review on how States exclude refugees from national development planning and the significance of refugee inclusion in achieving SDG targets. For example, section two provides an overview of education as a human right and State responsibilities related to this right; section three addresses the design of education as a humanitarian intervention for the refugees, including pertinent contrast and challenges; section four critically examines Bangladesh's legal obligation to refugee education; and section five goes on to discuss the exclusive features of refugee education in Bangladesh. The methodology and ethical protocol are described in sections six and seven. The conceptual framework is explained in section eight. The study findings and analysis on the implications of State exclusion of refugees from national education towards SDG 4 targets and State development, as well as a paradigm shift towards a development education model, are presented in sections nine and ten. The paper concludes by summarising the challenges in integrating refugees into national education in Bangladesh and offering some potential recommendations.

Research question(s)

- How is refugee inclusion linked with the SDGs agenda of a State?
- What are the key challenges that refugees face in accessing formal education in Bangladesh?
- How does refugee exclusion in national education affect SDGs implementation at the national level in Bangladesh?

2. Education as human rights and State responsibility

Education is neither a choice nor a privilege. Access to education is one of the fundamental human rights. As stated in Article 26 of the Universal Declaration of Human Rights (UDHR), "education is needed for the full development of the human personality". International human rights standards have recognised education for all without discrimination including refugees or groups of people who are not recognised by a State as refugees, such as irregular or undocumented migrants. The International Covenant on Economic, Social, and Cultural Rights (ICESCR), in Article 13, urges States to recognise the right of everyone to education. So, education must be accessible to all, especially the most vulnerable groups in laws and facts, without discrimination on any of the prohibited grounds (ECOSOC 1999). Article 28 of the Convention on the Rights of the Child (CRC) imposes an obligation on Member States to provide education progressively and on the basis of equal opportunity. Article 2 of the CRC also needs a careful look, which actually affirms a

prohibition of discrimination and reads "States parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction". Although the interpretation of this article relies on the State, the UN Children's Rights Committee has explained that Article 2 of the CRC should be interpreted in a broader way while State obligations under the Convention apply within the State's borders, which includes respecting children who attempt to enter the country's territory and then come under the State's jurisdiction (Committee on the Rights of the Child 2005). Therefore, the enjoyment of rights as stated in the CRC is not limited to citizens only but must therefore be extended to all children, including asylum-seeking, refugee, and migrant children, even though it is not explicitly mentioned in the convention (Willems and Vernimmen 2017).

3. Education as a humanitarian intervention for refugees: contrasts and challenges

Since the 1990s, UN agencies, international non-governmental organisations, and non-governmental organisations (NGOs) have increasingly recognised the role of education in assisting individuals in recovering from mental stress during emergencies. The International Network for Education in Emergencies (INEE) was founded during the 2000 Education for All (EFA) conference in Dakar to create worldwide minimum requirements for educational access in emergencies (Sinclair 2002; UNICEF and UNESCO 2007). The INEE establishes worldwide minimal criteria that specify the minimum level of educational quality and access in an emergency. These minimal criteria for education in emergencies emphasise the idea that education should be offered as a fundamental right, even during emergencies and for people within a State's jurisdiction, by the broader legal framework for education (INEE 2024).

However, an empirical debate lingers about what education refugees should get. Until 2012, the UN High Commissioner for Refugees' (UNHCR's) Global Education Strategy focused primarily on assisting refugees with access to quality education, resulting in distinct minimum education support. Given the extended nature of global refugee crises, the UNHCR has turned to advocate for the integration of refugees into the national system as the most appropriate approach to address refugees' human right to education (Dryden-Peterson 2016). However, until recently, only 11 countries around the world have incorporated refugees into their national educational legal and policy frameworks (UNHCR 2021b). This is because UNHCR, together with its funders and NGO partners, focuses on developing "special curricula" for refugees, and the host Government takes advantage of this opportunity by implementing discriminatory education policies for refugees. Refugees require particular arrangements to prepare them for mainstream education, such as local language training and socio-cultural orientation within the local education

system. However, this "special curricula" is in practice a separate education arrangement for the refugees paving them towards exclusion from formal education, such as separate curricula for refugees, separate classrooms, and separate class hours for refugees, or even separate schools for refugees, where their education remains informal and unofficial and they never have the opportunity to interact with national children or develop social integration skills. This kind of separate arrangement ultimately made the refugees "unfit" for mainstream education in a host country (Shuayb 2019).

The humanitarian approach plots refugee exclusion and eventual educational deficiency. For example, "refugee experience" is the most commonly used term while planning emergency education. Scholars contend that this concept is referred to legitimise separate or specialised educational programmes (Tallis 2019). Some academics oppose the concept of a single "refugee experience." They propose calling it "the experience and voice of refugees" to avoid mixing their experiences with their current needs (Brun and Shuayb 2020). Some regard the politicised approach to refugee education espoused by "Education in Emergency" under humanitarianism as regressive and devoid of pedagogical merit, as it promotes the official plan of separate schooling for refugees. Maha Shuayb and her research team examined documents from the previous five years about the challenges and successes in the education sector in both national and refugee education programmes in Lebanon and discovered that the challenges faced by refugees and marginalised nationals were strikingly similar (Shuayb 2019). An important question arises: can the same educational approach utilised for poor and marginalised citizens be applied to refugee education, and can humanitarian aid received by refugees benefit local disadvantaged populations?

Some studies have focused on developing theories for refugee education, suggesting that host countries typically adopt a "problem-solving approach to education" during crises, aiming to maintain the status quo. This approach primarily focuses on the "who and what" aspects, meaning who the refugees are and what minimal support can resolve the issue (Novelli 2008). However, this status quo approach tends to overlook broader social implications or impacts. These studies highlight that refugee education programmes are typically rooted in a humanitarian response paradigm (Brun 2016). Specialised education for refugees is proposed to portray them as unique in the humanitarian context (McBrien 2005). Rutter's study raises the important point that generalising all refugee children as "traumatized" and providing an education programme primarily focused on psychosocial support may not be appropriate for children who have not experienced the same traumas during their travels but face different post-migration challenges such as poverty, racism, and isolation (Rutter 2006).

In humanitarian education intervention, refugees are frequently labelled as "the others" and the education programme is described as a "refugee brand," "refugee-friendly," and "refugee-centred." However, this segregated approach often results in more negative outcomes than positive ones, such as refugees being unfit for mainstream education, unfit for the local job market, or regarded as unfit for local integration (Brun and Shuayb 2020). In many Global South countries that typically host refugees, discrimination takes various forms, with policy exclusion being the most common. In countries like Bangladesh, Pakistan, India, Malaysia, and Indonesia, refugees are barred from accessing public education, leading to an approach of exclusion and segregation from the host population. In these regions, refugees often attend community-based informal schools or learning centres in refugee camps. Despite the involvement of prominent humanitarian organisations and donors, research shows that the quality of refugee education remains inadequate, failing to bring about substantial changes in refugees' lives or their contributions to the host society (Hetzer and Hopkins 2019).

4. Refugee education and legal obligation of Bangladesh

The Rohingyas are one of the ethnic minorities in Rakhine State, Myanmar, who are both internally and externally displaced due to political and communal conflicts. They are also stateless, as they have been denied citizenship in Myanmar since the introduction of the 1982 Citizenship Law. Under international law a stateless person is defined as "someone who is not considered a national by any State under the operation of its law" (UN Convention on Statelessness 1954). Rohingyas therefore are regarded as stateless and prima-facie refugee in any country (UNHCR 1997). Rohingyas have been seeking asylum in Bangladesh for around five decades, and during this time the Bangladeshi authorities have been denying the right to education to Rohingyas refugees.

The provision of education mentioned in the Constitution of Bangladesh is technically vague but politically strategised. The Constitution has incorporated a provision on state education policy under Article 17 stipulating that "the state shall adopt effective measures for the purpose of (a) establishing a uniform, mass-oriented and universal system of education and extending free and compulsory education to all children to such a stage as may be determined by law; (b) relating education to the needs of society and producing properly trained and motivated citizens to serve those needs; and (c) removing illiteracy within such time as may be determined by law." Hence, based on the gist of Article 17 of the Constitution, educational access is granted to the citizens and legal residents (determined by laws). The Bangladesh Government does not recognise the Rohingyas as refugees and labelled them as "Forcibly Displaced Myanmar Nationals," regards them as "illegal" and ineligible for national education, and thus justifies structural discrimination against

the refugees and the provision of minimum education in refugee camps (Mamun et al. 2023).

However, Bangladesh's commitment towards international human rights treaties cannot be ignored. Bangladesh is not party to the 1951 UN Refugee Convention or the statelessness-related Conventions of 1954 and 1961, but the country is party to the CRC, ICESCR, and the Education 2030 Framework for Action (UNHCR 2018). In ratifying the ICESCR, Bangladesh declared it would implement the right to education without discrimination "in a progressive manner, in keeping pace with existing economic conditions.". But Bangladesh's refugee education policy is in complete contradiction with this declaration of the non-discrimination principle. Bangladesh's continued denial of refugee educational rights is not only discriminatory, but also contradictory to the country's commitment to progressive realisation. Such a denial is unlawful and misguided (Willems and Vernimmen 2017).

5. Exclusive refugee education in Bangladesh

55%, or about 540,000, of the present refugee population in Cox's Bazar are children, including unaccompanied, separated, and child-headed households (CODEC et al. 2017; UNHCR 2024). Several humanitarian organisations have evaluated the fact that good education intervention might be "one solution addressing numerous problems" (UNICEF 2019). According to the UNHCR, the existing limited informal education system in 34 refugee camps serves 203,316 children, leaving 47% of children aged 3–14 without access to primary school and 97% of adolescents and youth aged 15–24 without any learning opportunities (UNHCR 2021a; UNHCR 2021b).

Before 2005, Rohingya refugees did not even access informal education. Bangladesh's Government authorised non-formal education in refugee camp schools for the first time in 2006 (Prodip 2017). In 2007, community-based schools began teaching only Burmese, English, and Math. In 2008, the Bangladesh Government permitted the use of the country's national curriculum for non-formal education in refugee camps but did not officially acknowledge it. However, the overall approach to refugee education has changed dramatically since the 2016–17 surge. In 2018, the Government adopted a strategy of different curricula and educational arrangements for refugees, known as "refugee-specific education." As part of this new policy, the Bangladesh Government revoked the national curricula that were in use in the two registered camps in 2019, restricting teaching, learning, and the usage of Bengali in all educational activities within refugee camps. In 2018, humanitarian organisations formed the Inter Sector Coordination Group (ISCG) for Refugees. UNICEF, SCI, and BRAC serve as co-leads in the ISCG Education Sector, where they collaborate with the Government to construct the "education in emergency" programme

for refugees in Bangladesh. These agencies began developing temporary learning centres in all camps. The most fundamental problem of the ISCG Education Sector is that it never engages with the Ministry of Education Bangladesh, instead focusing on developing "refugee-specific" curricula. Currently, the ISCG education sector has produced and amended several such curricula but has struggled to execute them (Rahman 2020). The Learning Competency Framework Approach (LCFA), a non-Bengali refugee curriculum, was designed by ISCG in 2019. This curriculum has since been changed multiple times and is now used in refugee camps. In 2020, the Bangladeshi Government announced plans to install Myanmar curricula in Bangladesh refugee camps (Rahman et al. 2022). All of these measures indicate that refugees in Bangladesh have little to no possibility of integrating into regular education.

6. Research methods

This study employs an interpretive phenomenological constructivist qualitative analysis technique. Constructivism, which was first articulated by Jean Piaget in 1971 as part of his cognitive development theory, looks into the relationship between people's lived experiences (research participants) and the underlying meanings contained within them. Constructivism has several different branches, including cognitive, radical, phenomenological, and biological constructivism (Soffer 1993). In 1931, Edmund Husserl introduced phenomenology, intending to understand context via people's lived experiences. This study used a phenomenological constructivist method, looking into how people's experiences influence their worldviews, with a focus on the exclusion of refugees from education (Moran 2013).

6.1. Data collection and analysis techniques

Participants' recruitment process and limitations

This study collected information and insights using two methods: document analysis and semi-structured interviews. Document analysis is the process of obtaining useful information from written or recorded sources, such as reports, articles, or historical documents. The researcher extracted significant concepts and theories from the relevant literature. Semi-structured interviews entail conducting guided conversations with participants to capture qualitative data while allowing for flexibility in questioning to elicit more profound thoughts. This investigation looked at scholarly papers, UN, I/NGO, and newspaper stories, Government data and statistics, and major donor reports.

The study collected primary data through 35 key informant interviews such as refugees (11), civil society (including academia, human rights organisations, journalist) (5), host community (local village leaders) (5), Government officials (5), and humanitarian organisation (9). A

combination of purposive and snowball sampling was used to select research subjects. The purpose of choosing such tools is to get as many "relevant opinions" as possible from a variety of stakeholders, which allows for qualitative analysis. This is a technique where respondents are chosen in a non-random manner based on their expertise in the phenomenon being studied (Shi 2011; Singh 2007). A standard semi-structured questionnaire was used for all key informant interviews, which focused on seeking the answer to the same question from each set of participants.

6.2. Data analysis

The goal of this research was to investigate the formation of a humanitarian paradigm for refugee education in Bangladesh, as well as its relationship to State policies that exclude refugees from formal education, thereby violating refugees' human rights to education. To address the research questions, a two-pronged approach was adopted: first, an experiential analysis (constructivism) was used to understand the many perspectives on refugee education; second, a situational analysis (phenomenology) was used to discover why this problem persisted. Using qualitative approaches, the study examines existing refugee education paradigms and contextualises this phenomenon within Bangladesh's refugee education setting by delving into key informants' perspectives and experiences.

7. Ethical considerations

The data were collected between 2021 and 2022 after Mahidol University's Institutional Review Board (IRB) approved the ethical research protocol (IPSR-IRB-2021-170). During the informed consent process, which took place before the interviews and was documented in written consent forms, key informants were thoroughly briefed on the research's aim, goals, and potential ramifications. During interviews, the identities of participants were protected with pseudonyms. Questions were asked in Bengali, Rohingya, or English as needed, with no interpretation required because the principal researcher spoke all three languages fluently.

8. Conceptual framework

In the case of refugees, authorities frequently confuse "inclusion" with "integration" and consciously avoid using the word. This study, however, distinguishes between two viewpoints that have emerged in the literature as "structural integration" and "rational integration" (Strang and Ager 2010). The term "integration" is ambiguous in the refugee situation because it is closely linked to refugee status and rights, resulting in a complicated equation that involves access to services (OECD 2012). Integration entails not only providing refugees with access to resources, both minorities and non-citizens, but also resettlement and solution-seeking. In host countries, inclusion is generally considered as a path

to long-term status or citizenship, which has political implications. The term "inclusion" is sometimes used interchangeably with "reception," in which refugees are judged on humanitarian grounds to receive limited aid, including education (Sinclair 2002). However, this approach ignores the value of education in people's lives, as well as formal education as a vehicle for defining one's life story (Pinson and Arnot 2007).

In this study, the term "inclusion" refers to providing refugees with access to formal education as part of the solution. Inclusion in refugee education entails structural and rational integration. Structural integration policies give refugees access to resources such as schools, whereas rational integration policies prioritise socio-cultural integration, which involves identity development, a sense of belonging, and social involvement (Fraser 2007). Despite the removal of legal barriers, refugee children's school enrolment remains low in numerous countries, such as Thailand and Iran, due to a lack of awareness among both refugees and locals (Peterson et al. 2019). Socio-cultural integration is a linking process. Refugees should be entitled to attend classes with native children. This structural plan should include both initial and long-term interventions. In some countries, there are no legal impediments to refugees attending local schools; however, separate schools or shifts are established for refugee children to keep them apart from the local population. In Lebanon, for example, refugee children attend school in different shifts, denying them the opportunity to make connections, which is the primary impact of education on individual lives and serves as a means for local children to learn acceptance and contribute to the development of social cohesion (Taylor and Sidhu 2011). Furthermore, if refugees are restricted to small or rural regions, constructing new school infrastructure and instituting segregated schooling may further marginalise them, making it critical to integrate refugee children into local schools.

9. Research results

SDG 4 states: "Quality Education: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all." This goal is a combination of three themes: 1) inclusion (removal of structural barriers); 2) equality (fair and impartial); and 3) lifelong learning opportunities/ continuity (opportunities of learning new skills and knowledge throughout life). Based on the field data this section discusses how far these themes are implemented in the refugee context of Bangladesh.

9.1. "Inclusion" is denied

In Bangladesh refugees are not allowed to enrol in public school, therefore the theme of "inclusion" is restricted**.** First and foremost, in Bangladesh, refugees are politically "ineligible" for many public services, including education. The Rohingya are being refused refugee status on purpose.

The Bangladeshi Constitution states that education is only provided to citizens and legal residents. The Rohingyas are systematically barred from acquiring a public education. Rohingya refugees are not issued birth certificates, which are essential for enrolment in local schools. As a result, the Bangladeshi Government has limited the access of refugees to public education rather than completely ceasing to provide it. Haddad properly described the scenario in which "refugees are generally within and outside of the nation-state" demonstrating the conflict between global international rules and local implementation tactics (Haddad 2008, 7). To demonstrate their humanitarian image and adherence to international treaties, States welcome refugees but then hand them over to humanitarian organisations, saying that the State is financially unable to support an additional population. However, the State's realist approach isolates refugees from the national process, limiting the capacity of humanitarian organisations to take a holistic approach that would allow refugees to use public services in the same way that citizens do. This practical humanitarian approach poses obstacles in resolving several human rights issues for refugees, including education. In Bangladesh, the State portrays refugees as disaster victims and hence asks humanitarian organisations to provide "refugee-appropriate" education. Because camp-based refugee education does not collaborate with national-level processes or institutional enforcement, it continues to fall short of national education standards and is legally unrecognised.

9.2. 'Equality' is restricted

Bangladesh's current refugee education can be regarded as a "humanitarian response paradigm." This paradigm is simple and consists of two key elements: first, it addresses the vulnerability of the affected population in need of humanitarian assistance; second, it operates with a sense of temporariness, assuming that the support is temporary because certain individuals are staying temporarily. One of the most essential aspects of this paradigm is that it offers education to crisis-affected people not only in the short term but also without a clear purpose. This indicates a disparity between education offerings and their desired impact (Brun and Shuayb 2020).

In Bangladesh, refugee education is separated, with separate arrangements for refugees and the host population. This split is established by transferring refugee management to the Ministry of Disaster Management and Relief, which is independent from the Ministry of Education. The Bangladeshi Government justifies this policy by citing reasons such as refugees' temporary status as a population awaiting repatriation, concerns about educating refugees in national curricula, which could lead to self-integration or citizenship demands, and resource constraints in accommodating a significant additional population in the local educational system. This method exhibits the

humanitarian response paradigm, in which education is restricted to the humanitarian situation.

During the consultation for this study, a I/NGO staff state that:

"We run education in the refugee camp only to keep the children busy so that they are not involved in wrong activities and get spoiled" (HO-05, 26/11/2021).

Knowing this, a refugee parent stated that:

"They want to keep our children busy in the school but then designed a tedious education curriculum. Neither the children nor the parents found it useful for their children. This education has produced no impact on our children" (RO-02, 30/9/2021) and another stated:

"My son does not want to go to school and I can see why as he does not learn new things from the school. This education is not for us to develop, it's for the agencies to show their work" (RO-10, 15/12//2021).

9.3. "Lifelong learning opportunities" is ignored

In the alternative "humanitarian education" model the theme of lifelong learning opportunities is in complete ignorance, because:

a. Education is seen as a problem-solving intervention

Humanitarian reasons prioritise biological needs, which refer to the physical necessities of an impoverished individual's life, fragility, and unhappiness, and provide aid based on that, therefore preserving their lives. However, the biographical need for education in an individual's life, that is, the impact of education and knowledge that can enable individuals to do something independently or express their existence, is completely ignored in this type of education design, so scholars tend to call it "emergency problem-solving approach" (Crul et al. 2019).

During the primary data collecting process, refugee key informants stated that segregated refugee education not only fails to provide quality education but also struggles to instil excitement and drive in the refugee population. A few Rohingya refugee parents expressed their feelings on the quality of education in this research saying:

"Our children neither learn anything new in school, nor they can get any certificate that they would be able to use in future. Refugee children are getting frustrated when they see the Bangladeshi children in the next village go to the local school, but children are not allowed as they are refugees" (RO-4, 5/10/21).

Another refugee community leader said:

"Since refugee education is unofficial and is not regarded as an educational qualification, this does qualify us for the local job market, hence this is useless for us" (RO-5, 12/11/2021).

Refugee respondents conclude that the current education programme may not be able to improve their circumstances. Almost all refugee informants cite uncertainty and a lack of prospects as the key reasons for their disinterest in camp-based education. As a result, it is now common to hear stories about early marriage, refugees attempting to flee the camp, child or forced labour, trafficking, or attempting to move to other countries illegally. As one of the refugee key informants said:

"We wait for our girls to reach puberty soon to get them to marry as there is no education in the camp. I prefer my daughters to keep home and teach them some household work instead" (RO-7, 9/11/2021).

b. Education is designed as "psycho-social support"

Refugees are frequently characterised as "traumatized," hence refugee education is constructed in an "emergency" mode, with a large portion of the curriculum focusing on psychosocial interventions. Scholars, on the other side, have raised numerous concerns about this approach, including: 1) if refugees are included in global education for all missions to establish a sense of normalcy for refugees through complete education, how will this goal be reached with limited education? (Save the Children 2017); 2) children born in camps require systematic education to prevent trauma caused by a lack of cognitive development opportunities and a progressive loss of hope (Matthews 2008; Rutter 2006); and 3) can refugees be held in temporary, limited schooling indefinitely? (Crul et al. 2019). Here is a summary of the findings of some these questions extracted from this study.

Under the education in emergency paradigm, humanitarian organisations provide education as "psycho-social support" to the refugees to overcome the trauma associated with refugee life. Fassin emphasises critical long-term factors such as whether refugees will be refugees indefinitely, if they will live in confined camps, and whether host nations can sustain refugees on aid indefinitely (Fassin 2012). Bangladesh's refugee education programme is still limited to psychological interventions for refugee children due to a lack of a standardised curriculum. When asked how much the existing education helps address mental health issues, one refugee parent responded:

"I cannot answer my 10-year-old son why he cannot go to the same school as his Bangladeshi playmate in the next village. Separate education indicates that we are different and creates even more stress" (RO-02, 30/9/2021).

10. Critical analysis: Does refugee inclusion matter in Sustainable Development Goal 4 targets?

Refugees are sheltered in Cox's Bazar, one of Bangladesh's poorest regions, where education sector requires additional assistance to increase access and quality. Furthermore, the 2016–17 refugee intake has had an impact on local education, as local schoolteachers and students have decided to work in camp-based NGOs, resulting in a teacher shortage and school dropout among local high schoolers. This has negatively impacted local education (UNDP 2018). While investigating the efficacy and politics of Bangladesh's humanitarian refugee education model, this study seeks to identify a new paradigm of inclusive education through the following analysis.

10.1. Efficacy of humanitarian education paradigm

To ensure the success of any community-based effort, robust community involvement and a sense of "ownership" must be established. Refugees, on the other hand, have problems in Bangladesh due to the country's unique refugee policy. The continuous lack of structural educational opportunities has generated persistent pessimism. This pessimism can sometimes inhibit the fulfilment of fundamental human needs, also known as psychosocial assistance, for which the host State often enables refugee groups to attend school. The core issue is that if a given type of educational service does not adequately contribute to the cognitive development of students, it is unlikely to provide substantial psychological support (Centre for Peace and Justice and Brac University 2021). Although education is frequently cited as a critical source of psychosocial assistance for immigrant children. As one refugee parent commented:

"Our children do not want to go to school and we cannot see any change in their behaviour. Older children either want to go to work to earn money or remain idle at home" (RO-8, 13/11/2021).

In Bangladesh, the humanitarian response paradigm for refugee education lacks standardised curricula that might lead to meaningful educational outcomes or teach refugees about long-term solutions.

10.2. Exploring the development model

This development paradigm of refugee education, also known as humanitarian-development coherence in education, is a relatively new notion. Given the extraordinary extent of human displacement, all parties are increasingly aware that responding to humanitarian crises involving forced displacement cannot be fully dependent on foreign assistance. As a result, the most effective solutions must be developed locally and improved with additional resources.

It is critical to note that, while segregation is a significant impediment to providing quality education and upholding the right of refugees to an education, inclusion should be viewed as the most viable approach to ensuring refugee education while reducing the burdens on both humanitarian aid and host society. This development paradigm is based on two interrelated concepts: 1) inclusion in education and 2) inclusion in development. The primary goal of this part is to look at what inclusion means in the context of refugee education and how it may be integrated into a larger development strategy. The growing number of refugees in protracted crises is prompting Governments and humanitarian organisations to seek more practical approaches to refugee education, with a development-oriented perspective. This poses a challenge for developing countries in the Global South, where they host a significant share of the world's refugees. The dilemma arises from the need to accommodate new refugee children in schools while many of the national children lack access to education.

For education in particular, it is invaluable to understand the nexus between humanitarian and development coherence. The organisations and donors who target education support in crises like Education Cannot Wait, the Norwegian Refugee Council, the Global Education Cluster, and European Commission Humanitarian Aid often fail due to structural barriers and shrinking funds in short-term projects like in Bangladesh (Novelli 2016). There are multi-mandate organisations that seek long-term sustainable solutions for refugees that extend beyond humanitarian assistance, like UNHCR, UNICEF, and Save the Children, who need to work both in humanitarian and development spaces. Some development-focused organisations and donors provide funds for development like the Global Partnership for Education, USAID, and the World Bank, but many of these projects are hindered due to the emerging crises occurring in the countries where they invested development funds. Finally, the Government and the Ministry of Education need to play the most critical role by harnessing the human development dynamics of education to benefit both the resilience and improvement of the education system.

The entire concept of coherence here underpins the comprehensive humanitarian development efforts to ensure education for all children, both the distressed and local communities, to recover from the impact of the crisis. UNICEF has been leading education in emergencies globally (including refugee education in Bangladesh) and stated in its 2019 education report that to ensure the continuation of both humanitarian and development activities at the same time, policies and programmes must consider the impact of the crisis on the whole population (UNICEF 2019). Humanitarian organisations should advocate for policy inclusion and continue their education programme to prepare refugees for national education. The development organisation should invest in building additional schools and capacity-building of local schools to ensure

accessibility and quality of local schools targeting all populations in the locale.

10.3. Sustainable Development Goal 4, challenges and prospects in Bangladesh

As per the SDG index rank, Bangladesh ranked 104 out of 163, with a score of 64.22. According to UNICEF, 90% of 6–10 years old children are in school. This data surely does not include the refugee children of the same age group. Even UNICEF, the lead implementing partner, does not advocate on refugee inclusion, rather focusing on implementing the "Myanmar National Curricula" inside refugee camps in Bangladesh without any official agreement between Myanmar-Bangladesh (UNICEF 2023). Therefore, it is not clear which Government will be responsible for recognising such education. Refugees do not exist in Bangladesh national education planning where discrimination means a gender disparity and out of school children only refers to the poor and underprivileged community. Hence over a half a million refugee children living in Bangladesh strictly remain out of the national SDG planning.

Although the Bangladeshi Government insists that repatriation is the "only" solution and thus opposes any long-term intervention for refugees, most recent research and reports have found that "the government of Bangladesh must prepare for the fact that this refugee crisis is on track to become protracted" (Post et al. 2019). Such circumstances could have a huge impact not only on the refugees but also on the local community. Refugees rely almost entirely on aid services because they are not legally permitted to work. Furthermore, due to their illiteracy and lack of skills, the bulk of refugees are only qualified for physical labour and related job opportunities. Inadequate aid, along with a lack of educational and income opportunities, has forced refugees to engage in negative coping strategies including child labour, child marriage, drug use, and human trafficking (The Business Standard 2021; Palma 2021).

According to the UNDP, the service demands of refugees and local host populations in Cox's Bazar are practically comparable. While Cox's Bazar is one of Bangladesh's poorest districts, the two sub-districts Teknaf and Ukhiya, where refugees live, are also among the poorest in the district (UNDP 2018). The Cox's Bazar district has 33% of its population living in poverty, which is more than the national average of 25%. 40% of the Cox's Bazar population has the poorest food intake, and 41% borrow food from relatives or communities daily, which is nearly identical to the share of refugees who rely on food handouts inside the camp (IRC 2019a). Furthermore, according to the Ministry of Primary and Mass Education Bangladesh 2018 report, the district's school admission rate in 2017 was 73% males and 69 girls, compared to 98% nationally; yet the district had the highest school dropout rate at 31.2%, compared to

the national average of 19.2% (MoPME 2018). The World Bank's 2019 report shows that Cox's Bazar district has the lowest school attendance rate and educational performance in the country. It ranks second to lowest in reading and maths achievement, indicating a low quality of learning and teaching practice. This survey also found that public education receives the least amount of district development financing. As a result, it is obvious that the local population requires extra services to increase the district's educational level (World Bank Group 2019).

Along with the already poor quality, current refugee management has had an impact on the local educational system. Several thousand learning centres were established within camps for various refugee schooling arrangements, with the majority of teaching staff drawn from the local population, including local school teachers with prior teaching experience and local high school graduates. This has exacerbated the already severe difficulties facing the local education system, such as a rise in school dropout rates when students are hired by NGOs in refugee camps before finishing high school (Hetzer and Hopkins 2019). In response to the declining funding trend, several humanitarian and development organisations have recently begun advocating for a comprehensive development plan, with a focus on increasing self-sufficiency opportunities and allowing refugees to work legally (Clemens et al. 2018). However, the administration has consistently opposed such an approach. The World Bank and Asian Development Bank have lately failed to persuade the Bangladeshi Government to change its refugee policies in favour of a multi-year self-reliance approach that includes both refugees and hosts (Palma 2021). Interestingly, the IRC Livelihood Assessment Report 2019 showed that the key cause for the failure of most short-term self-reliance initiatives was the recipients' low literacy and skill levels (IRC 2019a).

11. Conclusion

Bangladesh's restriction on refugee education is in clear contraction of SDG 4 themes of inclusion, equality, quality, and continuity. When assessing the current state of education in Cox's Bazar, it is evident that the district's school system requires extra support. To accommodate refugees in local schools, the number of schools must be increased and education staff trained. These arrangements would be possible if the Government, development investors, and humanitarian organisations work together. If the Government allows refugees to attend national schools, development donors can help improve infrastructure, while humanitarian donors can give teacher and education staff training and prepare refugees for mainstream education. State Governments stand to benefit from such humanitarian-development coordination.

This study investigates the efficacy of humanitarian model of refugee education interventions, and it concludes that the current refugee

education system falls far short of quality humanitarian interventions while positively impacting the lives of refugees. As a result, temporary education decreased humanitarian costs while increasing the number of aid-seeking refugees. When refugees are regulated using humanitarianism approaches, the State prioritises its interests and imposes restrictions and legislation that restrict refugee services. In Bangladesh, for example, refugees are declared "illegal" when they are refused refugee status, restricted to access documents, and are ineligible for public education, hence the Government justifies limited camp-based humanitarian education for refugees. Furthermore, limitations on humanitarian education, such as the lack of a uniform curriculum, formal recognition, and education as a form of psychosocial help, have resulted in ineffective programmes. Education has a direct impact on both personal and societal growth. Excluding refugees from national education for an extended period may hinder overall national development.

The camp-based alternate education contradicts with the SDG "inclusion" theme. Refugees are unable to integrate into mainstream education and hence cannot contribute to national development. Refugees must be incorporated into Bangladesh's national development policy. This strategy will require collaboration between humanitarian and devolvement initiatives to address education requirements holistically for both refugees and locals. This technique will not only help with more systematic refugee management but will also enhance public perception of refugees, who are frequently perceived as burdens. However, more research is needed to discover the fundamental criteria for the collaborative development technique, as well as the key barriers to integrating refugees into national education in Bangladesh. By gathering such information, we may be able to determine what legislative measures are needed to integrate refugees into national education, as well as identify what further help refugees may require.

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Conceptual and institutional asymmetries in human rights treaty implementation: European Union-Pakistan dynamics

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Abstract: *This paper investigates how treaty regimes effectively improve human rights conditions in repressive States, focusing on Pakistan's commitments to United Nations-led human rights treaties such as the International Covenant on Civil and Political Rights and bilateral agreements like the European Union-Pakistan Cooperation Agreement and the 2019 Strategic Engagement Plan. Despite these formal commitments, meaningful progress remains limited, with Pakistan's failure to uphold treaty obligations potentially threatening incentives like the European Union's (EU)'s Generalised Scheme of Preferences status. The research explores how conceptual asymmetries – philosophical and normative divergences – and institutional asymmetries – structural and procedural mismatches – between the EU and Pakistan hinder the implementation of these treaties. Using a qualitative methodology combining critical content analysis and documentary analysis, the paper adopts a deductive approach to argue that the more repressive a State is (allegedly Pakistan), the more eager it is to ratify human rights treaties for strategic benefits, yet it struggles with implementation due to deep-rooted asymmetries. Building on Oona A. Hathaway's integrated theory of international law, this paper advances the framework by highlighting how asymmetrical actor relationships in international law regimes can transform treaties into instruments of performative compliance rather than substantive change.*

Keywords: *treaty regimes; human rights; European Union; enforced disappearances; mob violence; religious persecutions; civil and political liberties; conceptual asymmetries; institutional asymmetries.*

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1. Introduction

Central puzzle

Oona A. Hathaway, building her analysis on political science and legal scholarship, argues in her "integrated theory of international law" that "states with poor human rights performance are just as likely, or even more likely, to sign treaties as countries with better records, but they are less likely to follow through on these obligations" (Hathaway 2005, 474). It has been widely discussed whether treaty regimes make a difference in improving the human rights conditions in repressive States or not (Hathaway 2002). This paper directly engages with this debate and poses the central research question: To what extent are treaty regimes effective in improving human rights conditions in repressive States, and why do they often fall short in their implementation?

Although the scope of the paper is not minority centric, facts from the Human Rights Commission of Pakistan (HRCP) during the time frame of 1997–2015 indicate the patterns of persecution of religious minorities (HRCP 2023). It incorporates demolishing the places of worship of Christians, Hindus, and Ahmadiyya communities through organised mob attacks, threatening and pushing the worshipers of these communities for not performing their religious rituals or else their houses will be smashed, and openly assassinating individuals when found involved in the act of worship, particularly the Ahmadiyya community. Additionally, it encompasses the attacks on the schools and girls' hostels of the minority communities, guttering the religious scriptures, beating women and children of religious minority groups, attacking the police stations if those people accused of blasphemy are arrested and then lynching them, and doing harm to the religious minorities in any way possible. Moreover, Human Rights Watch testified that if human rights non-governmental organisations (NGOS) attempt to voice against human rights violations, they face harassment, threats, and continuous surveillance by Government authorities. Further, the Government uses the "Regulation of INGOS in Pakistan" policy to threaten to ban the work of these humanitarian organisations in Pakistan (HRW 2023).

2. Rationale for case selection (European Union-Pakistan)

Pakistan's participation in key international and bilateral treaties such as the International Covenant on Civil and Political Rights (ICCPR) (1966), the European Union (EU)-Pakistan Cooperation Agreement, and the 2019 Strategic Engagement Plan (SEP) makes it a relevant case (EEAS 2022). Despite these commitments, Pakistan continues to exhibit patterns of persistent human rights violations, which could potentially jeopardise economic and diplomatic incentives like the Generalised Scheme of Preferences (GSP+) status (MOHR 2020). The EU-Pakistan dynamic

offers a compelling case to examine the underlying reasons, particularly conceptual and institutional asymmetries, that explain this contradiction. Through this deductive research, the researcher attempts to test Hathaway's theory by analysing the treaty performance in the context of Pakistan's relationship with the EU.

Moreover, analytical research on human rights treaty performance, especially from the EU-Pakistan dynamic, is limited. The existing literature only provides descriptive accounts of the EU-Pakistan bilateral relations; thus, more analytical research is required, and this paper attempts to do the same. This research fills the gap in two ways; first, it highlights the "conceptual asymmetries" involved between the EU and Pakistan regarding treaty implementation and then documents their impact on treaty performance. "Conceptual asymmetries" refer to distinctions in how the EU and Pakistan view, philosophise, interpret, or conceptualise key aspects of the idea of human rights. The understanding of the conceptual asymmetries resolves the puzzle of why Pakistan is allegedly a primary human rights abuser in terms of freedom of thought, conscience, religion, freedom of the press, ensuring civil liberties, and so on. Hence, it informs our analyses of why the treaties are not effective with their true spirit when executed through a national institutional framework. Second, it highlights the institutional asymmetries involved between the EU and Pakistan regarding treaty implementation. The term "institutional asymmetries" refers to distinctions in how the EU and Pakistani institutions are differently structured and assembled. Peculiarities in institutional organisations can mean imbalances in legal frameworks, financial resources, administrative structures, and operational methods. These institutional distinctions greatly impact the capacities and effectiveness in achieving their shared goals; in our case, it is protecting the established human rights of its masses. This variable enlightens us about the institutional disproportionateness that is involved between the EU and Pakistan in the implementation of human rights treaties, and hence informs us why treaty regimes are not effective.

4. Central argument

This paper argues that the missing link in human rights treaty performance lies at both the conceptual and institutional levels. The rationale is rooted in concern for constitutional protections of fundamental rights and the ongoing human rights violations witnessed in the region. Treaty regimes, the paper argues, offer a vital lens to analyse and understand this global human dignity gap.

Moreover, this paper contributes to the existing theoretical framework of treaty performance in repressive States and particularly tests Hathaway's "integrated theory of international law" from EU-Pakistan dynamics. This paper aims to test the hypothesis that "the more repressive the State is towards its citizens (allegedly Pakistan),

the more enthusiastic it is to reinforce the ratification of the human rights treaties (ICCPR and others) because of attached incentives (GSP+ status) and hence faces profound challenges in treaty implementation because of the inherent conceptual and institutional asymmetries" (Hathaway 2002; Hathaway 2005; Hathaway 2007). This comparative study is indeed significant because it claims to produce generalisable findings and argues that they must be relevant to other repressive or low-performing States, generally in the context of United Nations (UN)-led treaty regimes and particularly for the low-performing States that are engaged in similar agreements as Pakistan is with the European External Action Service (EEAS).

5. Theoretical framework: Application of Oona A. Hathaway's integrated theory of international law

Hathaway's integrated theory of international law suggests that the effectiveness of international law is dependent upon the interplay between international norms and domestic institutions. Hathaway contends that international legal obligations are more likely to be implemented and followed when they are integrated into domestic legal frameworks and supported by vigorous institutional mechanisms. Her theory highlights the role of State interests, domestic politics, and institutional structures in determining the compliance and enforcement of international legal norms (Hathaway 2005).

5.1. Relevance of Hathaway's theory to study

Hathaway's theory is particularly relevant to this paper as it offers a systematic approach to consider the factors influencing treaty compliance and implementation. By fixing the focus on the integration of international norms into domestic legal systems and the role of domestic institutions, the theory proposes a nuanced elucidation of the discrepancies observed between the EU and Pakistan in their engagement with UN-led human rights treaties. This theoretical application develops the analysis by linking conceptual and institutional asymmetries to specific consequences in treaty performance. It provides a structured framework to infer the empirical findings derivative of the secondary data and academic literature, certifying that the study's conclusions are stranded in a robust theoretical context. By doing so, Hathaway's theory not only aids in addressing the research puzzle but also contributes to a profound understanding of the dynamics at play in the international human rights regime.

6. Research methodology

With a primary focus on the examination of legal, political, and institutional dynamics, this study uses a qualitative research methodology to investigate

the perceived ineffectiveness of UN-led human rights treaty regimes in repressive States, specifically through the EU-Pakistan relationship. The qualitative content analysis, documentary analysis, and the selection and evaluation of existing literature form the foundation of the methodological approach.

A wide array of resources was explored for this study, including international treaty documents (such as the ICCPR and the GSP+ conditionality framework), legal commentaries, human rights commission reports, institutional records from EU and Pakistani bodies, and academic literature on human rights implementation and treaty compliance. Primary attention was given to documents produced by the EEAS, Pakistan's Ministry of Human Rights (MOHR), Human Rights Watch (HRW), and the HRCP.

Through a systematic analysis of these materials, this research seeks to uncover how conceptual and institutional asymmetries between the EU and Pakistan influence treaty implementation. The study relies on a deductive approach to test theoretical claims, particularly Hathaway's integrated theory of international law, within the specific case study of Pakistan's engagement with the EU's human rights framework. This methodological orientation not only facilitates an in-depth understanding of the theoretical concepts but also offers practical insights into how power asymmetries, structural weaknesses, and divergent interpretations of human rights norms shape treaty performance in repressive States. Ultimately, the study contributes to broader debates in legal and political theory concerning the role of international treaties in shaping domestic human rights practices.

7. Conceptual and institutional asymmetries: An analysis

Philosophical discrepancies are examined through debates on universalism versus cultural relativism and theoretical models such as the theory of backsliding versus the spiral model. Meanwhile, institutional discrepancies are explored through the themes of supranationalism versus moral nationalism and Hathaway's integrated theory of international law.

Figure 1: *Showing theoretical models used for the study*
Source: Developed by the researcher

7.1. Treaty regimes and universalism versus cultural relativism

Although the theoretical debates on the nature of human rights have mostly been concluded after the advent of constitutional protections of fundamental human rights, legal protections are not enough, with special reference to allegedly abusive States like Pakistan (Brown, 2016; Hajjar Leib, 2011). The paper considers that this is a substantial conceptual asymmetry in human rights interpretation because, as Dembour notes, the conception of the idea of human rights is dissimilar between the West and other regions (Dembour 2010, 2).

8. Universalism

"I am Human and Nothing Human is Alien to Me."
Terence, 163 B.C.

The discussion on the universality of human rights further builds upon this natural law foundation. Henkin defines universality as freedom from territorial and conceptual limitations (Henkin 1989). Renteln elaborates that the Western conception of universality stems from the doctrine of natural law – a normative framework that transcends all man-made laws (Renteln 1988, 347). From this viewpoint, the existence of competing moralities is rejected, since universalist thinkers hold that only one valid moral code can exist. This claim is historically supported by early theorists: Hobbes emphasised the right to self-preservation, Locke highlighted the right to property, and others extended the list to include rights to life, liberty, political participation, and protection from torture (Renteln 1988, 348). These are now seen as the modern expressions of natural rights.

Several philosophical models have significantly shaped the universalist discourse. Kantian moral theory posits that moral reasoning is uniform and unaffected by cultural differences, thereby producing universal ethical standards. Likewise, Rawls's theory of justice argues that rational individuals, if placed in the "original position" behind a "veil of ignorance," would opt for fair principles of justice regardless of their personal or societal backgrounds. The origins of natural law theory can be traced back to classical traditions, with Thomas Aquinas formally articulating the concept, though its roots lie in ancient Stoicism and works such as Sophocles' Antigone (Zechenter 1997, 320).

However, this universalist position is strongly contested by proponents of cultural relativism. Critics argue that universal ethical standards are untenable in a world marked by deep religious, cultural, and philosophical diversity, even within the same societies. As such, relativists challenge the feasibility of implementing universal human rights norms uniformly across different cultural contexts. This fundamental disagreement between universalist and cultural relativist schools directly affects the practical implementation of human rights treaties, particularly in repressive or non-Western States.

The persistent ineffectiveness of UN-led human rights treaty regimes in contexts like Pakistan can be partially attributed to the unresolved tension between these opposing frameworks. While the UN system is largely shaped by universalist legal and moral assumptions, States with strong relativist orientations often resist these standards or reinterpret them through local cultural and political lenses. Thus, understanding the philosophical foundations of rights theory is essential to explaining the structural and normative barriers to treaty implementation in repressive States.

9. Cultural Relativism

"My Own Group Aside, Everything Human is Alien to Me."
Renato Rosaldo, 1985

Understanding the cultural relativist perspective on human rights necessitates a closer look at its foundational philosophical doctrines, particularly in light of their implications for the performance of international treaty regimes (Brown 2008; Cerna 1994; Dhaliwal 2011; Goodhart 2003; Zechenter 1997). The theory of cultural relativism challenges the idea of objective, universal moral truths by asserting that all human conceptions – ethical, cultural, or moral – are ethnocentric in nature (Zechenter 1997, 323). This viewpoint fundamentally questions the feasibility of a unified international human rights framework, especially when applied across diverse sociopolitical contexts. Moreover, cultural relativism gained prominence after the 1950s as a counter-narrative to the Western dominance in moral and legal discourse. Zechenter explains that scholars viewed this theory as a reaction against the West's self-glorification and its marginalisation of non-Western cultural systems (Zechenter 1997). Anthropologists and critics have therefore accused Western legal theorists, especially proponents of natural law, of cultural imperialism for failing to engage with or respect local cultural frameworks that diverge from Western liberal norms (Henkin 1989).

The failure of UN-led human rights treaties in repressive or non-Western States like Pakistan is not only a matter of enforcement or compliance but also a reflection of deeper philosophical and normative discord. When human rights regimes are constructed upon universalist foundations that assume moral uniformity, they often encounter resistance or reinterpretation in States shaped by strong cultural and religious particularisms. The relativist critique reveals how treaty performance becomes entangled in epistemological disagreements, further limiting the practical efficacy of international human rights law. As such, this literature highlights the inherent limitations of attempting to universalise human rights without reconciling or adapting to local cultural frameworks – a challenge that lies at the heart of this research.

To further illustrate the philosophical tensions that hinder the effectiveness of international human rights treaties, scholars such as Zwart

propose the receptor approach as an alternative to rigid universalism. This approach contends that local cultural and institutional "receptors" must be engaged and activated for international human rights norms to take root within diverse socio-cultural contexts (Afshari 2015, 881). Drawing from biological analogies, receptor molecules – situated at a cell's outer membrane – regulate whether external signals are accepted or rejected. Similarly, when human rights norms are transmitted globally, they are often obstructed by socio-cultural "receptors" in non-Western societies that are incompatible with Western universalist assumptions. This framework offers a constructive middle ground between the universalist and cultural relativist paradigms. Rather than imposing a singular normative standard, the receptor approach recognises the agency of local cultures and institutions in shaping how human rights are received, interpreted, and implemented. This resonates closely with the central argument of this study: the ineffectiveness of UN-led human rights treaties in repressive States like Pakistan stems not only from State resistance or weak enforcement but from a deeper epistemological and cultural disconnect between global human rights narratives and local realities. By emphasising receptivity rather than imposition, Zwart's approach reinforces the need for human rights regimes to accommodate plurality, thereby enhancing both legitimacy and compliance in contexts marked by cultural divergence and contested norms.

The limited effectiveness of UN-led human rights treaties in repressive States like Pakistan is not merely the result of policy failures, but is deeply rooted in normative and philosophical dissonance. The Bangkok Declaration (Ghai 1998, 79–82) illustrates how regional narratives contest the legitimacy of universalist claims, reinforcing the need to critically examine the cultural and conceptual asymmetries that shape treaty compliance and resistance in the Global South.

9.1. Treaty regimes and theory of backsliding versus the spiral model

The theory of backsliding offers valuable insight into the complex and sometimes contradictory behaviour of States within international human rights treaty regimes. While norms are typically designed to improve rights performance in States with historically poor records, Guzman and Linos contend that the same norms may inadvertently exert a regressive pull on high-performing States (Guzman and Linos 2014). This phenomenon, termed "human rights backsliding," refers to the tendency of such States to weaken their domestic rights frameworks, either in comparison to their past standards or in reaction to imposed external norms. In the context of this study, where the EU is positioned as a high-performing actor and Pakistan as a lower-performing one, this dynamic raises fundamental questions about the effectiveness and legitimacy of norm diffusion from global to regional contexts.

This tension speaks directly to the second philosophical discrepancy at the core of this research: the asymmetry between normative expectations and contextual realities. When high-performing States, such as EU members, influence norm creation without adequately engaging local conditions in States like Pakistan, the resulting standards may appear overly ambitious or misaligned. Other scholars (Adhikari et al., 2024) extend this concern by arguing that regionalism plays a pivotal role in shaping effective human rights norms. According to their findings, norms devised or adapted by lower-performing States are often more realistic and implementable, whereas those externally imposed, particularly by high performers, may suffer from rigidity or lack of ownership. It reinforces those conceptual and institutional asymmetries between actors like the EU and Pakistan, not only affecting the design and diffusion of treaty norms but also significantly determining their practical impact. Without reconciling these asymmetries – whether through contextual sensitivity, inclusive norm-setting, or regional adaptation – the promise of universal human rights implementation remains deeply constrained.

In contrast to theories emphasising structural asymmetries, the spiral model – rooted in the social constructivist tradition – provides an alternative explanation for norm diffusion and compliance within international human rights treaty regimes (Alhargan 2012; Collins and Bon Tai Soon 2024; Risse 2017; Shor 2008; Simmons 2013). This model emphasises the transformative potential of transnational non-State actors in influencing State behaviour, particularly in contexts where States exhibit persistent rights violations. Shor underscores that sustained normative pressure, applied through strategies such as shaming and denunciation, can gradually compel abusive States to align with internationally accepted human rights standards. The internalisation process, according to spiral model theorists, is driven less by material incentives and more by the persuasive legitimacy of universal norms.

This approach holds relevance to the present study's analysis of philosophical asymmetries between high and low-performing actors, such as the EU and Pakistan. While theories like backsliding highlight the risks of over-imposing rigid norms on less compliant States, the spiral model suggests a path toward convergence by building local acceptance through moral persuasion rather than coercion. Importantly, it counters the cultural relativist critiques that challenge the applicability of universal human rights by demonstrating how even resistant States can evolve under sustained normative engagement. In doing so, the spiral model complements this study's central claim that reconciling normative universality with local realities is essential for the effective implementation of international treaty regimes.

The literature on treaty performance offers valuable insights into the complex relationship between international agreements and domestic

human rights discourse. Guzman and Linos contend that while international human rights commitments may influence national discussions, they simultaneously involve trade-offs that often generate friction among domestic stakeholders (Guzman and Linos 2014, 612). This assertion aligns with the central puzzle of this study: Pakistan's ratification of human rights treaties under the incentive of GSP+ status, while domestically exhibiting limited political will for substantive implementation. Despite the influence of international agreements on national policy frameworks, Pakistan's hesitance to enforce these obligations – evidenced in periodic reviews by supervisory bodies – demonstrates a gap between formal commitment and practical execution, especially when the anticipated cost of non-compliance (such as losing GSP+ status) is not perceived as a credible deterrent.

This dynamic also reveals deeper conceptual asymmetries in how high- and low-performing States engage with human rights regimes. While it is commonly held that States with robust rights protections are relatively unaffected by international rules, Hathaway's integrated theory of international law, which is examined in detail elsewhere in this study, suggests that even compliant States benefit from rule-based commitments (Hathaway 2005). Guzman and Linos expand on this by noting that high-performing States may still influence treaty regimes by mitigating the risk of regression. Their puzzling participation in treaties where they already meet or exceed the standards reflects an investment in sustaining the system's legitimacy and resilience.

Moreover, their analysis of norm formation underscores the importance of State identification and regional dynamics. Regional groupings, particularly those comprising like-minded governments, can establish standards that are more politically palatable and behaviourally effective. In contrast, when such coalitions exclude high performers, the normative pressure for elevated standards diminishes. This observation is particularly relevant to the EU-Pakistan dynamic, where the EU's normative export encounters resistance due to mismatched institutional capacities and divergent legal-political cultures.

Backsliding theorists further highlight a structural tension in human rights regimes: the formulation of norms without the explicit consent of all actors. While these evolving norms may elevate expectations for underperforming States, they often overlook the risks of reversal, especially when such States were not active contributors to norm-setting (Ginsburg 2019; Khosla, et al., 2023; Norris 2017). In this context, setting excessively high standards may alienate the very States that need human rights protections the most. As this study argues, this underscores a critical institutional asymmetry – where the normative agenda is shaped largely by the priorities of high-performing actors, leaving low-performing counterparts like Pakistan navigating expectations they may lack the capacity or incentive to meet.

9.2. Treaty regimes and supranationalism versus moral nationalism

The literature indicates that the institutional architecture underpinning human rights protection plays a pivotal role in explaining the implementation gap observed in States like Pakistan. Scholars emphasise that institutional asymmetries – particularly the divergence between the EU's supranational governance structures and the relatively weak intergovernmental framework of the South Asian Association for Regional Cooperation (SAARC) – account for the stark differences in the enforcement of human rights treaties (Ahmed and Bhatnagar 2008; Dani 2017; de Búrca 2018; Jain 2002; Jiali 2012; Mahmood 2000; Paulus 2013; Reddy and Reddy 2013; Singh 2009). This difference resonates with the central claim of this study, which contends that while the EU's institutional setup actively facilitates the internalisation of human rights norms, Pakistan's regional and domestic institutional context lacks the necessary structural coherence to do so.

Bóka defines supranationalism as a form of structured collaboration among democratic States within autonomous supra-State institutions, functioning under a legal order that relies on federalist principles such as multilevel governance and the subsidiarity of competences between the Union and its Member States (Bóka 2012, 387). This institutional design not only ensures uniformity in rights implementation but also creates mechanisms for accountability and compliance. In contrast, Pakistan's position within a regional framework like SAARC, devoid of binding enforcement mechanisms and collective normative identity, undermines its ability to emulate similar outcomes. The EU's model fosters legal and political coherence around human rights through the consolidation of a shared identity beyond national borders, something that SAARC's framework fails to cultivate.

The construction of a supranational identity, which is crucial to sustaining such governance structures, draws from the same processes described in classical theories of nationalism. Bhabha, through his work Nation and Narrations, describes identity formation as a process of mythmaking enabled by collective storytelling (Bhabha 2008). Similarly, Anderson conceptualises nations as "imagined communities" forged through shared narratives, symbols, and historical consciousness that unite individuals who may never personally interact (Anderson 2003). Although these frameworks were originally developed in the context of nation-building, their relevance extends to supranational entities. In the EU's case, such identity construction supports the legitimacy and resilience of its human rights regime, whereas in South Asia, the absence of a cohesive regional narrative or institutional imagination hinders efforts to promote collective normative commitments.

Thus, the institutional asymmetries between the EU and Pakistan are not merely technical but embedded in broader questions of identity,

regional integration, and the legitimacy of international norms. This divergence significantly impacts the ability and willingness of States like Pakistan to effectively implement international human rights obligations, despite their formal ratification.

9.3. Treaty regimes and integrated theory of international law

Hathaway's integrated theory of international law provides a compelling framework for understanding why States, including those with questionable human rights records like Pakistan, ratify international treaties that seemingly constrain their autonomy (Hathaway 2005). Unlike traditional accounts that emphasise normative alignment or domestic pressure, this theory explains State behaviour through strategic cost-benefit calculations, which align closely with the EU-Pakistan case explored in this study. Hathaway argues that such States are more likely to commit to human rights treaties not because of a genuine normative shift but due to the voluntary nature of treaty participation, the weak enforcement architecture of most international regimes, and the collateral international benefits accrued through ratification.

This logic aligns with Pakistan's accession to human rights treaties in exchange for tangible economic incentives, notably the GSP+ offered by the EU. In this context, treaty ratification becomes an instrument of strategic diplomacy rather than a reflection of internal reform. Hathaway identifies that States with poor human rights records are often more enthusiastic signatories than democracies with robust domestic enforcement mechanisms. This paradox arises because weak institutions pose fewer internal obstacles to ratification, especially when external enforcement is minimal. The absence of supranational legal enforcement mechanisms – except in integrated systems like the EU – makes treaty commitment a low-risk, high-reward endeavour for repressive States. This observation ties directly to the institutional asymmetries at the heart of this study: while the EU can internalise treaty norms through its supranational infrastructure, Pakistan, embedded in a weaker regional framework, lacks equivalent mechanisms of implementation.

Moreover, Hathaway underscores the strategic motivations of abusive States, which often use treaty ratification to enhance their international legitimacy, secure external financing, and boost trade relations – even as they continue repressive practices domestically. In the EU-Pakistan relationship, this dynamic is particularly evident. The economic benefits attached to GSP+ status serve as collateral gains that incentivise treaty ratification without necessarily motivating sincere compliance. Thus, Hathaway's framework not only illuminates the logic of Pakistan's treaty behaviour but also reinforces this study's central claim: institutional and normative asymmetries between the EU and Pakistan critically shape the trajectory of treaty implementation, revealing the limits of international

legal commitments in the absence of credible enforcement and internalisation mechanisms. Hathaway's integrated theory of international law advances the understanding of State behaviour by challenging the conventional belief that international law is ineffective in the absence of transnational enforcement mechanisms (Hathaway 2005, 492). Rather than dismissing enforcement altogether, the theory contextualises it as one part of a broader framework that includes domestic legal capacity and strategic State interests. This nuanced approach is particularly relevant to explaining the institutional asymmetries between the EU and Pakistan, where the EU's supranational enforcement structures contrast sharply with Pakistan's weak domestic compliance mechanisms.

Empirical data underpinning Hathaway's theory further reinforces its applicability. She demonstrates that in areas where international enforcement remains weak, such as human rights and environmental law, the adherence by States to treaties depends significantly on the strength of domestic enforcement. This is especially relevant in the case of Pakistan, which lacks strong internal judicial oversight and accountability mechanisms to implement human rights obligations effectively. In contrast, the EU not only ratifies but also operationalises human rights standards through institutionalised supranational channels, making compliance more probable. This asymmetry underlines the structural challenges in aligning treaty commitments with behavioural change in weaker legal environments. The theory also offers insight into counterintuitive patterns of treaty participation. Hathaway notes that States, particularly non-democracies, often ratify human rights treaties not to implement them, but to gain reputational benefits and economic rewards. While Pakistan is constitutionally democratic, its behaviour mirrors such patterns due to institutional fragility and executive dominance. The economic incentive provided by the EU's GSP+ status plays a key role in encouraging ratification, even when substantial human rights reform remains elusive. Here, Hathaway's claim that even democratically constituted States with weak enforcement capacities may exploit treaty ratification for collateral gains resonates with Pakistan's engagement with the UN-led treaty regime.

Moreover, Hathaway contests interest-based theories that suggest States ratify only those treaties aligned with their existing policies. Her evidence suggests the opposite: States sometimes commit to treaties that demand more than the status quo, especially when external benefits are significant. This aligns with the EU-Pakistan relationship, where Pakistan commits to broad human rights obligations under GSP+ conditions despite persistent implementation gaps. Norm-centred theories also fall short in explaining why treaty ratification does not necessarily result in better human rights practices – something Hathaway supports with data indicating that States with poor human rights records often exhibit no improvement, or even regression, post-ratification (Hathaway 2005, 528–30).

Ultimately, Hathaway concludes that treaty effectiveness is contingent not just on normative alignment or legal commitment but on institutional capacity, regional enforcement structures, and the strategic calculations of States. Her findings echo the central claim of this study: the asymmetrical institutional architectures between the EU and Pakistan, particularly the presence or absence of supranational enforcement, critically determine the trajectory and efficacy of human rights treaty implementation. Supporting scholars – including Koh et al., Koremenos et al., Powell, Vreeland, and Weissbrodt – concur that the gap between treaty commitment and actual practice is most acute in States with weak domestic institutions and limited accountability mechanisms (Koh et al. 1997; Koremenos et al. 2001; Powell and Staton 2009; Vreeland 2008; Weissbrodt 2003). These findings further validate the importance of considering both internal and external institutional configurations in evaluating the role of international human rights law in repressive or weakly governed contexts.

10. Conclusion

This study examined the extent to which UN-led human rights treaty regimes can improve human rights conditions in repressive States, focusing on the EU-Pakistan dynamic. Through a deductive approach, the literature was categorised around two key variables – conceptual and institutional asymmetries – to structure a comparative framework for analysis. The first conceptual theme – universalism versus cultural relativism – revealed patterns in how States interpret and internalise human rights norms. While certain interpretations advocate for culturally specific conceptions of rights, others assert the pre-UDHR presence of universal values across religious traditions, highlighting tensions in norm transmission. These divergent readings are not just philosophical; they shape treaty implementation on the ground, particularly in settings like Pakistan, where pluralist legal traditions coexist with international commitments. Crucially, even where consensus exists on rights such as the right to life, the persistence of practices like the death penalty underscores how cultural and institutional filters mediate treaty efficacy.

The second conceptual theme – the spiral model versus backsliding – further refines the understanding of how States respond to human rights obligations. While the spiral model underscores the role of transnational pressure and local actors in norm internalisation, the backsliding perspective warns against overreliance on normative optimism, especially where conditionality is weak. This distinction is important in the EU-Pakistan case, where sporadic compliance with human rights treaties suggests fluctuating pressures, selective implementation, and, at times, regression. Rather than offering competing diagnoses, these perspectives collectively reveal that the dynamics of treaty influence are contingent on a State's institutional receptiveness and the nature of external leverage.

The third theme of institutional asymmetry, particularly comparing the EU and SAARC, revealed how structural design influences treaty outcomes. The EU's supranational mechanisms and normative cohesion support more consistent treaty compliance, whereas SAARC's intergovernmental and fragmented framework lacks enforceability. As a result, Pakistan's engagement with treaty regimes within the SAARC context remains largely symbolic or instrumental. This divergence points to how regional governance architectures condition the operational space for human rights norms and create asymmetries in implementation.

Hathaway's integrated theory, which forms the final theme of this review, helps reconcile these insights by offering a systemic explanation for why repressive or transitional States – like Pakistan – join human rights treaties despite limited enforcement capacity or genuine commitment. Her findings suggest that treaty ratification often serves reputational and strategic interests, especially in democracies with fragile institutions. Her work aligns with observed trends in Pakistan's case: formal commitment without consistent behavioural change. Yet, Hathaway's emphasis on the interaction of collateral consequences, domestic enforcement, and international signalling also offers a more nuanced lens to interpret treaty compliance patterns within asymmetric institutional settings.

10.1. Scholarly and policy contributions

This study makes several important contributions to both scholarly debates in international human rights law and political science, and to policy discourses concerning human rights treaty implementation in repressive or hybrid regimes such as Pakistan.

Reconceptualising treaty performance through asymmetries

One of the key scholarly contributions of this paper lies in its analytical framework: the categorisation of conceptual and institutional asymmetries as explanatory variables. While existing literature has examined the challenges of treaty compliance in authoritarian or transitional States, this paper innovatively reframes those challenges not as static failures of commitment but as dynamic manifestations of deeper asymmetries – be they ideological, normative, or institutional. This reconceptualisation adds theoretical clarity and offers a nuanced lens through which the conditional performance of UN-led treaty regimes can be analysed in specific regional contexts.

Bridging theoretical divides between norm internalisation and strategic ratification

This paper contributes to scholarly debates by offering a structured synthesis of theories that are often treated in isolation, such as the

spiral model, backsliding theory, and Hathaway's integrated theory. By aligning them within a deductive framework, the paper demonstrates that compliance or resistance to treaty obligations is not simply a matter of State will or capacity but reflects the interplay between internal normative legitimacy and external strategic considerations. This bridges the gap between norm-internalisation theories and rational-choice explanations, offering a more comprehensive theory of State behaviour in human rights governance.

Highlighting regional institutional effects on treaty regimes

At the regional level, the comparison between the EU and SAARC provides empirical insight into how regional institutional design profoundly affects treaty effectiveness. This has policy relevance for regional organisations seeking to enhance their human rights frameworks. For instance, the paper suggests that supranational judicial institutions, such as those within the EU, can play a significant role in norm diffusion and enforcement – insights which are crucial for reform debates within SAARC and similar regional blocs. For scholars, this comparison generates new avenues for research into institutional asymmetry and norm entrenchment beyond Western liberal contexts.

Informing conditionality and incentive-based human rights policy

For policymakers, – particularly in the EU and other international donors, – this paper provides an evidence-informed critique of conditionality-based approaches to human rights promotion. It underscores the limitations of normative pressure in the absence of institutional follow-through and domestic resonance. The findings imply that externally imposed conditionalities must be embedded in longer-term engagement strategies that include local capacity building, civil society partnerships, and legal institutional support. Rather than universalising a single template, human rights policy must become context-responsive, sensitive to both asymmetries identified in this paper.

Recalibrating treaty efficacy metrics for transitional States

The paper also challenges dominant metrics of treaty success, such as ratification rates or formal legal alignment, and proposes that meaningful compliance should be measured through behavioural transformation, internalisation of norms, and institutional reforms. For scholars, this opens up a methodological debate on how treaty regimes are evaluated. For policymakers and international human rights monitors, it encourages the development of more nuanced indicators that go beyond compliance checklists, incorporating qualitative measures of political will, legal reform processes, and societal acceptance.

Introducing a dialogue between universalism and pluralism in human rights norms

Finally, this study brings a fresh contribution to the ongoing philosophical debate between universalism and cultural pluralism in human rights theory. It avoids the polar extremes of relativism or hegemony and instead provides a framework to understand how different cultural traditions may support or challenge the universality of rights in practice. By rooting this debate in the empirical case of Pakistan, it shows how culturally plural legal and ethical systems intersect with international norms – an important insight for scholars working on postcolonial approaches to human rights, and for practitioners designing rights education or legal harmonisation programmes in pluralist societies.

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Cut the rights short: Reflecting about suicides in Italian prisons and punitivism

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Abstract: *This paper focuses on the relation between the high rate of suicides and the condition of detention inside Italian prisons, showing that the gap between the prescription of Article 27 of the Italian Constitution, namely "punishment must work for the rehabilitation of the condemned persons," and reality is yet to be filled. The deterioration of prison conditions as a major cause of suicides is analysed under three aspects: overcrowding; zero tolerance politics and the culture of control; and the nature of prison as a "total institution," annihilating any quest for dignity, decent life, or implementation of detainees' rights. The present theoretical discussion is endorsed by some interviews with a lawyer and three ex-inmates, who share in detail their experiences of the discriminatory and stigmatising nature of prisons. Concluding remarks emphasise the need to reduce to the minimum the use of prisons to avoid the degradation of life conditions and suicides therein.*

Keywords: *Italy; prisons; suicides; securitarianism; total institutions.*

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1. Introduction

The issue of suicides in Italian prisons has been at stake in recent years. The figures provided by the *Associazione Antigone* (Associazione Antigone n.d.; Antonelli 2025) emphasise how more and more inmates take their lives while under detention. Many more suicide attempts turn out to be unsuccessful, whereas, on the other hands, many suicides turn out to be the tragic consequence of the purpose to draw the attention of prison staff (Anastasia 2022, 48). Suicides are by this token an extreme, dramatic tool inmates use to communicate their unease to put up with the inhuman condition they face.

This paper focuses on the relation between the high rate of suicides and the condition of detention inside Italian prisons, showing that the gap between the prescription of Article 27 of the Italian Constitution, namely "punishment must work for the rehabilitation of the condemned persons," and reality is yet to be filled. The deterioration of prison conditions as major cause of suicides is analysed under three aspects. The first relates to overcrowding. Italian punishment structures currently host over 60,000 inmates, against a supposed capacity of 42,000 inmates (Ministero della Giustizia 2025). Overcrowding has led the Italian Government to be sentenced twice by the European Court of Human Rights in 2013 (*Torreggiani and Others v. Italy*; *Suleimanovic v. Italy*). Despite this, Italian prisons keep being overcrowded, because of the law-and-order policies that have been enforced throughout the "Western World" since the 1980s, which replace the welfare State with the penal/carceral State (De Giorgi 2001, 32; Wacquant 2007, 26), as well as to manage the conflicts that take place within post-industrial societies (De Giorgi 2002, 79).

Secondly, "zero tolerance politics" (Wacquant 2007, 57) march hand in glove with the so-called "culture of control" (Garland 2003, 123) that has spread across contemporary society in recent times. The public, under an increasingly technocratic turn of political institutions of neoliberalism (D'Eramo 2020, 81), considers more and more the penal sphere as the place to express its will (Pavarini 2015, 52), through the dynamics of the "community of accomplices" (Baumann, 2006) which consists of the individuation of scapegoats. Consequently, prisons are no longer the places deputed to carry out rehabilitation but rather places of exclusion where individual suffering must be taken to the extreme. Following such a path, suicides reassure a more and more cynical public opinion that sees inmates as a cost or as a problem.

Thirdly, suicides are doubtless connected to the nature of prisons as "total institutions" (Goffman 1961, 13) that de-humanise individuals and subjects them to a regime of full dependency from the staff of the institution, thus depriving them of their rights. Prison has "in-material" consequences on the life of inmates (Ruggiero and Gallo 1986, 34),

changing their way of perceiving reality and of interacting with other people. Suicides, attempted suicides, and self-injuries are a reaction to this mechanism of subjugation and dependency.

Suicides are analysed below under these three theoretical lenses, also using interviews done by the author to ex-inmates and to a lawyer. Concluding remarks address the dilemma between the policy options of decriminalisation or the improvement of prison conditions.

2. The roots of suicides: Overcrowding in prisons

The relation between suicides, physical restraints, and poor life conditions within prisons, can explain only in part the soaring suicide rates within Italian prisons. On the one hand, prisons, since their birth in the late eighteenth century (Santoro 1997, 26), are places designed for inmates to live through hardships and sufferings. Moral (loss of liberty) and material deprivation combine to make sure that, under the retributionist approach, inmates repay society of their debts. Punishment, following the utilitarianist approach, is supposed to balance pleasure and pain, and prison is the place where suffering will pay for the pleasure the offender has had in excess.

On the other hand, prisons make up an important part of disciplinary dispositives (Foucault 1976, 21; Melossi and Pavarini 1977, 16) that aim to discipline "dangerous" classes, such as workers, migrants, and the unemployed, for them to assimilate the production-oriented values of capitalist society. Imprisonment, by this token, is not supposed to physically deteriorate inmates, but, as Michel Foucault stated, "to educate the body through the soul." The body is not to be suppressed, but rather to be converted to productive purposes. Suicides refute this approach, as dead bodies obviously cannot be productive. Moreover, for this reason, since its foundations prisons have employed sanitary staff, both to constantly monitor (along with wardens) inmates and to make sure their physical and mental conditions do not deteriorate.

The difference between prisons and asylums (Basaglia 1978, 19) concerns the fact that the former are supposed to re-shape the way of thinking and acting of inmates, whereas the latter aim at their permanent exclusion from society. Even though both asylums and prisons share the status of "total institutions" (Goffman 1961, 33), the de-personalising, repressive, and authoritarian aspects of prisons are supposed to work just for temporary amounts of time, as their role is that of re-shaping the identity and the behaviour of inmates. Discipline was soon to be connected to the positivist-rooted idea of rehabilitation, that became re-socialisation after the reformist stances of the 1970s. The idea that punishment was finalised to re-integrate offenders in society underpinned all the main penal policies that Western Governments implemented in the 1960s and 1970s.

Alongside with the humanisation of punishment, the idea of alternative punishment, namely a range of penal sentences to be served in society in order not to sever the links between society and offenders, was actively enforced. The idea of a more human prison marched hand in glove with that of a fairer and more equal society.

The neo-punitivist way that spread in the United States since the 1980s, relying on the theories of *just desert*, spared Italy for at least ten years. Even though the figures of the detained population skyrocketed from 25,000 in 1990 to 50,000 in 1995, due to the anti-drugs law *Jervolino-Vassalli* (L No. 162/1990) and, eventually, to immigration laws, some reforms aiming at the improvement of detention conditions (Anastasia and Palma 2001, 72) as well as trying to reduce the number of inmates were undertaken. They include the law *Bindi* (DL No. 229/1999) that recognised the right to health assistance to inmates, the law *Smuraglia* (L No. 193/2000) providing fiscal advantages to the cooperatives that hire prisoners, and the law *Simeone-Saraceni* (L No. 165/1998) allowing the suspension of penal execution for the sentences of up to three years of conviction.

Such reforms could have been effective if the securitarian context had not become hegemonic in the Italian society. The demand for restrictive policies, to be tough on crime and enforce hard punishment, inspired by the law-and-order approach, has brought about not only a further growth of the number of inmates, but also the idea that prisons should be a permanent and degrading punishment. Life in prison has gotten by this token worse, providing the ground for the growth of suicides.

3. "Let's lock them away and throw the key": The consequences of zero tolerance

Zero tolerance policies, inaugurated in 1994 by the then major of New York and former magistrate Rudolph Giuliani, have played a capital role in shaping the securitarian approach to crimes which has caused overincarceration and deterioration of inmates' life, insofar as rehabilitation aims are ruled away and hard punishment has become the solution. Since Wilson and Kelling (1982, 33) published their essay about the theory of broken windows, shifting the responsibility of crimes and disorders from the social fabric to individual choices, lower class and marginal social groups have been more and more targeted as those "dangerous classes" (Chevallier 1977, 27) to be either controlled or expelled from society. By this token, prisons have turned out to be a place where social conflicts are stowed away, and inmates represent a population in excess, to be kept under degrading conditions for the longest time as possible. The "naked lives" (Agamben 1993, 8) of migrants, unemployed, Roma, refugees, sex workers, and LGBTQIA+ swell the ranks of prisoners, at complete disposal of power, with few possibilities to claim the respect of their fundamental rights. More in depth, a naked life, when in the hands of power, is very

likely to be deemed unworthy to live, unless the sovereign does not decide the other way.

Only those lives which are deemed worthy to be lived are saved, that is, under the bio-political contemporary power, those lives which are functional to a consumerism-oriented economy (Foucault 2001, 76; Zizek 2003, 15). In such a contextual frame, where power makes live and let die, suicides in prison are considered with indifference and relief, as one less "problematic" case to deal with is one less threat to society and one less cost for the State. Policies such as the "three strikes and you are out" approach, enforced in the United States since the 1990s (Simon 2008, 68), result in an embitterment of detention that is more and more associated to the idea of a permanent removal from society (Wacquant 2017, 44).

In the case of Italy, migrants account for one-third of the total prison population, although inside Northern Italian prisons they often account for most of the persons held under custody (Pavarini 2015, 39). Along with them, Italian prisoners are often from the South (Verdolini 2023, 56), keeping up with the reproduction of a trend that has been going on since the country became independent (Pavarini 1997, 83). Economic and social marginality are often overlapped with health problems (Sarzotti 1996, 45), as one-third of migrants are drug addicts and one-quarter of them suffer from serious pathologies (La Società della Ragione 2020).

Moral panic in relation to migrants living under precarious life conditions has spread across Italian society since the late 1980s. The collapse of Italy's "First-Republic," due to the so-called *Tangentopoli* corruption scandal (Dal Lago 1998, 98), left the legacy of more restrictive criteria for the Parliament to approve an amnesty, thus contributing to the overcrowding of prisons. More than that, social fragmentation, coupled with the end of mass participation through political parties, resulted into a boost in prejudices against migrants, Roma, and LGBTQIA+, who are often associated with street crimes (Verdolini 2023, 76).

Moral panic about migration and drugs has been fuelled by the representations provided both by the media and by scholars (Barbagli 1998, 12). Talk shows, entertainment shows, and TV serials have focused massively on the issue of crimes, always portraying migrants, Roma, and, recently, young people as a potential danger for individual safety, and advocating the enforcement of harsh punishment as both a preventive and a repressive means to fight crimes.

The importance of media in relation to crimes reached its peak in March 2020, when, during a TV Sunday show, the anchorman Massimo Giletti put on stage a live protest for the prison release of a Camorra boss who was at the final stage of his lethal disease. The then Minister of Justice took him seriously (Scalia 2022, 171), immediately dismissing the Director of the

penitentiary administration concerned. Shows such as *Striscia la Notizia* and *Le Iene,* which are supposed to entertain their audience, have found it more convenient to draw on a "blood and tears" approach for the sake of success also in this context. Along with shows, many popular fictions, focusing on crime, are regularly shown on Italian TV channels, always focusing on the representation of criminals as rational, merciless rogues, often with a migrant, Roma, or Southern Italian background, threating the lives of honest citizens, that handsome police officers will block, thus reassuring the attendance at home.

Popular culture marches hand in glove with academia, as the works of some scholars endorse the "fear" of the public about immigration and urban disorder through the publication of studies showing that migrants are more delinquent than Italians are (Barbagli 1998, 49; Anastasia 2022, 17). Such studies draw on an approximate use of empirical data, as they neglect aspects like the production of deviance as a selective process. Notably, police forces usually patrol the areas "at risk," which are marginal areas where migrants live, and so they are more likely to stop and search more migrants than Italians. Secondly, police forces are also influenced by the dominating prejudices against migrants (Palidda 2001, 65), so they are more likely to focus their work on non-Italian citizens. Thirdly, migrants are more visible (Goffman 1963, 31), not only because of their physical appearance, but also because of the kind of cars they drive (often second-hand cars, bought for their cheap prices), the way they dress, and their accents. Finally, once they have ended up in the penal system of the country, migrants can hardly rely on a proper defence, and their declarations are not always translated properly. M.M., a solicitor in Bologna interviewed by the author, shared the story of a group of migrants he managed to get acquitted from the accuse of terrorism in 2002:

They were eavesdropped in San Petronio, the translator of the Questura, took a comment on a painting as if they were advocating a terrorist action by Bin Laden. They were immediately arrested and put on trial. I was appointed by the court as their public defender, and immediately found out they were Berberians not Moroccans, so they spoke a language that is different from the standard Arabic. I have worked in the past with a Berberian translator. I hired her, and her translation proved successful. They were all acquitted. They were lucky, but it's a kind of luck that happens so often… (M.M., interviewed on 27 March 2024).

It is worth highlighting that media and the penal system reflect the uncertainties and the lack of identity for a more and more anomic society (Durkheim 2000), which needs one or more scapegoat to make up for its lack of mutual trust and shared values. Moreover, in a more and more globalised society, where super-national institutions make crucial decisions about economics and military matters, the national penal system has remained the only domain where citizens feel, more than think, that

they can actively participate in the decision-making process (Pavarini 2015, 26). "Patibular democracy" or "penal populism" (Anastasia 2022, 38) are the most appropriate definitions of contemporary age. The penal system of a country is deputed to govern all the social contradictions of the present age, conveying the frustration and the dissatisfaction with present life towards an extreme use of incarceration and punishment. The end of metanarratives, ruling out all the chances of radical transformations, combines with precariousness (Baumann 2002, 44) and neo-liberal competition, which rejects marginality and advocates a binary logic based on inclusion and exclusion, which requires the penal system to permanently exclude those who do not fit in the picture of global consumerism or are perceived as competitors. Prisons turn into the place of permanent exclusion, where inmates must experience extreme sufferings.

Political forces, on both sides of the left/right spectrum, use "penal populism" to gain political consent (Tarchi 2020). In 2018, one-third of the Italian voters chose to vote for the *Movimento 5 Stelle*, a political party that has based its identity on the anti-political rage (Mete 2022, 97), inspired by the alleged mass corruption affecting the political caste, to be regulated by a massive use of "legality," namely a massive use of penal measures. In the view of *Movimento 5 Stelle*, the respect of laws spreads from the bottom to the top, so that a strict repression of petty crimes will discourage potential offenders from violating the law.

On the other side, the Italian centre-right forces such as the members of the current Government coalition regard legality as a measure to tackle migration-related issues and "eccentric" behaviours (such as those allegedly related to ravers and LGBTQIA+ people). Migrants are seen as responsible for public disorders, and these forces' solution lies in the embitterment of anti-migration laws (as the *Cutro* Decree (DL No. 20/2023) shows) as well as in the approval and enforcement of laws deputed to repress political dissent and to restrict lifestyles which are not in line with the so called "traditional family" values. The Security Decree (DDL 1660/2024), approved by the Italian Chamber of Deputies on 18 September 2024, marches in this critical direction, whereas overcrowding and suicides are supposed to be solved both by building new prisons and by sending those inmates with 12 months yet to serve in communities where usually drug users stay.

Current governmental forces tend to dodge the problems related to the deterioration of life conditions in prison, as well as not considering the de-humanising aspect of punishment, including the abuses inmates suffer while under custody. The next section copes with these aspects.

4. Life in prisons: Total institutions or abusing institutions?

Erving Goffman (1961) has described and analysed in depth the nature of prisons as part of the circuit of "total institutions." Like asylums,

barracks, and monasteries, prisons are places that require the total surrender of individual wills to the power of the staff deputed to overlook at the inmates. Wardens, psychologists, psychiatrists, social workers, and social care workers, as caring and accurate as they can be, share the expectation that prisoners will accept to be subjugated, and to obey to their recommendations and orders. The legitimacy of their expectations rests upon the authoritative and repressive nature of penal institutions: inmates are in prison because a court, a judge, decided so. Consequently, they are obliged to accept a pattern of relations relying on subjugation.

Recent studies (Ross and Vianello 2024, 82) show that this pattern of asymmetrical power relations accounts for prisoners as the most negative aspect of their carceral experience. Subjugation is worsened also because of other aspects. Firstly, the closed nature of the institution concerned increases the discretionary power of the prison staff. Many aspects of the daily life in prisons, from treatment to the management of conflicts, are often decided on the spot by the prison staff, without respect of existing procedures. The lack of sufficient staff makes this trend more and more current in Italian prisons (Melani 2024, 23). Secondly, the legitimisation of the prison staff's power is reinforced by the prescriptive character of punishment. As prison staff members are vested with legal power, they are entitled to operate in the way they deem necessary, without being accountable for what they have done therein. A warden of a southern Italian prison told the author about the treatment of mentally ill inmates: "We deal with them. We know how to handle critical situations. Doctors? Nurses? Psychiatrists? Are you serious!? If you want me to tell you that here we have a sanitary staff, I will tell you. If you want me to tell you the truth, I will tell you that it is us penitentiary staff that deal with them. How do we deal with them? Let's say it's not a Sunday trip to deal with them…" (Interview, 3 July 2024).

Thirdly, inmates must deal with internal hierarchies between inmates, thus experiencing a further stage of subjugation. The process of de-socialisation they experience once they are restricted becomes by this token re-socialisation, as they must fit themselves into new rules and roles that might be opposite to those they use to follow and play outside. As an ex-inmate says:

You must spend your time with people you wouldn't have hung up with outside. Speak another language, constantly watch over your shoulder, weigh every word you say, hoping you won't harm anybody … You must remember that long term inmates, who have been there before you came and will remain after you finish serve your sentence, must be "respected." Use accurate language with the members of criminal organisations, try to be polite as well, and also hide your pain, because otherwise they will think you are wimpy and will bully you. And don't forget that people are frequently moved from one prison to another, so you haven't enough time

to get used and to create yourself a long-lasting group of friends. Who were you doesn't matter in there. You must invent another yourself, and it is not so easy, because it is an ongoing process (Interview, 3 July 2024).

Such a process of de-socialisation and re-socialisation implies, indeed, a de-personalisation of inmates, who undergo serious identity crises that result in the deterioration of mental health conditions (Corleone 2017, 15). The high number of inmates suffering from mental diseases is the consequence of detention under overcrowded, inhuman conditions. Vincenzo Ruggiero and Ermanno Gallo (1986, 85) argue that imprisonment, besides worsening material conditions, causes an alteration of perception of reality in prisoners, producing what one might call alienation: "Your body is searched at least 10 times a day. You never turn on and off the lights, privacy in toilets is an option, doors are open and closed by others, you share more and more shrinking space with people you don't know and, often, you don't like. When you are released, it takes time before you get used again to the old reality, and it's not sure you manage to do it. Even a pat on your shoulder scares you" (Interview, 3 July 2024).

De-personalisation is also related to the severing of links with the outer world while in custody. Parents are ashamed of having sons or daughters jailed, partners often decide to start a new dating, children are kept away from their fathers, either because of stigmatisation, or because the new life their parents who are not jailed stats forces them away from their jailed parent. Even in those cases that relations remain, the lack of a regular and constant bond ends up slackening them. A female ex-convict states:

My parents kept telling me: you are a junk, a pusher, your son cannot grow with you. Let's hope you'll be sentenced to jail, so that this poor little child can stay with us and lead a regular life. I haven't seen my son for one year. Then they decided to take him to visit me, but … we just didn't know what to tell each other. It was hard and painful. Even now, he still lives with my parents and agrees to see me once a month. I am his mum, but I am no more his mum, if that makes sense… (Interview, 5 November 2023).

Prison is a place for alienation and suffering, which regularly take place under the consent of a public opinion that regards penitentiaries as places to be kept away, possibly for good, from the rest of society. The double stigmatisation, in society and in jail, ends up weakening the detained persons, both physically and, especially, psychologically. Social problems, by this token, become a medical problem, both because health deteriorates, and because prisoners can only use sedative medication in order to forget their conditions of life: "Everybody in prison goes for the trolley. Pills of every kind, to relieve your physical and, especially, your mental pain. Benzodiazepine solves most of the problems of inmates, who are put to sleep and don't mind anymore quarrelling with their cellmate about who

is to stand up, as is impossible to stand all up in cells, or whether TV or radio should be turn on or off. Less work for the staff, no one complains, no violent reaction at all. Well, almost…" (Interview, 5 November 2023).

Finally, inmates suffer from abuse by the prison staff. The case of Asti, in 2012, shed a light about the existence of squads of prison police officers that, in some Italian prisons, engage in the practice of beating inmates, to the extent of torturing them (Scalia 2016, 448). The case of Asti, as well as that of Stefano Cucchi beaten to death while under custody in 2009, have contributed to raise awareness about the issue, boosting the drafting and the approval of an anti-torture bill (Law No. 110/2017) that has been constantly criticised by its political opponents as it is deemed to restrain the work of police forces.

The cited law against torture marches hand in glove with the institution, both on a local and on a national level, of the Prison Ombudsman (of persons deprived of their personal liberty) who is deputed to monitor the conditions of detention. Prisons are supposed to be transparent, both for them to comply with the prescription of Article 27 of the Italian Constitution and to make sure that the links between detention sites and the rest of society are never severed. However, the implementation of such devices to improve the conditions of detention are not at pace with their aims, as Italian prisons continue to be inhuman places where inmates consider the possibility of taking their lives as an alternative to the hard conditions of imprisonment.

Prison overcrowding is one of the reasons. As prisons are crammed with inmates, it becomes almost impossible to deal with the basic needs of every single person living behind the walls of the penitentiary. Moreover, abuses in prison are the consequence of a pattern of relations that are established in prison, as well as of the mindset that takes place within "total institutions." Philip Zimbardo (2005, 18) defines it as "Lucifer effect," that is the relation between being member of a group and respecting the laws. Prison guards are disciplined to behave according to a uniform, shared pattern of values and action, even if this approach implies that their behaviours result into the violation of laws. By this token, prison officers will share the view of their group. They will agree with deeming inmates as a threat to their lives, as "suspended lives" to be dealt with in the cruellest and most inhuman way, as they have violated the laws and were rejected by society. Such mood, feelings, and attitude that shape the prison officers' mindset are endorsed by the hegemonic penal populism, thus legitimising repression and abuses, and creating the paradox of enforcing law through systematic violation of laws. An ex-inmate has said to the present author:

When you are inside, it's an anomaly when you are not insulted, told offences against your family, your wife or the place you come from … their voice is always aggressive, and every little flaw in your behaviour, like

walking too slow (for them) or not saying "signorsì," is an excuse for them to push you, hit your shoulders or your face violently. If they think you are "a rebel," they start with retaliation. For example, they write in their report you behaved unproperly, so you know that you will be denied the possibility to go on furlough to see your family, or to apply for semi-liberty. Isolation, beatings, are for those who are deemed as "very rebel." Usually, slandering, swearing, threating, and light beatings work well enough to maintain discipline (3 July 2024).

This ex-inmate's description refers to three kinds of abuses: verbal, physical, and psychological. The threat of being reported, so that access to alternative measures is put at risk, plays a capital role in shaping power relations, as well as the quality of life, inside prisons. If penitentiaries are overcrowded, inmates will hope to benefit from alternative measures to escape their poor life conditions. The threat posed by the behaviour of prison officers increases tension among inmates, paving the way to the rise of conflicts or misdemeanours that will force prison officers to report about those inmates that did not behave properly, thus creating a vicious circle fuelling mutual resentment both between inmates and between the latter and prison officers. Asymmetrical power relations, combined with poor life conditions, produce a sort of self-fulfilling prophecy consisting of further deterioration of prison life.

Another seminal aspect about prison abuse concerns the denial of atrocities from inmates (Cohen 2006, 11). Prisons, as independent symbolic frames, set up a pattern of negotiated and shared behaviours and values, which contribute to keep prison as a "dark place," impermeable to external knowledge and influence. Prisoners and staff produce a negotiated truth, that is a narration of events that are influenced both by force relations and by sharing daily life within a closed context, such as that of prison. Following this approach, prison police officers will justify their abusive behaviour because of the aggressive, oppositive, and violent behaviour inmates enact. Other staff, such as physicians, nurses, psychologists, and teachers, will deny any knowledge because they do not know what happens in the rows. Their denial is driven by force relations, as they are afraid that, if they admit to knowing, prison officers could become hostile against them. An ex-inmate has explained: "Prisons directors rotate every three years. Medical staff come from outside. Teachers, social care, can apply to be moved somewhere else outside prison, they don't last for long inside. Police officers remain until they decide they want to go back home. They have a long memory of all the inmates who have come and gone, they know every single little detail about the lives of inmates, so they can blackmail you anytime. Officers are the real governors of a prison…" (Interview, 3 July 2024).

Finally, inmates prefer not to talk about abuses for different reasons. Firstly, their idea of prison is associated with suffering, so, if they protest,

their detention mates could regard them as cowards who broke the code prison that sees *omertà* as a way of surviving inside. Secondly, inmates are afraid they could face retaliations from the staff, both police forces and others. This aspect discourages from reporting, as their life inside the prison could deteriorate more. Thirdly, the public reputation of inmates is limited, so that prosecutors would hardly consider a report made by an inmate. Fourthly, because of their marginal status, inmates cannot afford to put up with legal expenses. Last but not least, those who have suffered serious abuse tend to remove the experience, hoping they will cancel the trauma they suffered.

It is a difficult task to ascertain and prosecute the violation of the human rights of inmates. Outside prisons, a wide part of the public opinion thinks that prison is not a place to claim rights. Inside the walls of a penitentiary, mindsets and codes follow the same path as outside. Despite the mobilisation of activists and the institution of the Prison Ombudsman offices, prisons remain opaque places where extreme sufferings occur and inmates do not see any way out of hardship. Revolts (Manzoli 2020, 9), self-injuries, and suicides become the only tools prisoners have for their demands to be listened to, although such extreme means, resulting in deaths, make their call for help useless. Probably, there is something wrong with prisons.

5. Concluding remarks

Suicides have been the starting point of the present contribution, the thread binding together the three aspects we have discussed: penal policies, punitivist narrations, and life in prison. It has described and analysed how the idea that prisons should be a place of extreme deprivation and hardships, which has been developed over the last 30 years and which has deteriorated prison life, cause a devaluation of the dignity of prisoners as human beings. Consequently, suicides are an extreme form of reaction to a condition of physical, social, and moral deprivation.

Civil society activism, combined with the protests of inmates and the work of newly instituted Prison Ombudsman, might help change the situation, as it is very important for inmates not to consider taking their own lives, and that they grow the awareness of being entitled to human rights despite the fact they are still in prison. Such awareness, though, risks to be useless if not combined with the chance to reintegrate in society again, and not to wallow in marginality and abuses for the rest of their lives. A change within society is necessary for this to happen. The first step to undertake is that of untying the bind between social conflicts and imprisonment. The decriminalisation of immigration and of drug use, as well as the reduction of sentence time, could help emptying prisons and improve life conditions inside, also for the prison staff. In this context, some authors (Whyte 2015, 5) argue that it is useless to criminalise street

crimes, both because it is ineffective and because many street crimes are refunded by private insurances. Other authors (Anastasia and Manconi 2022, 19) argue that it is time to abolish prisons, or to start to introduce a "limited attendance policy," consisting of jailing as much persons as prisons can store. It could be a first step to change. But it would be useless if new prisons were built and, especially, if the public opinion keeps considering that prison will solve every problem by stowing as many people as possible away. Such a way of thinking must change. Or other deaths in prison will follow.

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A slow revolution and the security dilemma: Rethinking punishment and the prison system through a human rights-based perspective

Cinzia Dimonte[*]

Abstract: *The relationship between punishment, human rights, and socio-economic marginalisation within contemporary criminal justice systems is increasingly scrutinised, revealing significant flaws in traditional punitive models. These systems, which heavily rely on incarceration, disproportionately affect vulnerable populations, such as immigrants, the socioeconomically disadvantaged, and incarcerated women. The paper critically examines different theoretical frameworks – retributivism, utilitarianism, and rehabilitation – demonstrating how they fail to address systemic inequalities, often resulting in overcrowded prisons and the over-incarceration of marginalised groups. A focal point of the analysis is Article 41-bis of the Italian Penitentiary Act, which serves as a case study of how exceptional security measures can become normalised, eroding human rights protections and diminishing rehabilitation opportunities. Originally implemented to counter organised crime, the regime has raised concerns regarding its impact on the long-term prospects of prisoners, with its widespread use now seen as undermining fundamental rights. The study argues that addressing organised crime requires not only stringent legal measures, but also socio-economic policies aimed at tackling the root causes of criminal behaviour. Advocating for a shift towards transformative justice, the paper highlights models that prioritise crime prevention, social investment, and restorative justice over punitive approaches. In promoting a human rights-focused rethinking of criminal justice, it calls for systemic reforms that address structural inequalities and offer more sustainable, equitable solutions to crime prevention. Ultimately, the study suggests that addressing socio-economic disparities is key to breaking the cycle of punitive justice and creating a more just and democratic model of public safety.*

Keywords: *punishment; prison; marginalisation; transformative justice; security.*

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1. Introduction

The increasing prominence of ethical, social, and legal debates surrounding punishment within modern criminal justice systems has prompted a growing body of research aimed at critically examining the intersections between punishment, human rights, and socio-economic marginalisation (Garland 2001; Crutchfield and Weeks 2015; Lacey 2022). As traditional punitive models continue to dominate policy discourse (Monterosso 2009, 15–16), questions have arisen about their effectiveness and fairness, particularly in relation to vulnerable groups who disproportionately bear the brunt of incarceration. This ongoing dialogue underscores the urgent need to reassess the role of punishment in contemporary legal frameworks and its broader societal implications.

While punishment is a cornerstone of legal frameworks, it remains a contentious issue, often lacking consensus among scholars, practitioners, and policymakers. A central motivation behind this study is the need to understand how traditional punitive systems, which primarily focus on incarceration, disproportionately affect vulnerable groups and perpetuate cycles of inequality. Furthermore, as public discourse increasingly embraces punitive populism, the paper seeks to highlight the limitations and risks of relying on incarceration as a default solution to complex social issues.

Existing literature on the subject spans a broad range of disciplines, from legal theory to criminology and sociology. Scholars such as Melossi (2015), Wacquant (2001), and Davis (2003) have explored the interplay between crime, punishment, and socio-economic inequalities, particularly concerning vulnerable populations such as immigrants, the poor, and women of colour. However, while these studies provide valuable insights, the role of punishment in perpetuating exclusionary systems and its implications for human rights remain underexplored in the context of contemporary legal frameworks. The present study builds on existing debates by integrating theoretical, historical, and case-specific analyses to offer a more comprehensive understanding of the limitations of punitive systems, particularly with reference to alternative justice models and human rights concerns.

The ultimate purpose of this article is to argue that the reliance on punitive measures, particularly incarceration, not only fails to address the underlying causes of crime but also exacerbates social inequalities. It further suggests that shifting towards transformative justice frameworks – centred on rehabilitation, social investment, and restorative justice – could provide more effective and equitable alternatives to current crime prevention strategies and criminal justice policies.

2. The rationale of punishment under different legal theories: A critical human rights-based perspective

The concept of punishment occupies a central yet contentious place in legal theory, particularly in the context of modern systems that aspire to uphold human rights principles. This section adopts a critical human rights-based perspective to evaluate classical and modern penal theories, interrogating the extent to which retributive, utilitarian, incapacitative, rehabilitative and reparative frameworks align with international human rights obligations. By "critical human rights-based perspective," this article refers to a normative and analytical framework that assesses penal theories and practices against international human rights obligations, with particular attention to the rationale that is also behind "The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty" developed by the International Commission of Jurists (ICJ 2023). This perspective maintains that criminal law must respect the rule of law and fundamental rights by ensuring legality, necessity, proportionality, non-discrimination, and minimum intrusiveness of State action. Moreover, it demands that criminal sanctions, even when lawful, do not reinforce structural inequalities, stigmatise marginalised groups, or result in the arbitrary or disproportionate deprivation of liberty (ICJ 2024, 7–9). From a critical standpoint, this approach scrutinises the legitimacy of punishment not only in light of its formal legal basis, but also in terms of its real-world impact on dignity, equality, and social justice, especially when criminal law is applied in discriminatory or harmful ways (ICJ 2024, 14–15). Hence, the human rights-based perspective outlined by this article aims at questioning the moral and legal legitimacy of traditional penal rationales, when these rationales produce or justify outcomes that contradict the human rights imperative to protect individuals from cruel, inhuman or degrading treatment and from discriminatory practices. Rather than merely applying human rights to existing theories, this critical human rights-based approach asks whether those theories themselves should be rethought in light of human rights standards. It thus frames punishment not as a neutral legal response, but as a practice that must be constantly re-evaluated for its systemic impacts on equality, dignity, and justice.

At its core, punishment involves the intentional infliction of hardship or deprivation by an authority in response to an offence. Despite its ubiquity, the concept remains elusive, with scholars grappling to define it in ways that are universally applicable across legal contexts (Canton 2022). This lack of consensus on what we should expect from punishment in modern legal systems poses significant challenges, particularly from a human rights perspective, as it directly affects individual freedoms and shapes the scope of substantive and procedural criminal law.

In 1954, Flew's definition of punishment outlined four key elements: the infliction of pain or hardship, the connection to an offence, the imposition on the offender, and the role of authority in executing the punishment (Flew 1954). This framework, while foundational, emphasises the punitive element (pain or hardship) in ways that might conflict with contemporary human rights standards such as the prohibition of cruel, inhuman or degrading treatment or punishment, as articulated in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (UN 1966). This provision reflects a broader international legal principle rooted in the inherent dignity of the human person, as affirmed also in the Preamble and in Article 10 of the ICCPR, which states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Punitive frameworks that emphasise suffering may therefore be seen as incompatible with the human rights imperative to prioritise dignity, proportionality, and the rehabilitative purpose of punishment (Rodley and Pollard 2009, 14–16). Hart later built on Flew's foundation, refining the concept to include additional conditions, such as the intentionality of punishment by legal authorities and the emphasis on an offence against legal rules (Navarrete 2011). However, both frameworks highlight the inherently punitive nature of punishment, which raises questions about its compatibility with international human rights instruments that affirm the obligation to treat all persons deprived of liberty with dignity and prohibit the infliction of pain or suffering as a legitimate penal aim. More specifically, according to the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners, better known as the "Nelson Mandela Rules," those in detention must be treated with respect for their inherent dignity, rejecting any punitive practices that undermine their humanity (UN 2015, Rule 1). Furthermore, as Ashworth and Kelly argue in their work, "the importance of punishment being in the hands of State institutions rather than victims or other individuals, resides in rule-of-law values" (2021, 64), which include legality, proportionality, and non-arbitrariness (UNGA 2012; Venice Commission 2011). These principles function as safeguards to prevent punishment from degenerating into retribution driven by vengeance or humiliation. Within this framework, this critical human rights-based perspective rejects the conceptualisation of punishment as a mere mechanism of suffering and instead affirms that it must be grounded in the recognition of the inherent dignity of the individual, regardless of the offence committed. Consequently, punishment must be understood not as a vehicle for pain, but as a regulated institutional process, consistent with international human rights obligations and compatible with democratic legitimacy.

Against this backdrop, it becomes essential to critically examine how the two dominant penal theories, retributivism and utilitarianism, engage with or diverge from these evolving human rights-based standards. By unpacking their foundational premises and normative assumptions, one

can better assess the extent to which these classical frameworks align with, or contradict, contemporary imperatives grounded in dignity, legality, and proportionality.

Retributivism, as epitomised by Kant, grounds punishment in the principle of moral responsibility and retributive justice. According to this view, offenders "deserve" punishment commensurate with the gravity of their crimes, as this restores moral balance within society (Kant and Sullivan 1996). Nevertheless, when assessed through the human rights-based perspective outlined above, the retributive framework raises significant concerns, particularly regarding the compatibility of such moral rationales with international legal obligations that prioritise the minimisation of suffering, the promotion of rehabilitation, and the safeguarding of human dignity. Central to these concerns is the notion that punishment must involve a degree of suffering that is "deserved," which risks legitimising infliction of pain as a moral good, rather than as a regrettable necessity to be minimised. Retributivist theories often prioritise moral rebalancing over considerations of broader societal equity or rehabilitation. The principle of proportionality – central to retributivism – has been criticised for its inability to account for the complexities of modern justice systems, where subjective interpretations of "severity" can overshadow fairness and systemic equity (Cavadino and Dignan 2007). Moreover, even modified retributive frameworks, such as Moore's attempt to temper punishment through proportionality principles, fall short when applied to real-world justice systems. Moore argues that while emotions may influence punitive motives, they cannot serve as a rational justification for punishment itself (Moore 1988). The challenges in applying proportionality in practice lead to punitive measures that often fail to align with broader social and ethical objectives. In this context, Lacey and Pickard (2015) contend that while proportionality is a key principle in justice systems, it is insufficiently institutionalised and cannot serve as the sole mechanism for regulating punishment. In the absence of the necessary institutional and social contexts, proportionality becomes more of an ideal than a practical standard. Relying on it within retributive frameworks, they argue, can result in arbitrary or disproportionate measures that violate human rights, especially the prohibition of cruel or degrading punishment. Instead, they advocate for a more nuanced approach that prioritises human dignity and rehabilitation over mere moral rebalancing. (Lacey and Pickard 2015).

Utilitarianism, championed by Bentham, offers an alternative framework, emphasising societal utility through rationales such as deterrence, rehabilitation, and public safety (Bentham 2015). This approach finds its roots in Beccaria's Enlightenment-era critique of cruel and disproportionate punishments. While both philosophers advocate for deterrence and humanitarian reforms, they diverge significantly in their approaches: Beccaria emphasises proportionality and rejects excessive punishment, while Bentham's calculus prioritises societal happiness,

potentially at the expense of individual dignity (Beccaria 1766). According to utilitarian logic, punishment should aim to prevent future harm by deterring criminal behaviour and rehabilitating offenders (Hudson 2003). Despite its theoretical appeal, the utilitarian rationale often fails in practice, particularly in modern criminal justice systems. For instance, the principles of deterrence and rehabilitation are rarely realised in systems plagued by prison overcrowding and systemic inequities (Von Hirsch et al. 2000). In such environments, the dehumanisation of detainees undermines both the stated objectives of punishment and the foundational principles of human dignity. The failure of punitive systems to deliver on utilitarian promises underscores the inadequacy of classical theories and punitive logics, particularly in light of recent data from Penal Reform International (2025). In 2024, the global prison population reached a record high of approximately 11.5 million, with 155 countries reporting overcrowded prisons, only 68 of which were operating within official capacity. Furthermore, violence, organised crime, and corruption persist throughout prison systems worldwide (Penal Reform International 2025, 7–8). These figures reveal not only the ineffectiveness of prison sentences in achieving deterrence and ensuring public safety, but also how current detention conditions may actively foster criminal behaviour within prisons. In addition, prison sentences impose significant economic burdens on both detainees and their families. Rising costs of living, combined with insufficient institutional support, limit access to essential goods such as food, medicine, and communication, further deepening socio-economic vulnerabilities (Penal Reform International 2023, 6). These dynamics contribute to what Heimer (2019) describes as "intersecting inequalities," structural disadvantages that are closely linked to both crime rates and recidivism.

The incapacitation rationale is focused on preventing further harm by removing the offender from society, often through imprisonment. While this approach aligns with the goal of protecting the public, it has been heavily criticised for its tendency to lead to over-incarceration, particularly in cases where the individual may not pose an ongoing threat (Barton 2005). Additionally, the human rights-based implications of incapacitation practices, which include mass incarceration and reinforcing structural inequalities pre- and post-detention (The Sentencing Project 2024), are concerning especially when viewed through the lens of mass incarceration and its disproportionate impact on marginalised communities (Cohen 1985). Such practices may violate the right to liberty and security of person, protected under Article 9 of the ICCPR, which prohibits arbitrary detention and requires that deprivation of liberty be both necessary and proportionate in each individual case (UN 1966). Where incarceration is applied in a widespread, preventive manner without case-specific justification, it may also undermine the principle of legality and the requirement of minimum intrusiveness, foundational to a human rights-based approach (ICJ 2024, 14–15).

Violations of the right to health, including mental health, are also associated to incapacitation practices, particularly where detention conditions deteriorate due to overcrowding or lack of medical care. This right is protected by Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and operationalised in Rule 24 of the Mandela Rules, which requires that prisoners enjoy the same standard of health care available in the community (UN 1966; UN 2015). Furthermore, incarceration frequently interferes with the right to privacy and family life, as protected under Article 17 of the ICCPR, due to the disruption of family ties, contact with children, and social reintegration. In cumulative terms, systems that rely heavily on incapacitation may violate the obligation to treat all persons deprived of liberty with respect for their inherent dignity (ICCPR, art. 10(1); Mandela Rules, Rule 1), especially when deprivation of liberty is no longer exceptional, but systemic.

From this perspective, the human rights-based implications of incapacitation are not limited to detention itself, but extend to the long-term social, economic and psychological consequences that such measures impose on individuals and their communities. Systems that rely on incapacitation often face ethical challenges, as they may disproportionately affect certain groups without addressing the root causes of criminal behaviour.

On the other hand, rehabilitation has long been a goal of modern penal systems, with the belief that punishment can be used to reform offenders and reintegrate them into society as law-abiding citizens. However, the effectiveness of rehabilitation programmes is widely debated. Some scholars argue that while rehabilitation aims to reduce recidivism and offer a more humane approach, it often fails to produce meaningful results due to poorly funded or ineffective programs (Martinson 1974). Furthermore, the focus on rehabilitating the individual offender can sometimes neglect broader social injustices that contribute to criminal behaviour, such as poverty or systemic discrimination (Garland 2001).

Lastly, the reparative model, which focuses on repairing the harm caused by the offence, emphasises the needs of victims and the restoration of social bonds rather than punitive retribution. This approach has gained traction in restorative justice circles, advocating for practices like victim-offender mediation and community service. Reparative justice aims to address the harm caused by the offence while promoting healing for both the victim and the offender. Nonetheless, while this model aligns more closely with human rights principles, it is not without its criticisms, particularly regarding its ability to deliver justice in serious criminal cases (Zehr 2002).

Punishment, as traditionally conceptualised, frequently overlooks the disproportionate impact on marginalised communities and fails to address

systemic issues such as prison overpopulation and the dehumanisation of detainees. From a human rights-based perspective, these shortcomings are not merely policy failures, but structural contradictions that undermine key principles such as human dignity, equality, and justice. As this section has shown, classical penal rationales often fall short of the normative standards imposed by international human rights frameworks, both in theory and practice. This issue extends beyond a technical legal debate: it directly implies fundamental human rights principles, necessitating a rethinking of punitive systems, one that foregrounds the rights of both offenders and victims and reorients criminal justice around models rooted in human dignity and social justice.

The following sections will explore these challenges and propose paths for aligning punishment with a human rights-oriented approach, posing a specific focus on the correlation between punishment and socio-economic marginalisation and the fallacy of prison as a punishment tool.

3. The relation between punishment and socio-economic marginalisation

A critical dimension warranting greater attention in the analysis of punishment is the link between imprisonment and the socioeconomic factors underpinning its application. Especially significant is the connection between incarceration and systemic issues such as poverty, social marginalisation, and the struggles faced by socioeconomically vulnerable groups.

In his 2015 work, *Crime, Punishment and Migration*, Melossi investigates the interrelation between human mobility and the social construction of crime and punishment, with a specific focus on immigrant populations in the United States and Western Europe. He contends that crime and migration are intertwined phenomena, shaped by the evolution of social structures under the pressures of global capitalism. Central to his argument is the assertion that power dynamics and class struggles have historically positioned punishment as a mechanism for regulating labour (Melossi 2015).

In comparing the United States and Europe, Melossi observes that the United States, despite its heightened punitive climate, incarcerates relatively few immigrants in proportion to its documented and undocumented migrant populations. This disparity, he suggests, reflects the United States' historical identity as a nation of immigrants, its comparatively flexible labour laws, and its structural differences from European nations, where immigrants constitute a higher percentage of the prison population (Melossi 2015, chap. 2). While some scholars argue that punishment in the United States should also be understood through the collateral consequences of deportation and the "deportability" of non-citizens (Brotherton 2017),

Melossi's comparative analysis underscores how punishment is intricately linked to socio-economic marginalisation, with penal systems reinforcing exclusionary cycles, particularly for vulnerable migrant populations.

Regarding Europe, Melossi identifies a significant transition: the shift from being nations of emigrants to becoming nations of immigrants. This transformation, he argues, has precipitated a range of humanitarian, political-economic, and security crises. Moreover, Melossi underscores the role of societal labelling and the social construction of the "other" in fostering moral panic and fuelling the rise of populist sentiments against immigrants across several European countries. Such dynamics have contributed to an increasingly securitised discourse around immigration and crime, thereby legitimising punitive policies as a default response to complex societal challenges (Melossi 2015, chap. 3).

Furthermore, the rise of populist movements, which are becoming increasingly prominent in global policy debates, serves only to amplify and instrumentalise anxieties surrounding public safety, positioning imprisonment as the unquestioned solution to all forms of crime and security concerns (Hamilton 2002).

A 2001 study by Wacquant explored how, unlike the United States, where the criminalisation of poverty has become deeply ingrained within the State structure and public culture, Europe could still prevent such a trend. The use of the prison system in advanced societies is not inescapable, but rather a result of political choices. To oppose the penalisation of social precarity, the article proposes a threefold battle. First, it calls for careful examination and critique of the language and discourses used, which often narrow the scope of debate and normalise the use of punishment for addressing social inequalities. Second, it advocates for policies and practices that resist the expansion of the criminal justice system and instead promote social, health, and educational alternatives. Lastly, the article highlights the importance of collaboration between activists and researchers working on both the penal and social fronts, at a European level, to optimise intellectual and practical resources for the struggle. Ultimately, the construction of a European social State that strengthens and expands social and economic rights is presented as the most effective means of countering the penalisation of poverty and reducing the reliance on incarceration (Wacquant 2001).

The link between the criminal justice system and social inequalities has been extensively examined in recent years, with a growing scholarly focus on gender-related issues in fields such as criminology and public safety. In particular, Dastile and Agostino's 2019 work on incarcerated women argues that their identities are deeply influenced by the colonial power dynamics embedded in imperialism. Their research underscores the necessity of reconstructing the identities of incarcerated women in order to challenge

the dominant, law-and-order narrative surrounding their criminalisation. Through a series of case studies, they explore the ways in which race, gender, and class intersect to shape the lived experiences of Black women within the criminal justice system, leading to distinct subjectivities and embodied identities. Ultimately, they highlight how the interplay between these women's identities and a Western-centric perspective significantly informs their criminalisation (Dastile and Agozino 2019).

This intersection between socio-economic marginalisation and the use of imprisonment as a tool for social control, exacerbated by the rise of punitive populism, highlights a troubling shift away from the principle of *extrema ratio* (UN 2021, 3). While punishment has historically been intended as a last resort, increasingly it functions as a primary response to complex socio-economic issues, particularly in relation to marginalised groups such as immigrants and the economically vulnerable. The growing reliance on incarceration as a solution to poverty, migration, and social exclusion not only perpetuates cycles of disadvantage but also risks reinforcing a punitive culture in which prison becomes the default mechanism for addressing societal problems. As punitive populism continues to gain traction, the promise of a human rights-based justice system is replaced by a system that too often resorts to penal measures as the first, rather than the last, line of defence. This shift threatens the very notion of punishment as a proportionate, exceptional response, distancing it from its original *extrema ratio* function (UN 2021, 3) and reinforcing the systems of control and exclusion that disproportionately affect already marginalised populations.

4. "Are prisons obsolete?": The revolution of critically thinking punishment in modern legal systems and societies

The most ground-breaking piece of contemporary legal and political literature presenting this theme is certainly *Are Prison Obsolete?* by Angela Davis (2003). In her seminal work, Davis provides a profound critique of the prison system, arguing for its abolition. She questions the commonly held belief that prisons serve as an effective solution to social problems, drawing attention to the deep-seated injustices and inequalities embedded within the prison-industrial complex (chap. 5). Davis traces the historical evolution of prisons, exploring their role in perpetuating systemic oppression, particularly with regard to marginalised groups such as people of colour and the economically disadvantaged (Davis 2003, 28, 36). She contends that prisons do not address the root causes of crime but instead function as instruments of social control, reinforcing existing power structures and exacerbating social inequalities (Davis 2003, 10, 16, 19). Building upon feminist and abolitionist frameworks, Davis proposes alternative strategies for addressing crime and achieving justice (Davis, chap. 6). Central to her vision is the concept of transformative justice (Davis 2003, 56), which prioritises addressing the underlying causes of harm,

fostering healing, reconciliation, and community restoration. She stresses the need for investment in education, healthcare, and social services as proactive measures, rather than resorting to punitive mechanisms such as imprisonment (Davis 2003, 88). Furthermore, Davis critiques the profit-driven nature of the prison-industrial complex, exposing the economic forces that sustain mass incarceration (Davis 2003, chap. 5). She highlights the racial disparities within the criminal justice system, shedding light on the disproportionate impact of incarceration on communities of colour and she asserts that the prison system is fundamentally flawed, serving to perpetuate harm rather than promote genuine justice. She advocates for a radical reimagining of society, proposing a shift towards community-based alternatives to incarceration. Ultimately, Davis calls for the complete abolition of prisons and the establishment of new systems centred on healing, rehabilitation, and social justice (Davis 2003, 106–08). Her abolitionist theory has served as a catalyst for a global debate on the legitimacy of prisons, laying the groundwork for a revolutionary theory of punishment. Although there is still a huge lack of consensus in literature on whether this new paradigm might be possible to realise, her work planted the seeds for other related studies to be started and the voices of thousands of legal and political theorists to be heard.

Ruth Wilson Gilmore, in her book *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*, shares a similar abolitionist perspective and argues for the dismantling of prisons as a response to systemic issues such as racism, capitalism, and inequality (Gilmore 2018).

In her influential work *We Do This 'Til We Free Us*, activist and writer Mariame Kaba advocates for abolitionist practices and transformative justice (2021). Through her writing and activism, Kaba stresses the necessity of community-based alternatives to punishment, emphasising the importance of addressing the root causes of harm rather than relying on incarceration. She challenges common misconceptions surrounding prison abolition, clarifying that its goal is to establish humane alternatives to imprisonment, all the while maintaining accountability for the actions of individuals (Kaba 2021, 70, 178–80). Central to her argument is the call to shift the focus away from punitive measures and toward tackling the systemic issues that underpin crime, fostering alternative frameworks that prioritise healing, accountability, and the well-being of the community (Kaba 2021, 241).

Kaba underscores that most crime is a consequence of desperation and adverse societal conditions endemic to marginalised communities (2021, 109–10). Rather than resorting to punitive measures, she proposes that violence prevention is best achieved by providing support and resources to meet individuals' basic needs (Kaba 2021, 164). By addressing the underlying issues of stress, scarcity, and oppression, communities can be empowered to confront these challenges and reduce crime rates (Kaba 2021, 242).

A key component of Kaba's perspective is the concept of "invest/divest," which advocates for reallocating resources from harmful systems, such as the police and prison-industrial complex, and redirecting those funds toward community-driven programmes. These initiatives would offer vital support and address the root causes of crime, thereby reducing police violence and creating space for unarmed individuals trained in social services to respond to incidents and provide necessary assistance (2021, 154, 200-05).

She also highlights the intersectionality of the criminal legal system, particularly the compounded vulnerabilities faced by women, trans, and gender-nonconforming individuals of colour (Kaba 2021, 207–11, 226) and she acknowledges the disproportionate punishment of survivors of sexual violence who act in self-defence, advocating for a rejection of the dehumanisation of victims and a challenge to societal narratives that perpetuate such injustices (Kaba 2021, 224–27). Moreover, Kaba's framework rejects vengeance as a response to gender and sexual violence. Instead, she promotes a process of healing and restoration for both victims and perpetrators (Kaba 2021, 199–200), focusing on preventing future harm by addressing its root causes and dismantling oppressive systems. Ultimately, her approach underscores the importance of valuing every member of the community, fostering a culture of care, and taking collective responsibility.

Abolitionists like Davis and Kaba have, on the other hand, strong theoretical opposition. The main concerns on the opposite front are that focusing solely on prison abolition may not effectively address the complexities of crime and public safety (Gottschalk 2016) and that there may be instances where incarceration is necessary to address specific forms of violence and protect communities (Forman 2017). Robert Perkinson, in his book *Texas Tough: The Rise of America's Prison Empire*, offers a critical examination of prison abolitionist theories, arguing that prisons serve multiple functions beyond punishment, including social control and economic exploitation, and that simply abolishing prisons may not address these underlying issues (Perkinson 2010). The role of social control and economic exploitation as foundational rationales for punishment has been thoroughly examined by Melossi in *Stato, Controllo Sociale, Devianza* [*State, Social Control, and Deviance*]. In this work, he illuminates the intricate relationship between the State and mechanisms of social control, exploring the various strategies and institutions the State employs to sustain its dominance and regulate populations. He further asserts that State control extends well beyond formal legal systems, encompassing a wide range of social, political, and economic mechanisms. Throughout his analysis, Melossi demonstrates how prisons serve to perpetuate social inequalities and reinforce prevailing power structures (Melossi 2002).

Ultimately, while the concerns surrounding abolitionist theories and transformative justice remain complex and multifaceted, these perspectives

challenge a criminal justice paradigm that, as Davis aptly argues, has become "obsolete." However, it is essential to acknowledge the intricacies involved in balancing the protection of human rights with public safety, particularly when the latter is invoked to legitimise exceptional penal regimes or materially disproportionate restrictions on individual liberties. This tension necessitates a constant recalibration in light of the principles of legality, necessity, and proportionality, as enshrined in international human rights law. Nonetheless, it is also important to assert that such concerns should not serve to justify phenomena like hyper-criminalisation and mass incarceration driven by security-driven moral panics. These periodic waves of public hysteria exacerbate systemic inequalities and fail to address the root causes of crime.

In light of this, the following case study will provide a concrete example of how these theoretical frameworks intersect with contemporary penal practices and the ongoing challenges in reforming prison structures.

5. The case study of the "hard prison regime" under Article 41-bis of the Italian Penitentiary Act: Human rights or public order issue?

An example that has sparked extensive debate regarding human rights and public safety in Italy for several decades is the so-called "hard prison." While this issue has been thoroughly examined in both legal scholarship and jurisprudence since its inception (Chinnici 2015; Kalica 2019; Giustizia Insieme 2020; Dolcini et al. 2020; Santangelo 2022; Metrangolo 2023; Caterini and Gallo 2025), the case of Alfredo Cospito, a prominent member of the Informal Anarchist Federation imprisoned under this regime, brought renewed attention to the human rights concerns associated with it. In October 2022, Cospito initiated a hunger strike to highlight what he deemed to be an issue of inhuman and degrading treatment (Seregni 2023; Human Rights in Context 2023).

The term "hard prison" refers to a more restrictive prison regime compared to the regular regime, as defined in Article 41-bis of the Penitentiary Act (Law No. 354 of 26 July 1975 and following modifications). Originally, the provision allowing for derogation from the ordinary regime was introduced to address situations of revolt or serious internal emergencies in Italian prisons under the so-called "*Gozzini*" law (Law No. 663 of 10 October 1986). However, following the *Capaci* massacre on 23 May 1992, a second paragraph was added to Article 41-bis, granting the Minister of Justice the authority to suspend the treatment rules and legal institutions provided for by this law which may be in concrete conflict with the needs of public order and security, specifically for prisoners belonging to Mafia-structured criminal organisations.

The suspension of the prison ordinary rules – which may involve restrictions on permits, mail, visits, and outdoor time – leads to a more

restrictive treatment for members of the criminal organisation. The law on public safety (Law No. 94 of 15 July 2009) has modified the duration limits, allowing the suspension of ordinary treatment and the application of Article 41-bis for up to four years, with the possibility of extensions for two years each.

The purpose of the "hard prison" regime is to hinder communications between inmates and criminal organisations outside the prison, as well as contacts between members of the same organisation inside the prison and conflicts between different criminal organisations. It aims to prevent crimes and ensure both intramural security and public order. The regime involves restrictions on interviews, censorship of correspondence, reduction of visits, and isolation from other prisoners to limit contact with the outside world and severely restrict interactions with other inmates. The "hard prison" applies to individuals convicted of specific crimes listed in Article 4-bis, paragraph 2, including terrorism, mafia-type criminal association, slavery or servitude, child prostitution, human trafficking, group sexual violence, and drug-related offences (Law No. 354 of 26 July 1975 and following modifications).

The European Court of Human Rights (ECtHR) has examined the compatibility of the 41-bis regime with human rights standards, particularly regarding personal searches, video surveillance of cells, restrictions on correspondence, and contact with the outside world. Before 2019, the ECtHR's jurisprudence recognised that the suspension of ordinary prison rules as a response to the mafia phenomenon does not violate the European Convention on Human Rights (ECHR) (Council of Europe 1950) (*Messina v. Italy* (no. 2), 25498/94, 28.9.2000 [Section III]; *Bastone v. Italy*, 59638/00, 11.7.2006 [Second Section]). However, the specific application of these restrictive measures to individual prisoners must be evaluated on a case-by-case basis to determine if they qualify as inhuman and degrading treatment in violation of Article 3 of the ECHR. The severity of the treatment is assessed based on factors such as its duration, its impact on the physical and mental well-being of the prisoner, and the personal characteristics of the prisoner, including their sex, age, and health. Still, with its judgment of 13 June 2019 in the *Viola v. Italy* case, the Court established that the non-reducible so-called "*ergastolo ostativo*" violates the prohibition of degrading and inhuman treatment and the general respect for human dignity (*Viola v. Italy (no. 2),* 77633-16, 13.6.2019 [Section I]). According to the ECtHR, "the current system focuses solely on the lack of co-operation with justice and does not consider the reintegration process nor any progress made of prisoners sentenced to this form of life sentence when deciding on conditional release" (Council of Europe 2020a). Therefore, "the irrefutable presumption of dangerousness has the effect of depriving the applicant of any realistic prospect of release and was thus in breach of Article 3 of the European Convention of Human Rights" (Council of Europe 2020a). In this context, the Italian Constitutional

Court has requested on several occasions an intervention of constitutional adjustment of the impedimental prison regime.

With the Decree Law No. 162/2022 (Decree-Law No. 162 of 31 October 2022), published in the Official Gazette General Series No. 255 of 31 October 2022 and entered into force on the same date, the Government introduced new rules for life imprisonment to remedy the lack of parliamentary outcome on the unified text of the Senate Act 2574 (Atto Senato n. 2574 XVIII Legislatura) (Senato della Repubblica 2024) which had the declared objective of reconciling the needs of collective security with the principle of re-education of the sentence.

The purpose of this historical and legal *excursus* on the concept of "hard prison" is to emphasise that, in certain very specific circumstances, it is especially challenging to carry out a valid assessment of the rationale behind punishment and, above all, the necessity of the prison system. For instance, those who lived in Southern Italy, from the 1970s to the 1990s, gained distinct awareness of the climate of terror instilled by organised crime syndicates and this law represents the legal outcome of the widespread state of emergency that prevailed during that period.

However, with the succession of political experiences and judicial events including the so-called "*Mani Pulite*" (Barbacetto et al. 2022) trial, which has kept the alert of new seasons of terrorism, Italy has inherited a logic of criminal justice that poses its fundamentals on the deterrence of Mafias. Therefore, the entire Italian regulatory system has strengthened its punitive walls, to the detriment of internal, international and supranational norms, constitutionally guaranteed, on the protection of human rights, such as Article 3 of the ECHR, Article 4 of the European Union Charter of Fundamental Rights, (European Union 2012) Articles 13 and 27 of the Italian Constitution, (Senato della Repubblica 1947) as well as international instruments like the UN Convention Against Torture and the ICCPR.

It is noteworthy that, while the 41-bis regime has undeniably impacted on the leadership of Mafia organisations, its overall efficacy in curbing organised crime remains limited. The growing use of isolation measures reflects the broader challenge posed by overcrowded prisons and the desire to prevent new forms of criminal organisation within the prison system.

As reported by *Associazione Antigone* in its 2024 report on the conditions of detention, the number of prisoners under the 41-bis regime remains high and stable over the last decade, with recent figures published by the Ministry of Justice showing 733 detainees as of 11 December 2023, including 12 women at the *Casa di Reclusione de L'Aquila* and 7 interned at the *Casa Circondariale di Tolmezzo*. This number dropped slightly to 721 by 4 April 2024, according to data from the Department of Prisons.

These detainees are distributed across 12 41-bis sections throughout Italy. Regarding affiliation with criminal organisations, the majority of detainees under 41-bis are linked to Italy's most prominent Mafia-structured groups. Of the 733 prisoners, 203 belong to the *Camorra*, 209 to the *Ndrangheta*, 205 to *Cosa Nostra*, 25 to the Apulian Mafia, 22 to the Sicilian Mafia, 19 to the *Sacra Corona Unita*, five to the *Stidda*, four to the Lucanian Mafia, three to other Mafias, and four to terrorism (both domestic and international). One significant factor contributing to the stable number of prisoners in 41-bis is the high rate of automatic renewals, with little scrutiny of whether the individual's ties to criminal organisations remain active. The Italian National Guarantor for the Rights of Persons Detained or Deprived of Liberty has reported that many individuals have been under 41-bis for more than 20 years, with a significant number serving their entire sentence in these sections (Associazione Antigone 2024). Interestingly, fewer than 30% of those under this regime are serving life sentence (Associazione Antigone 2024). Given these statistics and the evolving context, the 41-bis regime, which was initially introduced as an exceptional measure, seems to have undergone a process of normalisation.

For many of the detainees affected, it has become an ongoing form of suffering, no longer considered as an extraordinary measure, but as a standard element of their incarceration. This shift reflects the broader implications of mass incarceration and the extension of 41-bis beyond the anti-mafia context, revealing its growing integration into the general penal system as a tool of prison management rather than an exceptional measure.

This does not imply that a suitable framework for punishing such offences should be excluded, nor that the issue should be oversimplified or polarised. Rather, it underscores the urgent need to approach the matter with a fresh perspective, one that aligns with recent international human rights standards and recommendations (OHCHR 1990; Council of Europe 2020b; Italian Constitutional Court 2025). Such an approach could draw on research that challenges the traditional assumptions regarding the effectiveness of imprisonment, as explored in the previous sections of this paper. It calls for the exploration of innovative legal methods to redefine criminal law and the criminal justice system, advocating for a focus on reinforcing the rule of law rather than perpetuating mass incarceration and the erosion of human rights for individuals convicted of organised crime, terrorism, or other serious offences that pose a significant threat to public order and security.

Furthermore, research extensively underscores the critical importance of addressing the socio-economic and cultural conditions that enable organised crime to embed itself within societies. In Italy, for instance, studies have demonstrated a robust association between socio-economic inequalities and the prevalence of organised crime, found that regions

with higher levels of income inequality and lower social mobility tend to experience greater infiltration by criminal organisations. (Battisti et al. 2018, 205–39). This suggests that economic disparities create fertile ground for such entities to flourish.

Further analysis by Moccetti and Rizzica (2024) indicates that organised crime adversely affects the socio-economic development of affected areas through multiple channels, including the distortion of local economies and the erosion of social capital. This research highlights the complex interplay between economic disadvantages and criminal activity, suggesting that merely implementing punitive measures is insufficient to combat organised crime effectively.

In light of these findings, it becomes evident that a comprehensive strategy to combat organised crime must extend beyond traditional penal approaches. Transformative justice, in this context, refers to a framework that seeks not only accountability and harm repair, but also systemic reform. It addresses the structural and socio-economic conditions that foster criminal behaviour, such as marginalisation, poverty, and inequality. Gready and Robins (2014) advocate for integrating social and economic policies that promote social justice, reducing the appeal of organised crime. They argue that transformative justice should be holistic, encompassing a range of approaches that directly impact communities and promote long-term social transformation. Concrete examples may include community-based education programmes, hate crime prevention initiatives, funding alternatives to incarceration, and efforts to address systemic disparities through housing and employment within legality. Additionally, promoting sustainable development in rural and peripheral areas may help reducing economic dependence on illicit activities and fosters long-term social cohesion. While stringent legal measures are necessary to address immediate threats, they must be paired with initiatives aimed at addressing the socio-economic factors that enable crime, dismantling the structural inequalities that sustain.

In this framework, rethinking punishment through a human rights-based perspective means moving beyond punitive excess and populist criminal policies and advocating for a shift toward prevention and addressing the root causes of crime while resisting mass incarceration.

6. Conclusions

Revolution is a slow machine. This article has endeavoured to critically reframe the concepts of punishment and the prison system from a human rights-based perspective, demonstrating that traditional punitive models are often beset with shortcomings and structural inequities. By examining punishment from both a theoretical and historical standpoint, the discussion has illuminated how the concept itself remains elusive within legal theory and no single definition fully encapsulates its application across criminal law and

policy. This conceptual ambiguity raises both formal and substantive legal concerns, particularly when considering the balance between retributive justice and the protection of fundamental rights.

Through an analysis of the rationale behind punishment and the function of prisons, a clear correlation has emerged between incarceration rates and socio-economic inequalities. The disproportionate imprisonment of marginalised groups underscores how punitive measures often function as instruments of social control rather than as mechanisms of justice. This trend, exacerbated by populist penal policies, highlights the urgent need for a paradigm shift in criminal justice.

One of the most thought-provoking considerations to emerge from this research is the potential revaluation – or even abolition – of the prison institution in favour of alternative justice frameworks. Rather than perpetuating cycles of incarceration, a reallocation of resources towards strengthening the rule of law, social welfare, and crime prevention could offer a more effective and democratic approach to public safety. Such a transformation, however, must navigate the risks posed by populist rhetoric, which often exploits fears of crime to justify increasingly punitive policies.

To contextualise these debates, the paper examined Article 41-bis of the Penitentiary Act of Italy, a case study that exemplifies the tension between human rights and public security concerns. While initially conceived as an extraordinary measure to counter organised crime, the normalisation of Article 41-bis has revealed the dangers of indefinite punitive mechanisms, which risk undermining the protection of fundamental human rights. The rulings of the ECtHR on life imprisonment underscore the need for criminal justice policies that prioritise rehabilitation over permanent exclusion. Moreover, research has demonstrated that organised crime thrives in contexts of socio-economic disparity, suggesting that legal deterrents alone are insufficient. A comprehensive strategy must integrate economic and social policies aimed at addressing the root causes of criminality.

Looking ahead, the future of criminal justice must move beyond the dichotomy of punitive severity versus leniency. Transformative justice frameworks, which emphasise social investment, crime prevention, and rehabilitation over mass incarceration, offer a promising alternative. Integrating such models into legal systems requires structural reform, including a reconsideration of sentencing policies, greater investment in community-based justice initiatives, and the promotion of restorative justice practices. Furthermore, interdisciplinary research, bridging law, criminology, sociology, and economics, can provide new insights into how justice systems can evolve to be both effective and respectful of rights.

Ultimately, this article has argued that a criminal justice system perceived as “secure” can, paradoxically, become the most unstable when

it disregards human rights and social justice principles. Strengthening the rule of law, rather than expanding punitive measures, remains the most effective safeguard for public safety. The urgent challenge ahead is to recalibrate the justice system in a way that restores the principle of *extrema ratio* in punishment, ensuring that incarceration is a measure of last resort rather than a default response to social and economic vulnerabilities.

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Criminalisation of environmental defenders in Latin America: Standards for their protection since the Escazú Agreement

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Abstract: *Latin America is the most dangerous region in the world for environmental defenders, which is why the protection of these activists has become important in recent years. This work aims to analyse a crisis of systematic criminalisation against environmental defenders, who are legally and judicially persecuted for opposing extractive projects or defending their territories. This article analyses the phenomenon of criminalisation in three countries (Colombia, Mexico, and Honduras) through the lens of Article 9 of the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) and its 2024 Action Plan on Human Rights Defenders in Environmental Matters. Using a qualitative and comparative approach, it assesses the limitations and potential of the Agreement as a tool for effective protection. The study concludes that, whilst the Escazú Agreement is a pioneering normative advancement, its real impact remains limited due to political resistance, structural impunity, and the absence of coercive mechanisms. The existence of this regional instrument does not in itself guarantee the effective protection of environmental defenders. Its transformative potential will depend on its effective incorporation into national legal frameworks, the strengthening of monitoring and enforcement mechanisms, and the active participation of organised civil society. The articulation of international standards, strategic litigation, community participation, and political advocacy will be key to building a safe and enabling environment. The article proposes legal, institutional, and social recommendations to strengthen protection and ensure safe environments for those who defend the environment in the region.*

Keywords: *criminalisation; environmental defenders; Escazú Agreement; human rights; Latin America; international protection.*

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1. Introduction

In Latin America, environmental defence has become a high-risk activity (Alcañiz and Gutiérrez 2022). The region has witnessed alarming numbers of attacks, threats, and murders of environmental defenders, in a context marked by the expansion of extractive projects, institutional weakness, and structural impunity (Omeje 2013; Cardona 2024). Among the most worrying forms of repression is the criminalisation of environmental defenders, understood as the misuse of criminal law and administrative procedures to delegitimise, silence, and hinder their legitimate work (Deonandan and Bell 2019). This criminalisation distorts the essence of the rule of law and constitutes a mechanism of State-sanctioned violence that undermines human rights (Pérez et al. 2023).

This criminalisation manifests itself in arbitrary charges, detentions without due process, excessive use of criminal offences such as sedition, terrorism, or trespass, and stigmatisation campaigns promoted by State or private actors (Middleton and Sullivan 2024; CIEL et al. 2016; Aguilar 2020). Throughout the region, the arbitrary use of vague or ambiguous criminal offences has been identified to criminalise the work of environmental defenders, such as attacks on communication and transportation routes, attacks on national assets, or even the deprivation of liberty of an individual (Aguilar 2020). Human rights defenders are also vilified by the media, which stigmatises these activists to effectively eliminate the right to the presumption of innocence and the right to a fair trial in State justice systems (CIEL et al. 2016).

Given this scenario, the Escazú Agreement – the first binding environmental treaty in Latin America and the Caribbean with specific provisions on the protection of human rights defenders in environmental matters – represents an unprecedented normative promise (Dávila 2023). Specifically, its Article 9 and the Action Plan approved in 2024 offer regional standards that commit States to preventing violence and criminalisation, guaranteeing effective protection measures, and fostering meaningful civil society participation. The Escazú Agreement also represents the State Parties' commitment to the application of those guarantees already recognised in international normative texts (Jiménez 2021).

However, the persistence of systematic criminalisation practices in several signatory countries of the Escazú Agreement raises serious doubts about the actual effectiveness of these standards (Hatzky and Onken 2024). In this context, this paper aims to answer the following research question: How effective are the standards established in the Escazú Agreement in preventing and reversing the criminalisation of environmental defenders in Latin America?

Based on this question, the central research hypothesis is formulated. Although the Escazú Agreement introduces an innovative regulatory framework for the protection of environmental defenders, its effectiveness in preventing and reversing criminalisation has been limited due to a lack of political will, structural impunity, and the resistance of the judicial and State security apparatus.

The overall objective of this work is to critically analyse the protection standards contained in the Escazú Agreement against the criminalisation of environmental defenders in Latin America, evaluating their normative and practical implementation in specific national contexts.

From a methodological perspective, a qualitative-critical approach is adopted that combines legal analysis with comparative case studies. A documentary review of primary and secondary sources (international regulations, domestic legislation, rulings, reports from human rights organisations, and relevant jurisprudence) is conducted, complemented by a case study in three countries highly affected by the criminalisation of environmental defenders: Colombia, Mexico, and Honduras. Legal discourse analysis is also employed to demonstrate the selective use of criminal law as a tool of repression (Pérez et al. 2023). This approach seeks to reveal the tensions between international human rights law and State practices in extractivist contexts and contexts of high environmental conflict (Raftopoulos 2018; Scheidel et al. 2020; Cotula 2020). The jurisprudence of the Inter-American Court of Human Rights has undergone a process of greening, not as a free decision, but as a need to adapt the human rights enshrined in the American Convention on Human Rights to the worldview, ways of life, cultural identity, and relationship with nature of the traditional peoples of Latin America (Hardt 2024).

The paper is structured in six sections. After the introduction, the second section presents the characterisation and trends in the criminalisation of environmental defenders in Latin America. The third section examines the Escazú Agreement and protection from criminalisation. The fourth section examines the criminalisation of environmental defenders in Colombia, Mexico, and Honduras in light of the Escazú Agreement. The fifth section develops the limits and potential of the Escazú Agreement in the face of criminalisation. The sixth section makes normative and policy recommendations to strengthen the protection of environmental defenders. Finally, the seventh section presents the conclusions.

This paper seeks to provide evidence and arguments to an urgent and strategic debate, how to ensure that environmental defence in Latin America does not pose a risk to the freedom, integrity, or lives of those committed to this cause.

2. Characterisation and trends in the criminalisation of environmental defenders in Latin America

The criminalisation of environmental defenders in Latin America has taken on a systematic, functional, and structural character (Glazebrook and Opoku 2018; Pérez et al. 2023). Far from being isolated episodes or exceptional institutional failures, this practice represents a strategy of social control used to neutralise resistance to extractive, infrastructure, or agro-industrial projects in territories with high socio-environmental conflict (Olarte 2019; Borrás 2013). It is a form of institutionalised violence, in which economic interests, logics of State repression, and narratives that delegitimise those who defend human rights and the environment converge (Doran 2017; Kaufmann and Prieto 2024; Pérez et al. 2023).

Criminalisation can take multiple forms, including arbitrary criminal charges for crimes such as terrorism, sabotage, usurpation, or sedition; detentions without due process; defamation and stigmatisation campaigns in the media; surveillance and intelligence on community leaders; as well as the selective and disproportionate prosecution of social protest (Sauvant et al. 2016; Ferstman 2024; HRW 2024; Aguilar 2020). These actions seek not only to punish the defender but also to generate a collective deterrent effect on organised communities (Pigrau and Borras 2015). In many cases, this criminalisation occurs in parallel with threats, harassment, or murders, generating a climate of fear and immobilisation (Birss 2017).

Reports from international organisations have repeatedly warned of this problem. According to Global Witness (2024), of the 196 murders of environmental defenders documented that year, 85 percent occurred in Latin America, with Colombia, Mexico, and Honduras being the most dangerous countries. Added to these crimes are hundreds of cases of arbitrary prosecution, where the use of criminal law becomes a more effective mechanism of harassment than direct physical violence (Glazebrook and Opoku 2018; Knox 2017; Rodrigues et al. 2022).

The UN Special Rapporteur on Human Rights Defenders (2016) noted that environmental defenders face numerous threats and violations that are closely linked to criminalisation, including violent attacks and threats to their families, enforced disappearances, illegal surveillance, travel bans, blackmail, sexual harassment, judicial harassment, and the use of force to disperse peaceful protests. These violations are committed by both State and non-State actors and occur within a general context of stigmatisation, demonisation, and de-legitimisation of environmental rights defenders (Hossain et al. 2018; Hines 2020; CIEL et al. 2016; Pérez et al. 2023).

The pattern of criminalisation has a strong structural component (Peterson 2010). First, collusion between State and corporate actors creates an environment where extractive projects receive official support,

whilst local opposition is treated as a threat to "development" (Huisman and Sidoli 2019). Second, the weak independence of the judiciary and the lack of human rights training for prosecutors and judges facilitate the acceptance of unfounded accusations (Bartlett 2020; Aguilar 2020). Third, national regulatory frameworks often lack specific provisions to protect defenders, allowing them to be targeted based on ambiguous or anti-terrorism laws (Bennett et al. 2015; IACHR 2015).

These mechanisms articulate what Kaufmann and Prieto (2024) describe as legal violence, where structural inequalities decisively influence who can assert their claims before the State system. Criminalisation is thus not only an individual act of prosecution but a systemic strategy of repression that operates with the complicity or inertia of State institutions (Pérez et al. 2023).

Furthermore, the dominant discourse on development and progress obscures the legitimate causes of environmental protest, portraying defenders as "enemies of order," "radical anti-mining activists," or "investment saboteurs" (Lester 2019; Alvergne 2019). These labels are reproduced by authorities, the media, and even sectors of civil society, creating a stigma that justifies repression. This cultural violence, as Kaufmann and Prieto (2024) explain, instrumentalises discourses of progress and peace to legitimise economic projects (Hein and Bezerra Sales Sarlet 2019).

Criminalisation also operates in differentiated ways based on gender, ethnicity, and class. Indigenous, peasant, and Afro-descendant defenders face intersecting forms of violence such as sexual violence, institutional racism, and territorial dispossession (Hernández Castillo 2016; Aguilar 2020). These situations exacerbate the vulnerability of certain social sectors to the State's criminal justice system (Adams et al. 2019). Of particular note are the attacks against women human rights defenders, who face threats of sexual violence and smear campaigns based on their gender, further exacerbated by the context of criminalisation (CIEL et al. 2016; Pérez et al. 2023).

In the case of indigenous populations, they are often denied access to interpreters or translators who would enable an adequate defence, and in some cases, they are even prohibited from using their native language, which constitutes a form of criminalisation and discrimination based on language and cultural identity (*López Álvarez v. Honduras* 2006).

Finally, the current criminalisation of environmental defenders has historical roots. As Gargallo (2014) argues, this phenomenon is tied to the confusion between modernity and emancipated modernity. From rationalist postulates developed in Europe, communal lands were enclosed, poor people were persecuted, and women were criminalised –

all as part of the consolidation of an economic order hostile to popular mobilisations. These historical continuities underscore the deep structural nature of contemporary violence against environmental defenders.

3. The Escazú Agreement and protection from criminalisation

The Escazú Agreement, adopted in 2018 and in force since 2021, constitutes a milestone in environmental law and the protection of human rights in Latin America and the Caribbean. It is the first international treaty that explicitly links access to information, public participation, and environmental justice with the protection of human rights defenders in environmental matters, establishing legally binding commitments for the States Parties. Its Article 9, entitled "Human Rights Defenders in Environmental Matters," establishes a direct obligation for States to guarantee a safe and enabling environment for these defenders to operate without threats, restrictions, or undue risks.

This Article establishes that States Parties must take appropriate and effective measures to recognise, protect, and promote the rights of environmental defenders. It also includes the duty to prevent, investigate, and punish attacks, threats, or intimidation against them. This provision is particularly innovative, as it is the first international environmental law to specifically recognise the role of human rights defenders as an essential part of environmental democracy, a step beyond Principle 10 of the Rio Declaration and the Aarhus Convention (United Nations Economic Commission for Europe 1998).

In 2024, the States Parties adopted the Action Plan on Human Rights Defenders in Environmental Matters, which operationalises Article 9 through four strategic axes: (1) knowledge generation, to raise awareness of the situation of human rights defenders, systematise data, and promote research; (2) recognition, which seeks to strengthen the legitimate and fundamental role of human rights defenders in environmental protection; (3) capacity building and cooperation, aimed at the adoption of effective national and subnational measures; and (4) follow-up and evaluation, which creates monitoring mechanisms and holds States accountable for their progress.

This Plan also promotes the permanent establishment of the ad hoc Working Group and technical support from the Implementation and Compliance Committee, as well as liaison with national and international human rights networks. Special emphasis is placed on ensuring the participation of Indigenous peoples, local communities, and vulnerable sectors.

However, the transformative potential of Article 9 and the Action Plan contrasts with serious structural limitations. First, the level of

implementation in the States Parties has been uneven and, in many cases, declarative or symbolic. In countries with high levels of environmental violence – such as Colombia, Mexico, and Honduras – the Escazú commitments have not translated into legislative reforms, public policies, or adequate protection systems. Nor, in general, are there effective sanctioning mechanisms or consequences for noncompliance. Second, the Agreement's architecture lacks a binding international judicial mechanism, which limits its enforcement capacity. While the Implementation and Compliance Committee offers a means of monitoring, its consultative nature and dependence on State will reduce its effectiveness in authoritarian or markedly extractivist contexts. Third, the lack of resources and institutional capacities in several countries impedes the effective implementation of the established standards. Added to this is the resistance from business and security sectors, which perceive the Agreement as a threat to economic interests or territorial control.

Despite these limitations, the Escazú Agreement introduces a new framework of regional legitimacy that can be mobilised by defenders, strategic litigants, and civil society organisations. Indeed, its value also lies in its normative and symbolic potential: by elevating environmental defence to the level of a protected human right, it allows criminalising narratives to be challenged within an internationally recognised legal framework.

Article 9 of the Escazú Agreement constitutes a pioneering norm in the recognition and protection of environmental defenders, but its effectiveness in preventing criminalisation will depend on its social appropriation, its integration into domestic law, and the strengthening of monitoring, enforceability, and sanction mechanisms. This tension between normative promise and structural reality will be explored through case studies in the following section.

25 countries in Latin America and the Caribbean have adopted and implemented the Escazú Agreement in their legal system, with the exception of the Bahamas, Barbados, Cuba, El Salvador, Honduras, Suriname, Trinidad and Tobago, and Venezuela (Observatory of Principle 10 in Latin America and the Caribbean 2025).

The introduction of the 2021 Regional Agreement and the 2024 Action Plan (Conference of the Parties to the Escazú Agreement 2022) offers a ray of hope for the protection of environmental defenders. It is hoped that these documents will not only establish clear protection mechanisms but will also promote greater responsibility on the part of States (Catá 2011). One of the most significant aspects is the call for the participation of communities and organisations in the formulation and implementation of public policies related to environmental protection, which could strengthen support networks for defenders (Richardson and Razzaque

2011). Such is the case of the ad hoc Working Group on Human Rights Defenders in Environmental Matters.

However, expectations must be nuanced, the effectiveness of these initiatives will depend on their actual adoption in national legislation and the willingness of Governments to implement significant changes (Cerna 2013). In addition, civil society organisations will play a crucial role in monitoring implementation and holding States accountable (Ghaus 2005). The Escazú Agreement seeks double protection of environmental and human rights by providing a mechanism to hold Governments accountable in their efforts to address environmental challenges (Pánovics 2021).

4. Criminalisation of environmental defenders in Colombia, Mexico, and Honduras in light of the Escazú Agreement

Latin America is home to some of the most lethal contexts for environmental defence worldwide (Middeldorp and Le Billon 2019). Among the signatory countries to the Escazú Agreement, Colombia, Mexico, and Honduras stand out both for their high number of murders and attacks against defenders and for their persistent patterns of judicial criminalisation. This section analyses the implementation of the Agreement in each of these countries, with an emphasis on the effectiveness of Article 9 standards in reversing criminalisation.

4.1. Colombia: Between formal ratification and continued repression

Colombia ratified the Escazú Agreement in 2022 through Law 2273, declared constitutional by the (Constitutional Court Colombia 2024) Constitutional Court in ruling C-359 of 2024. The country has made formal progress in environmental regulations and the protection of defenders, such as the Comprehensive Security and Protection Programme for Communities and Organizations in the Territories, which includes protection components for social and environmental leaders (Krause et al. 2025).

However, the reality contrasts dramatically with the regulatory framework. Colombia has had the highest number of murders of environmental defenders in the region over the last decade. According to Global Witness (2024), more than 60 murders of environmental defenders, especially Indigenous, peasant, and Afro-descendant groups, were recorded in 2022 and 2023. Many of these murders have been preceded by judicial criminalisation campaigns, with unfounded accusations such as obstruction of public roads, criminal association, or terrorism (Aguilar 2020; Pérez et al. 2023).

Article 9 of the Escazú Agreement has had little practical impact on reversing these patterns. Protective measures remain reactive, fragmented,

and decontextualised. Furthermore, the criminal justice system and security forces maintain practices of stigmatisation and repression against environmental leaders, which perpetuates impunity and discourages public participation in environmental issues (Pérez et al. 2023).

4.2. Mexico: Fragmented institutions and strategic use of criminal law

Mexico ratified the Escazú Agreement in 2021, but has not developed a specific national plan to implement Article 9 or a differentiated protection system for environmental defenders. The fragmentation of powers between levels of Government and the militarisation of public security have aggravated the situation.

The case of Samir Flores Soberanes, a Nahuatl Indigenous activist murdered in 2019 after opposing the Morelos Comprehensive Project, is emblematic. Although his case generated international condemnation, the State has not guaranteed justice or implemented mechanisms to prevent similar attacks. Other defenders have been criminalised through accusations of vandalism, damage to public property, or carrying weapons, without clear evidence or due process (Aguilar 2020).

Prosecutors and courts often act in coordination with companies or local Governments, which reinforces criminalisation. Added to this is a general climate of impunity: in more than 95 percent of attacks on environmental defenders in Mexico, those responsible are neither identified nor punished. The Escazú Agreement, although cited in some official documents, has not been integrated into judicial practice or public protection policies, which limits its impact (Pérez et al. 2023).

4.3. Honduras: Institutionalised criminalisation and weak rule of law

Honduras ratified the Escazú Agreement in 2022, although the country presents one of the most alarming contexts of structural repression against environmental defenders. Criminalisation manifests itself in a combination of direct violence, arbitrary prosecution, and collusion between extractive companies, security forces, and local authorities (Borrás 2013).

The 2016 murder of Berta Cáceres, a leader of the Lenca people, exposed the level of risk faced by those who oppose megaprojects in Indigenous territories. Since then, dozens of defenders have been criminally prosecuted on charges such as "usurpation," "coercion," or "disturbing public order." Cases such as that of the Guapinol defenders, imprisoned for opposing river pollution by a mining company, demonstrate the systematic use of the judicial system as a tool of repression (IACHR 2011; IACHR 2017; Pérez et al. 2023).

Despite the existence of a Law for the Protection of Human Rights Defenders Decree 34-2015, (State of Honduras 2015), implementation has been minimal. No separate protocols for environmental defenders have been created, and the recommendations of the Escazú Agreement have not been translated into effective public policies or judicial reforms. As noted in the case of *Escalera Mejía v. Honduras*, threats and executions often go unpunished, highlighting the State's failure to dismantle environments hostile to defenders (IACtHR 2018).

The three countries analysed present common patterns of structural criminalisation: instrumental use of criminal law to deter and punish environmental protest, public stigmatisation of defenders as "terrorists," "anti-development," or "saboteurs," structural impunity, weak prosecutorial offices, and institutional complicity. There is an absence of robust national policies to implement Article 9 of the Escazú Agreement. It is also explicit, particularly in the contexts of Mexico and Colombia, that the contradiction between the development model adopted by these countries – anchored in the extractive industry, agroindustry, and large infrastructure works – and the actions of these defenders constitutes a principal factor generating risk (Carvalho et al. 2016; Pérez et al. 2023).

Furthermore, none of the countries have created independent and participatory monitoring mechanisms, as established in the 2024 Action Plan. Lack of resources, pressure from corporate interests, and weak democratic institutions hinder the effective translation of the Escazú Agreement into concrete protection.

5. Limits and potential of the Escazú Agreement in the face of criminalisation

The Escazú Agreement has been recognised by various international organisations as a pioneering instrument in the protection of human rights in environmental matters (Prityi 2021; Rodriguez and Menezes 2022; Novelli 2024). However, despite its binding nature and the regulatory advances it represents, its effective capacity to prevent or reverse the criminalisation of environmental defenders remains limited in the Latin American context (Doran 2017). This section critically examines its main potential and structural limitations from a legal, political, and institutional perspective.

A first limitation lies in the operational ambiguity of Article 9, which establishes general obligations but lacks precise definitions of what constitutes "criminalisation" or "safe environment," leaving wide room for interpretation by the States Parties. This lack of legal precision can be exploited by Governments reluctant to implement concrete measures, allowing the commitments made to be diluted into formal declarations without practical consequences (IACHR 2015).

Second, the Agreement lacks an international mechanism for sanctions or judicial enforceability. Unlike treaties such as the San José Pact of Costa Rica, it does not provide for a contentious system before a specialised court or committee. The Implementation and Compliance Committee is technical, non-binding, and depends on State consent, which limits its capacity to respond to serious violations (Scott 2016; Pérez et al. 2023).

At the national level, many States Parties have not harmonised their domestic legislation or created specialised protocols to comply with Article 9. Criminalisation remains a systematic practice protected by outdated criminal codes, national security doctrines, and ambiguous legal frameworks. In this sense, the lack of political will has been one of the main obstacles to the effective implementation of the Agreement (Aguilar 2020).

Furthermore, there is a strong power asymmetry between environmental defender communities and State or corporate actors. In contexts marked by extractivism, armed conflict, or the militarisation of the territory, defenders are left in a situation of extreme vulnerability (Dunlap et al. 2024). The Agreement, on its own, does not modify these power relations unless accompanied by structural reforms in the justice, security, and environmental governance systems (Evans and Thomas 2023; Pérez et al. 2023).

Despite its limitations, the Escazú Agreement presents valuable normative tools for building a safer environment for defenders (Saura 2022). First, it elevates the legal recognition of these individuals as subjects of special protection at the international level, legitimising their work and positioning it as an integral part of environmental democracy (Von Bogdandy and Venzke 2012). This international legitimacy is a key tool in strategic litigation, advocacy, and awareness-raising campaigns (Zarnegar and Schmitz 2019; Pérez et al. 2023).

Second, the 2024 Action Plan offers a concrete roadmap for translating Article 9 into national measures, including data generation, institutional strengthening, and civil society participation. If properly implemented, it could contribute to transforming public policies on the protection of defenders.

From a symbolic and political perspective, the Escazú Agreement has generated a framework for regional coordination between social movements, human rights organisations, and international agencies (Tigre 2024). The Agreement has encouraged the creation of national monitoring networks, independent observatories, and spaces for public deliberation. These dynamics have transformative value, as they contribute to displacing the dominant discourse that presents defenders as obstacles to development (IACHR 2017).

Furthermore, transparency and access to environmental information – core obligations of the Agreement – allow socio-environmental conflicts to be exposed and abuses to be documented, which is crucial in contexts of criminalisation (Asaba 2025). The enforceability of these rights can weaken impunity, especially when articulated with international mechanisms such as the Inter-American human rights system or the UN special procedures (Pérez et al. 2023; Southey 2025).

The effectiveness of the Escazú Agreement as a tool against criminalisation depends on multiple interrelated factors (Asaba 2025). Most of the most dangerous countries for environmental defenders have ratified the Agreement, but have not adopted national action plans or reformed their legal and protection frameworks (Dávila 2023). The Agreement provides for an active role for social organisations in monitoring and implementation (Ituarte and Mares 2024). However, in contexts of repression, many of these organisations face legal restrictions or threats (Menton et al. 2021). The creation of independent mechanisms, endowed with resources and legitimacy, is key to ensuring that Article 9 goes beyond a declaration of good intentions. Linkage with human rights treaties and international litigation strategies can strengthen its enforceability (IACtHR 2006; Pérez et al. 2023).

The Escazú Agreement represents an unprecedented regulatory advance in the protection of environmental defenders, but it faces structural obstacles that reduce its impact. Its transformative potential lies less in its immediate coercive capacity than in its role as an enabling framework for legal, social, and political action. Criminalisation will not cease simply because of the treaty, but the Escazú Agreement opens fertile ground for challenging it legally and symbolically, especially if social oversight, international cooperation, and pressure from grassroots organisations are strengthened (Satizábal et al. 2025).

The next section will present a series of legal and policy recommendations aimed at strengthening the protection of environmental defenders against criminalisation, as well as improving the national implementation of Article 9 of the Agreement.

6. Recommendations to strengthen the protection of environmental defenders against criminalisation

Based on the analysis developed in the previous sections, serious deficiencies are evident in the implementation of Article 9 of the Escazú Agreement by Latin American States. The persistence of patterns of systematic criminalisation, the instrumental use of criminal law, and widespread impunity makes it urgent to design comprehensive strategies to strengthen the protection of environmental defenders (Alvergne 2019). The following recommendations are addressed to the States Parties, but

also include proposals for civil society, international organisations, and regional cooperation networks.

- Incorporate Article 9 of the Escazú Agreement into domestic law in an express and binding manner, through national laws for the protection of environmental defenders that include a broad definition of criminalisation and establish specific obligations for judicial and security institutions.

- Provide support to victims, victims by extension, and surviving family members so they can obtain fair and timely reparations.

- Build support networks within the region's already established multilateral organisations, such as Community of Latin American and Caribbean States (CELAC), Organization of American States (OAS), and the Economic Commission for Latin America and the Caribbean (ECLAC).

- Reform criminal codes and national security laws that contain vague legal concepts (such as sedition, terrorism, aggravated trespass, or illicit association) that have been used to criminalise environmental protest, eliminating or restricting their arbitrary application.

- Legally recognise the role of environmental defenders as subjects of special protection, placing them normatively on par with journalists, judges, or protected witnesses, with reinforced guarantees.

- Create independent national protection mechanisms for environmental defenders, with civil society participation, a territorial and intersectional approach (gender, ethnicity, class), and equipped with resources and functional autonomy.

- Establish action protocols for cases of criminalisation, including legal assistance, personal protection, precautionary measures, and immediate action in the event of arbitrary detentions or unfounded judicial proceedings.

- Train justice officials, prosecutors, police, and public officials on human rights, Escazú standards, and the prevention of criminalisation, especially in areas of high environmental conflict.

- Implement monitoring, early warning, and follow-up systems for cases of criminalisation and violence against human rights defenders, with the active participation of communities and human rights organisations.

- Promote the formation of independent citizen observatories to monitor the implementation of the Escazú Agreement and document cases of criminalisation in the territories.

- Strengthen networks of support, solidarity, and legal defence among social, environmental, and Indigenous organisations, both nationally and regionally, to share strategies for resistance, self-defence, and documentation.

- Promote public awareness-raising campaigns to destigmatise the work of human rights defenders, positioning their work as essential to the rule of law, environmental democracy, and compliance with the 2030 Agenda.

- Strengthen the role of the Escazú Agreement Implementation and Compliance Committee, providing it with more rigorous monitoring powers and mechanisms for direct dialogue with victims and environmental rights organisations.

- Promote the creation of a Regional Special Rapporteur on Environmental Defenders, with a mandate to issue alerts, visit countries, systematise cases, and collaborate with international organisations such as the Inter-American Commission on Human Rights and the UN Special Rapporteur.

- Link compliance with the Escazú Agreement with other international human rights treaties and mechanisms, including the Inter-American system, the Sustainable Development Goals, and the Paris Agreement, to increase diplomatic pressure and regulatory coherence.

- Incorporate free, prior, and informed consent as a cross-cutting obligation in all projects affecting territories inhabited by indigenous people, with defence mechanisms against criminalisation arising from the exercise of this right.

- Ensure the effective and leading participation of these communities in the development, monitoring, and evaluation of the national implementation plans of the Escazú Agreement.

The criminalisation of environmental defenders cannot be eradicated without a comprehensive, multisectoral, and multi-scale response that articulates norms, institutions, public policies, and social mobilisation (Newell et al. 2023). The Escazú Agreement offers a powerful legal foundation, but its effectiveness will depend on its real appropriation

by local actors, the strengthening of State political will, and sustained international support (Esteve and Scheidel 2025).

The recommendations presented seek to transform Article 9 of the Agreement into a practical tool for prevention, protection, and reparation, helping to reverse the punitive logic that threatens not only defenders but also the very possibility of building environmental democracies in Latin America.

7. Conclusion

The criminalisation of environmental defenders in Latin America constitutes a systematic and structural form of repression that seriously violates the principles of the rule of law, human rights, and the standards of environmental democracy. Far from being isolated incidents, these practices respond to dynamics deeply rooted in extractive development models, weak institutional structures, and alliances between public and private powers that perceive environmental defence as a threat.

The Escazú Agreement, particularly its Article 9 and the 2024 Action Plan, represents a highly significant regulatory advance by establishing concrete commitments to prevent and reverse violence against defenders. However, as the comparative analysis of the cases of Colombia, Mexico, and Honduras demonstrates, its practical implementation has been insufficient and fragmented, which limits its effectiveness in the face of patterns of criminalisation.

The existence of this regional instrument does not in itself guarantee the effective protection of environmental defenders. Its transformative potential will depend on its effective incorporation into national legal frameworks, the strengthening of monitoring and enforcement mechanisms, and the active participation of organised civil society. The articulation of international standards, strategic litigation, community participation, and political advocacy will be key to building a safe and enabling environment.

In the face of the growing climate crisis and the expansion of socio-environmental conflicts, the protection of those who defend the environment is not only a legal obligation, but an indispensable condition for environmental justice and democratic sustainability in the region.

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The right to truth in Brazil: A review of challenges and progress

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Abstract: *This article examines the progress and shortcomings of the right to truth in Brazil. As Brazil marks 40 years since the military dictatorship ended (1964–85), and with renewed interest owing to the film I'm Still Here, the State's debt to dictatorship victims remains significant. While there have been some achievements, many obstacles still hinder the realisation of the right to truth in Brazil. The aim of the article is therefore to critically analyse the effectiveness of the right to truth in the country, while pointing out important facts and events that marked its development. It is expected to locate the current status of the right to truth and to comprehend how far Brazil is from fully implementing this right.*

Keywords: *right to truth; enforced disappearance; Brazil; military dictatorship.*

1. Introduction

The right to truth has garnered significant global attention, particularly in contexts of addressing historical human rights violations (Méndez and Bariffi 2012). Since its introduction in the International Convention for the Protection of All Persons from Enforced Disappearance (ICED) in 2006, the right to truth has attained the status of a legally binding norm, obligating States to comply with its provisions (art. 24). It reflected the long and difficult struggle especially of victims and their families for information about past human rights violations.

In the Brazilian context, the right to truth is closely tied to human rights violations which occurred during the military dictatorship (1964–85). The struggle for truth emerged as a response to the enforced disappearance

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and other gross violations committed during this period, such as torture. Victims and their families, along with human rights organisations, have continuously demanded clarification regarding the fates of the disappeared[1] and accountability for the perpetrators.

In the year in which Brazil marks the 40th anniversary of the end of the military dictatorship, and with the debate around the period revived by the success of the movie *I'm Still Here*[2] (*Ainda estou aqui* 2024), another issue remains latent in the country: the debt owed by the Brazilian State to the victims of human rights violations committed by the past regime.

This article aims to examine the status of the right to truth in Brazil, and what the key advances and insufficiencies in its effectiveness are. It aims therefore to evaluate the implementation of the right to truth in Brazil, identifying both progress and areas needing improvement. In order to pursue this objective, the article will first expose main developments on the right to truth that culminated with its introduction in the ICED. Then, it will address the right to truth when in contact with and transposed to the Brazilian context. By doing so, it is expected to locate the advances and difficulties faced by this right in Brazil. In the last part of the article, some recent events in the country will be pointed out in order to comprehend how far Brazil is from fully effecting the right to truth.

2. The path to the right to truth as an internationally binding legal norm

The development of the right to truth has evolved significantly over the past few decades, particularly in the context of international human rights law, as a response to gross human rights violations, such as enforced disappearances.

Initially recognised by the Inter-American Commission of Human Rights (IACHR) as a right attached to enforced disappearance (IACHR 1986), the right to truth gained traction through the advocacy of victims' relatives and human rights organisations, particularly in Latin America during the 1970s and 1980s, amidst military dictatorships and widespread abuses.

1 Regarding the nomenclatures used, it is useful to point out that the term "disappeared" refers to those who, until the enactment of Law 9.140, in 1995, had not been publicly declared dead by the repression and who, still without a death certificate, had their bodies hidden; the term "dead", in turn, covers cases in which an official version of the death of political activists and prisoners was drawn up (by members of the regime), even if the hiding of their bodies continues to this day, in a similar way to the first group.

2 The movie, directed by Walter Salles, portraits the story of Eunice Paiva, a mother and activist, coping with the forced disappearance of her husband, the politician Rubens Paiva, during the military dictatorship in Brazil.

Historically, the right to truth was linked to international humanitarian law, with early references found in the Additional Protocol I to the Geneva Conventions of 1977, which emphasised the need for families to know the fate of missing persons (art. 32).

This right began to take shape through early United Nations (UN) resolutions that addressed the issue of missing persons, emphasizing the need for families to know the fate of their loved ones (for e.g. UNGA Resolution 3450 (XXX) 1975; UNGA Resolution 32/128 1977; UNGA Resolution 33/172 1978). Although these Resolutions did not explicitly mention a right to truth, they reflected an awareness of the anguish caused by the lack of information on the fate of missing persons. Initially related to the situation in Cyprus, and later in Chile and Argentina, the concern with enforced disappearance would rise significantly in the UN. It was in this context that in 1980 the UN Commission on Human Rights established a Working Group on Enforced or Involuntary Disappearance (UNGA Resolution 20 XXXVI 1980), whose work has, since then, contributed to the promotion of the right to truth worldwide.

In the 1985–86 Annual Report, the IACHR began recognising the right to know the truth about past events not only as an emerging principle, but also as essential for preventing future violations. In its initial formulation, the IACHR asserted that societies have an inalienable right to know the truth about past atrocities (IACHR 1986, ch. V).

In the late 1980s and early 1990s, the right to truth became closely associated with the fight against impunity, seeking to challenge State laws that granted amnesty to perpetrators of such violations (Naqvi 2006).

During those decades, the authoritarian regimes that served as the foundation for the development of the right to truth were approaching their conclusion, with the beginning of a new democratic period in several countries, including Latin America and East Europe, after the fall of the communists' regimes.

As a result, the right to truth was incorporated into this new process, becoming a crucial component of transitional justice efforts. It was then recognised not only as a means for victims to seek acknowledgment and justice, but also as a societal necessity to prevent future violations and promote reconciliation (UNCHR 1997). As a reflection of this understanding, truth commissions emerged as a significant mechanism to establish the right to truth, with the notorious examples of the Argentinian and South African Commissions.

With the right to truth gaining new contours, it would enter a new phase, culminating in significant developments through various human rights courts, such as the Inter-American Court of Human Rights

(IACtHR) and the European Court of Human Rights (ECtHR). The IACtHR, for instance, has played a pivotal role in developing the right to truth, particularly in cases related to enforced disappearances. The Court, similarly to the Inter-American Commission, has addressed numerous cases in which there was an interest on behalf of the States to maintain the human rights violations undisclosed and unresolved. The demand of the victims, however, propelled the struggle for the clarification of these situations into the contentious sphere.

Initially, the IACtHR did not explicitly recognise the right to truth. In the case of *Velasquez Rodriguez v. Honduras* (1988), it expressed a concern with resolving cases through the investigation by the States of the facts concerning the violations and the prosecution and punishment of the alleged perpetrators, although limiting itself to ordering the States solely to pay pecuniary compensation.

However, it was from the duty to investigate that the IACtHR subsequently, in its jurisprudence, embraced the right to truth, understanding that it derives fundamentally from the right to access to justice, i.e., a combination of Articles 8 and 25 of the American Convention on Human Rights (ACHR). In the case of *Bámaca Velásquez v. Guatemala* in 2000, the IACtHR established a link between the obligation of States to investigate human rights violations and to provide clarity to victims and their families. The Court has emphasised that the right to truth is essential for victims and societies to know the circumstances surrounding human rights violations, serving as a means to prevent future abuses and ensure accountability.

The ECtHR, on the other hand, has been more cautious in its recognition of the right to truth. Primarily, it has evolved through cases involving enforced disappearances and serious human rights violations. Initially, the Court recognised the distress experienced by relatives of disappeared individuals due to a lack of information regarding their loved ones fates (*Kurt v. Turkey* 1998; *Tast v. Turkey* 2000; *Orhan v. Turkey* 2002; *Bazorkinat v. Russia* 2006).

Over time, the ECtHR has acknowledged the importance of the right to truth under the procedural aspect of Articles 2 (right to life) and 3 (prohibition of torture) of the European Convention on Human Rights, particularly in the context of investigations into human rights violations. For instance, in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia* (2012), the Court highlighted the obligation of States to investigate effectively and to provide victims and their families with information about the circumstances surrounding the violations. Furthermore, the ECtHR has recognised that the right to truth is not only pertinent to the victims but also serves the public interest, emphasising the societal need to know about past abuses to prevent future violations.

However, the ECtHR approach has been characterised as somewhat cautious and timid, with limited explicit recognition of the right to truth compared to the IACtHR.

The right to truth remains a complex and evolving concept within the ECtHR, often intertwined with the procedural obligations to investigate and provide remedies for victims. The ECtHR's decisions have illustrated a gradual acknowledgment of this right, albeit with some inconsistencies and a tendency to prioritise procedural aspects over a more autonomous interpretation of the right to truth.

Another Court that explicitly recognised the right to truth in its rulings based on the provisions of the ECHR was the Human Rights Chamber for Bosnia and Herzegovina. In the Srebrenica case, for example, it was deemed that a violation of the right to the truth about the fate and whereabouts of 7,500 missing men and boys had occurred, based on violations of the prohibition of torture, the right to family life, and the State's duty to investigate (Bosnia and Herzegovina: Human Rights Chamber 2003; Groome 2011).

While the courts helped to improve the consistency and scope of the right to truth, this right became the subject of numerous academic studies (Naqvi 2006; Naftali 2016; Osmo 2014). It was argued that this right seemed applicable to many different kinds of cases and disputes, raising questions about its true nature. While it was originally understood as a right relating to disappearances and aimed at clarifying what happened to the victims, its scope expanded to encompass prosecutions, truth-seeking mechanisms, archival preservation, and witness protection.

The introduction of the right to truth in the ICED was in that regard very important to crystallise one of the facets of this right, making it binding. The Convention articulated the need for States to provide information about the circumstances of disappearances and the fate of victims, thus formalising the right to truth within an international framework.

The process of including the right to truth in the ICED was a lengthy and complex endeavour influenced by various factors, which included the experiences of victims, international human rights organisations, and political negotiations among States (Tayler 2001). During the drafting process, some challenges arose, particularly related to amnesty laws and the need for balancing the right to information with privacy concerns. Some delegations supported the need for amnesties in the context of national reconciliation, which conflicted with the views of human rights advocates who wanted to prohibit them entirely (UNCHR 2003).

Despite the controversies, the ICED, adopted in 2006, became the first international binding instrument to explicitly recognise the right to truth.

Article 24 of the ICED outlines the right of victims to know the truth about the circumstances of enforced disappearances, the progress and results of investigations, and the fate of disappeared persons.

The inclusion of the right to truth in the ICED is considered an important development in international human rights law. The concept of the right to truth highlights a commitment to accountability and justice following human rights abuses, as it has progressed from an abstract principle to a legally binding norm.

3. The right to truth in Brazil: Between advances and insufficiencies

The right to truth in Brazil emerges in response to the atrocities committed during the military dictatorship in the country (1964–85). This is part of the ongoing efforts of relatives and victims to obtain information about human rights violations and to address issues of impunity. Groups like Torture Never Again in Rio de Janeiro and the project Brazil: Never Again in São Paulo are examples of this continuous mobilisation.

In Brazil, the number of those affected by political repression is still far from complete. According to a survey by the Special Commission on Political Deaths and Disappearances, it is known that at least 50,000 people were arrested in the first months of the military dictatorship alone and around 20,000 Brazilians were subjected to torture sessions (Comissão da Verdade da PUC-SP n.d.). In 2011, the Brazilian National Truth Commission concluded that 191 Brazilians who resisted the dictatorship were killed, 210 are still missing, and only 33 bodies have been located, making a total of 434 dead and missing activists (Comissão da Verdade da PUC-SP n.d.).

The process of uncovering the truth about the dictatorship's abuses, including their investigation and the condemnation of those responsible, has generally been challenging in Brazil. It remains incomplete and faces significant political resistance. To some authors, after the promulgation of the 1988 Constitution, and during most of the time, the right to truth in Brazil was fragile due to two main reasons: the secrecy imposed on documents containing information on human right violations which occurred during the dictatorship; and the Amnesty Law, which is valid until today (Pinheiro 2023; Torelly 2010). While this law prevents the cases from being investigated, it therefore blocks the knowledge of truth.

According to Juan Mendez and Francisco Bariff (2012), the aim of the truth telling process is to answer why did it happen, what really happened, and who is directly and indirectly responsible. To achieve this goal, it is necessary from the States to take positive actions by undertaking a sustained and systematic effort to investigate and accumulate evidence. It requires not only a great amount of attention, but also investments in

human resources. This is the reason why the access to public records, despite playing a crucial role in clarifying past facts, is not enough to fulfil entirely the right to the truth. Investigations are therefore mandatory.

In the Brazilian context, the complementarity between the access to official documents and investigations carried out by the State assumes an important role due to the fact that investigations are, *a priori*, not possible to be carried out, as the 1979 Amnesty Law is still valid. It means that a *lot of truth* will necessary be left out of the families and victims' knowledge, not to mention the limitation on their right to justice. For this reason, when defining the right to truth within the scope of the ACHR, the IACHR and the IACtHR consider the duty of States to investigate human rights violations.

This article will not explain in short detail what the Brazilian Amnesty Law consists of, and the story behind it, as it has been exhaustively dealt with the literature (Viégas and Vechia 2024; Schneider 2011; Parra and Miahle 2012; Piovesan 2009). Still, based on the relation between the duty to investigate and the right to truth, it is important to make few notes about this law, especially considering at the time it was promulgated, it had indeed a positive effect. It benefited 100 political prisoners and 150 banished individuals. Around 2,000 Brazilians were able to return to their country from exile (Comissão da Verdade da PUC-SP n.d.). On the other hand, the law provided that all military personnel who had committed abuses in the name of the State since the 1964 coup, including torture and the execution of opponents of the dictatorship were pardoned. The Amnesty Law is what gives them security that they will never be punished or even investigated. In 2008, the Brazilian Supreme Court ruled, in response to an action filled by the Brazilian Bar Association, that the Amnesty Law is compatible with the 1988 democratic Constitution (Viégas and Vechia 2024). The judiciary deemed it essential to transcend past events, proposing access to official documents as a potential measure for addressing historical issues (Schneider 2011).

The access to historical documents, however, was also difficult due to the secrecy imposed on them. The Law on Access of Information in Brazil, until 2012, allowed the Presidency to keep documents in infinite secrecy (Law No. 8.159 1991; Law No. 11.111 2005). According to the Brazilian literature on the topic, that was not even the worst problem faced to have access to historical documents concerning the dictatorship, but the lack of regulation on behalf of the legislature (Rodrigues 2014; Perlingeiro 2015). The laws just reproduced the right to access of information, along with the right to intimacy, private life, honour and image, without clarifying and defying how they relate, and most importantly how one could restrict the other.

It was only in 2010, the year in which Brazil ratified the ICED, that these obstacles in implementing the right to truth in Brazil began to be

positively mobilised, due to the IACtHR decision in the case of *Gomes Lund and Others v. Brazil* (also known as the *Guerrilha do Araguaia* case). This case is about the forced disappearance and execution of dozens of communist guerrillas in the Brazilian State of Paraná during the dictatorship.

The case gave the IACtHR the chance to address several issues, including enforced disappearances as continuing violations of human rights, validity of amnesty laws, and the right to truth, historical record, and recovery of bodies for burial. The Court emphasised that "thirty-eight years after the disappearances, only the remains of two bodies had been identified, and State still had not provided information regarding the location of the remaining sixty victims" (para. 121). As a result, it condemned Brazil responsible for the enforced disappearances, for violating its obligation to criminally investigate the events that occurred and punish those responsible, including the existence of the Amnesty Law, which does not comply with the obligation to adapt its domestic law to the ACHR, for violating the right to seek and receive information, the location of the remains, and access to official documentation on military operations in the Araguaia region, as well as the right to humane treatment to the detriment of the next of kin.

This decision was a turning point in the implementation of the right to truth in Brazil. Until this moment, there were few important achievements like the creation, in 1995, of a Special Commission on Deaths and the Disappearance of Political Persons, the creation of an Amnesty Commission in 2001, along with some measures of pecuniary reparation for the relatives of executed and disappeared victims (Law No. 10.875 2004. For a complete list, see Costa 2023; Gallo 2010; Borges 2015). After 2010, driven by the IACtHR' sentence, two very determinants measures were implemented, namely the promulgation of a new law on access of information in 2012 (Law No. 12.527 2011) and the formation of a National Truth Commission.

From 2012 until 2014, the Truth Commission aimed to investigate human rights violations and to document the history of repression. It concluded that the serious human rights violations that took place during the period under investigation, especially during the 1964–85 dictatorship, were the result of widespread and systematic action by the State, constituting crimes against humanity (Comissão Nacional da Verdade 2022).

For Brazil, with a limited scope of measures aimed at implementing the right to truth, the role of the National Truth Commission becomes even more important. Critically, however, although truth commissions clarify collective abuses, they often fail to address individual cases. In the case of Brazil, for example, the relatives of disappeared victims were left without

almost any new information regarding the whereabouts of their loved ones. Nevertheless, these investigations did leave a legacy in the form of a report, which detailed numerous clandestine detention centres and the methods of torture employed on prisoners. In many ways, they exposed entire structures of institutionalised violence, and this written document remains as a historical record (Gallo 2015; Paula and Vieira 2020).

It is important to note that the Commission could only access the documents containing information on human rights violations due to the law on access of information that had been recently promulgated (Comissão Nacional da Verdade 2014). This Law provided, for the first time in Brazil, that access to information took precedence over the rights to privacy, private life, honour, and image in "a) actions aimed at recovering historical facts of the utmost importance; and b) information about conduct that implies human rights violations committed by public officials or at the behest of public authorities" (arts. 21 and 22). In addition to these new provisions, the Law also ended eternal secrecy.

On the other hand, even though the 2011 Law on Access of Information represented undeniable progress, in many cases it still authorises both secrecy and the classification of information as top secret, secret, or confidential. In addition, it also makes excessive use of fluid and difficult-to-define concepts, such as national defence and public safety (arts. 23-30), which may be inaccurately used to deny access to documents.

Until today, and considering that investigations are out of hand, one of the main challenges to really implement the right to truth in Brazil concerns these obstacles imposed on accessing official documents. Despite the Brazilian obligations under international law, many documents are arbitrarily classified as secret (Paula and Vieira 2020, 137). Many are also claimed by the military to have disappeared.

In the following pages, the current situation in the country, including the obstacle to access official documents, will be analysed, in an attempt to understand how far Brazil is from truly accomplishing the realisation of the right truth.

4. Implementing the right to truth: The current situation in Brazil

The creation of the National Truth Commission, along with the promulgation of a new law on access of information, marked two major steps in implementing the right to truth in Brazil. However, the conclusion of the Commission's work coincided with a very unfavourable political context, i.e. with a breakdown of memory and truth policies, the spread of denialist discourse about the military dictatorship, and even official policies of forgetting (Schettini 2022). In a sense, this ultimately

demonstrated the various limitations of this mechanism of justice. When separated from the struggles of the present, especially during the Jair Bolsonaro administration, the legacy of the National Truth Commission seemed to be at real risk of being erased.

Institutionally, a series of mechanisms have been diminished, emptied, revoked, and even extinguished. Examples include the 2022 extinction of the Special Commission on Political Deaths and Disappearances, replacement of Amnesty Commission members with government-linked individuals, and denial of 95 percent of amnesty requests during his mandate. In 2019, the former President even decided to commemorate the 1964 military coup anniversary in the barracks.

These measures called the attention of the UN Working Group on Enforced or Involuntary Disappearance, who in 2024 addressed these changes in its General Allegations concerning Brazil. Several actions were requested, including the reinstatement of the Special Commission on Political Deaths and Disappearances, the implementation of the recommendations of the National Truth Commission, and the guarantee that the judiciary will not apply the amnesty law (UNHRC 2024).

To many advocates, victims, and their relatives, the return of Luiz Inácio Lula da Silva to the Presidency indicated a renewal of the Brazilian transitional process. Despite remarkable positive steps taken by President Lula's Government, like the reopening of the Special Commission on Political Deaths and Disappearances, the resumption of the work of the Amnesty Commission, the creation of instruments to monitor the final resolutions indicated by the National Truth Commission, and the prohibition to commemorate the military dictatorship's anniversary, the fact is that since the conclusion of the Truth Commission very little effort has been made to achieve justice and truth in Brazil. At the end of the Commissions mandate, for example, it presented 29 recommendations directed at the executive, legislative, and judiciary branches (Schincariol and Abreu 2023).

Until today, only three of these recommendations had been implemented,[3] including the repeal, in 2021, of the National Security Law (often known as "authoritarian rubble") and the operation, from 2015, of custody hearings, seen as an instrument to combat torture and illegal arrests.

The last recommendation fully implemented was the regulation of death certificate issuance for around 434 deceased and disappeared

3 In fact, some of the recommendations even suffered a setback. According to a report published by the Vladimir Herzog Institute, the implementation of the recommendations in 2023 reached its worse stage, since the conclusion of the Commission's work in 2014. By that time, seven recommendations (24 percent) had suffered a setback (Schincariol and Abreu 2023).

victims of the dictatorship identified by the Truth Commission. Now, almost four decades after the end of the dictatorship, some sense of closure and justice is being offered to the families of those deceased victims, as the death certificates must clearly provide that their relatives had passed due to violence committed by State members, and their supporters.

In regard to the other recommendations stipulated by the Truth Commission, it is worth noting that not even recommendation number one was fulfilled. It provides that the Armed Forces should "acknowledge their institutional responsibility for the occurrence of serious human rights violations during the military dictatorship." This means that the Armed Forces have not, until today, recognised their role in the crimes committed during their regime (Menezes 2024).

Not recognising its responsibility for the violations committed during the dictatorship only reveals how strong is the military resistance to assume what happened through a lens that is not their own. This resistance is also what keeps official documents closed for the victims, society, and relatives, despite the advances of the Brazilian law on access to information. It is also what keeps relatives of disappeared victims without knowing until today what happened to their loved ones, and the location of their remains. It is too what sustains the validity of the Amnesty Law.

The questions that remain with this scenario in view concern what the possible achievements are in fulfilling the right to truth under such restricted reality, and what should change to allow the truth, which is still unaccessed, to be known.

Evidently, in the scope of this article, it will not be possible to address these issues in detail, but as previously explained above, the right to truth depends not only on accessing information, but also on investigations. With the Amnesty Law blocking the possibility to investigate the cases, the truth will have to be obtained through other kinds of measures. The judiciary has shown itself to be generally helpful to the relatives in actions filed before civil courts with the aim to request pecuniary compensation, or the recognition of the State responsibility (Osmo 2018). The access to official documents, however, may be difficult, as some authors point to the fact that a large number of dossiers are considered missing, destroyed, or have not yet been collected in official databases (Tenaglia 2024).

In regard to the possibility to pursue investigations, a new proposition in the Brazilian Supreme Court made the hopes again to rekindle. In the end of 2024, Judge Flavio Dino suggested the Court discuss whether the 1979 Amnesty Law can be applied to crimes that began during the military dictatorship, but whose effects continue to the present, i.e. the

so-called permanent crimes.[4] The judge stressed that the issue requires attention due to its legal complexity and historical relevance,[5] proposing that it be dealt with under the *general repercussion system*, which allows the Brazilian Supreme Court to define a binding understanding for lower courts (Migalhas 2024).

In his ruling, Judge Flavio Dino emphasised that the concealment of a corpse persists as long as the victim's location remains undisclosed. He clarified that because it is classified as a continuing offence, the act of concealing a corpse extends over time. Regarding the 1979 Amnesty Law, he noted that if an action continues over time, it remains ongoing even after the law's promulgation (Migalhas 2024). The matter here is not reviewing the Court's decision that recognised the constitutionality of the Amnesty Law, but to examine whether the Amnesty Law can be applied to cases that have ongoing effects, such as enforced disappearances.

Concluding that the 1979 Amnesty Law is inapplicable to these cases will constitute a significant advancement towards the implementation of truth and justice. It will facilitate the investigation of these crimes and, upon elucidation, potentially alleviate the profound anguish experienced by the families of the victims. Following decades of uncertainty regarding their relatives' whereabouts, this development may provide clarity on the events that transpired and, if applicable, the location of the victims' remains.

Thus, the current reality shows that progress has been made, even though changes in Government may eventually threaten it, but that the path to realising the right to truth in a way that satisfies the demands of victims, families, and even society in general still faces obstacles. Overcoming these obstacles requires, above all, the huge challenge to break with the culture of secrecy and confidentiality that still characterises Brazil, perpetuated by some sectors' resistance to recognise the abuses of the past regime.

5. Conclusion

The right to truth in Brazil exemplifies the complexities inherent in the process of elucidating gross human rights violations. In the film *I'm Still Here*, former politician Rubens Paiva is forcibly removed from his residence

4 This is a crime whose consummation extends over time, for as long as its effects last. Unlike instantaneous crimes, which end when the act is committed, permanent crimes continue until the situation created by the crime is ended. For example, in the case of corpse concealment, the crime persists as long as the body remains hidden, renewing the practice each time the concealment continues.

5 This proposal comes in the context of an appeal that discusses crimes that took place during the *Araguaia Guerrilla*, such as the murder committed by Lício Augusto Ribeiro Maciel and the concealment of a corpse committed by Sebastião Curió, both soldiers in the Brazilian Army.

in Rio de Janeiro by military personnel and never seen again. It was not until 25 years after his disappearance, in 1996, that his death certificate was finally issued, and only in January 2025 was the cause of his death entered in the certificate. The document now officially states that the cause of death of the politician was non-natural, violent, and perpetrated by the Brazilian State (Bernardino 2025). In the Brazilian Supreme Court, the family of the politician still waits for a decision on whether the 1979 Amnesty Law applies to his case.

Even with so many barriers, if the right to truth is still on the Brazilian agenda it is mostly due to the insistency of relatives, victims, and human rights organisations. The ongoing court cases and their persistent efforts to voice their concerns demonstrate the significant challenges in achieving the right to truth and justice in the country. As primary obstacles, it is possible to list a few, such as the number of archives that remain classified or were intentionally destroyed. Despite both the 1988 Constitution and the Law on Access to Information No. 12.527 (2011) providing for their public access, military institutions continue to deny historical documents to come to public attention.

Another obstacle faced in Brazil is the Supreme Court's decision on the 1979 Amnesty Law. To consider that the Amnesty Law also covers the military personnel who committed crimes during the dictatorship prevents the truth from being uncovered, as cases remain not investigated. It reflects, in fact, the political resistance in Brazil and its strength. The non-acceptance on the importance of the right to truth, either individually or collectively, by important governmental figures and State agents continue to represent a major difficulty in the country.

The future steps for implementing the right to truth in Brazil continue uncertain. Art, in this particular case the Brazilian cinema, may contribute to this process by drawing attention to the historical context surrounding the story. This could potentially increase awareness both internationally and domestically, among the general public and within political and official circles.

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Leah Durst-Lee. "Colonial aphasia and its policy mismatches: How the United States continues to displace Nicaraguans long after its interventions." (2024) 8 *Global Campus Human Rights Journal* 171-185
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Colonial aphasia and its policy mismatches: How the United States continues to displace Nicaraguans long after its interventions

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Abstract: *Around the world, migration at the borders between the so-called "Global North" and "Global South" are commonly portrayed as urgent security threats or unexpected yet inevitable humanitarian crises. This is no different at the United States (US) southern border with Mexico, which is often viewed as a "crisis" of multiple possible origins: partisan politics, economic opportunity, the high volume of migrants, destabilising Governments abroad, or failed immigration policies. In light of all of these potential causes, the US is portrayed as the protagonist, merely a receiving country inundated with more migrants than one country could reasonably process. One consideration that is rarely, if ever, heard, is the US's role as antagonist through historical military and economic interventions in Nicaragua that have contributed to the northward migration patterns of today. Grounded in the field of memory and decolonial studies, this article applies a historical and policy analysis of the US intervention in the Nicaraguan Contra conflict and its subsequent policies towards those displaced to find that the persistence of policy mismatches stems from colonial aphasia, as Americans remain unaware of their role in the region's destabilisation. Addressing these policy mismatches requires a counter-memory approach which emphasises public awareness, legislative pathways to permanent residency, and a re-evaluation of immigration policies in light of historical interventionism.*

Keywords: *colonial aphasia; counter-memory; US immigration; US interventionism; Nicaragua.*

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1. Introduction

American common sense holds that migrants at its southern border are fleeing problems that originated in their own countries, and little thought, if any, is given to the ongoing instability caused by US interventions in Central America. This article employs a historical analysis of the US intervention in the Nicaraguan Contra conflict and a policy analysis of its subsequent policies towards those displaced to explore the question: how have historical US interventions in Nicaragua influenced migration patterns to the US, and what strategies can be implemented to address the resulting policy mismatches of the US's role in the region's destabilisation? This question is explored through the field of memory and decolonial studies, namely the concepts of colonial aphasia, implication, mnemonic common sense, and counter-memory. The first section is a literature review of the memory and decolonial studies field, highlighting how counter-memory can challenge colonial aphasia and its mnemonic common sense and implication. The second offers a brief overview of US intervention in Nicaragua, its resulting displacements northward, and subsequent US policy towards those displaced. The final section plays devil's advocate, raising the questions if the US must really make right the instability caused by its interventions and if there is even potential amongst the American public to make it right. To conclude, the article argues that a counter-memory approach which emphasises public awareness, legislative pathways to permanent residency, and a re-evaluation of immigration policies in light of historical interventionism can help to rectify US policy mismatches towards Central American migrants.

2. Politics of forgetting and colonial aphasia

The theoretical concepts for this article are from the field of memory and decolonial studies, which are not as often applied to the US as it is commonly not understood as a colonial power. Colonisation is the brutal, inhumane, and unethical theft of land, wealth, persons, histories, and epistemologies and has been legally, religiously, culturally, and scientifically sanctioned through the racialised othering of colonial populations. Furthermore, colonisation endures today in numerous forms, such as occupation, economic exploitation, racialisation, and denial of self-determination. It is not without great care that I make this application, and I believe strongly that through the concepts of colonisation we can provide a nuanced analysis of US-Central American immigration policy.

The call to unite the contemporary to its history is a throughline in memory studies, and highlights the struggle for who controls the narrative. It is a common adage that history is written by the victors, but history is not created only by what is written, but also by what is not. Ann Rigney highlights this by distinguishing between active and passive forgetting. Active forgetting is when a State erases or occludes what "was

once known but that is now hidden from sight" (Rigney 2022, 13). Berber Bevernage and Nico Wouters call this "state-sponsored history": the "diverse and complex series of processes and outcomes of direct and indirect state influence on the construction of history and public memory" (2011, 1). States can sponsor history through many ways, for example: censorship of ideas and academics, commemorative rituals, monuments, or counter-denial by acknowledging some events while obscuring others (Bevernage and Wouters 2011). Berthold Molden labels this power grip on history a "mnemonic hegemony": "the ability of a dominant group or class to impose their interpretations or reality – or the interpretations that support their interests –- as the only thinkable way to view the world … and delegitimizes alternative forms of reasoning" (2016, 126). To be clear, a history becomes hegemonic "not because it is superior but because the most powerful group put it there" (Molden 2016, 128). States obscure the idea that history could have gone differently – today's ruled could have been today's ruling – or claim that any outcome where they were not still in power "would be a worse-case scenario" (Molden 2016, 127). It is through mnemonic hegemony that a State creates mnemonic common sense – "what is historically thinkable and acceptable, and what is not" – thereby establishing the State-sponsored history as the "unquestioned, universalized, and essentializing assumptions" against which all else is fallacy (Molden 2016, 140).

On the other hand, passive forgetting is when memories are lost "because they are considered unimportant or, more insidiously, because they are simply invisible. They are the unknown unknowns" (Rigney 2022, 13). In a study of contemporary French society, Ann Laura Stoler (2016) found that France suffers from colonial aphasia, or the inability to see themself and their society in light of ongoing coloniality. If colonisation is the historical theft and usurpation of lands and people and the creation of a superior/inferior relationship between the colonisers and colonised, then coloniality is the power regime which upholds that superiority in power, knowledge, and being into the contemporary era (Maldonado-Torres 2007; Quijano 2007). In all three of these aspects (power, knowledge, and being), non-"Westerners" are not "of a rank equivalent to the European norm. And that exactly identifies a colonial view" (Quijano 2007, 170).

It is due to this deliberate theft and usurpation that Stoler uses the phrase "colonial aphasia" in lieu of "unreflective idioms" like "a 'forgotten history,' a 'memory hole,' 'collective amnesia' – a history that somehow got 'lost'" (2016, 125). Aphasia highlights not a forgetting of history, but an occlusion; aphasia is "the loss of access and active dissociation … a difficulty in generating a vocabulary that associates appropriate words and concepts to appropriate things" (Stoler 2016, 128). To the everyday person, colonial aphasia is the inability to identify oneself and one's society within the ongoing coloniality regime. As Rigney explains: "remembering and forgetting always go hand in glove. Not only because memory needs

to be selective and be meaningful, but also because the sense of a shared present can only be created if people are prepared to paper over historical cracks" (2022, 12-13).

States are not the only actors involved in the making and shaping of history, the "papering over cracks", as the passive forgetting evidenced in colonial aphasia is often carried out by everyday people, unaware of what other alternative histories there may be out there. Michael Rothberg proposed the concept of implication to describe this dilemma, defining implicated subjects as those people in "positions aligned with power and privilege without being themselves direct agents of harm; they contribute to, inhabit, inherit, or benefit from regimes of domination but do not originate or control such regimes … [They are] neither a victim nor a perpetrator, but rather a participant in histories and social formations that generate the positions of victim and perpetrator … their actions and inactions help produce and reproduce the positions of victims and perpetrators. In other words, implicated subjects help propagate the legacies of historical violence and prop up the structures of inequality that mar the present" (2019, 1).

Implication is almost always at once rooted in history and the present, as it "almost always has a diachronic [historical] dimension that intersects with a synchronic [contemporary] structure" (Rothberg 2019, 8-9). Similar to Stoler's research of colonial aphasia in France, implicated subjects may not even be aware of their implication, especially since the ugly histories they are implicated in "are frequently rendered obscure by forms of psychic and social denial" (Rothberg 2019, 8).

Molden states that the politics of memory will undoubtedly always have those who work to maintain, those who work to change, and "those who just live in it passively" (2016, 129). These passive actors of memory, I argue, are the implicated subjects of history: not victims, not perpetrators, but the shades of grey in between. Molden explains that

"those who are neither trying to strengthen nor to defy a dominant interpretation are also still part of the correlation of forces in the political field of historical representation: as consumers or ignorers of specific history politics, as potential recruits, and, most importantly, as the carriers of alternative, though not yet articulated narrations of history" (2016, 135).

As consumers or ignorers of the mnemonic hegemony, implicated subjects of history solidify the power of mnemonic common sense by uncritically accepting the history they are given.

Change, however, is possible, and goes by many names. Rigney uses the phrase "mnemonic regime change" to describe the work of memory

activists to change a memorial landscape, particularly within ongoing anti-racism and equality struggles (2022). Studying the reversal of State-sponsored memory from anticolonial back to colonial in Cape Verde, Cardina and Nascimento propose the concept of a "mnemonic transition": "the replacement of the dominant memorial landscape by a new memory scape" (2021, 384). Authors also speak of the power of "counter-memory" to transform the collective memoryscape by giving voice to subjugated histories and to challenge mnemonic common sense; "counter-memory is as much about undermining the power of the old narrative as it is about proposing a new one" (Rigney 2022, 14). As such, counter-memory can have an insurrectional function (Molden 2016).

Memory, and therefore history, is a dynamic "work in progress … continuously subject to revision … to fit the needs of a changing present" (Rigney 2022, 12). Forgetting "risks imposing a false and unsustainable unity on the past by erasing injustices which, from the perspective of their victims, should be collectively remembered and their perpetrators called to account" (Rigney 2022, 13). Hence, Rothberg calls for a "multidirectionality of memory" to account for both the historical dimensions and contemporary structures to identify implication and a path towards remedy (2019). Inequality continues in the world because "most people deny, look away from, or simply accept the benefits of evil in both its extreme and everyday forms" and "most people refuse to see how they are implicated in – have inherited and benefited from – historical injustices" (Rothberg 2019, 20). Counter-memory and its insurrectional potential can challenge colonial aphasia and its mnemonic common sense, especially in policy.

3. Intervention and its subsequent policy mismatches

In the US, right-wing media and politicians often depict Central American migrants as "caravans" of "invaders," coming to "poison the blood" of Americans, as Donald Trump stated on the campaign trail. Pundits warn: "they" are coming to take from "us". Why are "we" supposed to care for those displaced from "their" crises? It's "their" fault their economies fail/political oppression abounds/human rights are denied. Why are "we" supposed to clean up "their" mess? It is a little known fact amongst Americans today that the US has caused "their" mess; through economic and military interventions, the US has contributed to "their" struggling economies, political oppression, and human rights struggles. From Central to Southern America, the US has intervened in elections, social cohesion, and economic policies to obtain its political and economic goals. Experts find that these interventions have directly caused contemporary migration patterns to the US.

The 1970s and 1980s were tumultuous in Central America, as civil wars and communist revolutions erupted in Guatemala, El Salvador, Honduras,

and Nicaragua. Anxious of growing communist movements to its south, the US was quick to provide economic and military support to the anti-communist groups. Nicaragua's instability was seen as an opportunity and the Reagan administration threw their weight against the Sandinista party, having the US military and CIA train and arm Nicaraguan expatriates into what became known as the "Contras" (Lundquist and Massey 2005). Under the guise of protecting American "political and economic interests in Nicaragua and to check the spread of revolutionary socialism in Central America", this American proxy army caused wide destabilisation, escalating in widespread displacement (Lundquist and Massey 2005, 2-3). US-backed violence spilled over borders and affected more than just Nicaraguans. In total, hundreds of thousands of lives were lost and economies destroyed. As a result of the intervention, the GDP per capita in Guatemala, El Salvador, Honduras, and Nicaragua fell and did not recover to their pre-intervention levels until 2011 (Massey 2020, 21). This trend is not unique to economies, however, as homicide rates in those same four countries stands at 53.9 per 100,000, compared to 11.9 in neighbouring counties that did not experience similar US-backed Contra violence (Belize, Costa Rica, and Panama) (Massey 2020, 21). It was only after the US intervention in the Sandinista conflict that emigration accelerated, but this was "not because of direct exposure to violence but because of a broader feeling of vulnerability owing to the systematic destabilisation of the Sandinista government and Nicaraguan society generally by the US-backed incursion" (Lundquist and Massey 2005, 12). These large scale displacements were not unique to Nicaragua.

Historically, undocumented migrants crossing the US southern border have been Mexican nationals seeking employment or family reunification. This pattern changed, however, following interventionism across Central America. Massey explains:

"During the 1980s, the U.S. government provided aid to right-wing regimes in El Salvador, Guatemala, and Honduras, to train, fund, and support military units and paramilitary death squads in to suppress popular opposition in these countries, while also funding, training, and arming an army of "Contras" to fight the Sandinistas in Nicaragua itself. In the wake of this intervention legal violence surged, claiming hundreds of thousands of lives and destroying the region's economy" (2020, 21).

As the State-sponsored violence grew, so too did the displacements of Central Americans heading to the US southern border (Massey et al. 2014).

Even after the US intervention came to an end in the 1990s, Nicaraguans largely chose to remain north because the political and economic conditions remained unstable since (Lundquist and Massey 2005; Massey 2020). One of the new security concerns of Central America at large is gang violence,

which, much like the interventionist support of the Contras, has origins in the north. Central Americans displaced by the instability caused by US support of the Contras emigrated north to the US, where, undocumented, some "found solace and support in gangs … When undocumented gang members were later apprehended and deported, gang violence was exported back to El Salvador and transnational gang networks were created" (Lundquist and Massey 2005, 1056). Nicaraguans who emigrate to the US today are more likely to be "the sons and daughters, nieces, and nephews of undocumented migrants who left during the 1980s … to reunite with family members in the U.S. or to escape gang violence and economic turmoil at home" (Lundquist and Massey 2005, 1058).

Douglas S. Massey argues that contemporary US immigration policy is filled with "policy mismatches," stating that "we observe a stark policy mismatch being perpetuated by U.S. immigration authorities, who persist in treating what is essentially a humanitarian problem as an enforcement issue requiring the application of ever more repressive actions along the border. In pursuing this policy, the United States ignores its moral responsibility for the horrendous conditions that now prevail in Central America" (2020, 20-21).

The US created policy on the assumption that migrants at its southern border are single, male, Mexican migrants seeking jobs. This was the case when the Immigration and Nationality Act (INA), the overarching US immigration law, was passed in 1965. However, this pattern changed in the 1980s, when more and more Central American women and children fled the violence and economic hardships that resulted from the US intervention (Massey et al. 2014).

Nicaraguans displaced due to US intervention have endured their share of policy mismatches, starting while the US was supporting right-wing Governments in Central America. Congress passed aid packages and military support out of the desire "to prevent millions of … 'feet people' from arriving at [the US's] doorstep seeking refuge should communism prevail in the region" (Hernandez 2006, 227). By offering support to the Governments whose residents were being displaced, the US was prevented from acknowledging human rights violations in those countries and therefore "from recognizing that many of those Central Americans who did make it to its doorstep had legitimate claims to asylum" (Hernandez 2006, 227). Thus, the displaced Central Americans who arrived in the US had to live undocumented and could not seek legal residence as asylum seekers.

This policy mismatch was legally challenged in *American Baptist Churches (ABC) v. Thornburgh* (1991), which claimed discriminatory granting of asylum and resulted in a resounding win for Guatemalans and Salvadorans who were then able to reapply for asylum (Hernandez 2006). *ABC v. Thornburgh* did not increase protections for Nicaraguans, but it was

the beginning of a sea change of legal protections for Central Americans. While *ABC v. Thornburgh* was winding through the courts, Congress passed the Temporary Protection Status (TPS) programme to allow people from specific unstable countries to remain in the US with legal status and work permits for fixed periods of time. As protection under TPS is extended only six to 18 months at a time in the hope that the instability in the home country will clear, it is therefore a tenuous "band aid" fix in lieu of lasting legal change. Passed by Congress, TPS turned out to be political and not humanitarian in nature. The protected status was first offered to Salvadorans in 1991, but not Guatemalans fleeing the same conditions. The US was supporting right-wing Governments in Guatemala's civil war and therefore could not acknowledge protection based upon human rights violations of which it played a contributing factor (Hernandez 2006). Nicaraguans were not offered protection under TPS until 2001, but the need for protection was for a hurricane, not the instability caused by US intervention (Hernandez 2006).

By 1997, a backlog of pending asylum claims had grown so large that the US passed the Nicaraguan Adjustment and Central American Relief Act (NACARA), which allowed Nicaraguans in the US since 1995 to regularise their status in the US and apply for permanent residence (Massey et al. 2014). Notably, NACARA only allowed the transition to permanent residence for Nicaraguans; other Central Americans who had likely been displaced by regional violence caused by US intervention were not eligible (Massey et al. 2014). But NACARA was not passed out of an obligation to rectify past actions of the US, instead, it was to resolve an overwhelming backlog and to provide relief for those fleeing communist regimes. The US refused to admit Nicaraguans and other Central Americans as asylum seekers because to do so would be to admit that there were grounds for asylum. NACARA was a way to provide relief without admitting fault. Eligibility for NACARA ended for those who entered the US after 1995, leaving them with few pathways towards permanent legal residency.

TPS for Nicaraguans continued throughout the Bush and Obama administrations, under the rationale that living conditions were still negatively impacted from the 1998 hurricane, until November 2017 when the Trump administration announced it would terminate TPS effective from January 2019 (US Congressional Research Service 2023). However, TPS holders and civil society actors legally challenged the termination in *Ramos v. Nielsen* (a.k.a. *Ramos v. Wolf*) and removal of TPS for Nicaragua, El Salvador, Haiti, and Sudan was postponed until a final ruling. In June 2023, the Biden administration rescinded the terminations ordered by the Trump administration, thereby extending their temporary protection (US Congressional Research Service 2023).

A significant policy change for Nicaraguans came from an unlikely inspiration: the Russian invasion of Ukraine. In April 2022, the Biden

administration announced the "Uniting for Ukraine" programme as a pathway to allow US residents to financially support Ukrainians fleeing the Russian invasion. Uniting for Ukraine was met with bipartisan support and successfully admitted 100,000 Ukrainians in the first five months (Montoya-Galvez 2022). Similarly to TPS, the protection status for Ukrainians is valid for two years and subject to renewal.

Bolstered by its success, in October 2022 the Biden administration began a similar programme for Venezuelans, and then on 5 January 2023 announced that Cubans, Haitians, and Nicaraguans would be included in the programme, in what became known as Cuban, Haitian, Nicaraguan, Venezuelan (CHNV) parole (US White House 2023). Importantly, the impetus for CHNV parole again was not to amend the instability which resulted from US interventions, but rather as an alternative to what the Biden administration called "disorderly and unsafe migration" (US White House 2023). The Biden administration has moved steadfastly to the right concerning rhetoric and policies which paint the southern border as a security threat, and the CHNV parole programme, while indeed a welcome policy to expand legal migration pathways, must be understood in its context as one response to the perceived threat of undocumented migration.

The Biden administration claimed CHNV parole to be a success, and within the first six months of the programme, 160,000 eligible migrants had arrived in the US, including 21,500 Nicaraguans (US Department of Homeland Security 2023). However, unlike its predecessor United for Ukraine, CHNV parole has not received bipartisan support. On 24 January 2023 – a mere 19 days after CHNV parole was announced – Texas and 21 other Republican-led States filed a lawsuit claiming the Biden administration did not have the legal authority to extend the parole program (Justice Action Center n.d.b). After winding its way through the Southern District Court of Texas and being scheduled for oral argument on 4 February 2025 in the Fifth Circuit, the case was dropped prematurely (Justice Action Center n.d.a; Justice Action Center n.d.b). This is because on 20 January 2025, his first day back in the Oval Office, Donald Trump signed two executive orders terminating parole programmes (US White House 2025a; US White House 2025b).

In addition to US domestic law and policy, the understanding of "policy mismatches" as contrary to the spirit and letter of the law can be seen at the international level. In 1984, in the midst of US-backed violence, Nicaragua filed an application with the International Court of Justice against the US for use of force, intervention in domestic affairs, and violation of State sovereignty through its military and paramilitary interventions (*Nicaragua v. United States* 1986). Two years later, the Court ruled in favour of Nicaragua, finding that US interventions could not be considered as collective self-defence and that the US had violated

the international legal principles against use of force, non-intervention, and infringement of State sovereignty. The Court ordered the US to cease all military actions in Nicaragua which could be considered in breach of the ruling and pay reparations to Nicaragua (*Nicaragua v. United States* 1986).

So too can "policy mismatches" be seen in US obligations to refugee law. Despite being a signatory to uphold the right to seek asylum under the 1951 Convention Relating to the Status of Refugees and its domestic codification in the Refugee Act of 1980, the US sidestepped its obligations to grant asylum protections to displaced Nicaraguans, instead supporting the Government creating the displacements (Hernandez 2006). Not only did this put the US at odds with its duty to uphold the right to seek asylum, but also the *jus cogens* principle to not return a migrant or refugee to a country where their life or liberty will be put at risk (non-refoulement).

US intervention and support of the Contras directly destabilised the region, leading to widespread violence, economic collapse, and mass displacement. Despite its role in causing the conditions that forced Nicaraguans to flee, US policies towards the displaced revealed a long-standing pattern of "policy mismatches". Legal and humanitarian protections like asylum, TPS, NACARA, and CHNV parole have often been politically motivated or inconsistently applied, reflecting reluctance to acknowledge responsibility. While *Nicaragua v. US* confirmed US violations of international law, domestic immigration policy has continued to treat migration from the region as a security threat rather than a humanitarian issue, further exacerbating the mismatch between US actions abroad and its legal and moral obligations to those it displaced.

4. Counter-memory for policy matching

A brief historical overview of US immigration policy towards Nicaraguans shows little if any consideration for how the US is implicated for displacements related to the economic and military interventionist support of the Contras. Positive policy changes were concerned with regulating large numbers of undocumented migrants, preventing the deportation of people to a country struggling to overcome a natural disaster, or diverting migrants from seeking relief at the southern border. Relief after the end of NACARA has only been piecemeal and its temporary status translates to a life of uncertainty for displaced Nicaraguans. The US has and continues to implement policy mismatches not out of an active forgetting of interventionism, but rather a colonial aphasia where Americans simply do not know the US's role in the region, and therefore is implicated in its displacements. What those displaced by the ongoing effects from US interventionism need is not continued temporary protection, but the opportunity to transition to permanent residence in the US. But these policy mismatches will continue as long as the US public and policymakers

do not confront their role in the destabilisation of Nicaragua and Central America as implicated subjects.

To address the devil's advocate, this final section will raise two questions which must be considered if the US is to confront these policy mismatches. First, must the US really make right the instability caused by its interventions? And second, is there potential amongst the American public to make right the instability caused by interventions?

To answer the first question, the US already is and already has. Since 2014, the US has invested heavily in eliminating the "root causes" of migration (poverty, violence, and gangs) since the increased arrival of undocumented, unaccompanied children from Central America. However this funding is given with the caveat that it would reduce the number of northward asylum seekers, and does not acknowledge the historical role US interventions played in creating those same migration patterns. But there is also a historical precedent for the US making right the displacements it has caused.

Following the US intervention in Viet Nam and the devastation that it brought, the US admitted 1.3 million Southeast Asians and gave them permanent residence, therefore not requiring their legal status to be in limbo, being constantly renewed every two years in perpetuity (Massey 2020). Just as in Viet Nam, the US has a moral obligation to rectify the displacements it caused in Nicaragua – but in Viet Nam, that obligation was translated into policy, whereas in Nicaragua it was not (Massey 2020). Comparing the two, Massey summarises:

"Dealing effectively with refugees and asylum seekers from Central America is certainly within the nation's capacity to manage … There is no humane rationale for treating Central Americans any differently than Southeast Asians, and indeed the potential number of refugees is much smaller" (2020, 24).

US policymakers have shown themselves able to confront this policy mismatch before by granting permanent residency to Vietnamese and later to Nicaraguans under NACARA. But the instability causing displacements did not end with the eligibility cut off for NACARA in 1995. As more time passes since the interventions of the 1980s, it will grow more difficult for the US public and policymakers to draw the connection between contemporary migration patterns at the US southern border and US policies in Nicaragua four decades ago. Only by addressing its history can the US confront its present.

Second, is there potential amongst the American public to make right the instability caused by interventions? This is an opportunity for what Molden (2016) called the insurrectional potential of counter-memory.

While the US is not a colonial power to the same extent as France, the concept of colonial aphasia can illuminate the dilemma faced by the US in the last several decades. It is not only that contemporary Americans, both public and policymakers, have forgotten their Government's historical intervention in Nicaragua – we have – but it is also that status quo Americans suffer from an active dissociation from the ongoing coloniality regime. This is not true of all Americans, as the growing number of followers of far-right, anti-immigrant Donald Trump praise his "tough talk" ideology of Latin America as inferior vassal States to do America's bidding. Look no further than Trump's rallying cry to "build the wall" and that he would "make Mexico pay for it", or the US's heavy-handed expectations of States further and further south of the US to serve as American border patrol and stop the flow of migrants north. However, not all Americans followed Trump to the extreme right on immigration policies, and herein lies the insurrectional potential of counter-memory.

While polls are not authoritative, and indeed have been wrong in the past, representative sampling can still provide insight into popular beliefs. For example, despite the increase of sensationalist anti-immigrant messaging since 2015, many of the American public are favourable to offering protection to Central Americans. When a 2022 SRSS poll, funded by CNN, asked "Do you favor or oppose allowing refugees from Central American countries to seek asylum in the United States?", 56 percent of respondents approved, versus 44 percent who disapproved (SSRS 2022). Similarly, a 2019 Gallup poll found that 57 percent of Americans approved of Central American refugees coming into the US to escape "the situation there", versus 39 percent who disapproved (Gallup 2024).[1] A majority of Americans (59 percent) disagreed when asked if the US should pass a law preventing refugees from entering the US, versus 37 percent who were in favour (PRRI 2023). When asked in 2023 how sympathetic Americans are "toward people from other countries who travel to the US border in an attempt to enter the US", 35 percent are very sympathetic, 43 percent somewhat sympathetic, 11 percent somewhat unsympathetic, and 10 percent very unsympathetic (Gallup 2024).

Poll data for Central American immigrants does not vary drastically from other immigration-related polls. For example, a majority of respondents (60 percent) to the American Values Survey believe that undocumented immigrants in the US should be given a pathway to citizenship (PRRI 2023). When asked if immigration is a good or bad thing for the country, 68 percent of Americans stated that immigration is a good thing for the country, 27 percent who responded it is bad, 3 percent had a mixed response, and 1 percent no opinion (Gallup 2024). Of those polled on whether immigration is a good or bad thing for the country, half of Republicans responded it was a good thing, along with 67 percent of independents and 87 percent of Democrats (Saad 2023).

1 Unfortunately, Gallup did not include this question in polls after 2019.

This poll data is included not as a quantitative analysis that Americans are in support of refugees and immigrants. Rather, this data hints that the beliefs of the American public do not reflect what is commonly depicted in the media and what is implemented in US anti-immigrant policies. More than not, Americans support immigration, pathways to citizenship, and granting asylum to those in need. There is an opportunity for counter-memory to challenge the mnemonic common sense that Central American migrants arriving at the US southern border are being displaced by problems created by their own country, but instead fleeing ongoing instability caused by US interventionism. A recent example shows the insurrectional potential of counter-memory. In 2020, US history and society burst at its seams following the murder of George Floyd. For many, one public murder shone a light on systemic racism in the US, and Americans were forced to either confront or deny their roles as implicated subjects of ongoing racism. From mass protests and education to book bans and the end of affirmative action, there is no doubt that the aftershocks are diverse and far reaching. All it took was one event in 2020 to force the American public to confront or deny the counter-memory of systemic racism in the US.

The opportunity exists for a counter-memory which challenges why Nicaraguan – and Guatemalan, Salvadoran, and Honduran – migrants are at the US border and, importantly, what the US must do about their plight. To continue offering piecemeal temporary protection every few years is to continue the status quo of policy mismatches. Instead, the American public must confront their roles as implicated subjects of ongoing coloniality and institute policy and legislation to rectify the very causes that displace Nicaraguans. Civil society organisations should work to increase public knowledge about US interventionism and its contemporary displacements, thereby using counter-memory to challenge mnemonic common sense of Central American migration patterns. Public officials must push for the reinstatement of TPS and Central American development funding, but also pass legislation to create pathways towards permanent legal residency similar to NACARA and for those displaced from Vietnam. Finally, the Courts must consider the ongoing effects of interventionism while ruling on challenges to immigration law and policy, as was demonstrated with the CHNV parole legal battles. Until the US confronts the ongoing effects of its interventionism in Nicaragua and Central America, policy mismatches will continue.

5. Conclusion

US immigration policy toward Nicaraguans cannot be separated from the country's history of intervention in Central America, particularly its support for the Contras, which fuelled widespread violence, economic collapse, and displacement. Yet rather than acknowledge this role, the US has responded with short-term, politically motivated programmes –

TPS, NACARA, and CHNV parole –- that offer temporary relief without addressing the root causes of Nicaraguan displacement. This failure reflects a broader colonial aphasia that severs the present immigration trends from their historical origins and enables continued policy mismatches.

However, reform remains possible. Drawing on memory and decolonial studies, this article argues for counter-memory as a tool to shift public understanding and policymaking. Durable reform – including permanent residency, expanded legal pathways, historical education, and judicial recognition of US responsibility – can move policy from denial to accountability. With growing public support for humane immigration solutions, the US has a chance to replace policy mismatches with just immigration policies rooted in historical truth.

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Vulnerabilities of Burmese migrants, refugees and stateless people in Mae Sot after the 2021 military coup

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Abstract: *After the military coup on 1 February 2021, in Myanmar, the military junta inhumanely treated people around the country by means of arbitrary arrest, extra-judicial killing, burning homes, series of torture, confiscating property, sexual violence, denial of humanitarian assistance, incommunicado detention, and mass killing. Although Myanmar ratified the four Geneva Conventions, in which Article 3 prohibits violence to life and person, cruel treatment, and torture as war crimes, the military junta never follows international law. As the people were forcibly displaced due to the threat to their lives and security, they fled to neighbouring Thailand, which is south of Myanmar. The indigenous southern tribes and Burmese ethnic groups throughout the country have been compelled to evacuate to the Myanmar Thai border, particularly to Mae Sot. Due to their illegal status, they lose their fundamental human rights, especially health care, education, access to job opportunities, taking part in religious activities, and cultural rights. Moreover, they are at risk of being arrested by the Thai police and sent back to Myanmar by Thai immigration. This research paper focuses on how Burmese migrants, refugees, and stateless persons overcome their insecure lives for development, inclusiveness, and integrity in Mae Sot alongside their illegal status. This paper explores the desk studies of literature review, analyses international law, and uses a qualitative research method by looking at the vulnerable living status of targeted people. The paper will highlight the needs of international obligations for the sustainable development of vulnerable Burmese displaced people in Mae Sot pursuant to international human rights law.*

Keywords: *refugee; health; education; job opportunities; security; sustainable development.*

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1. Introduction

Thailand has been hosting migrants and refugees from Myanmar since the 1980s when the then Government depended on the Thai border, especially for imports and exports. Satria Rizaldi Alchatib explains that Thailand is a non-signatory State of the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention) and there is an absense of legal protection on migrants and refugees in its national laws (2023, 69). Thailand is also not a signatory State of the International Convention on Protection of the Rights of Migrant Workers and their Families (1990). Looking at the memorandum of understanding on labour cooperation between Myanmar and Thailand in 2016, a term "employment of workers" is found instead of the term "migrant worker." According to the geography, people from Myanmar, potentially across the Thaungrine river at the border, are at risk of economic imparities, arms conflict, natural disasters, and force majures. Migrants themselves may be termed regular or irregular, documented or undocumented, and legal or illegal. An international migrant (migrant) refers to "any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence" (IOM 2019).

People in Myanmar suffered socio economic impacts due to the outbreak of Covid-19, and soon after it, they also faced political upheaval by the military junta's power seizing. These crises of health and politics describe the cross-border movement of people who have a variety of protection profiles, reasons for moving, and needs but who move along the same routes, use the same forms of transport or means of travel, and often travel irregularly. Thus, Mae Sot is a hub of Myanmar people under a variety of statuses such as undocumented, documented, irregular and seasonal migrants, refugees and asylum seekers who connected with the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) whose offices are situated in Mae Sot.

There are camps where refugees reside in the nine temporary shelters such as Ban Nai Soi, Ban Mae Surin, Mae La Oon, Mae Ra Ma Luang, Mae La, Umpoem Mai, Nu Po, Ban don Yang, and Tham Hin that are offcially run by The Royal Thai Government on the Thai/Myanmar border where it is expected they will stay until the conditions change and they can re-enter their country (The Border Consortium n.d.). There are also urban refugees and asylum-seekers who are mainly of Karen, Karenni and Burmese ethnicity. Urban refugees encounter the risks of anticipated detention or deportation and they have a well-founded fear of being persecuted by military dictators. Likewise, undocumented migrants have to resist labour exploitation and threats of human trafficking. People residing in Mae Sot with different statuses sustain the uncertainity to access education, health care, legal protection, regular income from jobs, adequate living standards,

and daunting challenges, in particular for some women and children (especially girls), LGBTQ+ people, and victims of racism, xenophobia, and other forms of discrimination and freedom of movement that are fundamental human rights according to international human rights law.

This research paper looks at the real-life experiences of migrants, including refugees and stateless people, by using a method that involves talking to people and analysing international human rights law, refugee law, and local laws. It references studies by other researchers and reviews reports from international non-governmental organisations and United Nations (UN) agencies. The key informants were made to have an appointment and were interviewed in a safe place and for an appropriate time when they fit. Since this paper is qualitative research and experienced individuals and victims were inquired, dangers to them as well as potential ethical and security implications are carefully taken into account when gathering data. A code of ethical conduct, the "no harm" principle, was set to take care that there is no harm to the key informants and avoid any risk. The attached table shows the differences in background information, including gender, age, race, and ethnicity, among the main respondents. It analytically investigated people on the move possessed the reasons for their movements, problems they encountered, situations they were in, and what kind of support they needed.

2. Why and how were the Burmese people being displaced to Mae Sot?

The Republic of the Union of Myanmar is situated in the western part of continental Southeast Asia, ranging from latitude 10° N to around 28° 30′ N, and it shares its border with Thailand at the southeast. Shan State, Karen State, and Tanintharyi Region are located on the Myanmar side of the border, while Kanchannabuig and Tak Provinces are located on the Thai side to Mae Hong Song, where there are high mountain ranges of the Shan hills covered with rainforests and the Pai River and Salween River across the border. At the border between Shan State and the Province of Chaing Rai, there is the town of Tarchilake on the Myanmar side and the town of Mae Sai on the Thailand side. There is only one way of land crossing to migrate via this way, at the border of Karen State, adjacent with the Ayeyarwaddy Delta. It is a heavily forested, mountainous strip of land, and Salween is between Karen State and Mae Sot of Tak Province. Since then, ethnic armed groups have emerged, and trust between ethnic populations and the Burmese military Governments has deteriorated. The regions nearest the Thailand border have been mostly impacted by protracted civil conflict, erratic land-use regulations, population shifts, religious persecution, inadequate education, and inadequate infrastructure for sustainable development. These factors push people to migrate to Thailand. Observing the demography, there are about 7 percent of Karen people, about 10 percent of Shan people, and 7 percent of Tanintharyi

people among 135 races in the 51.7 million total population in Myanmar (Department of Population 2014).

The Karen are one of the ethnic minority groups in both Myanmar and Thailand and they inhabit both sides of the Thai Myanmar border. The Karen Hill Tribe in Thailand are the largest ethnic minority group, with an estimated population of about one million. They originally migrated from Tibet, moving from southern Myanmar to northern Thailand. The Karen Hill Tribe live in proximity to areas alongside the Thai-Myanmar border such as Mae Hong Son, Chiang Mai, Chiang Rai, and some in central Thailand (Parker et al. 2014, 1135).

The Tai-speaking group known as the Shan, or Tai-Yai (members of the Greater Tai ethnic family), are called Shan; that term also applies to all Thai people living in the Ayudia Shan Kingdom (Ayutthaya Siam), or what is now Thailand. The Shan people survived during British colonial rule, meaning that the British colonial Government acknowledged the legitimacy of Saophas (Sawbwas). To the east and west, respectively, of the Shan State, lie the Salween River and the Assam State valley of India, close to the trade routes that connected China, India, and the rest of Southeast Asia since the eighth century. The socioeconomic relationship between the residents of these locations and their migration since then is illustrated by their geographic proximity (Aphijanyatham 2009). Regarding people in the Tanintharyi region, it is unlike its neighbour State, Karen State, as the name of the region does not come from the name of ethnic people. In the 1983 national census, the population of the Tanintharyi Region was 917,628 (UNHCR 2014). As arms conflicts clashed since 1999, a lack of legal protection to minority groups, arbitrary taxation, land confiscation, and centralised exploitation of the Dawei Deep Port Project made a deep mistrust of residents to central Governments. Due to these problems, the Tanintharyi people were forcibly relocated to the Thai border through Ranong Province, which is a gateway to Myanmar via the Andaman coast. The population of the Tanintharyi region has decreased compared to other States and regions, according to Myanmar's demography data. The official records do not indicate the reason for a drop in population.

In addition, there have been several reports of military atrocities throughout Myanmar following the military takeover. Tens of thousands of people have fled from various parts of Myanmar since the military coup in 2021, traveling through the Karen State to the Thai border town of Mae Sot in search of safety. Tak's border with Myanmar is characterised by topography in the north by the Moei, a narrow river, and in the south by agricultural areas and forests. As this paper is only focused on the displaced persons in Mae Sot after the specific year of 2021, the research observes the issues of displaced persons such as migrant workers and urban refugees. Based on the qualitative approach, which involved interviewing 15 respondents, of whom five are migrant workers who had been living in

Mae Sot for many years and ten are urban refugees, they fled Mae Sot by crossing the Thaung Yin River as a result of the military's well-thought-out actions. The majority of respondents' decision to go to Mae Sot is that the path through Karen State is the safest option available. It was generally said that there was no woodland to hide in while entering Thailand lawfully and that there were immigration checks where one could be detained, making the route from Tachilake to Mae Sai impracticable. They primarily fled to Mae Sot because they thought the UNHCR would protect them under the UN system for protecting human rights and that Mae Sot was a safer location than their home country. Respondents fled to Mae Sot through the pre-existing informal channels, which depended on a system of brokers and collusion of officials at various levels, as well as general governance challenges in contested border provinces, and continued to operate, but at higher cost and less frequently. They said that they paid 3,000 Thai baht or 4,000 Thai baht to a broker to illegally enter Thailand for a safer location.[1]

As time has gone on, Mae Sot has developed into a dangerous haven for fugitive Burmese. There are many exiles residing in Mae Sot who are dreaming to go back home, waiting for an interview with UNHCR to move to a third country, trying to seek asylum in any country, constantly fearing spies and informers, and living in a condition of almost constant anxiety.[2] Lee describes Mae Sot as a border town as a social border system where Burmese people who live in Mae Sot actively engage with the existing system in the border town, i.e., they are not solely exploited and abused by the systems of control of the Thai State and capitalist economy, but rather they strategically seek opportunities to sustain their lives within the system, such as by playing hide-and-seek with the authorities and using different kinds of social networks (Lee 1966). There have been various types of displaced persons living with different experiences such as migrants, migrant workers, migrant families, refugees, refugee like situations, and asylum seekers, within Mae Sot Township.

Since the 1990s, Burmese people have been migrating to Mae Sot due to pull factors of better jobs, a safer environment, and access to better infrastructure. In order to identify what kind of people they are, international law provides the definitions by different international conventions. There is no universal and legal definition of "migrant," however, the IOM defines that a migrant is a person who, for a number of reasons, temporarily or permanently relocates away from their location, whether inside their own nation or across an international boundary (IOM 2019). People who moved from their original place and crossed an international border to an alien country can be called international migrants (IOM n.d.). There are different kinds of migration, such as regular, irregular, seasonal, legal,

1 Notes of interviews from respondents whom were questioned in March 2024.
2 Notes of interviews from respondents whom were questioned in March 2024.

and illegal. Movement of people who do not follow the rules, laws, or international agreements that control entering or leaving the country of origin, transit, or destination can be called irregular migrants.

The term "migrant worker" is defined as a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national (ICMRW, art. 2.1). Migrant workers live outside their home country for the purpose of work. Migrant workers regularly do not get the same rights and protections as national workers, and they are vulnerable to exploitation both at the workplace and in the community where they live if they do not have the correct documentation.

A refugee is someone outside their country of origin who is in need of international protection because of a serious threat to their life, physical integrity, or freedom in the country of origin as a result of persecution, armed conflict, violence, or serious public disorder against which the authorities in the home country cannot or will not protect them (Refugee Convention, art. 1). The refugee protection mandate of UNHCR, in accordance with paragraph 6A(ii) of its Statute (UNGA Resolution 428 (V), annex), covers "any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, or political opinion, is outside the country of his nationality [or habitual residence, for those without nationality] and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country."Refugees live in two situations: those of camp refugees and urban refugees. Camp refugees reside in a camp where it is expected they will stay until the conditions change and they can re-enter their country. Main examples of these are Burmese refugees who reside in camps along the Thai-Burma border and also in camps in Bangladesh and India. These are the only refugee camps in Southeast Asia. Since the Thai Government has not ratified the Refugee Convention and does not recognise refugee rights, it does not call these places "refugee camps," but rather uses the term "temporary shelter," implying that sometime soon the camps will close, and the refugees will return to their country. As can be seen by the age of these camps (most camps in Thailand are around 30 years old), these have not proved to be temporary solutions. There are families who have lived in the camps for three generations, with children being born, growing up, getting married, and having children within the camp (SHAPE-SEA 2018, 144).

In the camps, most people have their basic needs met by humanitarian organisations, but a variety of rights are denied to them, such as freedom of movement and the right to work, making their economic livelihood difficult as they must rely on charity from whatever organisations provide for their basic needs. Camp refugees who do leave the camp to find work do so without documentation and are at risk of deportation if caught. On the other hand, even if they do find jobs, they are at risk of exploitation or

even trafficking because whatever work they find will be in the informal sector. Once children graduate from primary school (which is available), there may not be access to a high school or university. However, refugees themselves have been actively responding to these concerns.

The second refugee group consists of urban refugees. These are mostly urban residents who are from outside the area. The majority of urban refugees are waiting for UNHCR recognition in the hopes of being resettled in a third country, although this procedure frequently takes years because so few countries in Southeast Asia have ratified the Refugee Convention. The refugees frequently live in a state of legal ambiguity as they wait and risk being deported at any time. Human rights breaches affect urban refugees in various ways. They frequently face serious security risks, such as being arrested and detained by local officials because they lack proper documentation. Even if they have a UNHCR "person of concern" card, it does not mean they will not be detained (Sharom et al. 2015, 133). Further, their families may not get access to healthcare or education. While they may find jobs, these are likely to be in the informal sector with low wages and increased risks.

A stateless person is defined in Article 1(1) of the Convention relating to the Status of Stateless Persons as someone who is "not considered a national by any state under the operation of its law" (UNHCR 2014).[3] The right to citizenship is found in Article 15 of the Universal Declaration of Human Rights (UDHR) which says: "everyone has the right to a nationality" and "no one shall be arbitrarily deprived of his nationality."

The definitions of refugees, migratory labourers, stateless people, and asylum seekers are provided by international conventions. During the interview process, interviewees are unsure about their status in relation to international law. With the exception of the migrant labourers, the remaining respondents sent their application for refugee status to UNHCR-Thailand. Nearly everyone has received their initial phone call and an automatic response. During the phone call, UNHCR representatives inquired in great depth about their activities following the military takeover in Myanmar, their reason for fleeing to Mae Sot, the method of their escape, their means of subsistence in Mae Sot, their income, and the status of their families. According to the respondents, the UNHCR is the most dependable agency that can help people get out of these problems. They experience depression, though, if the UNHCR does not follow up with them or make a phone call. They are not allowed to remain here lawfully if they return home. "I don't understand why we are stuck here, why the UN can't assist us in exercising our basic human rights, and why we aren't allowed to leave this nation.

3 The International Law Commission has concluded that the definition in Article 1(1) of the Convention forms part of customary international law (see the text of the draft articles on diplomatic protection in A/61/10, chap IV E 2, chap II, Natural persons, Article 8, Stateless persons and refugees, commentary, para. (3)).

The world greatly bothers me because it seems like documents are more important than individuals. I may travel on my own dime if UNHCR can assist with my travel documentation. After that, I can retire to Thailand or any other third-world nation."[4]

3. Skyrocketed numbers of refugees in Mae Sot after 2021 military coup

Since February 2021, growing internal warfare and the nation's political unrest has worsened the humanitarian situation in Myanmar. As of 1 November 2022, approximately 1.5 million people are internally displaced within Myanmar, according to UN data. Since 1 February 2021, around 70,000 refugees are said to have sought shelter in neighbouring nations in addition to the growing number of internally displaced people in Myanmar. A long-standing refugee crisis in the area has resulted in around 1.2 million Rohingya refugees, of whom nearly one million are currently sheltered in Bangladesh. Smaller populations are also present in Malaysia and India. Additional Myanmar refugees and asylum seekers number over 300,000 and are presently residing in Thailand, Malaysia, and India (UNHCR Operational Data Portal n.d.). Thousands of refugees entered neighbouring Thailand in April 2021 as a result of the conflict between the military of Myanmar and rebel groups over control of the border town of Myawaddy in the southeast. Since the mid-1980s, nine camps housing around 90,000 refugees from Myanmar have been established in Thailand. Following Myanmar's revolution in February 2021, at least 45,000 more refugees from that country fled to Thailand. The Thai Government has periodically forced these recent arrivals back while simultaneously allowing them to remain in makeshift shelters close to the border. Thai authorities have tight limits on the movement of these new immigrants as well as their access to humanitarian supplies and services. None of them are allowed to enter the current refugee camps (HRW 2023).

4. Vulnerable situations of migrants, refugees and stateless persons in Mae Sot

Hannah Arendt discussed "the perplexities of the rights of man" in terms of totalitarianism, alluding to the manner in which ardent supporters of rights typically carry out rights abuses. Arendt was extremely doubtful that those who had been displaced could successfully assert their rights in a way that would force the receiving State to act outside of its own interests, given her personal experience of persecution in Nazi Germany and her exile, as well as her observations about how vulnerable people had been abandoned by the world in their hour of need. According to her, the reason why refugees, stateless persons, and others did not have rights in the first place was because States are the ones who provide rights, and certain States had chosen not to do so (Arendt 1951, 268).

4 Iris, 50 years old female, interview on 28 March 2024.

According to international human rights law and international refugee law, there are provisions for basic human rights and fundamental principles, most notably non-discrimination, non-penalisation, and non-refoulement. International human rights law recognises that asylum-seeking, illegally entering into an alien State, can require a breach of the immigration rules of that country, as it is an inevitable event for forcefully displaced persons. Particularly, the 1951 Refugee Convention guarantees several safeguards against the expulsion of refugees, including the international principle of non-refoulement, that no reservations or derogations may be made to it by any State. It provides that no one shall be sent back home against his or her will in any means as he or she faces fears of threats to the right to life or civil freedom (Refugee Convention, art. 33). Although Myanmar and Thailand have not yet ratified the Refugee Convention, UN Member States should obey the international principles, as these are one of the sources of international law (Statute of the International Court of Justice, art. 38). It can be apparently seen that international law prohibits States' arbitrary actions against refugees.

The UNHCR was established by the UN General Assembly on 3 December 1949 as an UN organ (UNGA Resolution 319 A (IV)). According to Article 1 of the Statute of the UNHCR, the main task of the High Commissioner is to provide international protection to refugees and to seek durable solutions for refugees by assisting concerned governments to facilitate the voluntary repatriation of refugees, or their integration within new national communities. The function of UNHCR is emphasised as "entirely non-political" and "humanitarian and social" (Statute of the UNHCR, art. 3). The UNHCR has been operating in Thailand since 1975. It was awarded the Nobel Peace Prize twice, in 1954 for the first time and in 1981 for the second time, partly due to its non-political and humanitarian efforts in Southeast Asia following the "boat people" issue that affected not just Thailand but the entire region. The Royal Thai Government asked UNHCR for assistance in 1998 so that refugees from Myanmar may be protected near the Thai Myanmar border. In addition to the roughly 5,000 urban refugees, Thailand currently hosts some 91,337 refugees from Myanmar as of June 2023, under reverification in the nine Royal Thai Government-run temporary shelters along the Thai Myanmar border (UNHCR n.d.a).

People who illegally resided in Thailand can register as an asylum seeker of refugee status at the UNHCR office in Bangkok, Mae Sot, or Mae Hong Son. The UNHCR provides protection and aid to urban refugees and asylum seekers in Thailand. Among the 15 respondents, ten had applied for refugee status to move to a third country through the UNHCR's support. The UNHCR's responsibilities include determining a person's status as a refugee, providing health care support for severe conditions, counselling, psychosocial support, support for victims of sexual and gender-based violence, assistance with child protection, access to education, including

Thai language classes, cash-based assistance, and advocacy for alternatives to detention (UNHCR n.d.b). Although the UNHCR website displays these assistances to the applicants, most respondents said they had not received these type of support.

The UDHR adopted fundamental human rights, including asylum-seeking rights, from other countries (art. 14). The UDHR provides equal rights to human dignity, legal rights, civil rights, economic rights, social rights, cultural rights, and collective rights. Thailand ratified the International Covenant on Civil Rights and Political Rights (ICCPR) in 1996. The ICCPR may validly withhold refugee rights on the grounds of an absence of reciprocity and non-discrimination requires that rights allocated by a State to any group presumptively be extended to all persons under its jurisdiction (art. 2). The ICCPR provides the civil rights including freedom from interference with privacy or reputation, right to asylum, right to free movement, right to a nationality and the freedom to change it, right to marriage and family, right to own property, and freedom of belief and religion. Moreover, Thailand will respect the non-derogation rights under Article 4 of the ICCPR, which means right to life, legal rights, freedom of religion and belief, and non-retrospective rights. Moreover, Thailand acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1999. The Royal Thai Government guarantees just and favourable working conditions, adequate food and clothing, protection of the family (including of mothers and of children), secondary and higher education, social security, access to healthcare, and participation in cultural life according to ICESCR. However, in terms of these fundamental human rights, refugees cannot access the right to work unlike migrants who have a pink-coloured work permit card.

Ten respondents answered the question about job and income by stating that they could not have a physical job as they do not have the right documents nor Thai language proficiency. However, Lily told me that she worked at a civil society organisation (CSO) that supports Burmese refugee people for temporary shelter: "I am a student who took part in the civil disobedience movement (CDM) and have not yet graduated. I fled Mae Sot alone, and it is very hard to struggle here as my parents cannot support money. I had been employed at the CSO for three months before quitting because I felt exploited there. I worked from home at night to gather data and statistics, and my work hours are not restricted by low wages."[5] Sunflower, a CDM teacher, said that she depends upon income from online teaching. She teaches English at the high school level at one federal online school that is opened under the Ministry of Education, National Unity Government: "I am glad to work at that school because the students are from Myanmar and they study incredibly well despite many challenges, including limited electricity, the need to use a VPN because the

5 Lily, fourth year student, interviewed on 20 March 2024.

military has banned internet use, expensive data plans, a lack of computer devices, etc. Since my school provides free admission but accepts donations from parents in accordance with their capabilities, it is able to pay teachers' salaries at a rate of roughly 3,000 MMK per hour. I typically receive 240,000 MMK (2100 Baht) for teaching 80 hours a month. This sum of money is insufficient for a woman to cover my bills, house rent, food, and other essentials. Although I had sent a refugee application letter to UNHCR and asked for a housing form IOM since 2022, I have never heard about this from them."[6]The right to access healthcare is a fundamental human right for all without any discrimination, whether they are refugees, nationals, migrants, or stateless persons. In 1948, the UDHR stated that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care, and necessary social services (art. 25). Though the UDHR explicitly states that human rights do exist and should be both respected and promoted, there continues to be controversy about the notion of "rights" today. Addressing migrant health in any country is a complicated task as efforts always operate in a highly political sphere; these political influences ultimately shape the laws and regulations around the design of the health care system. In Thailand, there are three main health insurance schemes, such as the Universal Coverage Scheme for the general Thai population, the Civil Servant Medical Benefit Scheme for civil servants, and the Social Security Scheme for employees in the formal private sector in which Thai nationals take insurance (Tangcharoensathien et al. 2010, 33). However, these schemes need to identify the person's status as a foreigner, migrant, or refugee. The Royal Thai Government has initiated the M-Fund project in Maesot District in Tak Province along the Thai Myanmar border since September 2017. This is a voluntary, low-cost, non-profit health insurance scheme that has been designed to reach migrants uncovered by existing government insurance schemes in Thailand. It is initiated and implemented by a private social enterprise called "Dreamlopments" (The Migrant Fund n.d.). M-Fund is a good health insurance scheme that needs contributions by plan options upon the needed person, and it covers the cost and benefit per person.

Out of 15 respondents, only three migrants had bought M-fund cards. They explained that their reasons to take this card are that they will live in Thailand for a long time; they can take health care services at public hospitals with M-fund cards; and the cost of private clinic care is very higher than the monthly premium cost of M-fund. The rest of the of the respondents answered that they do not buy M-Fund cards because they plan to stay in Thailand for a while and they do not have serious health problems.[7] Tulip, 30 years old and gay, is a very healthy and active person. He is also working at an online school to facilitate classrooms. He always

6 Sunflower, high school teacher, interviewed on 18 March 2024.
7 Notes from interview, March 2024.

sits down in front of his computer all day with about 240,000 MMK (2100 Baht) in salary: "I live in a small room in downtown Mae Sot. As policemen checking around downtown by motorcycle, I don't dare to walk even for regular exercise. Because I had been arrested and visited the police station, then I had paid about 2,000 Baht for three times when I always borrowed from my friends. I am so scared to go out anywhere, resulting in my suffering from haemorrhoids. I thought that haemorrhoids in a gay guy does not imply any distinction from individuals of other sexual orientations. However, when I go to a private clinic, I feel insecure about the doctor's treatment and compounders' eyes to undergo for haemorrhoid relief. I have now many debts owe to my relatives in Myanmar. As I don't know whether I will suffer this kind of health impact and how much it will cost, I didn't buy the M-fund card."[8]

Moreover, displaced respondents experience intense personal loss – both of family members and of their mental, physical, and emotional health – as a result of the military atrocities that forced them to flee and their harrowing journeys. The five respondents who are under 30 years old feel like they have lost their dreams as they are blocked in Mae Sot. The three respondents who are above 40 years old feel that their lives are totally broken as they had built careers for many years in Myanmar. Daisy told me that she was a very active person to help people, and her habit is to travel anywhere when she has time. Now, she sees many persons with very different troubles: jobless, incomeless, dreamless, and friendless. She feels that she is a useless person as she cannot do anything here as she is under the same status with them.[9] Dahlia, the daughter of an irregular migrant worker, told me that she has been living here for 15 years already and she is staying with a pink colour card: "I am very sorry to see the young people here; they are very intelligent, and they had better education than me. I had a chance to take education at migrant schools in Mae Sot, but I can't do very well due to many reasons: family problems, being unbelievable to attend university, and less motivation. Whenever I spoke with refugee youths, I admire their strength, power, and politic, and I know that right to access education is also very challenging in Mae Sot."[10] The Thai Government has ratified "rights" to education for all children in Thailand since 2005. However, there are gaps in knowledge concerning the implementation of education policy for migrants, such as whether and to what extent migrant youths receive education services at a higher education level. Migrant children as well as refugee children can go to migrant schools that are legally approved by the Ministry of Education by the Royal Thai government. Cedar told me that some parents are incapable of sending their children to school because of security concerns, transportation ferry fees of about 700 Baht per month, and uncertainty of higher education after high school.[11]

8 Tulip, 30 years old, interviewed on 25 March 2024.
9 Daisy, 42 years old female, interview on 20 March 2024.
10 Dahlia, 22 years old female, interview on 12 March 2024.
11 Cedar, 40 years old male, interview on 28 March 2024.

Lupin told that he is a first-year student from Myanmar and his mother is a CDM professor. He fled to Thailand due to persecution of military junta to him as well as his mother: "I am confident to attend the universities in Thailand to restart first year. However, the facts that the admission fees and living allowances in Thai universities are very high, administration procedures are barred on undocumented students like me, and there are very few universities which offered with English language, make my education stopped. As I didn't have time to prepare before fleeing to Thailand due to military's arbitral actions, I don't have passport. So, I could not apply for the non-immigrant education visa in Thailand. I feel very depressed in this situation as I got age year by year. I don't have any idea how to overcome my distressed situation."[12]

One problem confronting refugees is lack of access to financial assets in the form of services from formal institutions such as banks and microfinance institutions. A second problem is the risk that livelihoods programming targeted at refugees can lead to resentment and hostility by the host population. Outside camps, refugees live amongst the host population, sometimes sharing their housing and land and often dependent on them for their good will. In terms of work on the displaced in urban areas, there is a similar disjuncture where we know little about how "good" or "bad" policies are actually formed, their impacts, and, perhaps most importantly, what constitutes a "good" urban refugee policy. Orchid told me that she is selling vegetables and meats by buying from market and delivering to refugees at their house doors: "I know that they could not go to the market as well as to the bank. I help them not only food delivery but also money exchange when they need. As always, Burmese people are so kind and generous, my customers usually pay tip money when they accepted money exchange. Regarding this, we are dealing with trust each other, so we always should follow moral and ethics."[13]

5. Conclusion

Having said that, Burmese people have been forcibly relocated to Mae Sot because they lack alternative options. They risked social unrest, legal issues, and physical danger when they fled to Thailand under the military junta's persecution. They hope to work with UNHCR to deliver travel documents to third countries, support the realisation of fundamental human rights, and engage in negotiations with the Governments of Thailand and other nations to request the admission of Burmese refugees. Millions of internally displaced individuals struggle to sustain themselves and their families in camps and outside of them, frequently with little help from humanitarian organisations and in the face of strong opposition from host country Governments and populace. Yet it is important that displaced people be supported in their livelihood efforts so that they can provide for their families when humanitarian assistance is insufficient.

12 Lupin, 23 years old male, interview on 26 March 2024.
13 Orchid, 48 years old female, interview on 12 March 2024.

Under international human rights law, the prohibition of refoulement entails an obligation that shall be obeyed. Regarding this, police forces might have the problem of identifying who has well-founded fears as refugees. Respondents had been arrested and answered police questions. They wanted to call UNHCR but the police did not let them to do. After bargaining about illegal fines with the police, respondents were released. This would be the very biggest issue if they were returned to their home country without a due dilligence check. The UNHCR should intervene to the Thai Government for safety guidelines for people. The widespread formal recognition of the right to seek asylum and the right not to be returned to death or danger that the Refugee Convention represents is a major step away from the abject rightlessness of displaced people during hardship time.

The displaced persons who fled to Mae Sot after the military coup are young persons, CDM civil servants, professionals, resource persons, and students. They are blocked in Mae Sot without any protection, legal rights, social rights, economic rights as well as professional development. If UNHCR makes a political dialogue with the Thai Government, displaced people should have been issued travel documents to a third country or UNHCR registration card to stay legally in Thailand. As displaced people are social animals like the other people, they need to have social integration for inclusiveness with the Burmese residence community and the Thai community for sustainable development.

In conclusion, a migrant does not have security issues, but they have other issues such as social and economic issues. A refugee is considered to be a risk to the national security of the host State if their presence or actions raise the possibility that they could inflict substantial harm to the State's most fundamental interests, either directly or indirectly. This risk can include the possibility of an armed attack on the State, its citizens, or its democratic institutions. As a result, the evolution of the UN treaty system, which started with the UDHR in 1948, represents a fairly widespread agreement regarding the primary imperative driving human rights reform: that is, that, according to international law and philosophical tradition, displaced people have a fundamental human right, which Governments must uphold through equitable and just implementation.

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Respondents List

Sr	Name	Age	Gender	Role	Interview Date
1	Rose	52 years	female	migrant/hotel worker	10 March 2024
2	Jasmine	55 years	female	migrant/vendor	10 March 2024
3	Orchid	48 years	female	migrant/vendor	12 March 2024
4	Dahlia	22 years	female	migrant/vendor	12 March 2024
5	Sunflower	45 years	female	refugee/cdm teacher	18 March 2024
6	Lily	24 years	female	refugee/cdm student	20 March 2024
7	Daisy	42 years	female	refugee/activist	20 March 2024
8	Iris	50 years	female	refugee/cdm teacher	22 March 2024
9	Poppy	28 years	female	refugee/cdm police	24 March 2024
10	Blossom	25 years	lesbian	refugee/cdm student	24 March 2024
11	Tulip	30 years	gay	refugee/cdm teacher	25 March 2024
12	Bud	34 years	gay	refugee/cdm teacher	26 March 2024
13	Lupin	23 years	male	refugee/cdm student	26 March 2024
14	Lotus	32 years	male	refugee/cdm teacher	28 March 2024
15	Cedar	40 years	male	refugee/activist	28 March 2024

Interview Questionnaires

1. Personal information: name, age, gender, place of origin, and ethnicity?
2. How long did you live in Mae Sot? Are you attached to your family in Mae Sot?
3. Where have you been when the military coup happened in Myanmar?
4. Which facts pushed you to flee to Mae Sot?
5. How did you cross the border? Did you cross the border with documentation or without it?
6. To cross the border, did you prepare for security or living status in Mae Sot?
7. What happened in the borderland when you fled? Have you ever received reliable information about that?
8. Please share your experience with security concerns at the time of your settling in Mae Sot.
9. Did you contact UNHCR or IOM? If yes, when? For what reason?
10. Do you have any network with international organisations that help migrants and refugees?
11. Have you ever been at any refugee shelter provided by the Thai Government?
12. Tell me your work or status before you came to Mae Sot.
13. If you have work, which language do you communicate with your boss in? Could you please share how you manage your living expenses in Mae Sot if you are not currently employed?
14. Do you get any chance to join an education programme, or can you keep studying for your education?
15. When you caught the illness or any health problem, which treatment did you get from a licensed health care clinic or hospital?
16. How did you spend the costs of medication to survive? Do you have any funding to cover that?
17. Can you tell me about your suffering or any impacts, such as mental pain or physical pain, before/after you arrived in Mae Sot?
18. Have you experienced any discrimination, exploitation, unfair treatment, or abuse at your temporary living place as an illegal migrant?
19. Have you been arrested in Mae Sot after your arrival? How did you negotiate your release?
20. What was the support you wanted when you were arrested by Thai police?
21. Can you tell me the amount of the fine from the Thai police?After your release from police station, can you work as usual? Which risks do you still have?
22. Are you able to integrate socially with both the Burmese community and the Thai community? Tell me details.
23. Which facts are prohibiting you to return home or to live in Mae Sot?
24. Add your comments.

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The treatment of the Korean minority in Japan: An assessment in the light of the relevant international human rights obligations

*Joshua Losinger**

Abstract: *This article provides an analysis of Japan's treatment of its Korean minorities, particularly Zainichi Koreans, or Koreans "residing in Japan," against the backdrop of international human rights law. Despite Japan's reputation as a highly developed country in virtually all areas, systemic discrimination of Koreans was and still is present. Colonial time inequality and post-war policies shaped the social and legal marginalisation of Koreans, namely through the deprivation of their citizenship, turning them into aliens in their own country. The study examines the evolution of Japan's legal framework, including the 1952 Alien Registration Act, the Nationality Law, and the 1946 Constitution, highlighting how these policies institutionalised ostracisation. The domestic law and practice are then assessed in the light of Japan's international human rights obligations. Its aim is to evaluate discrepancies between Japan's obligations and its domestic laws and practices concerning minority rights. Through an examination of the reports of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination spanning three decades, the research illustrates Japan's struggle to adapt national laws and practices to international standards in the sphere of minority rights. In particular, early concerns centred on legal discrimination, such as restrictions on movement, while recent reports emphasise the rise in hate speech and racial violence against Korean minorities.*

Keywords: *minority rights; discrimination; international human rights law; coloniality; Japan.*

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1. Introduction

Japan has been part of the most economically and socially developed countries in the world for decades. According to a 2024 report published by Forbes, Japan has been ranked second best country to live in overall, beating other countries such as Canada, Denmark, or the US (Bloom 2024). Its quality of life resonates with other appealing scores, such as its freedom. With a score of 96/100 according to Freedom House, Japan can be considered one of the freest countries in the world, with its citizens enjoying top-tier political rights (40/40) and civil liberties (56/60). However, some categories of that score might give out details about a potential crack in this perfect picture. "Do laws, policies, and practices guarantee equal treatment of various segments of the population?" This question obtained three out of four points, suggesting room for improvement. One aspect of Japanese society that can explain this abnormal imperfect score lies in its treatment of minorities. Various minority groups have suffered from diverse forms of discrimination, including on legal, political, social, and professional grounds. Inequality is what transpires from those discriminations, with the Japanese society systemically prioritising Japanese nationals' rights over minority rights. These minorities include groups such as the Indigenous Ainu people, the social outcast Burakumin people, as well as descendants of colonial subjects living in Japan, called *Zainichi*, or "foreign citizens staying in Japan," which can refer to Korean as well as Chinese nationals. Zainichi Koreans will be the focus group of this research, as well as the broader Korean population living in Japan. As of 2008, this part of the Japanese population amounted to nearly 600,000 Korean nationals and around 300,000 naturalised Koreans (Tomonari 2013, 6). Although Chinese people have become the largest minority group in Japan in 2007 (Tomonari 2013, 5), which brings new dynamics to Japan's immigration mix, this article will rather focus on the long-lasting issues that face Koreans and the institutional and legal treatment of their rights in Japan.

Those issues will be assessed in the light of Japan's international human rights obligations which are relevant for the purpose of the protection of minorities and minority rights. In this respect, it must be noted that Japan signed on 30 May 1978 and ratified on 21 June 1979 the two international covenants concluded in 1966 within the United Nations' (UN) framework, the International Covenant on Civil and Political Rights[1] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Furthermore, on 15 December 1995, Japan also acceded the

[1] The ICCPR, further elaborates on the civil and political rights and freedoms guaranteed by the Universal Declaration of Human Rights. Articles of this Covenant protect rights and liberties such as self-determination, privacy, equality under the law, and liberty of movement. In particular, Article 27 stipulates that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), which had been concluded in 1965. By contrast, Japan has not signed nor ratified the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), which was concluded in 1990.

These acts lawfully stipulate Japan's commitment to the protection of both nationals and foreigners' human rights within Japanese jurisdiction. However, previous research on the issue of the protection of Zainichi Koreans' rights suggest some discrepancies between Japan's formal commitment to respecting international human rights treaties and its actual domestic laws and practices. For example, the recently elected President of the International Court of Justice Yuji Iwasawa wrote in 1986 that "the legal treatment of Koreans in Japan is one of the major international human rights law problems facing Japan today" (Iwasawa 1986, 131). One might think that nearly 40 years later, the issue of legal discrimination against the minority group would be somewhat resolved in a country as highly regarded as Japan. However, as proven by the growing presence of far-right groups hostile to Zainichi Koreans – and other minorities –, the situation and its resolution remain complex. According to a 2013 report by Hurights Osaka, one such group, *Zaitokukai* (Association of Citizens against the Special Privileges of the Zainichi) has been holding anti-Korean marches in Tokyo since 2012. Therefore, between legal and social, discrimination appear to be rampant in the case of Zainichi Koreans. Of course, this issue is not homebound to the capital: 66% of surveyed Zainichi Koreans in Japan's Kansai region in 2012 reported having experienced discrimination (Chae 2024). Moreover, as many of them are registered as permanent residents rather than Japanese citizens, Korean permanent residents still enjoy fewer rights than their Japanese nationals counterparts. These include for example limits to political participation and access to public sector jobs, as well as naturalisation barriers and education recognition. In this respect, this research argues that past and present Japanese laws and policies have directly and indirectly restricted Zainichi Koreans' rights. Despite its commitment to international human rights frameworks, Japan's difficult alignment of its domestic laws and practice with its international obligations can be linked to various growing and alarming discriminations faced by Zainichi Koreans today. To assess the situation, this paper aims at exploring Japan's long-lasting societal issue of harmonising its domestic laws and practices with its duty to uphold international human rights obligations. Investigating Japan's complex position will require from this paper to first look into Japan's historical approach to Korean minorities in its pre-war empire and its post-war shift towards national homogeneity. The evolution of the legal treatment of Zainichi Koreans will guide this historical overview and provide context for the contemporary situation regarding Koreans' position in Japan. The research will then look into the 1946 Constitution, the way in which it dealt with the issue of minority rights in post-war Japan, and its effects on Zainichi Koreans' place in

society. These historical, legal, and political frameworks will then provide the tools for analysing the discrepancies between, on the one hand, Japanese domestic laws and practices and, on the other hand, Japan's international engagement to uphold the rights enshrined in the ICCPR. Therefore, the research aims at not only investigating the current issues regarding Korean minorities in Japan, but also confronts them against the backdrop of Japan's international legal obligations.

2. Japan's historical treatment of Korean minorities

2.1 Colonial period and interaction with Korean nationals

Korean communities in Japan take their origins from migration movements that followed Japan's annexation of Korea in 1910 and subsequent colonial rule. These migrations took the form of voluntary and involuntary transfers, leading to over two million of Korean immigrants living in Japan by the end of the war, while around three quarters of them were repatriated to Korea in half a decade (Iwasawa 1986, 133). During Japan's golden age of colonialism, in the first half of the 20th century, its empire was home to some hundred million people, of which 30 per cent were ethnic minorities (Yamanaka 2004, 161). In order to manage such diversity, scholars and thinkers of the Meiji Government contributed to what would become a pillar of Japan's domestic management of diversity: assimilation. The general idea was to unite the people under one national identity. This trend was inscribed in a broader societal transformation of Japan through industrialisation and modernisation which sought uniformity and unity in order to increase its domestic economy, as well as its military and intellectual influence on the world stage. During this colonial time, Japan had even endorsed the role of a regional leader in Pan-Asianist movements, which pertained to a general set of ideas that called for the solidarity of Asian nations specifically against the influence of the West in the late nineteenth to mid twentieth centuries. Originating from Meiji Restoration Japan, it developed as a belief that Japan needed to lead its Asian neighbours to progress and liberate them from underdevelopment – which was deemed a result of western domination. In Japan, Pan-Asianism contributed to its imperial course into the twentieth century, giving justification for its military expansionist agenda, eventually leading to its participation in World War II. Pan-Asianist ideas fuelled Japan's imperialist ideology and gave excuses to control regions like Korea and Taiwan, eventually mimicking the very model of Western colonialism it claimed fighting (Duara 2001, 110). Pan-Asianist idealism of equality and unity among Asian populations became known as the "Greater East Asia Co-Prosperity Sphere", and was first formally articulated in 1940 by Japanese Foreign Minister Matsuoka Yōsuke. The sphere was a political and economic concept with the aim of being free from Western colonial influence, under the guise of promoting mutual economic and cultural development (Acharya 2010, 1004).

However, what could be considered by Benedict Anderson as an "imagined community"[2] only contributed to Japan's policy of assimilating its annexed population while proving Japan's superiority and leading position. Despite Japan's take at colonialism aiming at a united heterogenous people, it unfortunately once again mimicked the discrimination and unequal treatment visible in Western imperial colonies. Its treatment of Koreans is a prime example, as underscored by Iwasawa in his discussion of their status under colonial rule. Although Koreans were legally regarded as Japanese nationals, they were classified as *gaichijin* (those of colonial origins), as opposed to *naichijin* (those of Japanese ancestry) in family registries (Iwasawa 1986, 144). Japan's society was still one of deep divisions between ethnicity, class, region, history, and gender (Yamanaka 2004, 163). This differentiation between "native Japanese" and "colonised Japanese" written in official registries allowed for a wide range of inequal treatments that systematically kept Koreans – as well as Chinese and Taiwanese citizens – in the lower classes of society. Types of citizenship therefore were the main factors in octroying rights to individuals. For example, Korean nationals' movements were controlled by the Government, allowing them or not to leave the Korean peninsula or access Japanese territory. Voting rights were also different for Korean citizens whether they lived in Korea or in Japan, limiting suffrage rights only to those living in the inner territory. These discriminations socially and effectively kept in place Koreans below ethnic Japanese citizens, leaving them performing low-paid labour – including forced labour –, and mostly uneducated.

2.2 Consequences of the post-war period

With Japan's loss in World War II, a shift occurred in Japan's policy towards its colonial subjects. The official assimilation approach to Japan's diversity changed to a clear separation between Japanese nationals and foreigners – especially ex-colonial subjects. Japan's defeat and subsequent American occupation brought the end of the Japanese empire and its colonies – including Korea. Decolonisation, under the American lead, could take place. As previously mentioned, over three quarters of the Korean population was repatriated to Korea, leaving around 600,000 of them in Japan for diverse reasons (Yamanaka 2004, 164). Despite the American-led deconstruction of Japan's empire and its switch from multicultural pride to homogenous harmony, the country remained significantly heterogenous. Japan's population was "recategorised" through the Alien Registration Law of 1947. With the help of family registers (*koseki*), the new Government recognised two groups of people: citizens and aliens, like Koreans, who

[2] According to Anderson, imagined communities are social constructs where members of a nation perceive themselves as part of a collective, despite not personally knowing most of their fellow members. He argues that nations are "imagined" because the sense of unity and shared identity is built through shared symbols, narratives, and practices rather than direct interpersonal relationships.

had to register as foreign citizens (Chung 2023, 202). The registers were thus used to trace back the ethnic background of citizens in order to deprive of their citizenship those that did not descend from Japanese lineage, no matter how long or for how many generations they had been in Japan. This was reinforced by the Nationality Law of 1950, which was a revision of the same 1899 Law. It ensured the retainment of *jus sanguinis* (law of blood) through paternal heritage to determine citizenship. Chung's article further identifies what she refers to as a "citizenship-as-identity" paradigm, which allowed for the systemic isolation of Zainichi Korean and other former colonial subjects in post-war Japanese society. The paradigm consists of three steps: repatriation, the closing of borders, and denationalisation (Chung 2023, 201). The 1947 Alien Registration Law laid the groundwork for the subsequent Alien Registration Act of 1952, which continued to regulate the status and rights of foreign residents in Japan. Former colonial subjects, now referred to as aliens, were relegated to foreigners' status despite their long-standing residence in Japan. The largest group of aliens were Zainichi Koreans, who remained stateless until the creation of the two new Koreas at the end of the Korean War. A substantial consequence of the new Alien Registration Act was the requirement for colonial subjects to carry their alien registration card at all times, as laid out in Article 13. The San Francisco Peace Treaty or Treaty of Peace with Japan, signed in 1951, marked the end of the allied occupation of Japan and the country's regaining of full independence, allowing it to enter the international community again (Yamanaka 2004, 161). However, as mentioned above, this also marked the Zainichi Koreans' formal deprivation of their Japanese citizenship, providing the legal framework for it. If Zainichi Koreans desired to regain Japanese citizenship, the only way was through naturalisation, a very difficult process with a high rejection rate (Chung 2023, 202).

Iwasawa underscores Article 2(a) of the Peace Treaty in which Japan recognised the independence of Korea and renounced all right to the territory. The underlying meaning points to a fracture not only with the territory of Korea, but also with its population. In executing this separation, Japan's Government not only deprived Zainichi Koreans of their Japanese citizenship, but it did not provide them with a Korean one, leaving them stateless. This action fits in the whole post-war process that allied denationalisation due to decolonisation with an increase of rights to Japanese nationals over foreigners, contributing to a new pride of homogeneity of the Japanese people: one nation, one people (Yamanaka 2004, 165). The assumed policy of alienage thus helped to socially and politically exclude minorities and institutionalised the association of nationality with ethnicity.

It is worth noting that the statelessness of Zainichi Koreans was partially resolved in 1965 with the Treaty on Basic Relations between Japan and the Republic of Korea, which provided South Korean citizenship to most

ethnic Koreans in Japan. It also allowed for first and second generations of Zainichi to obtain permanent residence. This did not prevent the continuing effect of ostracisation of the minority. Up until the 1980s, Koreans could not enjoy the same social benefits as their Japanese citizens counterparts, such as national health insurance or workers' pension (Yamanaka, 2004, 164).

3. The Constitution and the position of minorities

Since its return to the international scene in the 1950s, Japan went through an unprecedented economic growth, never experienced by any other countries. It propelled it to the ranks of the Western nations that once occupied its territory and shaped its 1946 Constitution. Known as the McArthur Constitution, or Showa Constitution, it was designed according to American and other Western values, creating a body of laws that resembled those of France, Germany, or, of course, the US. Some of its symbolic values include pacificism, the renunciation of war, but also individual rights, marking a shift from collective view of the Japanese people to individuality. Exiting World War II, the drafting of this new Constitution took place at the same time as the birth of the UN, to which Japan became a member in 1956. Both the new Constitution and the UN's Universal Declaration of Human Rights (UDHR) of 1948 echo to values enshrined in the Potsdam Declaration of 1945, namely the respect of fundamental human rights (para 10). This Declaration laid the ground for the temporary occupation and the future independence of Japan with the objective of leading it to the path of peace and making sure it would become an ally unlikely to wage war again. In this respect, it must be noted that several articles of the new Constitution point to these fundamental rights. For example, Article 13 recognised the "right to life, liberty, and the pursuit of happiness," echoing Western treaties. For its part, Article 14 guarantees equality under the law and protects people against discrimination on the basis of race, social status, or family origin.

However, it appears that, notwithstanding the formal recognition of the principle of equality in the Constitution, minority rights are still underdeveloped and overlooked in the Japanese legal system. In this regard, it must be noted that several domestic laws, especially those pertaining to citizenship, have allowed for various unequal treatment of minorities, especially Zainichi Koreans and Chinese people. Japan's situation is complex because inequality does not stem from discriminatory laws, rather from the lack of anti-discriminatory ones. As it has been observed, "no Japanese public institution, including the local government, the Immigration Bureau, schools, companies, hospitals, and police, are designed to accommodate or serve non-Japanese populations" and the reason is that "there is no anti-discrimination law to stop rampant racism in housing and the job market" (Shin 2010, 339). This lack of protection led these communities to be excluded from the public sector, jobs, housing, social services, or political representation (SPICE 2010). Marginalisation

indeed also affected Koreans in housing, as they were and still are often concentrated in ethnic enclaves, as well as in education, with Korean youth frequenting less desirable ethnic schools,[3] which undermines their chances of gaining a higher education and future employment (Carvalho and Yamamoto 2018, 128). Regarding job opportunities and Zainichi Koreans' position in the public sector, discrimination on nationality enabled local Governments to simply reject this part of the population. This was the case in 2005 when one Zainichi woman was denied a managerial position at the Tokyo Metropolitan Government due to her origins (Dunlop 2011, 309). There had been efforts to remediate the issue of national discrimination, as with modifications to the Nationality Law in 1982, which sought to equalise the situation between nationals and non-nationals. However, although it officially improved eligibility to the pension system and healthcare to foreigners like Zainichi Koreans, difficult requirements kept maintaining these populations off those services (Dunlop 2011, 292, Takao 2003, 528). These conditions still affect the overall Zainichi Korean's economic and social situation, putting them at a disadvantage and contributing to the cycle of inequality. In order to get out of the position of foreign residents, tough naturalisation policies are in place, though the difficult process requires deep cultural assimilation and the renouncement of original citizenship (Cidale 2024). To add on the pressure on Korean citizens in Japan, external tensions galvanise the situation, especially the distrust in some of Zainichi Koreans due to the post-colonial separation between North and South Korea, as those that have been living in Japan for generations belong to neither and yet face stereotypes and discrimination (SPICE 2010).

Overall, it appears that, while racial discrimination is prohibited by Article 14 of Japan's Constitution, the different treatment of minorities, such as Zainichi Koreans, prove a discrepancy in the commitment to equality set forth by this very Constitution. This discrepancy is only highlighted even more if one compares the domestic laws and practices in force against Japan's commitment to the UN's international human rights treaties.

4. The treatment of the Korean Minority in Japan in the light of international human rights law

4.1. The (uncertain) role of international human rights treaties in the Japanese legal system

There is an even greater discrepancy to notice in the relation between Japan's domestic laws and practices and their compatibility with its

[3] Ethnic Korean schools were originally designed for the Zainichi community after World War II as a way to provide education in the Korean language and about Korean culture. They are usually affiliated with the South Korean regime (*Kankoku Gakko*) or the North Korean regime (*Chosen Gakko*), with the latter facing hardship towards recognition by the Japanese Government, being categorised as "miscellaneous schools."

commitment to international human rights standards. As seen previously, Japan is part of the UN and thus has ratified a number of treaties enshrining the principle of equality of individuals, and engaged with the fight against discrimination and the overall protection of minorities. Such treaties include the ICCPR, the ICESCR, and the CERD. Regarding domestic legislation, Article 98(2) of the Constitution of Japan of 1946 provides that "treaties concluded by Japan and established laws of nations shall be faithfully observed." Under this new Constitution, the predominant view interprets this article as giving treaties authority over national laws. In this respect, it is important to note that, as highlighted by the Asia-Pacific Human Rights Information Center, "under the Japanese legal system, a ratified treaty has the same legal status as a domestic law, and also takes precedence over all related laws with the exception of the Constitution" (2013). According to this, these ratified treaties should prevail over national laws. Therefore, the Government and Japan's courts have most often taken a position in favour of treaties (Iwasawa 1986, 136).

However, Iwasawa addressed a general concern regarding the applicability of the UDHR, the ICCPR, and the ICESCR in relation to Japan's domestic laws. And indeed, the ICCPR, in particular, has been subject to a variety of concerns from the UN's Human Rights Committee over time. It has delivered reports that are relevant to this research, as Japan has not consistently succeeded in eradicating systemic and social discriminations of minorities, including Koreans. As it turns out, the situation has worsened over time. According to official reports from the Human Rights Committee, but also from the Committee on the Elimination of Racial Discrimination, Japan has struggled to fully commit to the primacy of international treaties over its national laws, reverberating into greater social issues over time.

4.2. The concerns regarding Japan's enforcement of international human rights law

Despite Japan's position at the UN and the ratification of the abovementioned treaties, concerns were reported over the effective compliance with its duties over the years. As far as relevant for the purpose of the present research, it must be noted that Article 27 of the ICCPR protects the rights for members of ethnic or linguistic minorities to enjoy their own culture, religion, or language. However, the reports provided by the Human Rights Committee have shown relevant failure from the Japanese Government in complying with this obligation.

In monitoring the implementation of the ICCPR under Article 40, the Committee provides input for the evaluation of Japan's handling of minority rights as human rights in the past 30 years in the case of Koreans. The choice of analysing three decades provides this paper with enough gap in time to witness important changes in Japan's society. In this

period of time, the discrimination experienced by Korean communities has shifted from a legal setback to a societal, gangrened issue, that takes its root from the difficult adaptation of national law to international obligations. Additionally, this research takes into consideration the reports of the Committee on the Elimination of Racial Discrimination within the same period, concerning the implementation of the relevant obligations enshrined in the CERD, and which identified the same problematic issues highlighted by the Human Rights Committee.

The Human Rights Committee has expressed its concerns over the treatment of Korean minorities since 1993, when it issued its considerations on the first report submitted by Japan. First, from a general point of view, the Committee expressed its fear that the ICCPR would correctly and effectively "prevail in the case of conflict with domestic legislation" (para. 8), which was a concern already expressed by Iwasawa in 1986. With specific regard to the case of Korean permanent residents, the Committee expressed concerns over discrimination against them, as well as other minorities. These include Japan's legal enforcement of the requirement for alien permanent residents to carry documentation at all times and its incompatibility with the ICCPR, as underscored by the Committee (para. 9). This obligation dates back to the Alien Registration Act of 1952, which was still in effect in 1993. According to the Committee, this legislation infringed on Koreans' freedom of movement in Japan, especially Zainichi, who had been living for generations in Japan and were arbitrarily deprived of their citizenship prior to the ICCPR. This law was therefore incompatible with Article 12 of the ICCPR, which provides that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement." In its suggestions and recommendations, the Committee put forward the need to abolish such discriminatory laws, as they are incompatible with the values of equality and protection of all under the law, as laid out in Articles 2, 3, and 26 of the ICCPR (para. 17). The main problems identified at the time of the report were legal matters, as they influenced directly the imbalance between Japanese nationals and Korean permanent residents' rights. However, already in 1993, the Committee was advising Japan to influence the public opinion so change could happen, hinting at the importance of changing not only laws, but the people's view of Koreans' rights.

Despite this, the Human Rights Committee reported a very similar situation in its report over the application of the ICCPR issued in 1998. Although it congratulated the Japanese Government for improving its human rights legislation, the situation regarding the treatment of Korean minorities remained much the same. Rampant issues emanating from Japanese laws incompatible with the provisions of the ICCPR include restrictions on individuals' rights according to Japan's laws (para. 8), "reasonable discrimination" (para. 11) used by Japan to target certain groups, as well as the Immigration Control and Refugee Recognition

Act, the enforcement of which may prevent second and third-generation permanent residents with no re-entry permit to return to Japan after they leave (para, 18) – a situation which especially applies to Zainichi Koreans. Similarly, the Committee highlighted once again in the report that the Alien Registration Law's requirement for alien permanent residents to always carry registration was still incompatible with the provisions. Overall, most issues identified in the previous report were not addressed by Japan, allowing for the spreading of discrimination to other spheres of society. Moreover, despite the Ministry of Justice's dealing of "the elimination of discrimination and prejudice against students at Korean schools in Japan," the same report expressed concerns over discrimination against members of the Japanese-Korean minority who are not Japanese citizens, "including the non-recognition of Korean schools" (para. 13). The analysis of the Committee's observations showed that, apart from an unequal treatment of Koreans' civil rights and protections compared to Japanese citizens, it seemed as if the Committee began to worry about other social issues, notably education, which the Government was failing to protect. Additionally, discrimination in education transpired in the considerations of the Committee on the Elimination of Racial Discrimination in 2001. It reported "violent actions against Koreans, mainly children and students" (para. 14) as well as the non-recognition of Korean Schools' diplomas as "resident Korean students receive unequal treatment with regard to access to higher education" (para, 16).Therefore, those two reports from the 1990s, reinforced by the 2001 report of the Committee on the Elimination of Racial Discrimination, highlight long standing issues regarding the legal treatment of Zainichi Koreans, especially their specific requirements and the need for change in various legislations.

Ten years later, the first subject of concern of the Committee was the lack of implementation of the 1998 recommendations, reflecting on the long-lasting issues of Japan's commitment to the ICCPR's provisions (2008, para. 6). Additionally, education also remained an issue. The Committee highlighted the lack of State funding for schools teaching in the Korean language compared to those teaching in Japanese, as well as again the problem of recognition of diplomas from Korean-language schools (para, 31). The disproportionate funding to certain schools underscores the general assimilative incentive from the Japanese Government to favour Japanese education rather than those of minorities, along with political distrust of some Korean schools affiliated with the North Korean regime. This contradicts Article 27 of the ICCPR, which ensures the enjoyment by minorities of their own language. Despite progress being made, the 2008 report showcases what looks like institutional and systemic discrimination that maintain a favouring of the Japanese majority and an ostracisation of the Korean minority. Education as a social right was threatened for Koreans, as highlighted also in the report from the CERD in 2010. Once again, this Committee underscored the differential treatment of schools for foreigners and Zainichi Koreans (para. 22(d)). It also subsequently warned

of the "continued incidence of explicit and crude statements and actions against groups, including children attending Korean schools" (para. 13). This hints at a greater issue regarding hate speech that will only grow more alarming in future reports from both Committees.

And indeed, it is in its 2014 report that the Human Rights Committee expressed alarming concerns regarding growing social discriminations towards Korean communities. Apart from yet again worries about the general non-implementation of previous recommendations by Japan (para. 5), the Committee was apprehensive of the rise in hate speech and racial discrimination that grew in Japan targeting ethnic minority groups such as Koreans. Such communities were subject to harassment and violence, sometimes through acts of extremist demonstrations, while the Government provided insufficient legal protection to them (para, 12). One example of racial discrimination provided by the Committee was the use of signs with "Japanese only" written on them, which directly violates values of both the Japanese Constitution and the ICCPR. Many of such signs spawned in Japan as the country attracted more foreigners, reflecting Japan's preference towards unity, ethnic majority, and rejection of non-Japanese people. The Otaru Onsen Case[4] is one such example, although it showcased above all how racial discrimination in itself is not punishable by Japanese law (Webster 2002). The Committee elaborated as a response to this issue as it further emphasised still in paragraph twelve of the report that propaganda advocating for racial superiority or discrimination should be prohibited by Japan's domestic laws, as well as being identifiable by the judiciary. Here the general concerns of the Committee were significantly less linked to a fear of legal imbalance and inequality between members of society but increasingly more connected to social insecurity of minorities like Koreans. It is worth noting that the sixth periodic report was published two years after the Japanese Government stopped requiring from alien permanent residents that they carry registration at all times. Instead, Japanese and non-Japanese residents were recorded alongside in the new *juminhyo* system.[5] Despite this effort, the 2014 report still points out blatant cases and uses of discriminatory practices and acts, only highlighting better how the deep-rooted discriminatory laws of Japan had already created room for the oppression of Koreans – Zainichi and new migrants alike. The problem was no longer only institutional, but social. It is once again worth noting how the same issues of discrimination were monitored

[4] The Otaru Onsen Case involved a Japanese public bathhouse ("Onsen") in Otaru, Hokkaido, that denied entry to non-Japanese customers, including naturalised Japanese citizens in the early 2000s. This policy was justified by the bathhouse as a means to address the disrespectful behavior of some foreign visitors, particularly Russian sailors. The case gained significant attention when three foreign residents filed a lawsuit in 2001, citing racial discrimination under Japan's Constitution and international human rights treaties. The Sapporo District Court ruled in 2002 that the bathhouse's policy violated the plaintiffs' dignity but did not rule it illegal under Japanese law.

[5] The Law for Partial Amendment to the Basic Resident Register Act in 2012 allowed for both foreign and Japanese residents to be registered under the same system.

by the CERD too the same year, only reinforcing urgency of the situation. It especially warned about the overall growing hostility towards foreigners, with a special emphasis on Korean minorities, which take the form of rallies and racist demonstrations (para, 11).Finally, the most recent report, dating back to 2022, has similar views as the 2014 one. Yet, it is more extensive. As part of the fight for equal rights, the Committee identified the current effect of discriminatory policies towards Zainichi Koreans, in particular in "social security schemes and the exercise of political rights" (para, 42). This demonstrates a constant ineffectiveness from the Government in properly dealing with the political and social integration of minorities, especially those that have been residing in Japan for generations. As permanent residents without recognised citizenship of their country of birth, Zainichi Koreans are still deprived of certain political rights, which is at the essence of what this treaty should provide. Similarly, in the 2018 report from the CERD too, concerns were raised about the Zainichi's lack of voting rights (para. 21).On another note, positive change is acknowledged, as the Government adopted measures and acts aimed at reducing violence and discrimination targeting minorities – especially Koreans – which have become an even broader issue (Hate Speech Elimination Act 2016). The report however calls for further, more impactful action. It recognises the need for a legal framework in order to make anti-discrimination legislation more effective (UNHRC 2022, para. 9). Especially, the Committee identified a set of actions in order to properly decrease cases of discrimination. These include criminalising acts of hate speech and training members of the law and of the judiciary in recognising such acts (para, 13). The urgency and close detail brought by the Committee is justified by its increasing concerns over the rise in a generalised and peculiar anti-Korean feeling that targets this minority whether they are Japanese nationals of Korean origins (Zainichi), or from new waves of Korean immigrants. The report mentions racially discriminatory acts such as demonstrations, protests, and political speeches, including ones as part of election campaigns (para. 12). Furthermore, as emphasised in the observations from the CERD too, "Korean women suffer multiple and intersecting forms of discrimination based on nationality and gender" (2018, para. 21) highlighting the discriminations that galvanise the intersections of multiple anti-Korean feeling through hate speech.

The societal problem of racism against Koreans and other minorities provides a fertile ground for crimes of such sort. In September of 2022, a Korean woman sued her employer after the company in question had repeatedly distributed in their workplace slanderous magazine articles directed at Chinese and Korean nationals (Negishi 2022). Just a month prior, the Kyoto District Court found a man guilty after he set on fire several buildings of an ethnically Korean district (Harrison et al. 2022). Although the judge in this case recognised the crime as being motivated by prejudice and crime, the mention of hate crime did not appear in the ruling. Recent cases such as these only further implicate the growing

hostility against Koreans, as well as they underscore the lack of legal acknowledgment of racial motivation in hate crimes. This justifies how extensive the 2022 report is and should call for the Japanese Government to take further action.

For the past decade, far-right hate groups with a specific anti-Korean agenda have been growing in Japan, adding on the persecution faced by Zainichi Koreans. The lack of prosecution of crimes directed at them as hate crimes further agonise the situation, with hate groups such as Zaitokukai still gaining traction today. In an atmosphere of growing xenophobia and neonationalism without fear of "hate crimes" labels, they freely advocate for the cancellation of the equal rights acquired by Zainichi Koreans (Sharkey 2021). Sharon Yoon, a professor of Korean studies at Keough School of Foreign Affairs, underscores another dangerous medium of hate: the publication of hate books and comic books that galvanise the movement. One such comic book entitled *Kenkanryu* (meaning "Hating the Korean Wave") was published from 2005 to 2015, which sold over 300,000 copies in the three months following its release (Sharkey 2021). It seems increasingly clearer that this trend of a more "comfortable" and accepted hatred of minorities in the public and private sphere correlate with a certain laxism in sentencing hate crimes as such, which ultimately reverberate in Japan's lacking in complying with UN norms and recommendations.

4.3. Evaluation and criticisms

The evolution of concerns expressed by the UN's Human Rights Committee, bolstered by those of the CERD too, testify of a long-lasting effect of institutionalised ostracisation of Zainichi Koreans, which extended to Koreans in Japan in general, as foreign workers and students from Korea are targeted as well. The question then becomes "Korean-ness" in general. The reports show that the legal issues of the 1990s that clearly discriminated against Koreans were replaced by greater, and even more serious, social problems. One early concern shared by both Committees was the access to and protection of education in the Korean language, which is part of the enjoyment of one's language as a minority, as guaranteed by Article 27 of the ICCPR. Moreover, the answer to this concern should be part of a greater plan of equal education to both Japanese nationals and Korean permanent residents, and should therefore be implemented by the Government, including financially, as pointed at in the 2008 report. Evolving from legal to social, the fairly recent issues raised by the two Committees regarding the question of Koreans pertain to hate speech, racism and hate crimes at different levels of society today. This hate transpires from individuals, the media, and the political and private spheres. Although it no longer is solely a question of discrepancies between domestic laws and international commitment to human rights instruments, the discrimination now directed at virtually all Korean minorities in Japan cannot be considered without its relation to systemic

discrimination. It originated from unequal laws and alienating policies that took too long to be changed – if changed at all. The Alien Registration Act, along with instituted discrimination under the guise of "public welfare"[6] or through clearly segregating laws, have shamelessly sought to maintain a hierarchy dating back to colonial times, relegating Koreans to second-class citizens. Leaving racism to ferment, the Japanese Government allowed xenophobia to spread out durably through societal norms, exemplified by grassroots movements with populist and nationalist views and racist groups using the "Korean scapegoat" as an identifiable target for hate speech and racism. They are a proof that the attitude of Japanese courts towards not recognising the "hate" factor of certain crimes contribute to a society where it became somewhat acceptable to promote the idea of removing the rights of a part of the population (Sharkey 2021), while the groups promoting these ideas enjoy the protection of their rights of association and free speech by the Japanese law (Shibuichi 2015, 736). Additionally, it is worth reiterating the existence still today of laws that keep Zainichi Koreans away from politics and social benefits, with the sole justification that they are not considered citizens of their country of birth and residence.

Since at least 1993, the Human Rights Committee encouraged Japan to abolish such discriminatory laws, and its Government to influence the public opinion. It had already recognised the virtuous effect of public opinion in not only changing more effectively laws, but also in making them acceptable to the general Japanese population. Opinions about Korean minorities had to change in order to foster the right environment for political and legal improvement. Instead, Japan slowly enacted more equal policies without effectively making its population agree with them. As a result, society kept running on a century-long incentive of assimilating the people, echoing the idea of "one nation, one people" (Yamanaka 2004, 165), which promoted a unity that failed to provide the necessary frameworks to guarantee the rights of Zainichi Koreans. When Japan finally eliminated some of its unequal laws, the social repercussions were already engrained in society.

Looking further, it is important to see how discrimination against Koreans and anti-foreigner feeling in Japan go hand-in-hand. The situation of Koreans cannot be seen as a singular instance, but as a singular case in a broader context. In the case of the Otaru Onsen lawsuit, the "Japanese only" sign was not aimed at Koreans, for example – at least not directly. It targeted people that did not look like the Japanese majority, making it a clear case of racial discrimination. However, the fact that this was not found illegal by a court under Japanese law is where abuse starts being

[6] The dangerous vagueness of the use of "public welfare" by the Japanese Government appear in all five analysed reports, demonstrating the insufficient efforts by the Japanese Government to comply with the Covenant's recommendations.

welcome. It gives way for further "door policies," such as passport control. Then it does not take long to become a tool for some to refuse entry to Korean citizens – as well as any unwanted nationality. Korean minorities then become one of many that can be discriminated against, however, the scope of the discrimination directed at them is important enough for the Human Rights Committee and the Committee on Discriminations to emphasise their community singularly in the analysed reports.

Over the chosen period of three decades, the situation of human rights in Japan seems to have worsened, with reports becoming more extensive with concerns and recommendations. As the UN advanced towards more effective human rights frameworks and instruments over time, it seems contrary that a country like Japan lacks the sufficient protection of minorities expected from its Government. Japan is economically, socially, and politically advanced, and its constitutional values align with the UN's human rights framework. As seen in the introduction of this paper, it reaches a nearly perfect score in terms of freedom. It is highly democratic and has been politically stable for decades. Despite this picture, Japan suffers from xenophobia as in other parts of the world, with Koreans being the prime target of discrimination.

The number one issue highlighted in the 1993 and 1998 reports of the Human Rights Committee is the lack of primacy given to international human rights law, as guaranteed by the ICCPR, over national law, which is a principle reiterated by Japan's own Constitution. As this easily identifiable problem faded in later reports, the primary issue became a need for social change through education and awareness campaigns. Yet not effective enough, it becomes Japan's best lead in tackling xenophobic attitude in the Human Rights Committee's 2022 report (para. 13(c)). It could be most effective in tandem with legal change and the attribution of more political rights, such as voting rights, to Zainichi Koreans. Changing laws alone is less likely to work, as this paper showcases the growth of social persecutions despite some improvement at the institutional level. Educating people on equality and acceptance as the Government passes legislation that makes this ideal a reality therefore seems like a safer bet than expecting people to become more accepting of diversity solely through the publication of new laws.

5. Concluding remarks

In conclusion, Japan's historical and contemporary treatment of its Korean minorities highlights a persistent struggle to balance notions of national homogeneity and domestic laws with international human rights obligations. From the colonial era's systemic inequalities to the post-war period's institutionalised alienation and statelessness of Zainichi Koreans, these policies have left a profound impact on Japanese society. This societal impact left Japan's legal treatment of

Zainichi Koreans incompatible with its international human rights engagement, in particular with the ICCPR. While progress was made in aligning domestic laws with international treaties, reducing while not eradicating discriminatory laws, deep-seated societal issues have grown and remain. The rise of hate speech, racial discrimination, and xenophobia reflects the strong influence of these historical injustices, revealing a still existing gap between Japan's legal commitments and the real experiences of Korean minorities, which extend to newcomers as it did to Zainichi.

As reflected in the most recent reports by the Human Rights Committee and the CERD, addressing these issues requires from Japan to not only enforce stronger legal protections against hate crimes and discrimination but also foster a sense of inclusive society through education and public awareness campaigns. Bridging the gap between law, social inclusion, and protection of minorities would not only enhance Japan's domestic harmony but also solidify its reputation as a regional leader in human rights on the global stage.

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Protection of fundamental rights of peoples belonging to disputed/occupied territories not protected by a constitution (Gilgit-Baltistan): Approaches of developing democracies (India and Pakistan) to autonomy and self-determination

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Abstract: *Constitutions not only guarantee fundamental rights but also prevent arbitrary State restriction on these rights. The absence of constitutional protection raises significant political and legal challenges both to the fundamental rights as well as governance system, as seen in the case of Gilgit-Baltistan. Gilgit-Baltistan is a disputed/occupied territory under the de facto administration of Pakistan, which is located to the north of Pakistan, bordering China and India. Gilgit-Baltistan is a region/territory which is neither constitutionally integrated into the Federation of Pakistan, nor protected by the Constitution's fundamental rights provision. Due to this peculiar situation of constitutional limbo, Gilgit-Baltistan occupies a unique position in political and legal academic discourse. Unlike other cases of autonomy and self-determination such as Quebec, Catalonia, South Sudan, West Bengal, and Kashmir, Gilgit-Baltistan lacks constitutional recognition within any State vis a vis Pakistan. This research project will address the political, democratic, and legal implications of this unique status, proposing a novel approach to autonomy with due consideration to the existing principles of autonomy (such as self-determination through autonomy or independence by Dr. Markku Suksi), that elaborates unique autonomy arrangements in the case of New Caledonia, which can form a foundation for the case of Gilgit-Baltistan. In doing so, the project will contribute to the broader discourse on autonomy and self-determination for disputed/occupied territories which lie outside the formal constitutional frameworks of sovereign States.*

Keywords: *self-determination; autonomy; international law; Gilgit-Baltistan; India; Pakistan; democracy; human rights.*

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1. Introduction

In modern day political and legal systems, "fundamental rights are at the heart of a constitution, which not only determines relationship between individuals, groups and the state, but also the policy and decision-making of the state" (OHCHR 2018). A constitution is the fundamental document to guarantee, provide, and protect the fundamental rights of the people within a State. Not only does it guarantee the fundamental rights but also prevents arbitrary restrictions by the State on fundamental rights. But what if a territory or its people and their fundamental rights are not protected by a constitution? For instance, in the case of Gilgit-Baltistan, which is neither part of the territories forming the Federation of Pakistan, nor are the fundamental rights of its people protected in the Constitution of Pakistan. In the context of decolonisation and globalisation, the right to self-determination as enshrined in Article 1 of the United Nations (UN) Charter is, perhaps, the most significant principle of international law accepted by all free and civilised nations. The history of Gilgit-Baltistan is both intriguing and tragic at the same time. Intriguing because of the significance it enjoyed due to its marvellous historical, cultural, geostrategic, and geopolitical position as a group of small yet sovereign and self-sufficient princely States until 1947. Tragic because of the transition from an independent State to statelessness under occupation and subjugation of the State of Pakistan. The twentieth century is marked for the beginning of decolonisation for some nations and colonisation for the others. The struggle for the rights to self-determination, autonomy, and independence resulted in the culmination in the control of colonial powers over many nations in Africa, Europe, and Asia, while for others it has brought tremendous human suffering, systematic human rights violations, and subjugation. Gilgit-Baltistan is a classical yet ignored case of colonisation, decolonisation, and recolonisation. Understanding of the current governance and legal system is possible only with an in-depth analysis of the historical events prior to the division of the Indian subcontinent into the dominions of Pakistan and India to the present day.

It is equally imperative to explore, in the current global dynamics, the geo-strategic, geo-economic, and geo-political standing and importance of Gilgit-Baltistan for two important reasons. First, to truly appraise the urge among the peoples of Gilgit-Baltistan for greater autonomy, self-governance, and for self-determination – viable options, which in the light of international law, human right instruments, and constitutions requires a thorough inquiry. Second, to compensate for the lack of sufficient scholarships on the subject, which have long contributed to the confusion, i.e. the association of Gilgit-Baltistan with Jammu and Kashmir and essentially with the issue of Kashmir, and to understand the ways in which the fundamental rights of the people can be protected pending the final disposition of the matter. The issues of autonomy and self-determination in Gilgit-Baltistan is unique in the sense that unlike other cases of autonomy

and self-determination, i.e. Quebec, West Bengal, Kashmir, Catalonia, and South Sudan, it is neither a territorial part of any State, nor it is part of a constitution seeking autonomy. Therefore, the project will seek to answer the legal question of autonomy and self-determination and will contribute to the wider understanding of the question of autonomy and self-determination for the regions not forming part of any State and as such not protected under any constitution. The objective of this study will be to identify a mechanism through which the fundamental rights of the people of Gilgit-Baltistan can be protected pending the political, legal, and constitutional status through a referendum or a plebiscite. An effort will be made to critically analyse the current status, as it exists in Gilgit-Baltistan, and its failure to protect the fundamental rights of the people of Gilgit-Baltistan, as these fundamental rights are not guaranteed under the Constitution of Pakistan. Furthermore, attempts will be made to explore and understand autonomy or self-determination as a viable long-term solution for the issue of Gilgit-Baltistan, considering other successful or failed cases of autonomy and self-determination in other regions of the world. Finally, given the sensitivity of the region, i.e. the geostrategic position of Gilgit-Baltistan, an epicentre of three nuclear States (India, Pakistan, China), and the power shift in the Global South, the action and inaction by the UN in determining the political and legal status (autonomy and self-determination) of the region will be considered to understand what implications it has on the right of self-determination and human rights of the people of Gilgit-Baltistan.

2. Self-determination: Connotations and use

The concept of self-determination has always been an important topic of discussion and controversy in the global political landscape and international relations since the twentieth century, not as a pure legal context but in a political one (Dembinski 1969, 35), which later became a legal "grundnorm." No specific definition of self-determination has been established since it has been used over the years in different political, legal, and human rights dynamics. Its use can be traced in economic, cultural, political, and legal connotation as used in international law and human rights instruments. In general terms, self-determination refers to "the right claimed by a 'people' to control their destiny" (Berman 1992, 389–90). It is this general proposition that establishes self-determination as a right to be claimed, which means the establishment of the right-holder "people." A right, a choice, through which "people" can decide and control their political destiny, if the proposition is used in the political context. The political and legal connotation of the right to self-determination merited attention in international law by its inclusion within the UN system through the UN Charter. Of particular importance in this context are Articles 1 and 55 of the UN Charter, which although do not provide a meaning or definition of the self-determination yet they do provide the purpose and outcomes of the principle of self-determination. Article 1

of the UN Charter enlists the purposes of the establishment of the UN, which includes, among other fundamental principles and purpose, the principle of self-determination. Article 1(b) reinstates the commitment of creating peace and friendly relations among the States as described in the preceding article and presents the principle of self-determination to attain these results. In the language of this article, one of the purposes of the UN is "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

Though this provides a foundation and subsequent transition of the self-determination principle to a legal and human right, it does not in itself recognise self-determination as right but as a principle to achieve other outcomes, i.e. development of friendly relations and peace among the nations. A similar type of commitment and principle is laid down in Article 55 of the Charter, which states "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote…." Both Articles 1 and 55 of the UN Charter merely establishes the principle of self-determination for the purpose of achieving other objectives and ends rather than laying down the self-determination as a principle or right in itself. A mere embracing of a principle under the UN Charter without providing more details and context have resulted in much anticipated confusing and debate, hence, it requires more understanding and interpretation in other UN promulgated instruments. One of the most important developments in providing a clearer notion on the principle came with the adoption of the famous Declaration on the Granting of Independence to Colonial Peoples through UN General Assembly Resolution 1514 in 1960. It is important to note that the Declaration lays down self-determination as a right in relation both of the "peoples" and territories. Article 2 of the Declaration states "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The Article reinstates three important principles regarding self-determination. First, by proclaiming self-determination not a mere principle but as a right of all peoples. Second, the political connotation of the right to self-determination, which guarantees the right to "all peoples" to determine and decide their own political status, governance system, and political destiny. Third, the expansion of the self-determination to the fields of economic, social, and cultural rights. Yet another important Article of the Declaration, which not only reiterates the notion of right to self-determination but provides further elaboration on what self-determination may entail is Article 4. According to Article 4 "All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their

national territory shall be respected." By incorporating the notion of "complete independence," the Declaration recognises the right of people not only of self-determination but also of the external aspect of the right to self-determination vis-à-vis complete independence and both internal and external sovereignty. Moreover, the right to self-determination has been accepted and incorporated into subsequent human rights instruments both in the context of civil and political rights as well as economic, social, and cultural rights. The International Covenant on Civil and Political Rights (ICCPR) lays down self-determination as a civil and political right whereas the International Covenant on Economic, Social and Cultural Rights (ICESCR) defines the economic, social, and cultural context of the right to self-determination. As a principle of international law, the right to self-determination has been accepted and acknowledged in different cases by the International Court of Justice (ICJ). In its Namibia opinion, the ICJ referred to the right of self-determination as "a principle in international law as enshrined in the Charter and its further development in the Declaration on Colonialism (1514(XV)), which refers to a right to self-determination" (Bucheit 1978, 9). Moreover, in the East Timor case (*Portugal v. Australia*), while adjudicating on the case the ICJ emphasised that the right to self-determination is "one of the essential principles of the contemporary international law" (Shaw 2003, 225). It is now consensus in the UN system that all peoples have the right to self-determination both internal and external. Further, it is acknowledged by a majority of the nations as a civil and political, and economic, social, and cultural right, the absence of which may endanger other human rights. However, the application and implementation of right to self-determination under human rights instruments and international law had so far been largely based on the different circumstances. For some "peoples" it had been made readily available and for others it has completely been denied. This unequitable approach of acknowledging and application had resulted in the distrust and criticism towards UN both by scholars and people. Additionally, the acknowledgement of the right to self-determination only after wars, conflicts, systemic and gross human rights violations, and destruction resulted in calls for a fresh approach of right to self-determination. Critics had long argued that the enforcement of right to self-determination only after conflicts and human suffering impedes the very purpose of the UN, which was established for promoting global peace, security, and human rights.

The UN Human Rights Committee, through its General Comments, Recommendations, and Reports has time and again reaffirmed the right to self-determination as a fundamental right as well as an important tool in the realisation of other human rights. In its General Comment 12 on the occasion of its twenty-first session, the Committee noted that "The right to self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of

those rights" (Human Rights Committee 1984, para. 1). In regard to the right of self-determination and its connection with the friendly relations between States, as enshrined in the UN Charter, the Committee opined that "respect for the right to self-determination of peoples contributes to the establishment of friendly relations and cooperation between states and to strengthening international peace and understanding" (Human Rights Committee 1994, para. 8). This not only emphasises the importance of securing, promoting, and guaranteeing the right to self-determination as a human right but also as a tool and an end in creating international peace and security.

3. Autonomy and self-governance

As opposed to the concept of self-determination, i.e. independence and sovereignty, autonomy refers to arrangements of power and responsibility sharing between two Governments or territories belonging to the same State – power sharing between a central Government and a subnational Government(s). Various reasons require delegation of greater governmental powers to the subnational or Governments of peripheries including the local Government's ability to better understand the local needs/challenges hence being in a position to have a better response to such local needs and challenges. Other reasons may include the refusal or lack of acceptance by the local populace to accept the powers of the central Governments due to social, cultural, and political sensitivities. Disputed and occupied territories are mostly susceptible to central Governments, which they may not perceive as their representative. In some cases, the violations of human rights and oppressive measures by the national Governments may raise concerns among the local masses and hence create desire for effective autonomy and self-governance. This has resulted in different governance systems, power sharing, and self-governance methods across the globe with the above-mentioned challenges. Before we discuss autonomy as a viable option for the people of Gilgit-Baltistan in the view of ongoing oppressive measures and human rights violations, it is important to discuss some conceptual foundations of autonomy.

Autonomy in general terms can be understood as a political and legal concept as a middle way between complete independence/secession and complete dominance between a national Government and a Government of a certain territory. Autonomy refers to "the ability of a region or community to organise its affairs without interference from the central government" (Ghai and Woodman 2013, 5). Territorial autonomy according to the definition means decentralisation and devolution of more powers from the central Government to the territorial Government in question. Autonomy is an effective way of managing the governance concerning minorities, hence it is on occasions referred to as the "queen of minority protection instruments" (Brems 1997, 14). As a global political phenomenon for accommodating the demands of religious, cultural, and ethnic minorities

or otherwise of disputed and non-self-governing territories it has helped managed the tensions and challenges across the globe. Quebec in Canada is an effective example of successful self-governing and autonomous territory.

4. Self-determination: Comparative analysis of Quebec, Kurdistan, Catalonia, and Kashmir

The right of self-determination in international law, the UN Charter, and human rights instruments is an established right of the people (the colonised people) to freely determine their legal, political, social, and economic status. In particular, the ICCPR and ICESCR through their Article 1 recognises the right of self-determination to all peoples. Additionally, it recognises the principles of autonomy and to freely determine their political status and to use their economic, cultural, and natural resources for their development. The concept and principle of self-determination in international law and UN instruments is used in multiplicity of connotations. In its broader sense it is used both for internal self-determination (self-governance/ internal autonomy) and external self-determination, i.e. independence and sovereignty. The broader and liberal principle on the principle of self-determination was incorporated through UN Resolution 1514 (XV) in 1960, including the Declaration on the Granting of Independence to Colonial Countries and Peoples. An affirmation for the self-determination principle was included in section 2, which states "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This concept of self-determination was further strengthened by its inclusion into the ICCPR and ICESCR in 1966, which recognises the right of self-determination, not only for the colonised people but to "all peoples." The right of self-determination was further broadened by adoption of the Friendly Relations Declaration to "peoples under alien subjugation, domination and exploitation" (UNGA 1993). Thus the right of self-determination extends beyond the context of colonialism (UNSC 1986; UNGA 1987; UNGA 1974). Since the development and establishment of the right of self-determination, many cases of autonomy and self-determination have emerged across the world. Some settled through constitutional adjustments granting more autonomy, many through recognition of right to self-determination (by UN), and many through armed conflicts, leading to independence. As a principle of international law, the right to self-determination has been accepted and acknowledged in different cases by the ICJ. In its Namibia opinion, the ICJ referred to the right of self-determination as "a principle in international law as enshrined in the Charter and its further development in the Declaration on Colonialism (1514(XV)), which refers to a right to self-determination" (Buchheit 1978, 9). Moreover, in the East Timor case (*Portugal v. Australia*), while adjudicating on the case the ICJ emphasised that the right to self-determination is "one of the essential principles of the contemporary international law" (Malcolm 2003, 225).

The literature review consisting of the cases of autonomy and self-determination from various regions will examine these principles and their practical implementations and will provide a basis for exploring new approaches to autonomy and self-determination while answering the question of autonomy and self-determination in Gilgit-Baltistan. These cases include Quebec, West Bengal, South Sudan, Catalonia, Kurdistan, and Kashmir.

The struggle for autonomy and self-determination in the Kurdish regions in Turkey, Iraq, and Iran has a long history. Kurds under the domination of Turks and Arabs brought their claims of self-determination to Paris Peace Conference in 1919 for the first time (Chaliand 1993). The provisions for the establishment of an autonomous Kurdish State were provided in the Treaty of Serves (Treaty of Peace with Turkey 1920), which culminated in the Ottoman empire. However, the subsequent Treaty of Lausanne (1923), which superseded the previous treaty omitted the provisions for the establishment of an autonomous Kurdish State. Subsequently, the uprising of Kurds demanding autonomy and self-determination was forcibly quelled. The struggle for autonomy and self-determination/independence in both Iran and Iraq were oppressed by use of force, resulting in thousands of Kurds killed. In the early twentieth century, renewed efforts were made by the Kurdish people in Iran, Iraq, and Syria. However, with the support of Soviet Union, the Kurdistan Democratic Party was able to declare Kurdistan as Republic of Mahabad in 1946, which could survive for only 11 months and culminated with the execution of the President by the Shah of Iran (Arfa 2006, 95). The human rights abuses and prosecution of Kurds continued in Iraq and Turkey, and during the Anfal campaign under Sadam Hussain's era in Iraq almost 10,000 Kurds were killed including Halabja genocide in 1988 (HRW 1993). In Turkey, the Dersim and Zilan massacres of 1937 resulted in the death of around 13,000 Kurdish civilian (Jokuza 2012). The Kurdistan Regional Government (KGB) was subsequently formed as a result of 1992 elections, due to a political vacuum in the region in the aftermath of Gulf War of 1991. The appeals from the KGB for greater autonomy and independence have repeatedly been opposed by the Iraqi Central Government. In 2017, the KGB hold a referendum on independence of the region, with 90% votes in the favour of the referendum, however, the outcome was not recognised by the Iraqi Government and the response of the international community has been discouraging. The unsuccessful plea of Kurdish self-determination represents the approach of authoritarian regimes towards international law and the right of self-determination. Also, it reflects the selective implementation of self-determination principles by the international community and UN. It is therefore imperative to revisit the legal approach to self-determination in third world countries and authoritarian regimes.

The Catalonian case of self-determination is a classical case in the context of liberal democracies in Europe. The case of Catalonia to self-

determination has historical, political, social, economic, and legal contexts and implications. During the twentieth century, politically, Catalonians were not given ample powers as they were striving for, and it was only in 1931 that the Spanish Parliament recognised limited autonomy "outside the cities with a common history, culture, and economy" within the Spanish State (Hannum 1993, 264). Due to widespread disagreements over the constitutional arrangements, a new Constitution was enacted and came into force in 1978 (Borgen 2010, 1018). The attempt to introduce this new Constitution was to ensure the State's legitimacy over all citizens within the State and to encourage solidarity over calls for autonomy and self-determination.

During this period until 2010, the Catalonian political arena was dominated by autonomist pressing for the right of Catalonian self-determination, however, such efforts were countered by the Constitutional Court of Spain's decision to promote territorial integrity (Lecours and Dupré 2018). In response, the Catalan Parliament decided to adopt a Declaration for Autonomy, which was declared repugnant to the Constitution by the authorities in Spain. The Catalan authorities made several deliberations with the Spanish Government in an attempt to secure a referendum for secession; however, such requests were frequently rejected. In such evolving circumstances, the Catalan authorities decided to consult the public and the rejection of such public opinion would lead the Catalan authorities to declare independence. An informal and non-binding referendum was conducted in 2014, with 80 percent of the participant voting in favour of the referendum of independence (BBC 2014). On 1 October 2017, the Catalan Government held a referendum to decide on the question of independence from Spain, which was obstructed by the Spanish Government with force resulting in injuries of around 800 people, however an overwhelming majority of 90% Catalan citizens vote in favour of the question (European Parliament 2017). However, the Spanish Government declared this referendum illegal and a crime against the Spanish State which resulted in the arrest of the Catalan leaders of the organisation (Montserrat Guibernau et al. 2014, 2). Due to the ban of such initiatives by the Spanish court, the Catalan Parliament decided to declare a symbolic independence in 2018 (Halisoglu 2020, 29).

The case of Quebec for autonomy and self-determination has its roots in linguistic, cultural, and political differences under a federal system with ethnic, linguistic, and cultural diversity. The self-determination in Quebec, which started in early 1960s as a "Quiet Revolution", which resulted in two referendums in 1980 and 1995, still resonates in the Canadian legal and political debates. The first referendum for self-determination/independence in Quebec was held in 1980, which resulted in 40.4 percent (Bienvenu 1999, 3) in support of the independence proposal, while the second referendum which was held in 1995 was supported by 49.4 percent of Quebeckers (Dunsmuir 2000). The question of secession of Quebec

was subsequently referred to the Canadian Supreme Court in 1996 for its opinion on the matter (Department of Justice Canada 1996). The Court disposed the question of Quebec's secession in 1998 and concluded as follows:

"The secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to affect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights". (Reference Re Secession of Quebec 1998, para. 273).

While recognising the right of self-determination for the province of Quebec, the Supreme Court had made the secession questions contingent upon the clear will of the majority through democratic and constitutional means. This reflects the openness and willingness of developed democracies and constitutions to negotiate and provide greater autonomy to the units of the federations. In contrast the authoritarian and third world democracies and constitutions tend to show rigidity to questions of autonomy and self-determination, as evident in the case of Pakistan and India while allowing more autonomy in Gilgit-Baltistan and Kashmir.

The Kashmir dispute represents a classic case of legal complexity in the context of colonisation of the Indian subcontinent by the British empire and its subsequent decolonisation plans. The origin of the dispute lay in the partition of Indian subcontinent into the dominions of Pakistan and India in 1947 by the British empire. Kashmir, a princely State, with a majority of Muslim population under the rule of a Hindu maharaja (King) was given the choice of acceding either to India or Pakistan (Teng et al. 2006), contingent on two preconditions, contiguity with either of the States, and aspirations of the people (Teng et al. 2006). In the face of Muslim uprising and revolt against the Maharaja, the Hindu Maharaja wished to align Kashmir with India, while the majority Muslim population wanted accession with Pakistan (Ankit 2010). This culminated with the Maharaja's accession of Kasmir to India through an Instrument of Accession on 27 October 1947. Autonomy was granted to Kasmir under

Articles 370 and 35A of the Constitution of India. This had later resulted in hostilities and three full-fledged wars between Pakistan and India in 1948, 1965, and 1971. Subsequently, the dispute was taken to the UN by India, which resulted in six UN Security Council (UNSC) Resolutions. These UNSC Resolutions accepting the right of self-determination for the people of Kashmir called for a "free and impartial plebiscite" (UNSC 1948). Additionally, the UN Commission for India and Pakistan was appointed to consult and mediate the dispute between Pakistan and India, and to study and recommend suitable conditions for administration of a referendum and plebiscite. Despite the calls for holding a referendum, the dispute remained unsolved until today, however, the UN has accepted the right of self-determination for the people of Kashmir, a legal right and foundation on the basis of which the people of Kashmir can determine their legal and political future, when conditions become suitable. The special status of Kashmir was revoked by the Government of India in 2019 by abolishing Articles 370 and 35A, which was legitimised by the Supreme Court of India in 2023 (INSC 2023). The right of self-determination for the people of Gilgit-Baltistan is distinct from that of the Kasmir issue because unlike the agreement between the Maharaja of Kashmir and the Indian Government, there had been no accession agreement between Gilgit-Baltistan and the Government of Pakistan. Hence, the question of self-determination in Gilgit-Baltistan requires a new approach and interpretation of the right of self-determination, which can contribute to a fresh understanding of the principle of self-determination applicable to the similar issue which may arise in the future.

6. The quest for autonomy and self-determination in Gilgit-Baltistan

Gilgit-Baltistan is sparsely populated, located among some of the world's highest and largest mountain ranges in the north of Pakistan (Gilgit-Baltistan Government 2025). As in the words of Dr. Martin Sokefeld, "the people of Gilgit-Baltistan are by no means a people without history" (1997). The struggle for constitutional rights, autonomy, and self-determination can be categorised into two parts. First, the political and legal situation before the partition of Indian subcontinent and second, from the independence. i.e. 1 November 1947, till present. Valuable pre-partition historical literature to an extent is available in forms of books, archives, and scholarship, such as the historical works of Edward Frederick Knight (1893), Colonel Algernon Durand (1899), Shah Rais Khan (1987), and Qudra Tullah Beg (1980). However, the huge amount of data preserved in British, Pakistani, and Indian archives still needs to be explored, especially those relevant to the events prior and immediately after the War of Independence in 1947. The region's constitutional dilemma took a major turn when it supposedly acceded to Pakistan in 1947–48, an action that was met with disapproval by Pakistan (Ali 2022). An attempt was made to legitimise this accession through the controversial Instrument of Karachi (Karachi Agreement 1949),

which the inhabitants of the region dispute as a one-sided agreement. The political, constitutional, and legal history and developments after the de facto administrative takeover of the region by the State of Pakistan requires a thorough examination and understanding. The current status of constitutional limbo and question of protection of fundamental rights originates from the takeover of the region by Pakistan. A limited literature exists regarding the legal developments since 1 November 1947 till the present time. A significant research scholarships gap exists regarding the political and constitutional developments in Gilgit-Baltistan and their implications on the right to self-determination for the people of Gilgit-Baltistan. This is partially due to the sensitivity of the subject and the region and partially due to censorship by the State. The question of autonomy and self-determination requires exhaustive research because Gilgit-Baltistan serves as the gateway and nerve of the China-Pakistan Economic Corridor (CPEC) (McCartney 2020), a major project under China's One Belt One Route Initiative (OBOR) (Du 2016). CPEC and the shift in the power dynamics in the Global South with China emerging as an economic power at the borders of Gilgit-Baltistan has amplified the international significance of Gilgit-Baltistan's constitutional status and protection of fundamental rights. However, Pakistan has been reluctant in making Gilgit-Baltistan part of its Constitution, hence, the constitutional status and consequently, the fundamental rights and territorial claims of the people of Gilgit-Baltistan which remain constantly at risk of exploitation by both Pakistan and China. It is therefore imperative to explore ways in which the fundamental rights of the people of Gilgit-Baltistan can be protected until their constitutional status or their right to self-determination is determined.

Due to the longstanding demands for fundamental and constitutional rights, in 1999, the Supreme Court of Pakistan delivered a significant judgment in the case of *Al Jihad Trust v. Government of Pakistan*, wherein it emphasised the extension of all constitutional and human rights to Gilgit Baltistan within a period of six months from the date of the judgment, which was 23 May 1999. The Court stated:

The two million people of Northern Areas are citizens of Pakistan with all intents and purposes and the fundamental rights as guaranteed in the constitution of Pakistan are very much available to the citizens of Northern Areas, now Gilgit Baltistan (GB), and these must be protected and enforced by making necessary amendments in the constitution of Pakistan and relevant laws and notifications as applicable (PLD 1999).

However, no steps have been taken by successive Governments to implement the Supreme Court's judgment, to the further suffering and agony of the 1.5 million people of Gilgit-Baltistan.

After 76 years of de facto control and reluctance of the State of Pakistan to provide fundamental and constitutional rights, in recent years, there has

been a rising desire among the general populace of Gilgit-Baltistan, resulting in an increased demand for a comprehensive political and constitutional framework, autonomy, and self-determination. However, due to the existing political vacuum created as a result of no representation of Gilgit-Baltistan in the Parliament of Pakistan and other constitutional institutions, the demands have neither materialised in any constitutional compromise nor in grant of autonomy. Such demands are further weakened by the persistence ignorance of the international community including the UN. However, keeping in view the change in power dynamics and increasing conflicts resulting territorial disputes or deprivation of fundamental rights, the constitutional status, autonomy, and self-determination needs immediate attention. It is therefore imperative to identify ways in which the fundamental rights can be protected and explore most feasible option of autonomy or self-determination in Gilgit-Baltistan, which will not only ensure the protection of fundamental rights but also prevent the region from a conflict and hotspot of war among nuclear States.

7. Why there is a desire for autonomy and self-determination in Gilgit-Baltistan

As a State narrative, the State of Pakistan had intentionally associated Gilgit-Baltistan with the Kashmir issue, however, the people of Gilgit-Baltistan had never been treated politically and legally like the people of Kashmir. On one hand Pakistan-occupied Kashmir (PoK) has been granted complete autonomy with an affective governance system and a Constitution which was adopted in 1974 (AJ&K Interim Constitution). The Constitution establishes a legislature with full powers to legislate on all matters related to PoK along with an independent judiciary and executive. The State is represented by the President of PoK and the Government by a Prime Minister who is elected by universal suffrage of the PoK citizens. Moreover, an independent judiciary is established to protect the human rights of the citizens of PoK, with a Supreme Court as the apex court. On the other hand, Gilgit-Baltistan has never been given autonomy neither through a legislature nor an independent judiciary. Gilgit-Baltistan has been governed through executive orders which are not acts of Parliament and their legal duration is limited to 120 days from its promulgation. Furthermore, the involvement of the Central Government in the appointment of judges compromises the independency of the judiciary. The differences of the legal and political treatment between Gilgit-Baltistan and Kashmir despite the frequent association of Gilgit-Baltistan with the Kashmir issue had caused resentment in the people of Gilgit-Baltistan, which resulted in frequent calls for autonomy and self-determination.

Furthermore, the sustained denial of legal and constitutional rights on the pretext of the linkage with the Kashmir issue had resulted in mistrust and suspicion among the people of Gilgit-Baltistan towards the Federal Government. Almost all major political and legal decisions

regarding the region are made by the Federal Government without taking the local narrative and opinion in the decision-making process and their implementation in the region without public involvement had caused a sufficient sense of deprivation among the people. This complete disregard of the local opinion in the political decision-making process is yet another reason for frequent calls for empowerment and self-governance. The representation of the people of Gilgit-Baltistan in the Parliament and other constitutional institutions of Pakistan had always remained a point of concern and sense of deprivation among the people. The lack of representation in both Houses of the Parliament (National Assembly and Senate) deprives the right of people of Gilgit-Baltistan to mainstream their issues and challenges. This is unlike Indian occupied Kashmir (IoK) to whom the Indian Government had given representation in both Houses of the Indian Parliament (Constitution of India 2024). The issues of the right to vote and political participation for the election of the Prime Minister and President elevates the sense of deprivation and raises concerns of a political nature, i.e. a Prime Minister and a President representing and making decisions regarding the people of Gilgit-Baltistan whom they did not elect. Furthermore, it is important to note that no person from Gilgit-Baltistan is eligible to be elected as the Prime Minister of Pakistan, which the people view as discrimination, violation of their rights, and their treatment as second-class citizens.

The rights of the people of Gilgit-Baltistan since their independence on 1 November 1947 from the Dogra's and the subsequent takeover by Pakistan had never been acknowledged in the first place, and when accepted they are not equally treated like other Pakistani citizens. The enforcement of the Frontier Crimes Regulation (FCR) by Pakistan soon after the takeover which continued until the mid-1970s is the first instance of systematic denial of human rights to the people who were left at the behest of a non-local political agent with all legislative, executive, and judicial powers (Holden 2019). The right to be represented by their chosen representatives was not recognised until the 1980s. The non-existence of a judicial system had entrenched human rights violations within the political system and perpetrators and oppressors had along avoided justice.

The indiscriminate use and extension of the Anti-Terrorism Act of 1997 to Gilgit-Baltistan has caused great concern among the members of civil society, political activists, and the people of Gilgit-Baltistan. According to the Human Rights Commission of Pakistan's (HRCP)[1] fact finding report on Gilgit-Baltistan in 2016, the HRCP's mission acknowledged the "rampant misuse of the Anti-Terrorism Act (ATA) by State institutions

3 The Human Rights Commission of Pakistan (HRCP), established in 1986 and registered in 1987, is the country's apex independent human rights body. A non-political, not-for-profit organisation, HRCP is committed to realising the entire ambit of human rights – civil, political, economic, social, and cultural – for all citizens and persons present in the country.

in Gilgit-Baltistan" (HRCP 2016). The law since its implementation has widely been used to supress political activists, members of civil society, and members of Nationalist parties who call for greater autonomy and right to self-determination. In this context, the HRCP further reported that, "Hundreds of individuals continue to languish in the jails under ATA and the law has been used extensively to supress any voices raised for the rights of the people of Gilgit-Baltistan" (HRCP 2016, 17). Many nationalist leaders and youths calling for the rights of the people of Gilgit-Baltistan are continuously booked under sedition and anti-terror charges. The courts under ATA are considered to be under the influence of the Pakistan military establishment of Pakistan, hence undermining their process of working, independence, and fairness of trials. Among several cases of misuse of ATA to supress voices, the case against the leader of Awami National Party along with 11 others just for protesting for the rights of the victims of Attabad lake disaster tells the folklore of the State's countless attempts to silence the voices of the nationalist narratives. Due to lack of access to information about the number of arrests and cases of anti-terrorism, it is not possible to know the exact number, however, in the year 2016 alone, 140 anti-terrorism related cases were reported (Mir 2025). It is worth mentioning that no inputs were taken from the Government of Gilgit-Baltistan in making or extending the law to the region. Furthermore, the Act was intended to be operational only within the territories of Pakistan, i.e. the territories mentioned in the Constitution of Pakistan, as the Act itself describes the limits of its application: "It extends to the whole of Pakistan" (Pakistan Anti-Terrorism Act 1997, art. 1(b)). Hence, its application in Gilgit-Baltistan has always been called in question as malicious and a repressive action by Pakistan. The behaviour and treatment of the State is such that, as per the HRCP's report, "every time they protest or demand the rights of the people of Gilgit-Baltistan, they are declared enemies of the state, booked under the ATA, and arrested" (HRCP 2016). Not only are members of political and national parties booked and arrested under the ATA but also members of civil society are, if they in any way highlight or organise activities related to the human rights violations in Gilgit-Baltistan. Moreover, the ATA has been frequently used for acquisition of lands for the China Pakistan Economic Corridor (CPEC), a part of China's flagship project and Belt and Route Initiative (BRI).[2] People who refuse to give their lands and homes or protest for forceful eviction from their homes or for payment of inadequate compensation are booked under the ATA. Among other provisions of the ATA, the most frequently applied Article to control the political activities of the nationalist political parties, members of the civil society, and youths is Article 11EE, which is commonly referred to as Schedule Four. Members of nationalist political parties and human rights

4 China's Belt and Road Initiative (BRI) development strategy aims to build connectivity and co-operation across six main economic corridors encompassing China and: Mongolia and Russia; Eurasian countries; Central and West Asia; Pakistan; other countries of the Indian sub-continent; and Indochina.

activists are enlisted in the Schedule in the pretext of danger to peace and security. The movement and activities of the person enlisted under Schedule Four are continuously monitored. They are forced to report their movements to the Station House Officer (SHO) of the local police station. According to Article 11EE(c) a proscribed person is required; (i) that his movements to be restricted to any place or area specified in the order; (ii) him to report himself at such times and places and in such mode as may be specified in the order; (iii) him to comply with both the direction; and (iv) that he shall not reside within areas specified in the order. The law grants a wide range of powers to the police and other law enforcing agencies to restrict the movements of such individuals even at district levels. The failure to comply with the above section can result in the arbitrary arrest of the individuals. On most occasions, the charges against the person enlisted in the Schedule are not communicated.

Gilgit-Baltistan, due to its conspicuous geographic location, possesses a tremendous number of natural resources in the form of minerals, water resources, and tourism potential. One of the most important economic aspects of Gilgit-Baltistan is the linkage it provides between Pakistan and China, especially in the context of CPEC, i.e. the multi hundred-billion-dollar project between Pakistan and China. The land and natural resources of the people of Gilgit-Baltistan are exploited by the State institutions in the name of Khalsa Sarkar. Khalsa Sarkar are laws "by virtue of which the government could claim ownership of barren or uncultivated land, even if it was collectively owned by the community" (HRCP 2022). The illegal land grabbing by the State and State institutions dates back to the Pakistan takeover of the administrative control of the region. However, it was through the Northern Areas Nautore Rules 1978–80 (Bhatti and Ali 2016) imposed by the military dictator General Zia ul-Haq that attempts were made by the Federal Government to dispose the rights of the land without paying compensation to the people of Gilgit-Baltistan. These practices still exist and were incorporated in the Gilgit-Baltistan Empowerment and Self-Governance Order 2009. Such continuous and prolonged discriminatory and oppressive treatments by the State aggravated the demands for autonomy and self-governance among the people of the region. Furthermore, the natural resources of Gilgit-Baltistan had continuously been appropriated by State institutions, State-sponsored business in the wake of development projects, security installations, and projects of public interests, which had caused further resentment, mistrust, and suspicion towards the Federal Government and essentially towards the State of Pakistan. Gilgit-Baltistan serves as a gateway for CPEC, which is thus far one of the most important strategic and economic initiatives for both China and Pakistan. CPEC runs at least 300km through Gilgit-Baltistan from Xiangjiang province in China before culminating in the Khyber Pakhtunkhwa Province in Pakistan (Malik 2018). The project gives China easy access to the Indian Ocean by reducing the previous distance of 13,000km to only 2,500km (Alam et al. 2019). While entering

into the partnership with China, the people of Gilgit-Baltistan were not taken on board, while their lands have been utilised in the projects. Since then, a notion that "Pakistan wants only the ownerships of the lands of Gilgit-Baltistan and not of its people" had become common among the people of Gilgit-Baltistan. Furthermore, no due share for Gilgit-Baltistan had been given under the project, depriving the people from employment opportunities and economic benefits. All these factors together have increased the pre-existing urge for self-governance, autonomy, and self-determination in the region.

At the time of independence, the population of Gilgit-Baltistan was composed mostly of indigenous people. However, since 1947, Gilgit Baltistan has gone under significant demographic change. Up until 1974, the imposition of State Subject Rule had protected the demographic composition in Gilgit-Baltistan. With the abrogation of State Subject Rule in 1974, the demographic composition of Gilgit-Baltistan started changing significantly. This has mainly shifted the demography in the main cities in Gilgit-Baltistan, i.e. Gilgit and Skardu. This perhaps has been a deliberate and intentional move by the Government of Pakistan, either as a result of distrust for the local population in case of a plebiscite in Kashmir or to increase the number of votes in case of the referendum (Rasul 2004, 79). The Government had sponsored the settlement of the non-locals in the region, creating an imbalance in the local to non-local population, which resulted in rifts in the cultural and social fabric (Shah 2021). The indigenous communities had long resisted these sponsored settlements, however, the disagreements among the locals and non-local settlements on many occasions led to clashes. The State had frequently increased the deployment of armed forces and law enforcing agencies on the pretext of keeping security, law, and order. In fact, for the State of Pakistan, this had been an opportunity of divide and rule policy and to strengthen its grip of governance in Gilgit-Baltistan. In the view of the nationalist political party's (Balawaristan National Front) leader, "The Pakistani administration has been involved in efforts to alter the demographic profile of Pakistan-occupied Gilgit Baltistan, reducing the indigenous people to a minority. In the Gilgit and Skardu areas, large tracts of land have been allotted to non-locals. Other outsiders have purchased substantial stretches of land since they are economically better off than the locals. The rapid induction of Punjabi and Pashtun outsiders has created a sense of acute insecurity among the locals" (Khan 2002). Additionally, the whole region of Gilgit-Baltistan has been heavily militarised. The exact number of armed forces deployed in the region is unknown, given the secrecy and sensitivity of the region, however, according to the reports there is a huge presence of the Pakistan military in Gilgit-Baltistan (Asian Development Bank 2010). The army not only controls the law and order situation but also the communication system, is involved in construction enterprises, and tracks down nationalist voices. The whole telecommunication system was in the control of the military (Special Communication Organization – the

army wing controlling telecommunication in Gilgit-Baltistan) until 2020, and other operators were denied internet operations (Ali 2018). This was particularly designed to control freedom of expression and cases were filed against the youth and people raising their voices on social media and other platforms against human right violations in Gilgit-Baltistan. The hegemonic control of the whole region by the army and military intelligence can only make sense for brutally supressing the voices asking for protection of human rights, autonomy, and self-determination. Such people are booked for sedition charges and in many cases forcefully disappeared. Keeping in mind these oppressive measures, Pakistan is doing in Gilgit-Baltistan exactly what India does in IoK.

8. Autonomy v. self-determination: A viable option for Gilgit-Baltistan

The Supreme Court of Pakistan's decision of 1999 is perhaps the most authoritative document in the context of Gilgit-Baltistan's political and legal status. Apart from directing the Federal Government to ensure the human rights of the people of Gilgit-Baltistan, the Supreme Court expressed its limitation on deciding the form of Government for Gilgit-Baltistan and expressed its opinion as:

> It may be observed that since the geographical location of the Northern Areas is very sensitive because it is bordering India, China, Tibet and USSR, and as the above areas in the past have also been treated differently, this Court cannot decide what type of Government should be provided to ensure the compliance with the above mandate of the Constitution. Nor we can direct that the people of Northern Areas should be given representation in the Parliament as, at this stage, it may not be in the larger interest of the country because of the fact that a plebiscite under the auspices of the United Nations is to be held" (*Al-Jehad Trust v. Federation of Pakistan* 1999).

As a consequence of prolonged constitutional limbo and identity crisis, Gilgit-Baltistan has been searching for a viable option for protecting the rights of the people. Arguably two alternative options can be explored from within the UN system and the UN Charter. The option of right to self-determination is enshrined in Article 1(2) of the UN Charter, which guarantees it to all peoples "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." For all intents and purposes of this Article, the people of Gilgit-Baltistan constitute "peoples" to which the article refers for self-determination. As such, legally speaking the people of Gilgit-Baltistan can invoke the right to self-determination under this article of the UN Charter. Moreover, the right to self-determination guaranteed under Declaration on the Granting of Independence to Colonial Peoples can be made the

basis for demanding self-determination for the people of Gilgit-Baltistan. However, how practicable this option is, given the political and ground realities, can be arguable. It seems unlikely given the position and actions of the consecutive Pakistani Governments since 1947 that Pakistan is ready to give any concession to the people of Gilgit-Baltistan to invoke the right to self-determination. However, it legally remains an option if Gilgit-Baltistan is able to galvanise international support for its cause in the light of the human right violations which had continuously taken place for 76 years.

As an alternate and feasible option in the current political situation, autonomy and self-governance under the UN Charter can be invoked by the people of Gilgit-Baltistan. Article 73 and 76 of the UN Charter respectively guarantees autonomy and self-governance in respect of non-self-governing and trust territories. Article 73 of the UN Charter emphasises that Member States "develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement." Since Gilgit Baltistan is a non-self-governing territory and no representation has been given in the Parliament of Pakistan, it has the right to demand self-government on the basis of the above article. Furthermore, with regard to trust territories the UN Charter obliges Member States "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence" (art, 76(b)). Pakistan is a Member State of the UN, it could be convinced with the involvement of the international community or regional countries such as China to extend autonomy and self-governance in Gilgit-Baltistan. The right to autonomy and self-governance has already been partially accepted by Pakistan in the form of the Supreme Court's judgment of 1999 and subsequently to a lesser extent by the promulgation of the Gilgit-Baltistan Empowerment and Self-Governance Order 2009. Hence, the granting of effective autonomy to the people of Gilgit-Baltistan seems to be an available option until the region is successful in convincing the UN Member States to support its claim to the right to self-determination.

9. Conclusion

Gilgit-Baltistan is a complex case of identity crisis, marginalisation, human rights violations, and constitutional limbo. The history both pre-partition and post-partition is full of ambiguities and subjugation. One of the biggest mistakes made by local historians is their inability to reduce their history into writing. As the colonials always do, they create rifts and ambiguities in the history, they divide and rule. Such an attempt is the Treaty of Amritsar between the British rulers in India and Sikh rulers in Jammu, making parts of present-day Gilgit-Baltistan part of the State of Jammu and Kashmir. Due

to its important geo-political and geo-strategic location, Gilgit-Baltistan remained under British rule until 1947. Many scholars argue that Gilgit-Baltistan was the centre stage of the "Great Game" in the nineteenth century and the first half of the twentieth century. However, when the British rulers decided to leave the Indian subcontinent, they decided to hand over parts of Gilgit-Baltistan to the Kashmiri rulers. The indigenous people of Gilgit-Baltistan revolted against this decision and liberated the parts of Gilgit-Baltistan and declared independence on 1 November 1947. However, it is rightly argued by Sokefeld (1997) that the independence won from the Dogra's was subsequently lost to Pakistan. After the war between Pakistan and India on Kashmir issue, a UN-led commission was formed to formally end the war. In anticipation of the negotiation and in view of the UN Resolution regarding the peaceful settlement of Kashmir issue, Pakistan signed the infamous Karachi Agreement with the Government of PoK. Though without any authority, the PoK Government transferred the administrative powers to govern Gilgit-Baltistan to the Government of Pakistan. This decision on the part of Pakistan makes sense in the view of scoring the majority of the votes in case of a plebiscite in Kashmir, as guaranteed under the UN Resolution of 1948. The approaches to self-determination and autonomy as a comparative analysis between developed democracies and third world nations are full of differences, both legally and politically. For instance, the Canadian Federation to a large extent have provided autonomy for Quebec along with the acceptance of self-determination for the people of Quebec, while third world nations are reluctant either to accept such rights or to implement them, such as in the cases of Kurdistan, Kashmir, and Gilgit-Baltistan. It is important to note that the UN Resolution regarding Kashmir makes no mention and reference to Gilgit-Baltistan. Since the beginning of Pakistani rule in Gilgit-Baltistan, the people of the region had been dealt with as second-class citizens without any politico-legal system and suffering oppression and systematic human right violations. The region was run under FCR, a draconian law for deterring and oppressing the masses. The first so called reforms were introduced in 1974 with the abolishment of the FCR and establishment of a council. Devoid of any actual political power, the reforms were meant to ease the growing demands of self-governance and self-determination in the region. In an acknowledgement of the grievances regarding the systematic human rights violations and deprivation, the Supreme Court of Pakistan in 1999 ordered the Federal Government to treat the people of Gilgit-Baltistan as equals to the other citizens of Pakistan. The Court emphasised reforming the political system to give more autonomy and self-governance to Gilgit-Baltistan within six months of the judgment, however, the orders were disregarded. The first reforms in the form of an executive order, the validity of which remains arguably in question, were introduced in 2009 through the Gilgit-Baltistan Empowerment and Self-Governance Order 2009. The opinion regarding the political status of Gilgit-Baltistan is contested and differs among the political leaders, the nationalist parties, and the people of Gilgit-Baltistan, perhaps influenced by a prolonged State propaganda, and probably this explains Pakistan's

successful oppression of the demands for autonomy and self-determination. The most recent reforms package was introduced in 2018, which was challenged in the Supreme Appellate Court of Gilgit-Baltistan (Nagri 2018), which declared the order illegal. However, in an astonishing move, the Supreme Court of Pakistan (EFSAS 2019) for the first time self-extended its jurisdiction to Gilgit-Baltistan and quashed the decision of the Gilgit-Baltistan Supreme Appellate Court. Subsequently, the order was enforced in the region and the current political and legal system is based on this order. Under the UN-based system, two alternatives for political identity and status exist in the UN Charter, i.e. self-governance and self-determination. The struggle of the 1.5 million people of Gilgit-Baltistan for autonomy and self-determination continues in the face of State oppression and fundamental human rights violations. In the changing global political dynamics and shift of the power to the global south, perhaps, the attention of the international community may provide solace for the political aspirations of the people and protection of their human rights.

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The curious case of compulsory military trainings for students impacting transitional justice

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Abstract: *Compulsory military training for students has become a prevalent practice in various countries, impacting the broader framework of transitional justice. This study briefly draws connection between the correlation of each pillar of transitional justice with memorialisation as the fifth pillar. It explores the inherent tension between such military training programmes and the principles of memorialisation within transitional justice. Specifically, it investigates how compulsory military training for students in China, Viet Nam, and the Philippines*[1] *influences educational curricula and the collective memory of past conflicts. Through case studies and analysis of state-driven educational policies, this research examines the ways in which military training is integrated into academic settings and its implications for transitional justice. The findings reveal that while States claim to prepare students for military service, these programmes often perpetuate biased historical narratives and contradict the goals of memorialisation by weaponising memories of conflict. These outcomes highlight a significant challenge: the clash between State-imposed military curricula and the need for a human rights-based approach to education that supports transitional justice. The broader implication of this study suggests a critical re-evaluation of educational practices in post-conflict societies to ensure they foster principles of transitional justice. The re-examination ought to focus on education as a means of memorialisation that helps adopt a balanced understanding of history while creating a safe space for various narratives to co-exist.*

Keywords: *compulsory military training; education; memorialisation; transitional justice; weaponisation of memory.*

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The author chooses to limit the case studies to these three countries in Asia, as the paper is inspired by the experiences and discussions between fellow classmates during the APMA Programme.

1. Introduction

In a post-conflict society, one of the vital elements to peacebuilding and securing a stable democracy is transitional justice. Transitional justice attempts to aid States undergoing social and political transformation by instilling human rights protection, rule of law, and democracy through judicial and non-judicial process and mechanism "to secure accountability, serve justice and achieve reconciliation" (UNSG 2004). It protects domestic and international peace and security while being essential to prevent states from regression to authoritarian regimes, repression, and relapse into conflict (Collier and Hoeffler 2004).

The United Nations (UN) recognises four pillars of transitional justice: truth, justice, reparation, and guarantee of non-recurrence. However, without the memories of the past atrocities, ensuring transitional justice along with its four pillars is impossible. Memorialisation plays an important role in acknowledging past abuses, remembering and honouring victims which in turn is expected to prevent future atrocities. Therefore, a fifth pillar, memorialisation, has been introduced which is a cross-cutting yet independent element that helps connect transitional justice processes with gross violation of international human rights and humanitarian law (UNGA 2020, para. 21). However, this paper shall be focusing on State obligations in regard to transitional justice only under international human rights instruments.

However, memorialisation is a challenging process which faces three main obstacles, namely: "memorialisation in times of conflict, memorialisation in post-conflict situations and weaponisation of memory in connection with the politicisation of social networks" (UNGA 2020, para. 21). Subscribing to the third challenge, this article argues that compulsory military training for students is in contradiction to the good practices of memorialisation as it weaponises memories of the conflict to instil a hyper-vigilant state-of-mind among the younger generations. It further discusses that it is in contravention to the guarantee of non-recurrence as States try to prepare for soldiers in reservation through this method.

2. The pillars of transitional justice

The pillars of transitional justice operate through four core processes: truth, justice, reparation, and non-recurrence. Each of these processes corresponds to State obligations under international human rights law, as enshrined in various treaties and principles. This section briefly discusses these processes and their interrelation with memorialisation and how it impacts the collective memory of society in post-conflict situations.

The first pillar, the justice process, intends to reprimand the perpetrators of mass atrocities and bring justice to the victims. This is essential to establish

individual and collective accountability for the grave crimes during conflict situations. It is important to bring closure to the victims and their families by providing adequate reparation. The justice process primarily takes place through national judicial mechanisms (ECOSOC 2005b, principle 20) but States have international obligations which they must uphold in accordance with the Universal Declaration of Human Rights, and other international human rights instruments (ICPPED, arts. 2(3), 4, 6–9, 11, 14; CAT, arts. 4–7, 12–14). Failure to do so may lead to international and internationalized criminal tribunals to exercise concurrent jurisdiction (ECOSOC 2005b, principle 20) such as the use of hybrid tribunals in Sierra Leone, East Timor, Bosnia and Herzegovina, and Cambodia.[2]

The reparation process, as the second pillar, helps redress the harms done to victims of atrocities. This includes two elements, the State and individual criminal responsibility. In the aftermath of the gross human rights violations, the State must take actions to redress the victims as per their obligations under international law (ICPPED, arts. 24(4)–(5); CAT, art. 14; ICERD, art. 6; CRC, art. 39). Additionally, in cases of war crimes, crimes against humanity, genocide, and aggression, individuals who committed these crimes may also be made liable to produce reparation for victims as per Article 75 of the Rome Statute. Such reparations must be adequate and proportional (ECOSOC 2005a), however there is no internationally agreed upon standard which dictates the threshold of adequacy. This is one of the major challenges in the reparation process. Other problems, to name a few, include the enforcement of reparation, who constitutes as victims in case of mass atrocities, and whether reparation can be quantified monetarily.

The third pillar is the truth process which attempts to conduct a complete investigation on the gross human rights violations in order to unearth the extent of conflict/repression, who were the culprits behind it, and the state of victims of such crimes. This right of victims has been enforced by the UN Convention on the Protection of all Persons from Enforced Disappearances (ICPPED 2006, art. 24(2)) and holds the status of customary international law under Geneva Convention Protocol I (Geneva Convention Protocol I 1977, arts. 32–34). Moreover, since violations committed during conflict are often denied or committed in secrecy by parties to the conflict including the State, it is essential to elucidate when, how and who is responsible for the atrocities (Roht-Arriaza and Mariezcurrena 2006) which would further aid a holistic memorialisation processes (Salvioli 2023, para. 17). The failure of truth process "leads to denialism and perpetuates and legitimises violence" (UNGA 2020, para. 20).

Non-recurrence is the forward-looking (Office of the High Commissioner for Human Rights) fourth pillar which is concerned with non-repetition

2 Special Court for Sierra Leone, the Crime Panels of the District Court of Dili in East Timor, the War Crimes Chamber in the State Court of Bosnia and Herzegovina, and the Extraordinary Chambers in the Courts of Cambodia.

of gross violation of human rights (ICCPR, art. 20; CAT, arts. 10–11; ICPPED, arts. 16, 23) in the future. The major step for this is institutional reformation, including constitutional reform, archiving, history education with special focus on reformation of the "security sector" (UNSG 2008) of the State. The security sectors include the police, military personnel, intelligence services, and other relevant state actors including non-state actors with security functions. It is essential to reform State organs to guarantee non-recurrence of mass atrocities.

In order to ensure the transitional justice process satisfies all four pillars, there must be careful preservation of the memories of past atrocities. It is important to establish the facts of past violations, commemorate the memories of victims, combat denialism, urge perpetrators to make public apologies, reform systems, and restore trust in the State. This also serves as a way to raise awareness which can in turn prevent future violations. The memorialisation process is thus regarded as the fifth pillar of transitional justice which aids connecting transitional justice processes with gross violation of human rights and international humanitarian law (Salvioli 2020).

3. Memorialisation in practice and its impacts

The transitional justice process is guided by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNGA 2005). However, in order to include the memory process, the "Updated set of principles for the protection and promotion of human rights through action to combat impunity" (ECOSOC 2005b) was adopted by the General Assembly in 2005 as a supplementary principle for transitional justice. It established the duty to preserve memory (ECOSOC 2005b, principle 3) as a general principle which suggests that the State has a duty to preserve archives and evidence of violations of human rights and humanitarian laws as this history is part of peoples' heritage. Moreover, it emphasises that preserving these memories is protecting them from "revisionist and negationist arguments" (ECOSOC 2005b, principle 3).

The memory process is often limited to texts during the transitional phase which means that the following generation grows up without memories of conflict, repression, and violations. Barahona de Brito states that transitional justice is only a small part of the process that formulates how society remembers the violations in post-conflict society (2001). Therefore, the principles further highlight the importance of commemorations and tributes to the victims; and the inclusion of accurate information on violations in training courses on international human rights law and international humanitarian law and in educational materials used at all levels as a part of memorialisation. This must be carried out as

memory processes aids not just the reparation, justice, and truth process but also significantly impacts guarantees of non-recurrence. In fact, it is essential in case the propaganda narratives and hate speeches are still prevalent in post-conflict situations such as in the case of Yugoslavia, despite the judicial success of ICTY (UNGA 2020, para. 53).

Memorialisation can be done through various methods such as physical memorials like the Holocaust Memorial in Germany, or museums such as Apartheid Museum in South Africa or Anne Frank House in the Netherlands. They can also be artistic expressions such as movies like Hotel Rwanda that depict the genocide in the country or books such as *The Northern Ireland Book of the Dead* which helps the victims share their sufferings. Another important method of memorialisation is through education which openly discusses atrocities without negation, without trying to justify the gross violations of human rights.

However, the memory process is entangled with many challenges. One of such challenges is caused by the subjective nature of memorialisation. It should not deny or downplay the extent and intensity of violations, nor should it create scepticism about the occurrence of atrocities. Memory process must be conducted with a human rights-based approach which encourages debates about the causes, consequences, and attribution of responsibility for past crimes instead of creating a homogeneous narrative (UNGA 2020, para. 37). "The voices of the victims of human rights violations must play a key role in the construction of memory, thereby avoiding the distortions that the perpetrators may attempt to impose" (UNGA 2020, para. 38). This has also been reiterated by Binford, who suggests that the gaps in narratives can only be restored through testimonials and community stories (2016).

Additionally, another problem with memorialisation is that it may limit people into a victim mindset when it is not conducted with a human rights-based approach. Oftentimes, narratives circulating about the victims may marginalise them. Worse, it might even evoke need for revenge, further inciting conflicts between different groups. It is difficult to strike a balance between preserving memories and unbiased information about conflict, and prohibition against incitement of hatred. This has been further challenged by the ever-changing and developing social media platforms that use clickbait and misinformation; hateful content has more chance of becoming viral which is difficult to monitor.

This discussion illustrates that memorialisation is a process that forms collective memory of the society which should ideally reform the repressive patterns and narratives by legitimising the voices of victims through a human rights-based approach. It highlights the subjectivity of memory and narratives while acknowledging the diversity in shared struggles. Memory process is concerned with past atrocities but it has the power

to shape the future (Mitzal 2003, 13). Collective memory can generate meaning and structure future social actions.

4. Military training for students: A contravention of transitional justice

When it comes to shaping future social action, education is the key instrument to mobilise the new generation. However, education has not been free from politicisation and is often weaponised by autocratic regimes as a tool for hegemonic control (Barahona de Brito 2010). The content of school books is distorted to fit the narrative of the ruling Governments. In worst cases, the part of history where authoritative regimes committed mass atrocities forgo complete erasure from the textbooks.

In addition to this, many States require students to complete compulsory military training as a part of their academic curriculum. This training is said to discipline the students who will soon enter the society. However, as argued above, while the security sector reform is fundamental for non-recurrence, military indoctrination through university education is in contravention to the pillars of transitional justice.

One prime example of this can be seen in China where the first course university students take is a military training which can last up to one month as a part of their enrolment (Zhang 2018). Moreover, this training, which is arguably narrated as a physical fitness programme (Wang 2018), started off as a ploy to suppress the student movement that besieged the country in the 1980s. The student movement reached its peak from April–June 1989 and was subsequently forcibly suppressed by the State, deploying military force to occupy Tiananmen Square causing death of the protestors. The training was made compulsory for university students throughout the nation soon after the Tiananmen Square Massacre. At the time, the duration of such training was 12 months.

Foreign Policy reported that now the training also includes classes in relation to the Cultural Revolution which the students describe as a memorialisation effort by stating "very humiliating memories" (Sul 2019) that must be remembered to prevent recurrence. Sul argues that this is a strategic effort to show the students how China is better off now (2019). However, memorialisation must include a human rights-based approach that creates space for diverse narratives to coexist. A failure to do so demonstrates that the "Chinese democracy" is still using what once was a propaganda tool for negation and denial of gross violation of human rights. This is especially concerning since the training remains a requirement within their national academic programme that includes all university students.

In Viet Nam, the military curriculum is not just limited to university level. Vietnamese Law on National Defense and Security Education (2013) requires schools to have a military curriculum included in all levels of school from primary to higher education as well as vocational education (art. 10). Although this is meant to be "age-appropriate", the course comprises teaching "the nation's traditions of fighting foreign invaders" as early as grade 3 (People's Army Newspaper 2024). Moreover, there are popular summer programmes for school students known as "military semester" that parents can voluntarily enrol the students into. These summer programmes can include students as young as eight years of age and are believed to be for the personal development and discipline of the children (People's Army Newspaper 2022).

However, as the students' advance to university, the curriculum is designed to strengthen students' knowledge of national defence and security. Since 2020, the universities in Viet Nam spend 165 hours spread out through four modules of National Defense and Security Education that includes both theoretical and practical aspects (Ministry of Education and Training Viet Nam 2020). The students are taught prevention strategies against "peaceful evolution" (Ministry of Education and Training Viet Nam 2020, 2) by hostile forces against the Vietnamese revolution which is essentially a course against the ideas that are in contravention to the Party's beliefs. Additionally, Module IV focuses on infantry combat techniques and tactics that involves 56 hours of practices of various combat skills using rifles and grenades too (Ministry of Education and Training Viet Nam 2020, 3). While it is contestable whether these trainings actually strengthen the national defence, it is important to acknowledge that this does not cater to an education centred around peace-building.

A similar provision is also prevalent in the Philippines whereby as a part of the National Service Training Programme Law, college students are mandated to choose between Reserve Officers Training Corps (ROTC), Civic Welfare Training Services, or Literacy Training Service. Unlike the other two countries, the archipelago categorised these trained students as reserve soldiers. The ROTC was only made optional in 2001 following the murder of a student in ROTC, who exposed corruption within the unit (Magsambol 2023). Since then, the students are allowed to make a choice between the three mentioned above. However, motions to make ROTC compulsory has been raised by the National Youth Commission which was further supported by the then Vice-President and Education Secretary Sara Duterte.

Given the history of the autocratic regime in the Philippines and existence of political dynasties, such proposals cannot be taken lightly especially when supported by State actors who have clear connection to the former regimes. In December 2022, the House of Representative passed the bill making ROTC compulsory for the duration of two years. The Bill is currently pending the second reading in the Senate, making the situation more ambiguous (Senate of Philippines 2023).

In all these cases, the underlying issue is that it compels students to enter into military training as a part of their curriculum. While mandatory military conscription often appears as a separate track, these countries compel students to undergo training as a part of education which is against the fundamental human rights and rights of children. These States often cite promotion of national unity and resilience as the main objective, however, in the next section this paper will discuss how this can disseminate conflict narratives while pushing society towards militarisation, both of which are against the pillars of transitional justice.

5. Analysis

International human rights instruments are focused on peacebuilding and thus the State Parties are obligated to uphold this notion in all aspects within their nation. The International Covenant on Civil and Political Rights (ICCPR) stipulates that advocacy or incitement of hostility or violation shall be prohibited by the State Parties (ICCPR, art. 20(2)). This must be maintained despite the national interest of States being placed at the highest priority by any Government. When compelling students to undergo military training, the Government maintains that it is for the best interest of the nation; whether it is to unify the students under one ideology like China does, or it is to ensure national security against both internal and external threats as argued by the Philippines and Viet Nam. No matter what the argument is, through this compulsory training, the historical legacies are being imparted to the new generation. The problem arises because such mechanisms can be wrongfully used to enforce a State-construed narrative or even hatred. This is especially prevalent in the practices of undemocratic Governments such as the cases we discussed above.

Additionally, the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that the fundamental right to education is linked with an education that promotes and strengthens "respect for human rights and fundamental freedoms" and "maintenance of peace" (ICESCR, art. 13(1)). The Convention on the Rights of the Child (CRC) reiterates that the education of children must be directed towards human rights, fundamental freedoms, principles of the UN Charter (CRC, art. 29(1)(b)), peace, and tolerance (CRC, art. 29(1)(d)). The General Comment No. 1 further explains that this right of children is even more important in context of "those living in situations of conflict or emergency" (Committee on the Rights of the Child 2001, para. 16). The peacebuilding and human rights aspect of education is often neglected when it comes to ensuring the right to education for children. The Dakar Framework for Action has tried to highlight this urging the parties to conduct educational programmes to promote peace, tolerance and mutual understanding to prevent violence and conflict (World Education Forum 2000).

	ACTIVE APPROACH		
PROMOTING NEGATIVE CONFLICT	Hate curriculum Defense curriculum Stereotypes and allegiances	Action to challenge violence and rights violations Dialogue, encounter, democracy Learning about political conflict	PROMOTING POSITIVE CONFLICT
	Violence as normal War as routine Omission from discussion	Personal conflict resolution Tolerance Inner peace	
	PASSIVE APPROACH		

For a just transition to occur, education should also pay careful attention to whether younger generations remember past conflict and violations, and how they remember it. This plays a crucial role to guarantee non-recurrence. The State mechanism using forced military training within the academic curriculum is not within the realm of good practices of memorialisation and is not consistent with the international human rights instruments. To further understand this, Davis proposes a simple diagram which demonstrates how education can play an important role in transitional justice.

The above diagram (Davis 2017, 6) depicts that the best way to impart a biased curriculum is by engaging students in military training and defence curriculum (top-left quadrant). This creates a sense of constant threat among the new generation and keeps the wounds of the past painfully fresh. This can also instil fear, hatred, and/or stereotypes either consciously or unconsciously. It can push a whole generation to a state of hyper vigilance which would make post-conflict situations more precarious and prone to further conflict.

Therefore, based on Davis' theory (2017, 6), it is clear that the inclusion of military training in the education sector as a compulsory part of academic requirement is detrimental to the transitional justice process. Although it may not directly impact the four pillars, the memory process is directly and severely distraught by this practice. Due to its cross-cutting nature with the rest of the processes, especially guarantee of non-recurrence, the very aim of transitional justice is being compromised by compelling students to complete military training as a part of the curriculum.

6. Conclusion

The progressive nature of the transitional justice process has enabled memorialisation to become an indisputable fifth pillar of the process. Memorialisation efforts aid truth seeking, reparation, justice, and non-recurrence. The memory process during the conflict has a vital role to aid

justice and reparation while in post-conflict situations it supports truth seeking and guarantee of non-recurrence. With regards to ensuring non-recurrence, newer generations must be taught about the violations, its causes, consequences, and attribution without negation or downplaying the extent of atrocities. There must be space for various narratives to co-exist without justifying the need for grave human rights and humanitarian law violations.

In all the case studies discussed above, with the history of authoritarian rule, a systematically constructed version of historical "truth" can be used by the respective Governments to "prolong their violence through official narratives presented as truth" (Lerner Febres 2003, as cited by Grindle and Goodman 2016). In light of this, including compulsory student military training can be seen as a systematic strategy by the States to impart a single, State approved narrative about the conflict. It could lead to a total erasure of the past crimes committed by State and State-actors or could subject the youth to hegemonic control by the State. In the age where more youth are being vocal about their rights and demand accountability of States, this mechanism could silence an entire generation, risk militarisation of civilian population and invite more gross violation of human rights.

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Multinational companies: "The descendants of chartered companies" aka "torchbearers of colonialism"

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Abstract: *This article examines the historical continuity between chartered trading companies and modern day multinational corporations (MNCs), arguing that contemporary corporate structures retain core attributes of their colonial predecessors. Chartered companies, such as the British East India Company, functioned as hybrid entities – merging commerce, governance, and military power – operating with State-like authority while pursuing profit. Despite formal decolonisation, the legacy of these entities persists in MNCs through corporate immunity, regulatory arbitrage, and economic coercion in the Global South. This article explores how MNCs leverage their vast capital and transnational presence to influence policy decisions, exploit labour, and contribute to environmental degradation, particularly in the Global South. Case studies such as Freeport McMoRan Inc.'s operations in West Papua illustrate how MNCs, often in collusion with host Governments, engage in practices that parallel the exploitative and racially hierarchical structures of colonial rule. The article argues that MNCs function as instruments of capitalism in much the same way chartered companies served as instruments of colonialism. By drawing attention to labour exploitation, environmental destruction, and the strategic manipulation of governance structures, it contends that the global economic order remains entrenched in colonial legacies. The discussion underscores the urgent need for stronger regulatory mechanisms to ensure corporate accountability, prevent human rights violations, and dismantle economic structures that sustain post-colonial dependency and inequality.*

Keywords: *business and human rights; neocolonialism; extractive capitalism; multinational companies; human rights abuse.*

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1. Introduction

While analysing multinational companies (MNCs) one is reminded of "Red Riding Hood," a story from children's story books. In the story, a wolf disguises itself as the grandmother of a little girl in an attempt to pounce upon her. This act indicates two things: firstly, the change in clothes does not change the nature of the wolf. A predator will remain a predator irrespective of the change in the form. Secondly, the change in clothes was not an unintentional act but a step towards a well thought out plan of luring the prey by appearing harmless. Similarly, MNCs are the present-day wolves dressed as friendly grandmothers. However, once the veil is lifted, the reality becomes visible. MNCs are essentially modern versions of chartered companies carrying on the ideology of capitalism (modern day colonialism). This article attempts to establish this idea by drawing the link between the traits of MNCs and chartered companies.

In this context, this chapter proceeds on the hypothesis that the substance and structure of MNCs can be traced back to the chartered companies. The nature of operations is extractive mimicking the colonial empires.

In pursuance thereof, the methodology adopted by the author was primarily doctrinal whereby the evolution of the chartered companies was studied in parallel to the MNCs whilst critically analysing the characteristics of the two. The doctrinal research was followed by problem- and policy-based non-doctrinal research to understand the flaws crippling the current capitalistic structure followed by the MNCs. Furthermore, effort was made to conduct the study by resorting to interdisciplinary legal research particularly while examining the operations of Freeport McMoRan, Inc. and the State of Indonesia in West Papua. The reason for picking West Papua as a case study is because it is the perfect example that supports the hypothesis of the article. It shows the MNCs as descendants of chartered companies in the most raw and primal form. Additionally, comparative legal research involved studying the conduct of MNCs in the Global South nations as compared to the Global North.

The article is divided into five parts. Part two lays down a brief understanding of the exploitative nature of chartered companies with special emphasis on the colonial rule of British East India Company (EIC) in India. Part three explores the similarities between MNCs and the chartered companies with relevant examples. Part four is a case study of the nexus between Freeport McMoRan, Inc. and Indonesia in the colonisation of West Papua. Part five is the conclusion that summarises the article.

2. Chartered companies: Vehicles of colonialism

It may be hard to believe but the truth is that "spice," a harmless commodity, played a pivotal role in shaping the world not just in terms of trade but

in determining the fate of nations for years to come (Mishan 2019). It led to the discovery of the trade routes opening up the gates for the Western chartered trading companies to reach the East and South-eastern regions of the world (Hancock 2022). Little could Emperor Jehangir of the Mughal Dynasty of India predict the destruction that would follow with the grant of a simple "*farman*" (license) to the EIC for establishing a factory in Surat (a port place in the western part of India). With such a small request, the EIC made inroads in India as a trading company. EIC was one of many such chartered companies that were ambitiously looking for regions to plunder (Ward 1994, 45–47).

2.1. Birth of the chartered companies

With change in the needs of the population and the prevalence of new philosophies and inventions during and post the Industrial revolution, new forms of economic activities came up. First to emerge were the guild merchants and later the craft guilds (Anderson and Tollison 1982, 1240–43). However, in the sixteenth century, joint-stock companies came into picture (Schmitthoff 1939, 80–90). One of the prime examples of the joint-stock companies were the chartered trading companies. A number of these companies were incorporated essentially and exclusively for overseas trade (Boardman-Weston 2012, 21). Chartered companies were based on monopoly and played a critical role in the rise of commercial capitalism and establishment of colonialism (Carlos and Nicholas 1996, 916). These companies though, organised as private companies, were dependent on the imperial powers of their home country for grant of exclusive trading rights. Around 40 such companies had secured grants of trading monopolies for long-distance trade over many parts of the world (McLean 2004, 363–67). Some of the known companies were EIC, Dutch East India Company, the Royal African Company, and the Hudson Bay Company.

2.2. Identifiable characteristics of the chartered companies

It may be noted that the chartered trading companies were distinct from each other in terms of the stipulations in the charter, the region of operation and incorporation, and size, however, the *modus operandi* and organisational systems were similar.

The primary functions of these chartered companies were capital accumulation and establishment of colonial empires (George 2013, 935-940). Although they would enter a country for trading, later on they would ensure the expansion of the colonial interests of their home country. To achieve the objective, these companies would perform Government-like functions and sometimes act as the Government in these potential colonies. For instance, in India, EIC obtained the rights to collect taxes in the province of Bengal (Marshall 1985, 164–66). There was a gradual

transformation from a trading company to a governing one. There came a time, when the British Government and EIC became almost synonymous in terms of power and the nature of work. The trade was exploitative in nature. The real governing head, the Crown, ensured its rule on the people of India through the EIC and the British officers posted in India. EIC essentially played the role of the facilitator that made the ground fertile enough for the Crown to take over. There was a time when EIC was ruling around one-fifth of the population of the world and earning more than Britain (Ciepley 2013, 139).

The British rule was disastrous for the Indian economy as the Indian continent was robbed of the raw materials like cotton for manufacturing of products in England which were sold at greater prices to the West. Due to mechanisation of production leading to greater quantities of products being produced with cheaper cost of production, the British products completely destroyed the Indian village handicraft industry. The farmers were forced by the British Government to produce only those raw materials that were required for British markets (like indigo), thereby snatching the freedom of the farmers and consequently leading to a decrease in the food production. This economic drain drove the Indian population into poverty and famine (Roy 1987, 39-42). The Great Bengal famine in 1770 was one the worst famines in history wherein ten million Indians died (Mallik 2024, 1–18).

3. Multinational companies – Vehicles of capitalism (cousin of colonialism)

In the late-nineteenth and twentieth centuries the world of politics underwent a change with the formation of new institutions regulating international relations and trade. There were great advances in the technology, transport, and communication sectors. These developments made it imperative for the corporate world to come up with a new system of functioning. It is in these conditions that the MNCs were formed (Stern 2016, 434–38). However, the new international economic order is founded on the cemetery of colonialism with the emergence of MNCs as the successors of chartered companies. Mercantilism was replaced by liberalism which brought in the divide of public and private domain and eliminated the sovereign or sovereign-like powers that the chartered companies were exercising in the sixteenth and seventeenth centuries. However, when viewed from a colonised person's lens, the core ideology of operation of these MNCs is no different than that of the chartered companies.

An MNC is defined as a company which has its headquarters in the home country but has operations in more than one country called the host country. The objective is maximisation of profit through diversification of activities (Köksal 2006, 6-9). MNCs enabled foreign direct investment

by the companies of the former colonisers like Britain and those who benefitted from colonialism like Switzerland. These companies could now engage in international trade with their headquarters in their home countries. MNCs provide transfer of organisational practices from the home country to the host country.

3.1. Neocolonialism, dependency, and capitalism

Additionally, MNCs enable colonialism like their predecessors (chartered companies) in an indirect manner to be in consonance with the "civilised," "developed" world that we presently live in. Social Darwinism (Misra 2003, 141), which was used to justify imperialism, is inherent in the operational schemes of the MNCs. The notion that the companies based in the rich "developed" nations are far superior to the domestic companies in the "developing" or "underdeveloped" countries is what drives the sales and marketing strategies of the MNCs. In the garb of investments and transfer of technology, capitalism is used to maintain the power of the West in the Global South.

In the present times, colonialism is manifesting in the form of capitalism. One can even term it as a form of "neo-colonialism" as MNCs promote economic dependency in the developing countries in order to gain control of the economic and consequently the political structures of these countries. Capitalism ensures that the supremacy of the former colonies is maintained in the developing economies by increasing their dependence on MNCs and in the process is ignorant of the impact of such unrequited exploitation which in many instances leads to infringement of the basic human rights in the host countries.

It is interesting to note that the chartered companies possessed structural and organisational features similar to the present day MNCs. The chartered companies functioned on stock shares and capital that was pooled. The employees were salaried and operated in a hierarchal bureaucratic manner (Erikson and Assenova 2015, 1–3) while making decisions associated with the company. The managers of the trading companies faced issues with coordination with the central authority in the colonising country about production, distribution, and services. The modern day MNCs also face similar issues as the central head is situated miles away in the home country. This similarity of real power lying in the home country and delegated power with the managers in the host country links MNCs to the chartered companies.

Further, the most significant feature that makes it tough to distinguish between the two is the fact that chartered companies were the "prime instrument of colonization" (Bedjaoui 1979, 36) and, thus, were equipped with sovereign-like powers to achieve the goal of establishing the empire of the colonising country. Similarly, the present day MNCs possess enormous

capital enabling the exercise of influence and control in developing economies. As discussed above, the dependency created by these MNCs in the host country makes these companies more powerful than the sovereign Governments of the host country. The headquarters of most MNCs are situated in the former colonising countries, so in effect, these colonisers still wield the real power over their former colonies through capitalism (Bedjaoui 1979, 36–39). Thus, it would not be wrong to conclude that the MNCs are now the "prime instruments of capitalism."

The chartered companies were not just the agents of the colonising State but were the colonisers themselves like EIC in India had the power to take military decisions, impose taxes, enact laws, and adjudicate disputes (Bedjaoui 1979, 36–39). In the same fashion, some of the big MNCs completely influence the political, economic, and administrative decisions in the developing countries where they operate (Sundhya and Saunders 2019, 141–48), like, for instance, Freeport McMoRan, Inc. in West Papua (discussed in the succeeding paragraphs). Alternatively, due to their huge capital, these MNCs tend to resort to intimidation tactics on the developing nations for favourable policies. Philip Morris International, a tobacco giant, filed a lawsuit against the Uruguay Government on the ground that the anti-tobacco policies of the Government were unreasonable and hampered the sale of cigarettes in the country (*Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay* ICSID ARB/10/7).

3.2. Exploitation of labour

Another significant similarity is that the nature of operation of both the MNCs and chartered companies is exploitative and racialised in nature (Mehta n.d., 6–8). The EIC employed the local Indian population as labour for their activities in India. Moreover, some Indian population were forced to work in other colonies of the British empire for EIC. A number of Indians were transported to South Africa, Sri Lanka, or Indonesia by EIC against their will. Forced labour was a characteristic feature of colonialism. As a strategic move, EIC introduced education in India, to provide basic education for the Indians to work as the clerical staff in India, whereas the managerial positions were always exclusively held by the British. The "higher than thou attitude" and "white man's supremacy" underlined such policies. Similarly, the MNCs look towards the Global South as a haven of cheap labour. Exploitation of labour brings down the cost of production for the MNCs which reap profit but at the cost of extreme human rights violations. Nestle admitted to the possibility of indulging in slave trade in the chain of production in Brazilian coffee plantations (Hodal 2016). The news hit the headlines and that is it. There is no accountability or measures of correction taken in this light by Nestle.

As per Principle 11 of the UN Guiding Principles on Business and Human Rights (UNGP), the MNCs are under an obligation to respect

the global human rights regime which includes measures for prevention as well as remediation. Thus, MNCs are bound to follow the eight core conventions of the International Labour Organisation, the Universal Declaration of Human Rights (UDHR, articles 7 and 23), International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966) and the entire established international human rights jurisprudence.

Furthermore, human rights due diligence is the basic responsibility to be carried out by these enterprises under UNGP (UN Guiding Principles on Business and Human Rights 2011, principle 17). However, when companies like GAP or ZARA are ridiculed for engaging in child labour in India (McDougall 2007) or linked to forced labour from Uyghur region and benefitting out of the conflict in the region (Sheffield Hallam University Helena Kennedy Centre for International Justice 2023), it does not produce any meaningful change in the operations of these companies. It is business as usual for them (Muchlinski 2001, 38-39). The clear indifference displayed by most of these MNCs is no different to the chartered companies that engaged in slavery and some of the highest forms of human rights abuse.

While the chartered companies caused economic drain of their colonies, MNCs cause "brain drain." Human resource is an important factor for the development of a nation. However, with the promise of a beautiful life most of these MNCs lure the best of the people from the developing economies to work for them. For instance, a significant population of the Silicon Valley of the United States is composed of Indians. Moreover, major big firms are being led by Indian CEOs for instance Google and Alphabet's Sundar Pichai and Microsoft's Satya Nadella (Gibbs 2014). This brain drain ensures that the emerging economies remain underdeveloped or stagnant in their growth.

3.3. Environmental degradation

Lastly, environmental destruction is a trait that the chartered companies and the MNCs share. Chartered companies in the selfish pursuit of wealth ignored the consequences of such plunder on the environment. The present day issues of climate change and global warming are a result of mindless colonisation and industrialisation. Following the same path, MNCs prefer countries where the environmental laws are lenient. Taking advantage of the poor environmental regulations, European oil trading companies like Trafigura and Vitol export sulphur rich fuel which is beyond the permissible limits in Europe to African countries. This has caused serious health issues in Africa as the "dirty fuel" is the major contributor to respiratory issues (Ross 2016). However, these companies see nothing illegal about the business as they are following the laws. The fact that the ethics of doing business is absent and is primarily driven by profit

irrespective of the damage caused is an ideology of colonialism. Something that is unfit for the European population is considered to be fine for the former colonies. The idea of superiority and inferiority rooted in racism is reflected from the capitalistic mindset. Under the UNGP, the companies have an obligation to respect the internationally recognised human rights (UNGP, principle 12) which is inclusive of the right to a clean environment. Moreover, in several instances the deforestation by MNCs causes adverse impact on the indigenous tribes that are deprived of their livelihoods and often displaced. A classic example of such environmental social injustice is the aluminium refinery project by an Indian MNC Vedanta Ltd. in the Indian State of Orissa which has affected the local tribe, Kondh. The nexus of the State and the MNC ensured that the project got the environmental clearance even though 118 acres of forest land was included in the project (Xaxa 2012, 188).

4. MNC – State nexus: Freeport McMoRan, Inc. and Indonesia in West Papua

4.1. A brief history of West Papua

Freeport McMoRan Inc. (Freeport) is an American mining company that has been a key player in the colonisation of West Papua in modern times. West Papua was previously a colony of the Dutch Government along with Indonesia. While Indonesia became an independent nation in 1949, the Dutch Government intended to declare West Papua as a separate independent State. However, the Indonesian Government claimed its right over the region and thus began an intense conflict between the Dutch Government and Indonesia.

When Indonesia sought the support of Soviet Union against the Dutch, the United States intervened to limit the influence of the communist bloc and brokered peace between the two nations through New York Agreement 1962 whereby the Dutch transferred the region to the United Nations Temporary Executive Authority and thereafter to Indonesia in 1963 without the knowledge of the West Papuans. In accordance with the 1962 Agreement, a referendum was held to decide on the status of West Papua: independent State or part of Indonesia. As the region was under military dictatorship (supported indirectly by the Americans), the Papuans could not exercise free will and the referendum resulted in West Papua becoming a part of Indonesia (HRW 2001, 7).

Soon thereafter, the American MNC, Freeport, entered into a 30-year contract to undertake mining activity in Papua. It is important to note, that under the said contract, Freeport was under no obligation towards the environmental regulations or for that matter the rights of the indigenous landowners (Kusumaryati 2021, 889–90). Freeport's association with the

White House is speculated to be the crucial factor in the securing of such "free-hand" contract (Kusumaryati 2021, 890–94).

4.2. Unhindered exploitation of West Papua

The Freeport's mining range slowly moved towards the Grasberg site which is the world's biggest gold mine and one of the largest copper mines. Freeport has been accused of committing extreme human rights violations in the region since the commencement of mining operations. The Indonesian State is aiding the company in this process with deployment of military power. According to a fact-finding committee, "slow-motion genocide" is being undertaken for decades in West Papua (Catholic Justice and Peace Commission of the Archdiocese of Brisbane 2016, 24). The indigenous population has been subjected to torture with instances of people being picked up by the military in Freeport's vehicles.

Moreover, Freeport is responsible for polluting the Aikjwa river system by releasing around 200,000 tonnes of toxic waste (Schulman 2016). The environmental degradation by destruction of mangroves, fertile lands, rivers, and land grabbing has resulted in forced displacement, loss of livelihood, and poverty of the locals. However, the Company prides in bringing culture and development (Kusumaryati 2021, 889–90) to the region as its largest employer and largest tax payer in Indonesia and declares its resolve to respect human rights in consonance with the UDHR and UNGP (Kusumaryati 2021, 889–90).

Freeport's case is a great example which confirms that MNCs are embodiments of chartered companies. Neo-colonial policies of the Freeport along with the support of the Indonesian Government has snatched away the autonomy, security, right to life, and livelihood of the West Papuans whilst destroying the rivers and forests, and filling the environment with toxic substances, all in pursuit of power and profit. In today's so-called "modern" times, an entire population is being wiped away in the name of capitalism by the capitalist forces. Racism which forms the core of colonialism is evident in this capitalistic venture. The indigenous population is deprived of education and any manner of development to ensure easy exploitation. It is a sad reality that despite the existence of the several international organisations that advocate for human rights and environmental rights, a region is being colonised in broad day light.

The only difference in the West Papua case is that the host country is one of the agents of the modern colonisers. Military power of the Indonesian Government is what facilitates Freeport's ventures. Police power was a major instrument used by EIC to ensure success and continuation of British rule in India. A totalitarian State uses the might of the police to impose its rule on the voiceless people and to suppress the voices of those who dare to fight against the injustice (Ghosh 2017, 31–32). The three pillars of the UDHR, freedom,

equality, and dignity, form the bedrock of human existence. These rights are neither inviolable nor non-derogable. However, the racism intrinsic to the concept of capitalism and colonialism is antithetical to these rights.

5. Conclusion

Although it looks like the world has come a long way since the abolition of colonialism, a close study indicates the contrary. The form may have changed but the nature remains the same. Colonialism and capitalism can be used interchangeably depending on the times one is referring to. The two pre-requisites for the chartered companies to flourish were monopoly and free trade. These pre-requites become equally important for capitalism to spread and sustain itself.

Ideologies require agents to achieve the final goal, and similarly colonialism and capitalism have founded chartered companies and MNCs as the respective agents.

While the chartered companies were a creation of the State and MNCs are creations of the market, the support of the State becomes fundamental for functioning of these companies. MNCs are credited for transferring technology and capital from the West to the emerging economies but the reality is that these companies are gaining more from this association. The cost of production due to the domestic sources and cheap labour and the ease of doing business due to lenient or poor environmental regulations and land regulations which helps the companies to produce more at lesser prices. Moreover, the huge population of these developing nations like India and China provide a great market for the goods produced. Further, the enormous capital that these companies possess vests greater power in MNCs to influence the laws of the land of the host country.

Today, MNCs are not mere corporate players but have a great role in shaping international relations during the times of peace and war. The role of some major MNCs in funding the wars occurring in present times where millions of lives have been murdered in the name of politics and profit cannot be unseen. The influence of the former colonisers along with the MNCs in world politics is immense. In short, the prequel to capitalism and MNCs was colonialism and chartered companies.

Thus, it is pertinent to incorporate the UNGP in the daily operations of the MNCs, more so when operating in the Global South nations. Responsible business and corporate accountability should go deep into every step of the organisation including maintenance of a clean supply chain. To achieve success in this area, the role of both the home State and the host State becomes crucial. Regulations should be brought into force that align businesses with human rights instead of mere national level

frameworks that lack any teeth. Moreover, the global community should come together to reprimand corporations. In extreme situations the States should not hesitate from imposing economic sanctions to contain human rights abuse by MNCs.

Apart from legal measures, the need of the hour is also an evolution of the individual mind. The predominance of excessive greed stemming from the fear of scarcity of resources leads to lack of respect for a living being. It is essential to change this mindset for the success of the legal framework. This change may take centuries or may not ever happen. But hope is what one needs to carry in their hearts to see a world which values life and nature.

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