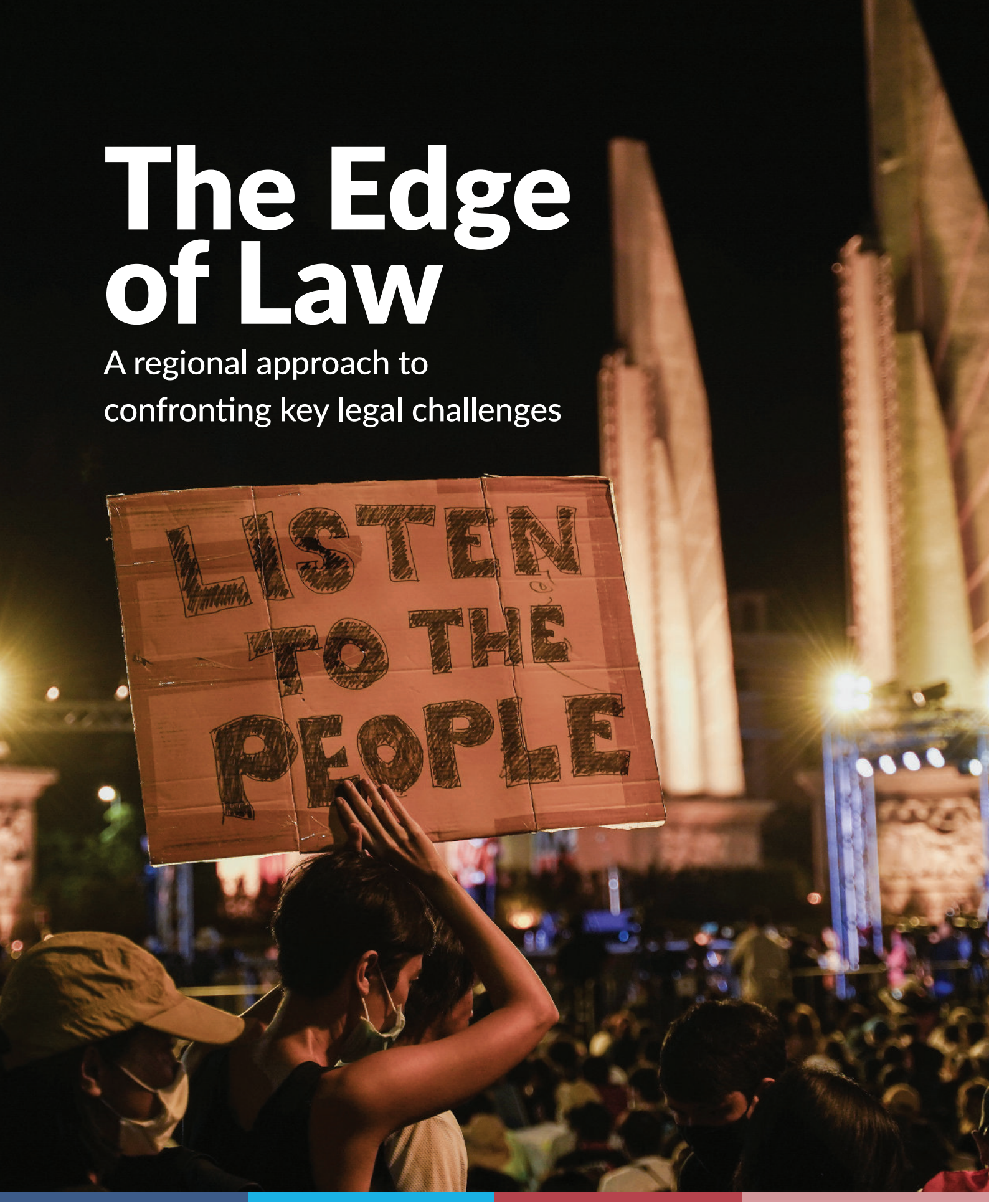
The Edge of Law

A regional approach to confronting key legal challenges



ABA AMERICANBARASSOCIATION
Rule of Law Initiative

BAR HUMAN RIGHTS COMMITTEE OF ENGLAND & WALES

The Edge of Law

A regional approach to confronting key legal challenges

Authors: **Diana Constantinide, Pamela Katz, Dr Louise Loder, Sarah McCoubrey and Beenish Riaz**
Forewords: **Stephen Cragg KC, Dr Felicity Gerry KC, Nighat Dad and Surya Deva**
Editors: **Stephen Cragg KC and Dr Louise Loder**

About the Bar Human Rights Committee of England & Wales

The Bar Human Rights Committee of England and Wales (BHRC) is the independent, international human rights arm of the Bar of England and Wales, working to protect the rights of advocates, judges, and human rights defenders around the world. BHRC is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial. It is independent of the Bar Council.

Our vision is for a world in which human rights are universally protected, through government and state actors' adherence to international law obligations and internationally agreed norms.

Our mission is to protect and promote international human rights through the rule of law, by using the international human rights law expertise of some of the UK's most experienced human rights barristers.

BHRC members are primarily barristers called to the Bar of England and Wales, as well as pupil barristers, legal academics, and law students. Our members include some of the UK's foremost human rights barristers, legal practitioners, and academics.

Our Executive Committee and members offer their services pro bono, alongside their independent legal practices, teaching commitments and legal studies. BHRC is supported by a Project Team of two project officers and a project administrator.

About the American Bar Association Rule of Law Initiative

The ABA Rule of Law Initiative (ABA ROLI) is an international development program that promotes justice, economic opportunity, and human dignity through the rule of law. The ABA established the program in 2007 to consolidate its five overseas rule of law programs, including the Central European and Eurasian Law Initiative (CEELI), which it created in 1990 after the fall of the Berlin Wall.

For more than 25 years, and through their work in more than 100 countries, the ABA Rule of Law Initiative (ABA ROLI) and partners have sought to strengthen legal institutions, to support legal professionals, to foster respect for human rights and to advance public understanding of the law and of citizen rights. In collaboration with in-country partners—including government ministries, judges, lawyers, bar associations, law schools, court administrators, legislatures, and civil society organizations—they design programs that are responsive to local needs and that prioritize sustainable solutions to pressing rule of law challenges. They employ rigorous and innovative monitoring and evaluation approaches in assessing the quality and effectiveness of our programs.

ABA ROLI has roughly 500 professional staff working in the United States and abroad, including a cadre of short- and long-term volunteers and legal specialists, who in fiscal year 2017 alone contributed $1.34 million in pro bono legal assistance. Their Core Principles are:

1. **Partnership.** They employ a highly consultative approach to the delivery of independent, professional technical assistance, working with justice sector colleagues and local stakeholders to develop programs that are responsive to their needs and interests.
2. **Empowerment.** They provide people with the legal information, resources, and assistance to defend their rights, access justice and hold government accountable.
3. **Inclusivity.** They work to eliminate bias and to ensure that marginalized groups have access to justice and public participation.
4. **Universality.** They look to comparative and international law to identify universal standards and global best practices, with the US legal system providing just one of several available models.
5. **Sustainability.** They pursue strategies with lasting impact, including expanding citizen awareness, strengthening local capacity in the governmental and non-governmental sectors, and furthering the professional development of our host country staff, who will become their country's next generation of leaders.

Acknowledgements

The Bar Human Rights Committee of England & Wales wishes to acknowledge the exceptional efforts of all *Edge of Law* speakers, rapporteurs, participants, and organisational and institutional partners who supported the series and actively contributed to its success by generously offering their expertise, time, and support to the production of the four virtual dialogues and to the creation of this report.

We wish to thank our partners in this initiative, the American Bar Association Rule of Law Initiative, for their close co-operation in the planning and implementation of this ambitious project. We also thank the Bar Council and the Commonwealth Lawyers Association for their valued support for BHRC's participant outreach for each of the four virtual dialogues in the *Edge of Law* initiative and all their ongoing support of BHRC's international advocacy.

In particular, BHRC would like to thank the UK Foreign, Commonwealth and Development Office (FCDO) for its generous support and funding that made the *Edge of Law* project possible.

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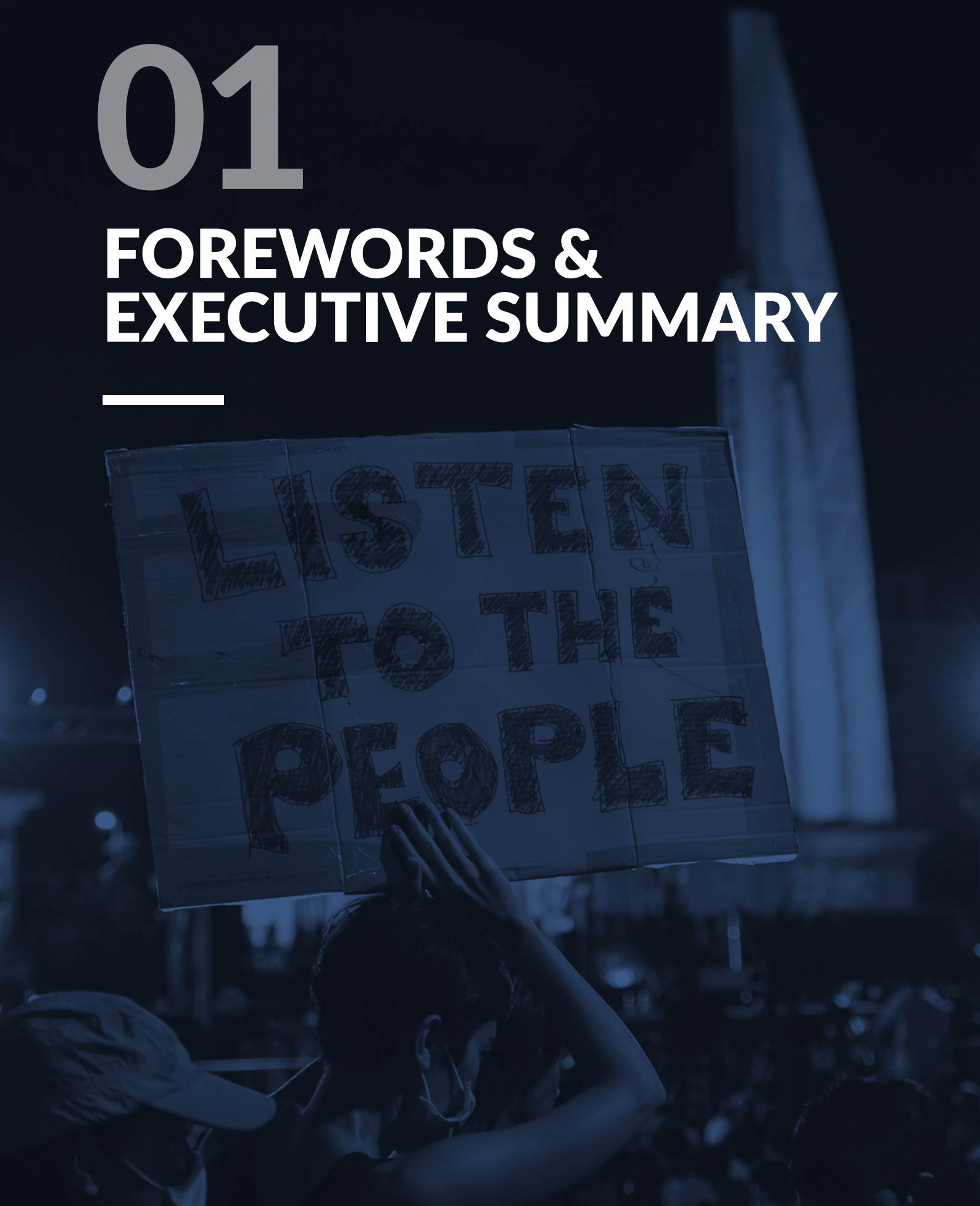

1.1 Introduction by Stephen Cragg KC

CHAIR OF THE BAR HUMAN RIGHTS COMMITTEE

As Chair of the Bar Human Rights Committee of England & Wales (BHRC), I am proud to present this report further to the conclusion of *The Edge of Law: A regional approach to confronting key legal challenges*, a major advocacy project on which we are proud to have partnered with the American Bar Association Rule of Law Initiative (ABA ROLI).

The *Edge of Law* was a path-breaking series of virtual dialogues hosted by BHRC and ABA ROLI between November 2021 and March 2022, addressing specific dimensions of forced labour/modern slavery, sanctions, data security/digital privacy, and judicial independence in Asia, with discussions designed to speak to the overarching question: *What is the role of the legal profession in protecting human rights and the Rule of Law?*

Chaired alternately by a senior representative of BHRC and ABA ROLI, each of the virtual dialogues were designed to conclude with solid, actionable steps that participants and other stakeholders can import into regional law practice and policymaking. For each event, we invited speakers from and based in Asia, Australia, the UK, Canada, and the US. All speakers were experts in their fields and addressed human rights concerns in Asia, with a focus on international law and the rule of law. Our discussions were highly interactive in nature and exceptionally well-attended by members of the legal profession, regional Bar Associations and Law Societies, the judiciary, civil society and NGO representatives, human rights defenders, writers, and academics.

From within the region, I am proud to share that we welcomed participants from Bangladesh, Cambodia, China, Hong Kong, India, Indonesia, Japan, Malaysia, Myanmar, Nepal, Pakistan, Singapore, Sri Lanka, South Korea, Thailand, and Viet Nam. From the wider international community, participants logged in from Australia, Austria, Belgium, Fiji, Germany, Jordan, Lebanon, Malawi, the Netherlands, Papua New Guinea, Poland, Spain, the Solomon Islands, South Africa, Switzerland, Turkey, the United Kingdom, the United States, and the Zambia.

This key report, which synthesises the observations, challenges and opportunities that emerged from our *Edge of Law* discussions, generates a decisive blueprint for practitioner-led action and empowerment in the region. The recommendations that are annexed to this report are a distillation of the rich analysis of our rapporteurs and report authors, woven throughout the sections of this work.

Through these events, BHRC and ABA ROLI sought to create a regional platform where practitioners, academics, civil society actors and policymakers could openly discuss some of the most acute challenges to the rule of law in Asia, contributing to and building regional consensus on the human rights realities in Hong Kong, China, India, and other Central and Southeast Asian countries.

These are all countries where BHRC has heavily focused its global advocacy in recent years. We have developed strong expertise and exceptional relationships on the ground amidst the escalating persecution of human rights practitioners and defenders, and in light of an increasingly febrile climate affecting human rights and rule of law issues in the region. BHRC's work in East and Central Asia in recent years, for example, has focused on allegations of atrocity crimes in Xinjiang and on the swift and severe clampdown on political and democratic freedoms in Hong Kong, as well as on Chinese human rights lawyers who continue to face a bleak crackdown. Throughout the region, countries are suffering from acute human rights crises and substantial rule of law concerns. Many of these have been exacerbated by the pandemic, with increasing incidences of arbitrary detention of political prisoners without due process, clampdowns on civil society, attacks on the right to peaceful assembly, the freedom of expression and information, and the insidious rise of digital authoritarianism.

In all our work, BHRC aims to use our significant legal expertise to build capacity for legal practitioners and human rights defenders on the ground. Our goals are to provide them with the necessary training and support, to monitor human rights violations, conduct trial observations and international fact-finding investigations and research, promote the rule of law and human rights through public events, and assist individuals and groups to hold states accountable for abusive practices. The *Edge of Law* series has enabled us to maintain our engagement within the region, working in solidarity with our regional and international counterparts in finding solutions to significant human rights challenges.

1.2 Introduction by the American Bar Association Rule of Law Initiative

The American Bar Association Rule of Law Initiative is pleased to have cooperated with the Bar Human Rights Committee of England and Wales in presenting *The Edge of Law: A regional approach to confronting key legal challenges*. Now more than ever, with fundamental freedoms and democratic norms under attack across the globe, the legal community has a responsibility to do everything in our power to push back against this trend and protect the rule of law.

During the pandemic, the world stayed home. In many cases, we lost vital connections with one another, missing the opportunity to share our ideas, experiences, and worries. Authoritarianism backed by governments, on the other hand, continued to march on, as governments took advantage of the pandemic to exert greater executive authority. Challenges to rule of law norms progressed, but the international legal community was growing more isolated; as the pandemic wore on, it became increasingly critical to find ways to bring lawyers together across borders.

The *Edge of Law* and other series like it sought to address these issues by providing a digital platform for lawyers across Asia and the Pacific to not only discuss the challenges our legal systems face, but more importantly, to consider potential solutions to those challenges and better understand the role the legal profession has in protecting democratic norms. Through four discussions over the course of four months, lawyers from China to Fiji and Sri Lanka to Japan met to hear from experts in different subject areas and participate in those conversations.

In this white paper, you will see the results of those discussions. Led by experts in their field, lawyers across the region considered what role the legal profession has in combatting forced labour; how the legal profession can inform effective sanctions regimes to push back against creeping authoritarianism; the need for better protection of digital privacy rights; and the critical importance of an independent judiciary. Although not all discussants agreed, the participants asked critical questions, probing issues like the ways in which Hong Kong's National Security Law undermines judicial independence, and whether a blunt instrument like sanctions could be an effective tool to change government actions. The recommendations from these discussions provide potential action points for lawyers and bar associations in the Asia-Pacific region and beyond to confront these critical issues.

Just as important as the recommendations for action that arose from the discussion is the platform these discussions created. Lawyers from across the region face similar challenges; building a network of lawyers committed to upholding the rule of law and protecting human rights is critical to strengthening the global response to authoritarianism. The *Edge of Law* project sought to do just that—bring together lawyers from diverse countries to virtually connect with one another in a network of active discussion and consideration of the fundamental question: How does the legal profession uphold the rule of law and protect human rights?

The *Edge of Law* project sought to bring together lawyers from diverse countries to virtually connect with one another in a network of active discussion and consideration of the fundamental question: How does the legal profession uphold the rule of law and protect human rights?

This question is at the core of the mission of ABA ROLI as we seek to support the rule of law both at home in the United States and abroad. In our work, we have had the opportunity to connect with bar associations, legal clinics, and lawyers acting as human rights defenders; a critical part of our mission is to support individuals and organisations as they demand protection for democratic governance and human rights. Building networks that cross borders, finding common solutions, and supporting action are ABA ROLI's priorities, and we are pleased to have been able to work with the Bar Human Rights Committee to implement them through this discussion series.

We hope that, in reading this report, the role of the legal profession in addressing the critical rule of law and human rights challenges becomes clear. This report will provide the reader—and the legal profession at large—with recommendations and guidelines for what to do to combat rising authoritarianism, but this report is only the first word, not the last. We hope that the ideas contained in this report spark thought, debate, and action in the legal and human rights communities, and we hope that you, the reader, continue to engage with the ideas herein.

1.3 Introduction by Surya Deva

PROFESSOR, MACQUARIE LAW SCHOOL, MACQUARIE UNIVERSITY, AUSTRALIA

It gives me a great pleasure to write a foreword to this report, which grapples with some of the major challenges to human rights, the rule of law and democracy experienced in Asia and, indeed, across the world.

The report draws upon virtual dialogues among various experts around four themes: forced labour and modern slavery, sanctions, data security and digital privacy, and judicial independence. I had the opportunity to participate in a virtual roundtable on the first theme and share some thoughts about the responsibility of different actors – from states to corporations, investors, law firms and business consultants – in eliminating forced labour and modern slavery in Asia.

The four themes may appear disconnected on the first glance. However, one may note close connections on a deeper reflection. For example, many of the sanctions – whether the Magnitsky-style or import bans – have been introduced as a response to credible allegations of forced labour, modern slavery, and digital surveillance of ethnic minorities. Similarly, while new technologies could be used to combat modern slavery, they also raise serious concerns about privacy, informed consent, and autonomy of data subjects. Moreover, judicial independence is critical to address labour rights abuses as well as breaches of privacy, or even adjudicate disputes related to the imposition of sanctions.

It is arguable that challenges depicted by the four thematic issues are rooted in systemic governance deficits in Asia. Modern slavery, for instance, is the result of multiple social, political, cultural, economic, and legal factors such as poverty, inequality, discrimination, corruption, conflicts, power asymmetries, absence of independent trade unions, shrinking civic space, weak rule of law and lack of effective regulatory regimes. The COVID-19 pandemic has exposed some of these vulnerabilities, experienced in particular by children, women, migrant workers, and those being part of the informal economy. We can also see mass protests in recent years across Asia in the wider context of people coming out on streets to stand up for human rights, the rule of law and democracy. These people protested in large numbers and for long periods because democratic channels to raise grievances and address legitimate concerns either do not exist or have become dysfunctional.

Overcoming these challenges would require structural changes in the existing relation between individuals, states, and businesses. In this context, the Western sanctions to address human and labour rights abuses (or to promote the rule of law generally) in Asia should only be seen as an interim and reactive tool with limited potential. The value of targeted sanctions lies in pressurising key decision makers to change course and sending a message of solidarity for people fighting to defend human rights and democratic values. At the same time, such sanctions face risks of being labelled as politically expedient and selective. Therefore, additional tools should be employed to support human rights movements in Asia. These may include raising awareness, empowering social movements, building capacity of human rights defenders, creating cross-border networks, and facilitating peer learning as to what works in Asian conditions. Translating international standards to local realities, with help from experts from the Global South, will also be critical.

The value of targeted sanctions lies in pressurising key decision makers to change course and sending a message of solidarity for people fighting to defend human rights and democratic values. At the same time, such sanctions face risks of being labelled as politically expedient and selective.

Moreover, focusing merely on the conduct of states and government officials will not suffice, as business enterprises are often at the heart of challenges related to forced labour, modern slavery, and data surveillance. Private actors may also help in bypassing sanctions or undermine judicial independence by bribing judges. In some cases, the close state-business nexus may make it difficult to decipher the role played by state agencies and private actors. Therefore, a multi-prong approach is needed to influence the corporate behaviour: businesses are often part of the problem, but they could also become part of the solution. Apart from leveraging the role of market forces, legally binding rules are needed at national, regional, and international levels to set expectations for businesses. The hardening of soft international standards, such as the UN Guiding Principles on Business and Human Rights, especially in Europe offers some hope in this context to send a clear signal to private actors to make "profit with principles".

Another common thread of various challenges discussed in this report – e.g., modern slavery, data privacy and sanctions – is that they involve a cross-border dimension. This means that even if these challenges are unfolding in Asia, there is a role for non-Asian states, businesses, lawyers, trade unions, academia, and civil society organisations to play a role in supporting the quest to create a rule of law society in Asia. Promoting human rights is after all a collective global project. Multistakeholder collaborations among actors from different world regions are therefore essential.

Finally, access to remedy and accountability is central to the rule of law. While access to remedy could be obtained by a range of non-judicial mechanisms as well as by resorting to alternative dispute resolution, judicial institutions are the bedrock of the entire justice ecosystem. However, unless courts are independent, well-resourced, and functional, they could hardly fulfil their role as the guardian of constitutionalism in society. Judges should not only enjoy external and internal independence but also be well-versed with new technological and legal developments. Only then, they would be able to defend the rule of law. In this context, institutionalised dialogues among judges in Asia and other regions of the world would be vital to enhance peer learning and build a reciprocal support system.

Let me conclude by commending the Bar Human Rights Committee of England and Wales and the American Bar Association's Rule of Law Initiative for joining hands for this project. The resultant report is important not only in terms of its focus but also in terms of its methodology to develop actionable recommendations for states, businesses, and other actors in building a rule of law society in Asia.

1.4 Introduction by Nighat Dad

EXECUTIVE DIRECTOR, DIGITAL RIGHTS FOUNDATION, PAKISTAN & MEMBER OF THE OVERSIGHT BOARD

This report, part of the *Edge of Law*'series, brings together important perspectives on a wide range of topics that require urgent attention from lawyers, the judiciary, and policymakers. The breadth of topics covered by this report ranges from international law concerns, emerging issues such as data privacy to more conventional subjects such as judicial independence that concerned jurists for a long time. What binds these disparate topics is the critical and urgent perspectives captured in the conversations, providing a canvas for future interventions and discussions.

As a participant in the panel series myself, the bringing together of experts to discuss these crucial topics was pivotal not only for the exchange of ideas but also a deep dive into these important topics from a legal perspective. Looking at structural social and economic phenomena such as forced modern slavery, and the way it manifests in Asia, allows us to unpack how this and other complex issues can be dealt with by the law. Labour issues in countries in the Global South, including Asia, are tied to larger issues of global capital. Therefore, adequate legal interventions require a nuanced approach that brings together legal protections and accountability mechanisms along the supply chain along with human rights standards captured in documents such as the UN Guiding Principles on Business and Human Rights (the UNGPs) and the OECD Due Diligence Guidance for Responsible Business Conduct.

The issue of targeted sanctions is perhaps foremost in international law in an increasingly contentious world order, with authoritarian governments emerging with worsening human rights records and often operating with impunity. Targeted sanctions under the relatively nascent Global Magnitsky framework are a good starting point but one cannot help but notice that sanctions are exclusively applied in a unilateral manner against 'non-Western' governments and officials, creating the impression that this tool of international law is a US-centric one.

There is a need to open up the framework by taking measures to make the process of imposing targeted sanctions more participatory in order to ensure legitimacy of the process, but also fairness in application. Inclusion of civil society organisations in the process is a start but needs to be institutionalised in order to be effective at a structural level. There is a dire need to address the perception of 'double standards' when it comes to the use of

sanctions to prevent it from becoming a blunt instrument for achieving foreign policy objectives rather than a tool to ensure international human rights compliance.

Furthermore, the scope of targeted sanctions requires broadening to include accountability for digital rights violations. Recently, US lawmakers have rightly called for the imposition of sanctions against Israeli spyware firm NSO Group and other companies for their role in abetting surveillance practices by authoritarian governments. Lastly, the Global Magnitsky Act is set to expire by the end of 2022, which would be a good opportunity for renewal and re-examination of its processes to make it more participatory.

Coming to the subject of data privacy, this is an exciting time to be examining these issues as laws and regulations regarding digital privacy are relatively new, rapidly evolving, and responding to emerging issues. Many legislators have proposed laws that are in the process of being drafted or honed. This also presents a challenge as we do not have a longitudinal perspective on these laws.

As the conversations for this series point out, the focus on Chinese militarisation of daily life –the blurring of lines between the civic and military space – is a trend we have seen across Asia. Thus, the language of security is used to construct laws around militaristic anxieties using the prism of national security to ensure data privacy, rather than centering on human rights. Furthermore, technologies allowing for unprecedented levels of surveillance and data processing has created calls for regulation of the cross-border exchange of this technology. In 2019, the UN Special Rapporteur on Freedom of Opinion and Expression made a call for an immediate moratorium on the sale and transfer of surveillance technologies until international mechanisms based on human rights safeguards were developed and adapted. Lastly, another emerging issue in Asia to signpost is the trend towards data localisation, or data nationalism, whereby individual countries develop bespoke data oversight systems. This is concerning given that many countries in the region lack adequate data protection laws and practices in place to support such proposals. These calls for localisation also point towards a fragmentation of the internet and its regulation, further complicating an already complicated legal landscape.

The issues regarding judicial independence highlighted here date back to foundational debates regarding constitutionalism and democracy. Framed in a contemporary light, the report points out issues of separation of powers, appointment and removal of judges and confidence in the judiciary which require larger institutional reforms and changing of democratic norms.

Furthermore, emerging challenges faced by the judiciary in relation to technology issues require careful consideration particularly in Asian contexts. Speaking from experience in Pakistan, the judiciary is slow to adapt to emerging technologies, often resistant to changes. There is a dire need for education of the judiciary regarding technologies, particularly technological issues such as Artificial Intelligence, Machine Learning, and automated decision making if they are to be considered equipped to make human rights-based interventions regarding the use and potential misuse of these technologies.

My hope is that this report is the starting point for larger conversations and exchange of ideas. When speaking from a legal perspective, particularly regarding issues such as judicial independence, we often invoke concepts such as 'objectivity' as placeholders for fairness, justice, and rule of law.

My hope is that this report is the starting point for larger conversations and exchange of ideas. When speaking from a legal perspective, particularly regarding issues such as judicial independence, we often invoke concepts such as 'objectivity' as placeholders for fairness, justice, and rule of law. However, it is hoped that this quest for objectivity does not mean that the law is blind to subjective experiences such as those of women, gender minorities and marginalised communities who are most often found on the '*edge of law*' and the legal system. We must take them from the edge to the centre of our conversations.

1.5 Executive Summary by Felicity Gerry KC

LEADING INTERNATIONAL LAW PRACTITIONER AND PROFESSOR OF LEGAL PRACTICE

This report draws on virtual dialogues between experts at events co-hosted by the Bar Human Rights Committee of England and Wales (BHRC) and the American Bar Association Rule of Law Institute (ABA ROLI) between November 2021 and March 2022. It focuses on some of the most acute challenges to the rule of law in Asia / Asia Pacific region which has been a key area of global advocacy. It looks beyond law to guidance and knowledge of broader factors in the most modern of challenges in justice systems, hence the *Edge of Law* title. The recommendations are designed to be participatory and inclusive and actionable by lawyers, the judiciary, and policymakers. Introduced by Stephen Cragg KC, Surya Deva, and Nighat Dad, the four core themes of the BHRC / ABA ROLI virtual dialogues are explored in this report:

- **Forced labour and modern slavery**
- **Sanctions**
- **Data security and digital privacy; and**
- **Judicial independence.**

Cross border and cross jurisdictional collaboration are key themes along with commitments to transparency and accessibility, treating the Global North and the Global South equally and developing expertise and appreciation for the cultural differences across the Asia/Asia Pacific region. The key takeaway across all four issues is the vital role lawyers play in addressing autocracy and strengthening the rule of law and the need to recognise and protect lawyers as human rights defenders.

On causes and solutions to forced labour and modern slavery, **Pamela Katz** describes how the political climate, deterioration of democracy and aggrandizement of Executive power allows such exploitations to flourish. Katz highlights the role of the legal profession to develop, assess and evaluate regional and international instruments and domestic responses to understand what is working and what is not. The American Bar Association Business Law Section model contract clauses help buyers and suppliers redesign their contracts to better protect human rights in their supply chains Katz notes from the virtual events that 'black letter law' is no longer enough to give complete advice to corporate clients but, whilst business lawyers need to blend the promotion of human rights with the interest of corporate clients, this can create a clash with professional standards. Recommendations on forced labour and modern slavery include:

- **Strengthening training and learning for lawyers and judges.**
- **Drafting accessible and usable guidance on forced labor and modern slavery.**
- **Working with corporate clients and colleagues in bar associations to adopt human rights-focused contractual obligations and eliminating the silos in corporate structures.**
- **Working within bar associations to push for domestic laws that mandate core human rights obligations.**
- **Using litigation to bring meaningful change under domestic law.**
- **Developing guidance about ways for lawyers to overcome clashes between professional standards, interests of corporate clients and social justice considerations.**

Beenish Riaz discusses the virtual fora in the context of sanctions regimes. Sanctions have become an important tool to promote the rule of law and hold perpetrators accountable for violations of established norms. Noting that several countries have enacted Magnitsky-style laws following the US model, Riaz relates examples of some effects across Asia / Asia Pacific region which reveal that sanctions have possibilities but also limitations. Enforcement differs from country to country and rely on private persons or companies to comply. Sanctions form part of a 'compliance mesh' at the centre of risks that businesses evaluate when deciding where to invest and who to do business with. Lawyers play a critical role in advising on compliance with sanctions programmes and play an essential role in promotion and reform of sanctions, collecting evidence and assuring enforcement and compliance. Key recommendations on the use of sanctions include:

- **Governments should ensure sanctions are fair and flexible.**
- **Civil society plays a core role in promoting draft legislation and facilitating sanctions programmes and identifying potential individuals to sanction. Lawyers can provide pro bono assistance to civil society actors.**
- **Civil society actors should also both look to reflect the voices of the local affected communities and build relationships of trust with state officials.**
- **Bar Associations can take steps to share ideas for reform and innovation, enabling discussion and providing oversight.**
- **Lawyers can ensure that corporate clients achieve compliance with sanctions.**
- **Bar Associations can play a particularly strong role in defending lawyers and human rights activists and call for the removal of sanctions that are against the rule of law and human rights.**

Acknowledging nuanced cultural understanding and jurisdictional differences, **Sarah McCoubrey** then considers the tension between state interests and individual rights on data security and digital privacy in the Asia / Asia Pacific region, particularly inconsistent corporate compliance. The fora brought together three distinct perspectives – civil society, commercial interests, and national security on the implications of current and emerging privacy issues. The speakers examined resource and environmental implications, power imbalances and data handling practices, enforcement mechanisms and emerging technologies. As data protection and digital privacy continues to evolve, lawyers and Bar associations can play important roles. Key recommendations on the data and privacy issues include the following:

- **Building understanding, influencing data protection and digital privacy policy, drafting legislation and privacy policies as well as corporate legal advice.**
- **Bar Associations can do more to identify the need for professional upgrading and should actively participate in consultations to bring a rigorous privacy protection perspective to legislation or policy development.**
- **Working to improve data protections and digital privacy, recognising common ground, and finding ways to strengthen those commonalities.**
- **Putting the United Nations International Human Rights Framework at the centre of drafting and interpreting privacy and data protection frameworks.**

Finally, **Diana Constantinide** and **Louise Loder** discuss the importance of judicial integrity, independence, and impartiality in building a rule of law society in the region. The Asia / Asia Pacific region lacks binding regional instruments, enforcement or supervisory mechanisms and lacks reporting procedures. Countries in the Asia / Asia Pacific region have not established a Judicial Council or similar independent institution. This gives rise to serious concerns that core values identified in the Bangalore Principles of Judicial Conduct are not being observed. Constantinide describes the 'broad sweep' of the judiciaries in the Asia / Asia Pacific region which reveals a 'chequered story', and presenters noted the World Economic Forum report that countries with poor human rights and democracy records have low judicial freedom. Reforms to the judicial appointment process, removal mechanisms, a codification of judicial ethical behavior and conduct were deemed necessary, particularly in relation to the use of technology and to progress diversity with training to call out gender discrimination within courts. The role of professional bodies, such as Bar councils, and international organisations are expressed valuable in keeping a check on the erosion of judicial independence. Key recommendations include:

- **Strengthening regional bodies.**
- **Taking steps to ensure that international rules and standards aimed at dealing with the issues of judicial independence are integrated into domestic law and applied by domestic courts.**
- **Tackling corruption, sextortion, and diversity.**
- **Codification of judicial ethical behavior and conduct.**
- **Strengthening judicial roles in technological change**
- **Engaging judges in the evolution of the courts and to value the role of judicial leadership.**
- **Bar Associations to monitor these issues and contribute to progress.**

02

CONFRONTING FORCED LABOUR AND MODERN SLAVERY IN ASIA

Pamela Katz JD

PROFESSOR EMERITA OF POLITICAL SCIENCE AND LEGAL STUDIES, RUSSELL SAGE COLLEGE (NEW YORK), USA

2.1 Introduction

Forced labour (FL) and modern slavery (MS) (collectively, FL/MS) includes work or service exacted from any person, involuntarily[1]. It is a worldwide problem that "threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values" expounded in international human right law[2]. And, in Asia, the problem is particularly pressing, as over 65% of the Asian workforce is in the informal economy[3] and the Global Slavery Index shows that 62% of the people trapped in FL/MS are in the Asia Pacific region[4], with the International Labour Organization (ILO) estimating that number to be about 11 million people[5]. And yet, most Asian countries do not recognize FL/MS in their domestic law[6].

There are multiple contributing factors to the problem of FL/MS within Asia. Asia is diverse and the complexities of each country's particular social, political, cultural, and economic landscapes mean that there are different causes, effects, breakdowns, and failures as well as different solutions. Even within nations, the differences across industries and businesses and vertically within industries and businesses make it hard for there to be one solution to this intractable problem[7]. As Surya Deva put it: "Forced labour and modern slavery is part of both the formal and informal economy across all sectors of production, manufacturing and service (including sexual services)"[8]. The problem is not just visible in the big multinational companies, but in agriculture, small shops, and businesses as well. It is important to note that while FL/MS victims are mostly in Asia, they are linked to corporate actors outside of Asia, due to supply chains and globalisation. Therefore, there needs to be a combination of international, regional, domestic law and policy and soft efforts to steer this human rights issue in the right direction[9].

Significant too are the governance issues in some Asian countries that exacerbate the problem of FL/MS and undermine efforts to ameliorate it, including weak rule of law structures, lack of effective judicial systems, poverty, inequality, discrimination, corruption, conflicts, and authoritarian regimes[10]. In some countries, such as China, the authoritarianism is clear and complete, and includes the harassment of the opposition, the hollowing of accountability mechanisms, the public framing of opposition as an enemy of the people and, above all, the aggrandisement of executive power. In others, the transformation of democratic systems towards authoritarianism is less easy to grasp; it is more a process of deterioration that occurs within the rules of the democratic system itself, a more subtle form of power grab where the rule of law is distorted and used instrumentally to consolidate power and move away from dispersed power centres. As a result, the political process retreats from citizens and makes participation in it more restrictive. These realities make it hard to regulate FL/MS because the space for unions and civil society is so small, and the power imbalances so great[11].

With this in mind, in this session we explored the legal framework which seeks to control FL/MS and current challenges. We highlighted the role of the legal profession to develop and implement solutions and engage in ongoing assessment and evaluation of what is working and what is not, including unintended consequences of domestic, regional, international, and soft law and policy. The three panel presenters surveyed the same issue from different angles, including the role of businesses, law firms and legal consultants to work with policymakers and business clients and within bar associations and in court, using representation, lobbying and litigation to bring meaningful change.

1 P. Chandran, BHRC x ABA ROLI Virtual Dialogue Session 1, Nov 10, 2021
2 *Chowdury and Others v Greece,* Application No. 21884/15, 30 March 2017, para. 93, p. 30.
3 S. Jolly, Conference Chair. BHRC x ABA ROLI Virtual Dialogue Session 1, Nov 10, 2021.
4 S. Deva, BHRC x ABA ROLI Virtual Dialogue Session 1, Nov 10, 2021, citing to Global Slavery Index, *https://www.globalslaveryindex.org/*
5 Ibid. Bangladesh is highest among them in the Global Slavery Index of 198 countries. Jolly, BHRC Dialogue.
6 Chandran, BHRC Dialogue
7 Deva, BHRC Dialogue
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.

2.2 Legal Frameworks and Current Challenges

Several international conventions, treaties, protocols, and statements seek to address the problem of FL/MS and human trafficking, either directly or through standards for the domestic law of signatories[12]. Litigation in international and domestic forums generate court decisions that refine and enforce the principles of enacted law and direct and deter non-litigants, including businesses. Soft law – including international standards guiding businesses seeking to align with human rights norms and expectations – and private law, as well as the growing environment and social, governance (ESG) movement in business and industry all contribute to the legal framework currently addressing FL/MS in Asia[13].

2.2.1 International Law Treaties and Conventions

A. The 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the 'Palermo Protocol') prohibits FL/MS and requires state parties to adopt legislative and other measures to criminalise trafficking[14], provide assistance and protection to its victims[15], and establish policies to prevent and combat the practice[16]. There are other goals and principles - some aspirational - making the Palermo Protocol a widely cited source of FL/MS law. Its definition section of trafficking is broad and includes FL/MS: "For the purposes of this Protocol: (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, or practices similar to slavery, servitude or the removal of organs"[17].

Additionally, the Palermo Protocol has been interpreted to enforce the non-punishment principle, which means that victims of FL/MS must be provided with protection, not punishment, for their unlawful acts arising as a direct consequence of their trafficking[18]. The Office of the United Nations High Commissioner for Human Rights (OHCHR) Guidelines thereto recognise that human trafficking could be aimed at the exploitation of the victims' involvement in unlawful activities. It also accepts that victims might incidentally commit unlawful acts, such as illegal entry into a country, in the context of their status as trafficking victims. Correspondingly, the OHCHR guidelines caution that the actions of law enforcement agencies involved in trafficking investigations must never take place at the expense of victim's rights, and that law enforcement efforts must not place trafficked persons at risk of being punished for offences committed as a consequence of their situation[19].

B. The European Convention on Human Rights (formally, the Convention for the Protection of Human Rights and Fundamental Freedoms, 'ECHR') holds that "No one shall be held in slavery or servitude ...[or] be required to perform forced or compulsory labour"[20]. However, this provision fails to provide a definition of what forced or compulsory labour *is*, only what it *excludes*. Nevertheless, it has been interpreted broadly by the European Court of Human Rights (ECtHR) so that forced labour is considered a form of exploitation subsumed by the definition of trafficking [21].

12 This section will include only those presented at the Dialogue and referenced in the notes provided by the speakers. It is not intended to be a complete or comprehensive accounting of international or domestic law on FL/MS.

13 D. Snyder, BHRC x ABA ROLI Virtual Dialogue Session 1, Nov 10, 2021

14 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo, 15 November 2000) (entered into force 25 December 2003), Article 5.

15 Ibid. Article 6.

16 Ibid. Article 9.

17 Ibid. Article 3 (a)

18 Office of the United Nations High Commissioner for Human Rights (OHCHR), Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1), principle 7. ("Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.")

19 Ibid. See also S. Mullally, Report presented to the UN Human Rights Council: "Implementation of the non-punishment principle", A/HRC/47/34 - June 21- July 9, 2021, referred to Chandran, BHRC Dialogue. The Association of Southeast Asian Nations Convention against Trafficking in Persons, Especially Women and Children (Kuala Lumpur, 22 November 2015) (entered into force 8 March 2016) closely follows the language of the Palermo Protocol. It was not mentioned or discussed during the BHRC Dialogue but was referenced in a reading linked from Chandran's synopsis.

20 Council of Europe, European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended, section I, Article 4.

21 Chandran, BHRC Dialogue

In the landmark case of *Chowdury et al v Greece*, the ECtHR found that the ECHR's Article 4(2) imposes on states positive obligations to prohibit slavery, servitude, forced and compulsory labour, and human trafficking and enforced these duties[22]. The positive obligations found and enforced include the requirement that contracting States have the obligation to provide an appropriate legal and regulatory framework for the criminalisation of FL/MS, operational measures for the prevention of the same, and the protection of victims' rights, including effective investigation and judicial procedures[23].

Chowdury involved undocumented and mistreated Bangladeshi workers in Greece. The ECtHR found that Greece had complied with the positive obligation to put in place a legislative framework to combat human trafficking as the Greek Constitution prohibited compulsory labour (Art 22, section 3), and relevant provisions of the Criminal Code did the same[24]. However, the ECtHR held "that the operational measures taken by the [Greek] authorities were not sufficient to prevent human trafficking or to protect the applicants from the treatment to which they were subjected"[25]. Additionally, Greece failed in its "procedural obligation to guarantee an effective investigation and judicial procedure in respect of the situations of human trafficking and forced labour complained of by these applicants"[26].

Further contributing to and expanding the interpretation of the definition of FL/MS, the ECtHR in *Chowdury* explicitly found that there is no need for restriction of movement of the victim in human trafficking and forced labour cases[27]. In *Chowdury,* the domestic Greek court found that since the workers were able to leave, their employers had not engaged in FL/MS[28], but the ECtHR found otherwise: "The relevant form of restriction relates not to the provision of the work itself but rather to certain aspects of the life of the victim of a situation in breach of Article 4 of the Convention, and in particular to a situation of servitude"[29]. In other words, trafficking may exist despite a victim's freedom of movement.

Importantly, Article 4 of the ECHR has been found to incorporate the non-punishment principle in the 2021 landmark decision of *VCL and AN v United Kingdom*. This case involved the trafficking of migrant Vietnamese children for cannabis cultivation in the UK[30]. In VCL, the ECtHR found that domestic authorities violated the ECHR by failing to take operational measures to protect minors, despite a credible suspicion that the minors were victims of human trafficking. Additionally, the court found that the State's failure to investigate the applicants' status as potential trafficking victims affected fairness of criminal proceedings brought against the victims. The court's decision noted that the victims' attorneys should have been alert to indicators of trafficking and were not, but that his failure doesn't absolve the State and its agents in their responsibility under the ECHR, where they are under a positive obligation to protect victims and investigate potential trafficking[31].

C. The International Labour Organization Protocol of 2014 to the Forced Labour Convention 1930 (the "ILO Protocol") confirms the right to remedies for victims of forced labour: "Each Member shall ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation"[32]. It includes strict legal obligations not only to criminalise and prosecute FL, but also take prevention measures to ensure effective remedies[33]. The ILO Protocol uses the broad definition of FL from the of ILO Forced Labour Convention: " ... the term forced or compulsory labour shall mean

22 *Chowdury and Others v Greece,* Application No. 21884/15, 30 March 2017

23 Ibid. discussing Chowdury. ("There has accordingly been a violation of Article 4 § 2 on account of the failure of the respondent State to fulfil its positive obligations under that provision, namely the obligations to prevent the impugned situation of human trafficking, to protect the victims, to conduct an effective investigation into the offences and to punish those responsible for the trafficking." *Chowdury*, para. 128, p 38)

24 *Chowdury* para 109, p 34.

25 Ibid. para 115, p. 35

26 Ibid. para. 127, p. 38. ("For an investigation into exploitation to be effective, it must be capable of leading to the identification and punishment of the individuals responsible, this being an obligation not of result but of means … A requirement of promptness and reasonable expedition is implicit in all cases, but where the possibility of removing the individual from a harmful situation is available, the investigation must be undertaken as a matter of urgency." *Chowdury,* para 116 p. 35)

27 Chandran, BHRC Dialogue

28 Ibid.

29 *Chowdury* para 123, p. 37. See also M. Grazia Giammarinaro, UN Special Rapporteur on Trafficking in Persons, Special Position Paper on "*The importance of implementing the non-punishment provision: the obligation to protect victims",* 30 July 2020 (referenced in Chandran BHRC Dialogue on the Palermo Protocol ("The consent of a trafficking victim to any of the acts above, or indeed to their exploitation, is rendered irrelevant whenever they are subjected to any one or more of the means, it being an impossibility for a person to exercise free will in these circumstances.")

30 *App. Nos 77587 and 74603/12, 16 February 2021*. Discussed by Chandran, BHRC Dialogue.

31 Ibid.

32 International Labour Organization, P029 - Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 11 June 2014) (entered into force 9 November 2016), Art. 4 *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029*

33 S. Mullally, Statement of the UN Special Rapporteur on Trafficking in Person, especially women and childrenon the occasion of the 10th session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime. Vienna, October 13, 2020. Referenced in Chandran, BHRC Dialogue.

all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"[34]. Fifty-nine countries have ratified the ILO Protocol, including some Asian countries[35]. Further advancing the non-punishment principle, the ILO Protocol requires state parties to take "necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour"[36].

D. Council of Europe Convention on Action against Trafficking in Human Beings (CoE Convention) requires states to take operational measures to prevent and protect victims of FL/MS. It calls on member states to adopt a range of measures to prevent trafficking and to protect the rights of victims. The preventive measures include measures to strengthen coordination at national level between the various anti-trafficking bodies and to discourage demand, which promotes all forms of exploitation of persons. Protection measures include border controls to detect trafficking, facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological, and social recovery[37]. The CoE Convention definition of FL/MS is generally the same as that of the Palermo Protocol (see A above)[38]. It was also the first binding treaty to explicitly include a non-punishment provision; in Article 26, it identifies non-punishment with the possibility of "not imposing penalties" on trafficking victims to the extent that they have been compelled to engage in unlawful activities[39].

2.2.2 Domestic Law

The international law described above largely sets broad goals and mandates and relies on the passage and enforcement of the domestic law of signatories. The ECHR gives supervisory jurisdiction to ECtHR, but other conventions do not have enforcement mechanisms and rely on domestic litigation only[40]. The record of using domestic law to protect and vindicate FL/MS has been mixed, at best.

One example of domestic law discussed at the dialogue, was the United Kingdom's Modern Slavery Act of 2015, which criminalises "slavery, servitude and forced or compulsory labour"[41]. UK domestic law against FL/MS initially arose from the case of *Patience Asuquo v Commissioner of Police for the Metropolis* (2008) (unreported) in which Patience Asuquo, a Nigerian woman, escaped from a trafficker and brought a case in UK court against the police, citing a violation of the state's obligation to investigate. She lost her case in the UK[42], but the failure of the court to find and apply relevant UK domestic law led to key legislative changes and the introduction of the free-standing criminal offences of slavery, servitude and forced labour under domestic UK law in 2009 (re-enacted as the Modern Slavery Act 2015)[43].

Hong Kong provides another example of domestic law addressing FL/MS, albeit unsuccessfully for the victim of trafficking for forced labour in *ZN vs Secretary for Justice, et al*[44]. In this case, ZN, a victim of forced labour, sued in Hong Kong under Article 4(3) of Hong Kong Bill of Rights (BOR), which prohibits slavery and the slave-trade in all their forms. The Hong Kong court held that the Hong Kong government failed in its investigative duty under the BOR but that the BOR did not cover human trafficking as a form of modern slavery or human trafficking for forced labour[45]. More specifically, the Hong Kong court held that the description of human trafficking as a form of modern

34 ILO Forced Labour Convention 1930 (no. 29) Article 2,§ 1

35 *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:3174672*

36 International Labour Organization, P029, Art 4.

37 Council of Europe Convention on Action Against Trafficking in Human Beings (Warsaw, 5 May 2005), C.E.T.S. No. 197 (entered into force 1 February 2008)

38 Ibid., Article 4(a).

39 Ibid., Article 26. Not discussed explicitly in the Dialogue session, but referenced in some readings in speakers' notes is the *Charter of Fundamental Rights of the European Union*, which prohibits slavery and forced labour in its Article 5 as follows: "1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour. 3. Trafficking in human beings is prohibited" Official Journal of the European Communities (18.12.2000/C 364/01)

40 Chandran, BHRC Dialogue

41 Modern Slavery Act of 2015, UK Public General Acts, 2015 c.30 holds that "A person commits an offence if—(a)the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or (b)the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour." Part 1, Section 1

42 Although the UK government paid her compensation when the case went to the ECtHR: *Asuquo v UK* Appn no 61206/11 *https://hudoc.echr.coe.int/eng?i=001-112339*

43 Chandran, BHRC Dialogue

44 FACV/2019. [2019] HKCFA 53). 10 Jan. 2020

45 Summary of Judicial Decision by H.K. Department of Justice in *ZN vs. Secretary for Justice et al*, FACV/2019 HKCFA 53) *https://www.doj.gov.hk/en/notable_judgments/pdf/FACV_4_2019e.pd*f referenced by Chandron, BHRC Dialogue


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slavery is not clearly defined or criminalised under the BOR or in UK's Modern Slavery Act of 2015, and it held further that analogising the Palermo Protocol's definition of "trafficking in persons" is not appropriate since the People's Republic of China had declared Hong Kong excluded from the Palermo Protocol's application[46].

Domestic law has not always caught up with the need to meet the obligations of international convention signatories has lagged behind the need and, although enforcement is improving, more still needs to be done. It is worth noting that the non-punishment principle is now found in domestic legislation in many places where FL/MS is a problem, including in Albania, Belgium, Cyprus, Ecuador, Egypt, Germany, Greece, Indonesia, the Lao People's Democratic Republic, Kenya, Malawi, Mexico, North Macedonia, Spain, Thailand, and Uruguay[47].

46 Ibid

47 S. Mullally, Report presented to the UN Human Rights Council: "Implementation of the non-punishment principle", A/HRC/47/34 - June 21- July 9, 2021, referred to Chandran, BHRC Dialogue.

2.2.3 International Standards, Soft Law, Private Law and the ESG Movement

There have been soft international standards targeting businesses for decades, including the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines)[48], the United Nations Guiding Principles on Business and Human Rights (UNGPs)[49], and the OECD Due Diligence Guidance for Responsible Business Conduct (OECD DD Guidance)[50]. The OECD Guidelines are "recommendations by governments to multinational enterprises operating in or from adhering countries [which] provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards"[51]. The UNGPs, adopted in June 2011, creates clear expectations for businesses to conduct human rights due diligence (HRDD) to "identify, prevent, and mitigate adverse impacts on human rights throughout their business operations"[52].

For the most part, today HRDD is not mandatory, but is being done by some companies, largely because of societal pressure and the UNGPs[53]. Investors, boards, shareholders, and consumers are talking about corporate Environment and Social Governance (ESG) and are looking to measure and report on this, largely for public relations and good will reasons. And, while corporate boards may not all be concerned about human rights the impact on share prices, or embarrassment to the company, may impact the company's bottom line and lead to action[54].

Along with this sometimes reluctant attention to human rights, the face of global corporate accountability for human rights abuses within supply chains is changing[55]. There has been a general awakening to the issue of FL/MS, causing market actors, like consumers, investors, corporate boards, and civil society organisations to demand that corporations to be more responsible and proactive in the discovery and disclosure of FL/MS up- and down-stream in their supply chains, and not just from/to immediate suppliers/buyers[56]. Consumers and investors worldwide are increasingly concerned about buying from and investing in companies whose supply chains are tainted by forced or child labour or other human rights abuses[57].

As a result, in some places the OECD Guidelines and UNGPs are being "hardened" through the implementation of domestic legislation, in disclosure/transparency laws, court cases, customs restrictions, and import bans. Mandatory HRDD legislation is on the near-term horizon in France, Germany, and in the European Union[58]. Government bodies such as US Customs and Border Protection are increasingly taking measures to stop tainted goods from entering the US market. And supply chain litigation, whether led by human rights victims or western consumers, is on the rise[59].

There is now a focus in private law on making 'soft' law more operational. To align with international business and human rights norms and expectations set out in the OECD Guidelines, the UNGPs and the OECD DD Guidance, commercial contracts are being drafted and revised to reflect the parties' human rights commitments and provide clear processes for upholding them[60]. To facilitate this movement, in 2021 a working group formed under the auspices of the American Bar Association Business Law Section published a set of model contract clauses to help buyers and suppliers redesign their contracts to better protect human rights in their supply chains. These were the first model contract clauses that attempt to integrate the principles contained in the UNGPs and the OECD DD Guidance into international supply contracts, integrating HRDD into every stage of the supply contract and operationalising the shared responsibility between buyers and suppliers. When adopted, these clauses translate human rights principles into contractual obligations that require buyers and suppliers to cooperate in protecting human rights and make both parties responsible for the contract's human rights performance[61].

48 OECD (2011) OECD Guidelines for Multinational Enterprises, OECD Publishing. http://dx.doi.org/10.1787/9789264115415-en
49 United Nations. (2011). *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework.*
50 OECD (2018), OECD *Due Diligence Guidance for Responsible Business Conduct.*
51 OECD, Forward, p. 3.
52 Snyder, BHRC Dialogue
53 Deva, BHRC Dialogue
54 Snyder, BHRC Dialogue
55 Ibid.
56 Ibid. and Deva, BHRC Dialogue
57 Snyder, BHRC Dialogue
58 Ibid.
59 Ibid.
60 Ibid.
61 Ibid.

2.3 Synthesis of Observations from Virtual Dialogue

As the panel presenters discussed the topic of confronting FL/MS in Asia, they explored the realities of supply chains, the effectiveness of legislation and court decisions and model contract clauses from different angles. These included the role of businesses, law firms and legal consultants to work with policymakers, NGOs, and clients, and within bar associations and courts, using legal representation, lobbying and litigation to bring meaningful change. Discussed below are some of the key themes arising from the Dialogue regarding the major issues and the role of the legal profession in responding to the challenges.

One issue raised was a basic problem with the definition of FL/MS: it is not always clear what is included and a consistent, widely-accepted definition is necessary. As pointed out earlier in this section of the report, Article 4 of the ECHR, for example, prohibits FL without defining it. However, there are several international instruments that do define FL, for example the ILO Convention 1930 (No 29) which reads as follows: "... the term forced or compulsory labour shall mean all work or service which is exacted from any person under menace"[62]. As the Court pointed out in *Chowdury*, any work demanded from an individual under the threat of a "punishment" does not necessarily constitute "forced or compulsory labour", and it is "necessary to take into account, in particular, the nature and volume of the activity in question"[63]. This lack of clarity becomes an issue when norms and values clash, especially between the Global South and Global North. Both share responsibility for FL/MS and most countries do not support it, but the interpretation of what FL actually is may differ between the region itself. There are countries that say that they permit certain labour practices in order to alleviate poverty, but these may conflict with human dignity and freedom. Panel presenter Parosha Chandran posited that FL/MS is best understood as an umbrella term that includes various forms of exploitation: for example, *human trafficking*, which brings a person into condition of exploitation; slavery, which is the exercise of the right of ownership over another person; the *use of persons for criminal enterprises;* and *child labour* in drugs manufacturing. This broad definition enables all the types of exploitation that can happen to fall under protective mechanisms.

Another common theme was the need for attorneys to help corporate clients – large and small companies – to develop and implement healthy policies in their functions and supply chains in a way that is both legally and operationally effective. This means, among other things, making mandatory meaningful and enforceable HRDD that goes beyond tier one suppliers[64], establishing effective grievance mechanisms, which are accessible, fast, and effective, with no fear of retaliation for victims who utilise such mechanisms.

Dialogue presenters and participants agreed that lawyers and law firms have a great deal of influence on their corporate clients, therefore business and labour lawyers must not leave human rights protection only to human rights lawyers. Business lawyers need to blend the promotion of human rights with the interest of corporate clients. However, this presents a dilemma to lawyers and law firms who are hired to serve the interests of their business clients and manage risk for them, rather than to protect the interests of workers in the supply chain. While social pressures and perception are recognised as risks to companies and need to be on the radar of their lawyers, the purely lawyerly position is not sincerely engaged with the social justice considerations. This clash of professional standards and human rights considerations can result in lawyers being part of the problem, rather than the solution.

Black letter law is no longer enough to give complete advice to corporate clients; lawyers need to consider the potential adverse impacts of their advice to companies on human rights. This means changing the education and mindset of lawyers. For states to comply with human rights standards to identify and protect victims of trafficking, resources must be committed to train those who are involved at all levels of the process. Training needs to be targeted for attorneys and all domestic investigative, prosecutorial, and judicial authorities, to include police, immigration and

62 ILO Convention 1930 (No. 29), Article 2 § 1

63 *Chowdury*, para. 91, p. 30

64 suppliers with whom one directly conducts business.

border agents, labour inspectors and other law enforcement officials to recognise human trafficking and victims of FL/MS. Criminal defense attorneys and prosecutors in particular need to be trained to recognise victims of FL/MS when they encounter them. For states to comply with human rights standards to identify and protect victims of trafficking, resources must be committed to train those who are involved at all levels of the process to effectively identify victims early and afford an array of protection measures based on a multidisciplinary approach and tailored to each victim.

All panel presenters agreed that the problem of FL/MS cannot be considered in isolation. Big, macro-level problems, like the shrinking of civil society and the growth of authoritarianism, need to be brought into the equation for solutions to work. There is a need to integrate a gender perspective, since more than 70% of FL/MS victims are women and girls. And there is a need to take collective action in complex markets and situations. It is essential to strengthen and support the establishment of independent trade unions in supply chains, rather than undermining them. Everyone has a role to play – businesses, lawyers, government – in meaningful partnership with civil society, including adequately resourced and supported NGOs and human rights defenders working with victims. Importantly, all efforts need the participation of victims and survivors of FL/MS in shaping legal and policy measures to combat the problem.

All methods of addressing FL/MS are needed and should be developed and strengthened: hard and soft law, both international and domestic. Voluntary social compliance initiatives were an important start, but there is a need for core human rights obligations – including, but beyond, criminal justice responses. Included in this big tent is the importance of working with the IT sector to (i) combat online trafficking, especially of children for the purpose of sexual exploitation and (ii) use digital technology to raise awareness of risks and exploitation related to FL/MS[65].

Likewise, cross border brainstorming and collective action is essential. Standards from international law and organisations, NGOs, domestic law, and more should be considered and gleaned for best practices, then tailored to the various countries in Asia, which, all speakers recognised, is a very diverse area and so, perhaps, requires a subregional approach.

Finally, all agreed that the Covid 19 pandemic has highlighted the existing and persistent inequalities and precariousness of many migrant workers, especially those in domestic work and informal sectors. There is a need for states to formally acknowledge the contributions of migrant workers and strengthen legal and social protection and pathways for victims of labour exploitation.

2.4 Conclusion and Recommendations

Based upon the Virtual Dialogue panel presenters' reporting on the legal landscape and current issues, as well as the common threads and issue identification that ran throughout the Dialogue, the following recommendations for action by attorneys and bar associations should be considered:

- Address autocracy and strengthen rule of law by working with policymakers, NGOs, and partners in Asia to build structural protection, such as constitutionalism and separation of powers, against excessive executive power.
- Strengthen training and peer learning for attorneys and judges, including:
  - Learning about human rights among stakeholders and bottom-up capacity building. This means keeping rights-holders and victims central to the discussion.
  - Training for criminal defence attorneys and prosecutors to recognise victims of human trafficking so that they can facilitate implementation of protection and non-punishment principles. National authorities should divert trafficking victims from the criminal justice system as offenders and safeguard them as victims when the conditions for the non-punishment principle have been met. Where this diversion has failed at first

65 See also S. Mullally, Statement of the UN Special Rapporteur on Trafficking in Person, especially women and childrenon the occasion of the 10th session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime. Vienna, October 13, 2020. Referenced in P. Chandran, BHRC Dialogue

instance and such trafficking victims are charged or prosecuted, national authorities are under the duty to discontinue the proceedings brought against victims of trafficking for the commission of trafficking-dependent offences as early as possible. Criminal defence attorneys and prosecutors are essential to these efforts at all stages.

  - Experiential learning / training: putting decision makers in the shoes of people who are suffering. This entails judges, lawyers, and businesspeople going to the places where the abuses are happening and where trafficking is uncovered, and also speaking with victims about their experiences through a facilitated conversation outside of a procedural/legal context.

- Assist in drafting guidance on FL/MS to clarify the definition of terms and legal standards related to FL/MS, making them accessible and operational for lawyers in all areas of practice (not just human rights law) as well as usable across national and cultural boundaries.
- Make it easier for corporate clients to do the right thing, meaning things that are productive and good for society. Attorneys can do this by:
  - Influencing corporate clients to change their business model to empower workers and worker-led initiatives.
  - Working with corporate clients and colleagues in bar associations to adopt human rights-focused contractual obligations that include
    (i) HRDD for buyers and suppliers before and during the term of the contract,
    (ii) requiring buyers and suppliers to each engage in responsible sourcing and purchasing practices, and
    (iii) prioritise stakeholder-centered remedies for human rights harms before or in conjunction with conventional contract remedies and damage assessments.
  - Eliminating the silos in corporate structures, which tend to have "sustainability departments" or similar, which "take care" of human rights concerns so that others do not have to pay attention to them.
- Work within bar associations to push for domestic law that mandates core human rights obligations including but not limited to criminal justice responses, such as effective implementation of labour and human rights standards. Simultaneously, push for long term social protection for victims of FL/MS to replace short term, conditional assistance measures to avoid risks of re-trafficking and secondary victimisation.
- Use litigation to bring meaningful change under domestic law, in the ECtHR and other international courts, and guide lawyers who engage in risk management about the exposure to their corporate clients through lawsuits related to human rights problems. Point to successes at the ECtHR to advocate for enforcement mechanisms outside of domestic courts through other international and regional human rights conventions and courts.
- Work with bar associations in developing guidance about ways for lawyers to overcome dilemmas concerning the perceived clash of professional standards between serving interests of corporate clients and social justice considerations. And/or amend professional standards for lawyers to reflect human rights concerns in order to address the dilemma when corporate clients' profits and protecting human rights fail to converge. In all cases and whatever is attempted or accomplished, the responsibility of lawyers and law firms to protect human rights should be stressed so that their legal advice does not inadvertently violate human rights.

03

SANCTIONS REGIMES IN A RULE OF LAW CONTEXT: POSSIBILITIES AND LIMITATIONS

Beenish Riaz
LEGAL FELLOW, FORD FOUNDATION

3.1 Introduction

Sanctions have become an increasingly important tool to promote the rule of law abroad and hold perpetrators accountable for violations of established norms. In fact, over the last five years, activists report that thousands of sanctions have been imposed for human rights violations alone. In particular, the type of sanctions most favoured by activists and the focus of this chapter, are global targeted sanctions. Targeted sanctions regimes all share four core features namely

1 **a focus on addressing human rights violations and/or corruption;**
2 **individuals and entities as targets;**
3 **imposition of a travel ban, freezing or seizing of assets and funds and prohibitions on doing business with the sanctioned individual or entity; and**
4 **a strong history of engagement by civil society.**

Civil society actors, including NGOs and activists, laud these sanctions as a rapid response international accountability mechanism that can both nudge perpetrators towards compliance quickly, and flexibly adjust to changes in circumstance in a way that other tools like shaming, the United Nations system, international court systems, and even Alien Tort statutes cannot. For this Virtual Dialogue hosted by the BHRC and ABA ROLI, panel presenters deeply engaged in this field came together to share perspectives on budding global sanctions regimes, the potential and limitations of sanctions, and key recommendations going forward. What follows is not intended as a comprehensive overview of the subject area, but a snapshot of the main issues raised by the speakers and participants within this session of the *Edge of Law* series.

NOTE ON SANCTIONS

There are many more types of sanctions other than the global targeted sanctions discussed in the context of the *Edge of Law* series. In fact, sanctions are a broad category of economic actions that governments can take to further their foreign policy abroad. Sanctions include not just asset freezes and travel bans but also trade blockades. They may be multilateral with many states coming together to sanction (such as those imposed by the United Nations Security Council under Chapter VII of the United Nations Charter) or unilateral, imposed by a state on its own initiative (such as by the US against the Central Bank of Venezuela). Sanctions may also be country or sector specific, and not just 'smart' sanctions focused on individuals and entities (such as the sanctions on Russian President Vladimir Putin). Sanctions may actively promote human rights (such as targeted sanctions against the Myanmar government for the Rohingya atrocities) or conflict with human rights objectives (such as the sanctions against Iraq in the 1990s that led to a humanitarian crisis)66. Over the past few years, there has been increased recognition that in many cases, comprehensive country or sector specific sanctions can be especially damaging to the population of the country and survivors of human rights abuses, as those in power are typically able to pass off the worst effects of these sanctions lower down the chain, even causing humanitarian emergencies. This has led to the use of targeted sanctions gaining prominence in recent years. Sanctions are just one tool among other diplomatic measures (aid, dialogues, trade agreements, etc), and can complement other measures.

66 See e.g. *ICRC, Iraq: 1989-1999, a decade of sanctions,* https://www.icrc.org/en/doc/resources/documents/report/57jqap.htm.

3.2 Legal Frameworks and Current Challenges

The first international sanctions regime to target individuals and entities for their involvement in human rights abuses and corruption in the world was the Global Magnitsky Human Rights Accountability Act, enacted in 2016 (Magnitsky Act) in the United States[67]. In December 2017, the law was first implemented with historic Executive Order 13818 sanctioning several companies and individuals including a former president of The Gambia and the president of Nicaragua's Supreme Electoral Council at the time. These sanctions included both financial and visa restrictions[68]. Today, the US government has a robust targeted sanctions program with over 350 sanctions imposed under the Magnitsky Act. Following the example set by the US, four other large governments have built fully functioning and robust targeted sanctions programs – Canada, the UK, the EU, and Australia – with others such as Japan beginning to craft and implement these regimes.

However, because sanctions legislation is nascent, it is still an evolving area. Panel presenter Simon Henderson, Head of Policy at Save the Children Australia, shared some core features of the legislation that have been helpful in his work on the Australian law and that policymakers, activists and lawyers elsewhere can consider when assessing and developing these laws further. These include determining: (1) what conduct is being prohibited (for example, the definition(s) of 'human rights' and 'corruption') with the aim of keeping definitions broad; (2) the scope of sanctions with the aim to have expansive sanctions; (3) whether sanctions apply retrospectively (which would be the preference); (4) what the nominating process for sanctions is, including the role for civil society (which should be strong); (5) who is the decisionmaker; and (6) what sort of review or accountability process is built in to these programmes (which must be robust). Below is a brief overview of each legal regime.

3.2.1 The United States

Laws and regulations on sanctions in the US including the Magnitsky Act are administered by the US Department of Treasury's Office of Foreign Assets Control (OFAC) and to a limited extent, the US State Department. The Magnitsky Act is named after Sergei Magnitsky, a Russian tax advisor. In November 2008, Magnitsky exposed corruption by the Russian elite only to be arrested shortly thereafter and ultimately die in police custody a year later[69]. Following civil society outrage and pressure to respond to his death, the US passed the Sergei Magnitsky Rule 33 of Law Accountability Act of 2012, imposing travel and financial restrictions on those Russian individuals believed to be responsible for his death. Faced with other similar deaths and mistreatment, the US expanded this law to launch the global Magnitsky Act. In doing so, the legislature built on two core US sanctions programmes – (1) the US Antiterrorism and Effective Death Penalty Act of 1996, which allows the Secretary of State to "designate a foreign terrorist organisation", and (2) Executive Order 13,224 permitting designations by the US Department of Treasury of "specially designated global terrorists"[70]. At present, there are more than 355 individuals or entities actively sanctioned under the Magnitsky Act.

Legislators and executive branch officials attach many goals to the Magnitsky Act including "disrupting or deterring serious human rights abuse or corruption; promoting accountability in environments of impunity; and advancing international human rights and anticorruption norms, among other goals"[71]. EO 13818 allows the US President to sanction foreign persons "responsible for or complicit in, or who have directly or indirectly engaged in, serious human rights abuse" and corruption including attempts to engage in these acts with secondary sanctions imposed on US persons who assist these acts. The President, though, is subject to mandatory reporting obligations on these sanctions and providing explanations for its determinations including decisions to remove or lift the sanctions. The law is set to expire on 23 December 2022, unless renewed by Congress[72].

67 *Global Magnitsky Human Rights Accountability Act 22 U.S.C. §§2656*
68 *https://home.treasury.gov/news/press-releases/sm0243*
69 The European Court of Human Rights in the "Case of Magnitsky and Others v Russia" on August 27 2019 found multiple human rights violations associated with Magnitsky's death and detention.
70 Principles of International Law Sean D. Murphy
71 *https://sgp.fas.org/crs/row/R46981.pdf*
72 *cbo.gov/publication/57424#:~:text=The%20Global%20Magnitsky%20Human%20Rights,and%20requirements%20of%20the%20act.*

3.2.2 Magnitsky-Style Acts Around the World

Several countries enacted Magnitsky-style laws following the US model. This includes the UK, Canada, the EU, and most recently Australia. The table below lists the relevant legislation in each jurisdiction[73].

COUNTRIES	LEGISLATION
The United Kingdom 	The main legislation is the Sanctions and Anti-Money Laundering Act 2018[74]. In 2020, the Global Human Rights Sanctions Regulations implemented the Act to establish the UK's Magnitsky-style regime. The focus of these sanctions is on the right to life, the right to be free from torture or cruel, inhuman, or degrading treatment and the right to be free from slavery, servitude and forced labor. The UK government's Office of Foreign Sanctions Implementation administers the regime with designations made by the Foreign Secretary through the UK Foreign, Commonwealth and Development Office[75].
Canada 	Enacted shortly after the Magnitsky Act, the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) 2017 in Canada permits the Governor in Council to impose sanctions for gross violations of internationally recognized human rights and corruption[76].
The EU 	In December 2019, the EU adopted a regulation setting out its intention to establish a Magnitsky-style regime. In November 2020, the European Council passed the EU Action Plan on Human Rights and Democracy 2020-2024[77]. Shortly thereafter, in December, the European Parliament passed a resolution on the EU Global Human Rights Sanctions Regime (EU Magnitsky Act) that came into effect on 10 December 2020 and calls for sanctions for "genocide, crimes against humanity and other serious human rights violations and abuses"[78]. Member states are generally responsible for implementing sanctions against listed individuals and entities[79].
Australia 	In November 2021, the Australian legislature passed the Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021. Prior to this, Australia had two limited sanction regimes – (1) to implement sanctions imposed by the United Nations Security Council through the Charter of the United Nations Act 1945 and (2) the Autonomous Sections Act, 2011 to sanction actions contrary to the policies of the Australian government. Implementing the law, the Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021 passed shortly thereafter[80]. These regulations allow the Minister of Foreign Affairs to impose sanctions on those who have "been engaged in, responsible for, or complicit in serious violations or abuses of three human rights relating to physical integrity [rights to life; not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; and to be free from slavery, servitude or forced or compulsory labour]; been engaged in, responsible for, or complicit in serious corruption, defined as bribery or misappropriation of property; or caused, assisted with causing, or been complicit in, a cyber incident or an attempted cyber incident that is significant or which, had it occurred, would have been significant".
Japan 	There is growing interest in Asia to develop Magnitsky style laws. In early 2021, a multiparty parliamentary group shared draft legislation in Japan. Since then, civil society has been pushing for the enactment and endorsement of such a law in the country[81].

At present, sanctions in the Asia-Pacific region cover individuals and entities in many countries from Russia, China, Myanmar/Burma, to Saudi Arabia, North Korea, Afghanistan, & Syria. Sanctions cover a range of human rights violations from the atrocities committed against the Rohingya in Myanmar to forced labour in China and war crimes in Syria.

73 For a more detailed comparison of the laws please see *https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct/Report Chapter 3*

74 *https://www.gov.uk/guidance/uk-sanctions#:~:text=HM%20Treasury%20implements%20and%20enforces,and%20enforced%20in%20the%20UK.*

75 For more details see: *https://www.humanrightsfirst.org/sites/default/files/UK%20Global%20Human%20Rights%20Sanctions%20Primer.pdf*

76 For more information see: *https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/victims_corrupt-victimes_corrompus.aspx?lang=eng*

77 *https://www.consilium.europa.eu/en/press/press-releases/2020/12/07/eu-adopts-a-global-human-rights-sanctions-regime/*

78 *https://europeanlawblog.eu/2021/01/13/habemus-a-european-magnitsky-act/*

79 For more information see *https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/201217-human-rights-guidance-note_en.pdf*

80 *https://www.legislation.gov.au/Details/F2021L01855 81 See e.g. Human Rights Watch, https://www.hrw.org/news/2021/09/24/japans-next-premier-should-endorse-sanctions-law*

81 See e.g. *Human Rights Watch*, *https://www.hrw.org/news/2021/09/24/japans-next-premier-should-endorse-sanctions-law*

3.3 Synthesis of Observations from Virtual Dialogue

Lawyers and civil society actors are involved with sanctions programmes from their creation to their implementation. The Virtual Dialogues shared perspectives and recommendations for civil society on all steps in the sanctions process:

1. **First, Simon Henderson from Save the Children Australia discussed the creation and amendment of the legal framework setting up a global sanctions regime, sharing lessons learned from civil society involvement in recent developments in legislation in Australia;**
2. **Second, Scott Johnston, Staff Attorney for Human Rights Accountability at Human Rights First, described the role NGOs play in relation to the oldest global sanction regime in the US, once the law is enacted and to be implemented by state officials; and**
3. **Finally, Professor Felicity Gerry KC shared her experiences in Singapore with compliance specifically concerning sanctions against the Myanmar army among others involved in the atrocities against the Rohingya people.**

3.3.1 Creating a Targeted Global Sanctions Regime for Human Rights

The first step to a sanctions programme is the passing of legislation and regulations authorising and implementing the programme. Behind the enactment of all Magnitsky-style regimes has been a push from civil society. The most recent legislative change of this kind is in Australia where change was spurred on and supported by human rights and humanitarian organisations like Save the Children and Human Rights First. Support for the legislation includes advocacy through submissions to legislative committees, assessments of the benefits / costs of the law and sharing of findings with legislators, and presentations at legislative hearings, among other advocacy-based measures.

Citing the experience of Australia, Simon Henderson shared four key aspects of civil society advocacy that proved critical to the eventual passage of the legislation and attendant regulations. First, he underscored the cooperation among civil society organisations, academics, and others in Australia among themselves and with their counterparts globally as critical for success. Information sharing allowed all those advocating for the change to align their positions and present a strong coherent message that the legislature was receptive to. Second, civil society organisations were a part of early discussions around legislative language and any proposed changes. This included 160 legislative submissions and presentations at eight hearings. Third, civil society organisations engaged in political advocacy, uniting all political parties on the issue and ensuring bipartisan support critical to passing the legislation. And finally, civil society organisations engaged with the bureaucracy who at first resisted the change and was uncertain about sanctions but came to understand their need.Several features of the resulting law in Australia are a testament to civil society's impact, most notably on:

1 **the addition of grave violations of international humanitarian law especially children's rights as a basis for sanctioning;**

2 **the addition of serious corruption as sanctionable given its contribution to undermining good governance and rule of law; and**

3 **the definition of egregious violations which largely follows legislation in UK and includes all core rights – the right to life, the right to be free from torture, and the right not to be held in slavery.**

3.3.2 The Roles of Governments and NGOs in Implementing Sanctions Regimes

Just as it plays a strong role in creating a sanctions regime, civil society has been and continues to be critical to maintaining these regimes. To hold foreign governments accountable, NGOs predominantly identify individuals and entities to sanction and share these names with sanctioning governments. In fact, in many cases, the state relies on civil society to use their access to local communities and resources on the ground to investigate and verify human rights abuses and potential perpetrators.

The Magnitsky Act itself recognises the critical role civil society plays in the growth of these programs in Section 1263(c) which states that "in determining whether to impose sanctions … the President shall consider … credible information obtained by other countries and nongovernmental organisations that monitor violations of human rights"[82]. In the US, after reaching out to local partners on the ground, NGOs will submit the information to their contact at the State Department for consideration. Once this information is verified by the US government, sanctions are imposed against the individual or entity. The process can take anywhere from two months to two years. The State Department has also created a forum to receive suggestions for possible individuals and entities to sanction including inviting NGOs at annual meetings and often officials will afterwards be in contact with NGOs on a weekly basis[83].

Discussing the successes of civil society in this endeavor in the US, Mr Johnston presented his experiences leading the Human Rights Sanctions and Accountability Coalition, a group of more than 150 NGOs using the Magnitsky Act. He noted that about a third of all sanctions imposed under the Magnitsky Act were initially put forward by this coalition and that creating channels of dialogues and building relationships of trust was critical to this.

In considering whether sanctions are an appropriate tool for a particular human rights problem, Simon Henderson shared how sanctions, like every international human rights accountability tool, have both possibilities but also limitations. The table below lists key considerations for civil society organisations and governments when determining whether to use sanctions.

82 Section 1263(c), The Magnitsky Act

83 Save The Children, Inquiry into whether Australia should enact legislation comparable to the United States Magnitsky Act 2012, 21 February 2020, p 13, Accessed at *https://www.savethechildren.org.au/getmedia/ed6c9486-1242-4061-937b-604b2f99ff54/save-the-children-magnitsky-act-submission-(february-2020).pdf.aspx*

	POSSIBILITIES	LIMITATIONS
Sanctions as a tool for justice 	Sanctions allow governments to take a stand against human rights abuses and corruption, express solidarity with victims and defend their values in a way that has more teeth than traditional diplomatic statements but is less aggressive than direct conflict and military intervention.	Sanctions can never provide the type of justice that victims of serious abuses deserve, and so may only be used as one piece in a broader, long-term strategy to provide accountability for past abuses.
Sanctions as a remedy 	Sanctions are flexible, providing not only a stick but also a carrot. They also allow the state to take action even in countries that the state has positive political relationships with. Perpetrators have an incentive to change their behaviour and comply with human rights since sanctions can be repealed if behavior has sufficiently modified.	Because sanctions are an administrative and not a judicial tool, in most cases, the assets of sanctioned individuals may not be seized and repatriated to victims. Instead, even if they reform their actions and sanctions are lifted, perpetrators may continue to benefit from ill-gotten gains. Additionally, sanctions are a tool only available against individuals and entities in relatively less economically and politically powerful countries, as countries in the Global North have great leverage in global economics and politics.
Sanctions as a deterrent 	The threat of sanctions can itself act as a deterrent against human rights abuses with individuals and entities afraid of losing business, assets and/or visa access in certain countries.	Over-sanctioning may damage countries' abilities to maintain their economic advantage over other countries like China. This could make such countries more appealing to the growing number of autocratic regimes and kleptocracies around the world, reducing the power of sanctions significantly.
Effectiveness of sanctions 	Sanctions can lead to rapid change in behaviour among those sanctioned.	Since sanctions are a new tool, there is only anecdotal evidence suggesting that sanctions programs actually lead to the behavioral change desired, and their effectiveness is uncertain. Targeted sanctions cannot cover all bad actors even for known violations. Budgetary and staffing restrictions also impact their value. States may even impose retaliatory sanctions against activists including lawyers[84].
When imposed multilaterally 	Sanctions may be imposed multilaterally which increases exponentially the strength of these sanctions, severely impacting the international financial opportunities of those sanctioned.	Sanctions are an inherently political and discretionary tool and while the systems currently in place are widely regarded as appropriate, diverse, and fair, sins of omission are common. Multilaterally exercised sanctions make this type of political hypocrisy and race to the bottom even more likely as countries struggle to find targets that they all agree on.
Sanctions as compared to other tools 	Targeted human rights sanctions allow states to single out specific actors, elites and kleptocrats, with penalties specific to them so that pressure is put on the individuals responsible without negatively affecting the lives and livelihoods of others including survivors of human rights abuses.	Sanctions may undermine other forms of diplomatic engagement and dialogue and be seen as imposed without proper due process and procedural fairness.

84 See e.g. recent sanctions by Iran against the US, and sanctions by China against human rights lawyers

CASE STUDY

CHINA

Governments have in the past sanctioned members of the Chinese Community Party and the Chinese military for many reasons including for their involvement in the torture of human rights defenders, the repressive crackdown on Hong Kong, persecution of religious minorities, and mass abuses against Uyghurs and other ethnic minorities in Xinjiang and sanctions continue to be an active outlet for creating pressure on perpetrators in China, particularly at a moment when many governments are not willing or able to challenge Chinese officials in other ways[85]. One of the most significant and historic sanctions was levied for the abuses in the Xinjiang province on March 22, 2021. On this day, the US, UK, Canada, and EU all came together to issue same-day, coordinated sanctions against Chinese government officials and entities responsible for abuses in Xinjiang, the first time that all four major jurisdictions with targeted sanctions programs came together to sanction for specific abuses, putting increased pressure on the Chinese government to take action[86]. Nevertheless, human rights violations in Xinjiang continue. However, a report by a local partner of Human Rights First, Falun Dafa Info Center, notes several positive actions following sanctions by the US[87]. For example, a Municipal Police Department reportedly released four women and returned to them all their belongings (which would normally be confiscated permanently) and upon release, the police urged the women to not report their names 'otherwise, my child won't be able to go to the US in the future'. In another instance, two people were arrested, but when the police searched their bags and found paperwork related to US sanctions, they were promptly released. Activists in China have also documented multiple instances of government officials asserting that they have changed jobs or trying to change their information to make themselves more difficult to track for sanctioning purposes. In other cases, though, the Chinese government has responded to sanctions with defiance including even imposing sanctions of their own, weaponising the tool against human rights defenders and lawyers who have spoken out against the Chinese government[88].

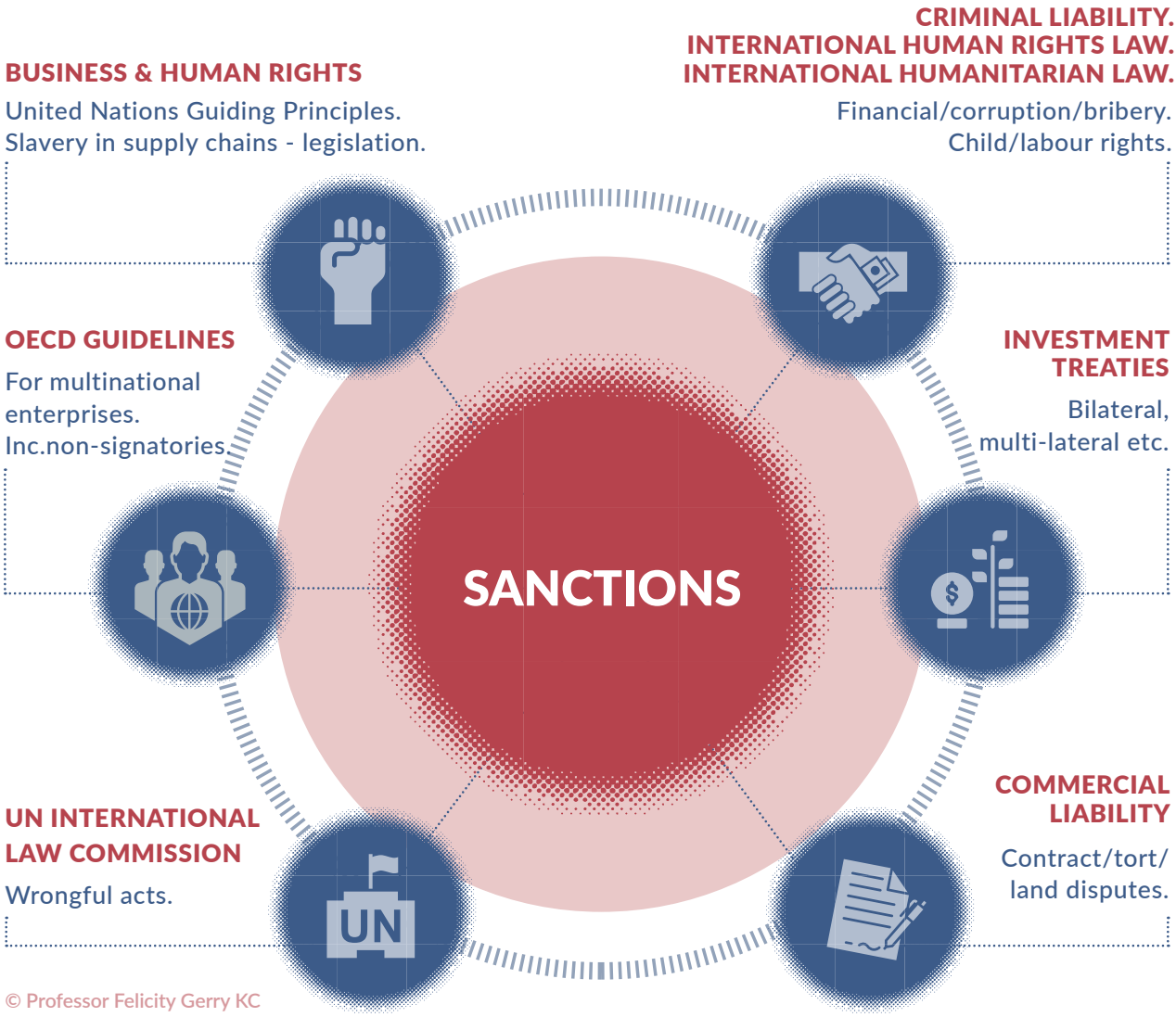
85 Bloomberg, *bloomberg.com/news/articles/2022-06-09/china-deserves-new-sanctions-over-xinjiang-eu-parliament-says#xj4y7vzkg*
86 See e.g. Washington Post, *https://www.washingtonpost.com/world/xinjiang-sanctions-european-union/2021/03/22/1b0d69aa-8b0a-11eb-a33e-da28941cb9ac_story.html*.
87 Scott Johnston, BHRC Dialogue
88 See e.g. *https://www.law.com/international-edition/2021/07/26/chinas-retaliatory-sanctions-a-risk-for-global-law-firms/* (discussing China's retaliatory sanctions).

3.3.3 Compliance

Enforcement of sanctions differs from country to country, but all sanctions regimes rely on private persons or companies to comply with the law. In the US, travel-based sanctions are enforced by the US State Department through visa bans, while the Department of Treasury handles asset freezes. In the UK, HM Treasury through its Office of Financial Sanctions Implementation does this. In the EU, each country is responsible for implementing the sanctions based on their respective domestic governance structures.

However, sanctions that restrict individuals and entities from doing business with sanctioned individuals all rely on private compliance and proper due diligence. If an individual or entity is found violating any sanction or not sufficiently monitoring their activities to ensure that no violation occurs, regulators have great power to impose financial penalties. The risk of these penalties along with reputational and other risks are sufficient for most persons from sanctioning countries to refuse to do business with those sanctioned.

In this light, Professor Felicity Gerry KC described the role sanctions play as a "compliance mesh". Sanctions are at the centre of and speak to several different risks that businesses evaluate when deciding where to invest and who to do business with. Potential risks to consider include business and human rights related issues, customary international law, international humanitarian law, investment treaties and commercial liability under contract or tort law. The following diagram, created by Professor Gerry KC, illustrates the potential risks:



Lawyers play a critical role in advising on compliance with sanctions programmes including answering the question of whether sanctions even apply. Professor Gerry shared an example of an area where compliance becomes tricky, citing her experience working on a legal memorandum concerning potential costs and risks arising for the Singapore Stock Exchange, a financial market, from its listing of the Singapore-domiciled Emerging Towns & Cities Singapore Limited (ETC), given its financial relationship (a build operate transfer agreement) with the Quartermaster General's Office of the Myanmar Army[89]. In the memorandum, Professor Gerry argues that, because of sanctions against several entities In Myanmar, there are (in practical terms) international law and due diligence obligations placed on the Singapore Stock Exchange and potentially also the Monetary Authority of Singapore and the Singapore Government, in relation to their support of and work with companies doing business with the Myanmar military. While Singapore has not imposed any sanctions on Myanmar, the US, UK, Canada, and the EU have all imposed sanctions including on the Myanmar State Administrative Council, the Myanmar Economic Corporation, Myanmar Economic Holdings Limited and others[90]. Potential consequences include the direct risk of sanctions faced by the Singapore Stock Exchange as ETC may be using the Singapore Stock Exchange to raise funds for its business in Myanmar, and risks to investors if the company is listed on the stock exchange. In the US, OFAC guidance specifically states that 'blocked persons' include any entity owned 50% or more by a blocked person directly or indirectly[91]. Ultimately, Professor Gerry concludes that due diligence must go beyond mere fact of payments to a particular entity; due diligence is in fact an onerous and important exercise that requires attention to a range of legal problems and risks and financial markets are at the core of ensuring corporate integrity and responsibility for human rights abuses. In these situations, lawyers have an obligation to recognise and consider these risks when advising their corporate clients. Some risks to consider, for instance, are those illustrated in the "compliance mesh" above.

89 *https://www.justiceformyanmar.org/stories/international-legal-issues-arising-for-the-singapore-stock-exchange-from-its-listing-of-emerging-towns-cities-singapore*

90 In fact, sanctions related to the Rohingya genocide in Myanmar were some of the earliest under the Magnitsky Act and the U.S. government has built on those actions in response to the recent coup by creating a Burma country-specific program.

91 *https://home.treasury.gov/system/files/126/12212017_glomag_faqs.pdf*

3.4 Conclusion and Recommendations

Ultimately, the consensus among civil society activists and lawyers in the dialogue was that sanctions are a useful tool for civil society actors to engage with to promote human rights. They represent some measure of accountability in the face of overwhelming and unabashed impunity for human rights violations. Their real-world penalties have been documented to change behaviour fast. By singling out perpetrators and putting in place penalties specific to them, sanctions can ultimately both disincentivise and punish bad behaviour and allow democratic states to make a strong statement of values in favor of human rights and against impunity. Lawyers, in turn, play an essential role in (a) promotion and reform of these programmes, (b) collecting evidence to identify perpetrators and (c) even assuring enforcement and compliance.

3.4.1 Recommendations to Governments

Targeted sanctions programmes can allow states to support human rights and promote rule of law abroad. In creating such programs governments should ensure the following:

- that they are fair and impose appropriate penalties for documented violations of the rule of law;
- that they have requisite flexibility to cover a wide range of violations;
- that they take into account the role of civil society and provide a mechanism for civil society to share their perspectives on potential persons to sanction;
- that they cover a diverse range of actors in multiple countries; and
- that they have a well-funded strong team at implementation and enforcement level.

3.4.2 Recommendations to Civil Society Actors

Civil society plays a core role in facilitating sanctions programmes and later identifying potential individuals to sanction, and therefore a sustained level of engagement and enthusiasm from civil society is critical to the growth and development of these programmes. NGOs and civil society organisations should learn from past examples of success.

In countries where sanctions programs are still not in place, NGOs and civil society actors must help to promote draft legislation. This includes early discussions on legislative language and political advocacy, as well as engaging with state officials, academics, and all other concerned actors, creating a united front in favour of targeted sanctions. Where there are sanctions, civil society actors should ensure that they accompany their recommendations of the individuals or entities to be sanctioned with detailed evidence that is easy for state officials to approve and implement. In making these recommendations, civil society actors should also both look to reflect the voices of the local affected communities and build relationships of trust with state officials.

3.4.3 Recommendations for Bar Associations

Bar Associations can take steps to share ideas for reform and innovation, enabling greater discussion and providing oversight for budding sanctions programmes. Lawyers should also ensure that their corporate clients are in full compliance with all sanctions-related laws. Lawyers can also provide pro bono assistance to civil society actors to help build evidence against certain perpetrators. As retaliatory sanctions programmes emerge, such as in China, Bar Associations and their human rights committees can play a particularly strong role in defending lawyers and human rights activists and call for the removal of sanctions that offend rule of law and human rights.

04

DATA SECURITY AND DIGITAL PRIVACY IN THE ASIA-PACIFIC REGION

Sarah McCoubrey
ACCESS TO JUSTICE STRATEGIST, CALIBRATE

4.1 Introduction

Legal protection of personal data raises overlapping issues of technology, global business, international standards, and discrete national legal regimes. It touches on both large-scale concerns about intellectual property, national security, and human rights, as well as individual concerns about personal autonomy, consent and understanding of data usage. These overlapping issues, combined with the pace of technological change, makes data protection an area of legal, political, and practical complexity.

Examining the critical issue of data and privacy protection in the Asia Pacific context highlights the different legal regimes and the gaps in corporate practices that result in vulnerability for individual users and for states. Data protection and digital privacy is particularly challenging because of key attributes of this area of legal regulation:

Data crosses borders. Legal regimes, whether national or international, must address the intangible nature of personal data. Companies doing business are expected to comply with a specific country's culture and legal traditions. It is difficult to enforce these laws when companies operate globally and can use differences between legal regimes to evade or ignore regulation.

State Interests. The effective use of legal regimes to protect personal data is fundamentally different between democratic contexts and authoritarian ones where state control of personal data is one of the primary privacy risks.

Pace of Change. Legislative and regulatory approaches often focus on specific companies or processes, rather than broad, clear purposes. This makes it difficult to interpret or apply the law as corporate structures change or as the technology evolves. Narrowly defined regulations quickly become outdated.

Lack of Regulatory Leadership. Legal professionals – lawyers, judges, adjudicators – can lead robust data and privacy protection, based on a nuanced understanding of the intersection of individual and human rights, intellectual property, data use and global corporate regulation.

To examine the way these issues play out in the Asia Pacific region, the Bar Human Rights Committee of England and Wales and the American Bar Association's Rule of Law Initiative brought together three distinct perspectives – civil society, commercial interests, and national security. The speakers addressing each of these offer distinct perspectives on the implications of current and emerging privacy issues.

Nighat Dad started by acknowledging the importance and value of data for individuals, for companies and for governments. Often described as "the new oil", data is treated as a commodity. She provided three challenges to this analogy that are critical to the regulation of data and privacy protection. First, data comes from people's personal identities and is linked to their personal safety. Talking about data as a product that can be mined and exploited is reductive and reduces it to a commercial imperative, making it difficult to prioritise safety and self-determination. Second, the extraction of fossil fuels has not been environmentally or economically sustainable. Applying this paradigm to data introduces a dangerous, exploitative approach. Finally, the oil business involves two parties in an exchange, with both getting something from the transaction. In contrast, people are being mined for their personal data without consent or awareness of what kind of data is being extracted. They are not part of the economic transaction. Nighat used this critique as the basis for examining power imbalances and efforts to provide oversight to data handling practices.

Our second Virtual Dialogue presenter provided an overview of the Asia Pacific transition in the wake of the adoption of the GDPR. Countries are revising and strengthening their regulations to obtain favourable decisions under GDPR (Japan and South Korea, 2020; Australia and Singapore, 2018). This is positively affecting cross border transfer of personal data for businesses and making these countries more appealing to multinational companies. In particular, the requirement for mandatory data breach notifications has increased consumer awareness and company activity

92 Digital Rights Foundation, *https://digitalrightsfoundation.pk/*

on cybersecurity and privacy. He also identified practical barriers to data protection and digital privacy citing the complexity of legal regimes in China, the weak protections in outdated laws in Hong Kong, and difficulties faced by global companies navigating these competing approaches. The presenter emphasised the critical importance of understanding the culture of each country and the nuance of its legal regimes when designing data policies.

Jordon Brunner focused on the specific data and privacy challenges that arise when state and private sector uses of data overlap. He described the Chinese Military Civil Fusion (CMCF) framework for technology development where data collection and regulation from a global business perspective intersect with national security interests. Using this example, he identified five ideas for action to promote better understanding and transparency, prioritising the impact on the user as a priority.

1 **Moving away from publishing lists of companies with poor practices and towards articulating the specific activity that the list seeks to sanction. This would prevent companies from changing their name or operating as a subsidiary to avoid the sanction.**

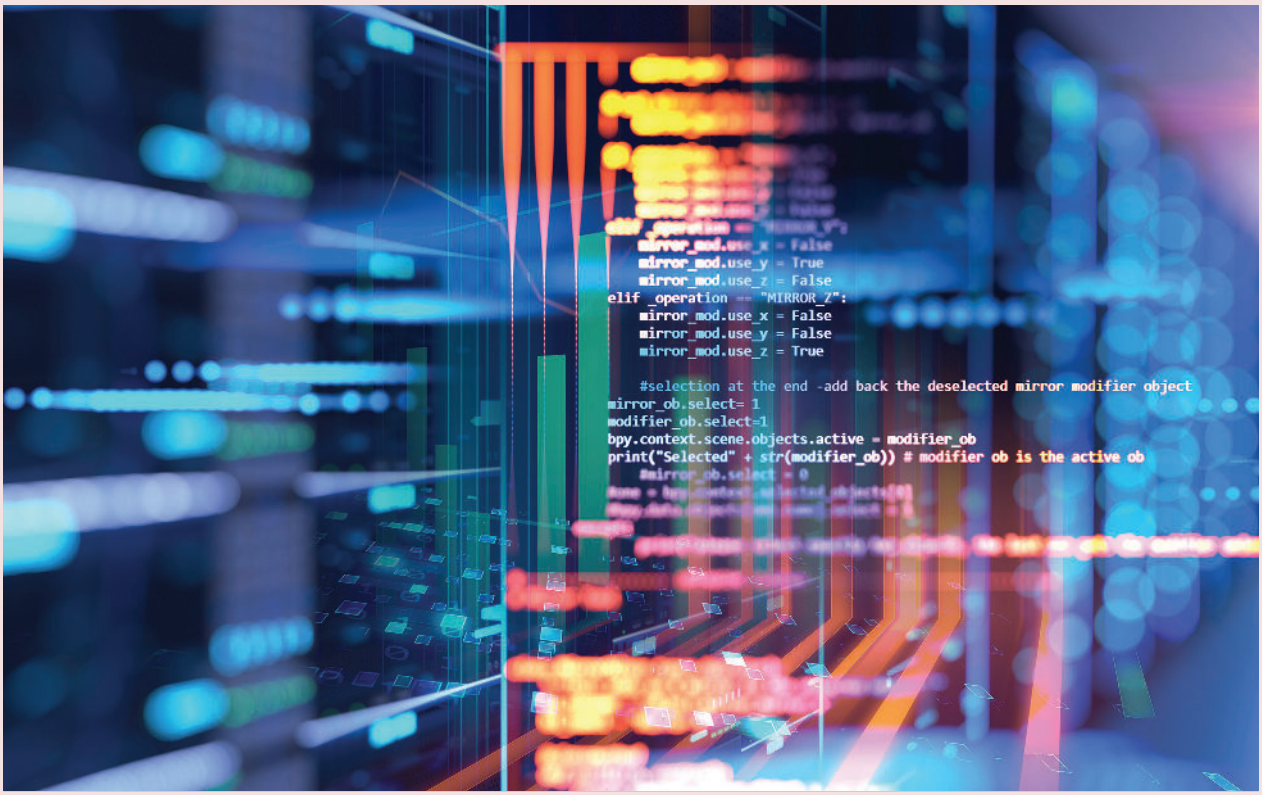
2 **Strengthening existing enforcement mechanisms to avoid the patchwork approach and give companies greater clarity of expectations.**

3 **Better education for governmental actors, companies, and ordinary citizens, explaining why companies should not do business with companies with poor data handling practices, both for security reasons and to protect consumer data.**

4 **Requiring greater due diligence by corporations about who they do business with when it comes to emerging technologies, including explicit obligations to take steps to protect their clients' privacy and security.**

5 **Working with other like-minded nations to design similar frameworks and align data protection regimes to establish international norms for privacy protection.**

These three speakers brought diverse perspectives to a wide-ranging discussion that addressed common concerns and themes raised by the speakers and the audience.



4.2 Legal Frameworks and National Culture in Asia Pacific

Individual countries have legal regimes that address data collection, storage, and use. In some contexts, existing laws like Hong Kong's Personal Data (Privacy) Ordinance passed in 1995[93], is the mechanism for privacy protection, despite being drafted long before current global trends in data collection. In other cases, new frameworks are being developed, to respond to conflicting expectations. Pakistan's proposed Personal Data Protection Bill[94] received a mixed response and has been criticised for not extending protections to government held data[95]. The United States regulation of data arises out of privacy protection, regulation of commercial relationships and national security concerns, with different priorities in each context.

Meanwhile international bodies are establishing standards or requirements for data protection. The General Data Protection Regulation (GDPR) was adopted in the European Union in 2018[96], creating enforceable regional standards that have influenced data practices globally. The European Commission has further recommended digital standards for Artificial Intelligence including the collection and use of personal data[97]. At a political level, state leaders are calling for agreed-upon standards for the protection of critical data[98]. These efforts, with variable levels of support or enforceability, are creating a common direction for privacy protection regimes.

The Asia Pacific region is vast with different languages, ideologies, corporate ecosystems, religions, and cultures. Companies based in Europe or the US often see Asia Pacific as a single region, using a single approach to privacy and data compliance. Companies need technology teams with local resources to develop a comprehensive understanding of the culture and regulations. Assumptions and generalisations where there are cultural differences inhibit compliance.

The importance of nuanced cultural understanding is critical whether in the design of enforceable regimes that will align with international standards or when working with regional or local experts to establish business practices that comply with the data protection laws. The tendency of large companies to treat the region as having a singular culture exacerbates compliance issues and misses the opportunity to develop practices that both comply with the national law and are compatible with global operations. An example of the way culture affects understand is evident when looking at the classification of a Critical Information Infrastructure Operator (CIO) under China's Cyber Security Law. It categorises companies based on, among other factors, its impact on citizens. In some regimes that might be represented by a specific number of personal data points or users. In the Chinese context, the law does not have a numeric requirement. Instead, the idea of impacting the citizenry is understood as the proportional impact or level of recognition by average people rather than a set number of users. Not appreciating the incompatibility of these two measures is a barrier to working across systems.

93 The Personal Data (Privacy) Ordinance (the "PDPO") 1995, *https://www.pcpd.org.hk/english/data_privacy_law/ordinance_at_a_Glance/ordinance.html#:~:text=DPP3%20prohibits%20the%20use%20of,previously%20given%20by%20written%20notice.*

94 Personal Data Protection Bill 2021, *https://moitt.gov.pk/SiteImage/Misc/files/25821%20DPA%20Bill%20Consultation%20Draft(1).pdf*

95 Nadeem Iqbal, Personal data protection as a rights issue, The International News, May 10, 2020. *https://www.thenews.com.pk/print/656413-personal-data-protection-as-a-rights-issue*

96 General Data Protection Regulation, *https://gdpr-info.eu/*

97 European Commission, Shaping Europe's digital future, *https://digital-strategy.ec.europa.eu/en/library/communication-artificial-intelligence-europe*

98 Biden tells Putin certain cyberattacks should be 'off-limits', Reuters, June 16, 2021, *https://www.reuters.com/technology/biden-tells-putin-certain-cyber-attacks-should-be-off-limits-2021-06-16/;*

4.2.1 Jurisdictional Differences

Looking at the regulations in place across the Asia Pacific region, there are emerging commonalities in the definition of what constitutes personal information and the requirement for government controls. However, there are also significant differences that make it difficult for companies to understand and comply with each jurisdiction's legal regime. For example, in China, the China Cyber Security Law, Data Security Law (2021), and the Personal Information Protection Law (2021)[99] all set out rules of dealing with data and establish enforcement agencies and industry regulatory bodies. The laws each address different purposes, mixing extraterritorial application and national security concerns with insolvency processes – all with an impact on data privacy. It is difficult for a global company to fully understand China's legal regime, let alone comply with all aspects of it. The rational for each law affects its interpretation, adding additional complexity for companies trying to navigate privacy regulations.

Across the Asia Pacific region, the legal approach varies by country. Some require greater focus on state accountability, others on reigning in the private sector. Many countries limit data transfer to countries with *similarly placed* data protection regimes. However, the definition of *similarly placed* is complex. A consumer protection approach, such as that used in the US, is different from a consent-based approach like the GDPR model in Europe, while other countries have no data protection laws at all. Determining compatibility between these completely different approaches is difficult, creating a gap that is easily exploited by companies. The impact of these legal gaps is evident when a company leaves a national jurisdiction with the data of its citizens. Situations like the departure of a telecom companies from Myanmar after government insistence on the misuse of consumer data raises questions about the ownership and control of the users' data, and the security of the data long-term[100].

One of the most difficult aspects of compliance with privacy regulations is the requirement for data localisation. Integrated IT systems, developed and improved over the last decade, cannot be used if they move data and hold it in one centralised location, outside of the country. China requires standalone systems, housed within China, with minimal data exchange. These restrictions are more onerous if the company is classified as a Critical Information Infrastructure Operator (CIO) that cannot transfer key operational data outside of China. This limits the company's ability to analyse data or report on global operations. This restriction, multiplied in other Asia Pacific countries, makes the operation of IT systems and regional data sharing complex.

The different legal frameworks in each country also affect enforcement efforts. Each has its own expectations with little attention to compatibility, despite commerce and digital communication happening at the global level. Some legal frameworks authorise numerous agencies, each responsible for different aspects of data management. Agencies at the state, province, and industry level each have their own processes, with no common point of contact for a company to approach for clarification.

4.2.2 Data Ownership and Privacy Interests

Debates about data regulation often focus on control and profitability – priorities for companies, and governments – not on user safety, wellbeing, and autonomy. Individual ownership of data should be the starting point for discussions of regulation, with attention to users retaining control, choice, and autonomy in how the data will be used.

Meaningful consideration of privacy protections requires first acknowledging the vast power imbalances between users and data controllers. This imbalance is even more extreme in the Global South where decision making, processing, sharing and storage are concentrated with private companies based predominately in the Global North, leaving users with limited avenues for participation or recourse. Similar asymmetric relationships, lack of accountability and transparency between users and governments further impact control and undermine meaningful consent. Data protection laws are a key tool to address these power imbalances.

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99 Skadden, *China's New Data Security and Personal Information Protection laws: What They Mean for Multinational Companies*, Nov 3, 2021. *https://www.skadden.com/Insights/Publications/2021/11/Chinas-New-Data-Security-and-Personal-Information-Protection-Laws#:~:text=The%20Data%20Security%20Law%20(DSL,on%20the%20data's%20classification%20level.*

100 Will Feuer, Myanmar bars foreign telecom executives from leaving country, July 5, 2021. *https://nypost.com/2021/07/05/myanmar-bars-foreign-telecom-executives-from-leaving-country/*

In Pakistan and India where there are efforts to bring in social media regulation, the tension between international norms and local laws relating to blasphemy or free expression are in conflict. Civil society and journalists are actively challenging social media regulation because of its overreach or the intersection with other laws.

Looking to legal regimes to protect people's personal data is difficult where mechanisms for government accountability are weak or there is no institutional precedent for oversight bodies. Laws enacted to protect users in online spaces can be weaponised against political dissenters and marginalised communities.

The tension between state interests and individual rights is even more attenuated in the context of national security where legal frameworks may exacerbate rather than address power imbalances. For example, when Pakistan introduced its draft Personal Data Protection Bill 2021[101] – still not enacted – it included an exception for government-held data. Rather than address users' lack of control over their privacy, the proposed bill would have entrenched government immunity for data breaches. This type of conflict is more evident in the legal frameworks used in authoritarian contexts, making it difficult for individuals or civil society to challenge regulations. When legal approaches are incompatible, there has been a decoupling of the laws or regulations affecting a specific technology. This has led to some technologies only being available in the Chinese sphere.

4.2.3 Oversight of Data Practices

Independent commissions that hold data collectors accountable and do not shy away from enforcement are a part of the landscape of regulation, creating expert and independent decisions that can build public confidence. Government oversight in countries with authoritarian governments or a history of authoritarian regulation may result in increased risks to vulnerable communities without meaningful protections to users.

The effectiveness of independent commissions to monitor or enforce data protection is complicated. In countries with an established reputation for independent commissions with appeal rights to courts and enforceable fines and remedies, a commission is a good tool to build public confidence and prevent state intervention. In authoritarian countries where there is a pattern of strategic government appointments to commissions or industry lobbying of members, the independence of the commission model is suspect. Appointing experts with academic or civil society support can bring nuanced understanding to the decision-making process. Looking critically at the make-up of a commission is key to assessing its independence. The feasibility of a commission having authority to enforce legal violations against a company headquartered in another country is another barrier to effective regulation.

In the judicial context, Pakistan and other countries are seeing an increase in the judiciary appointing *amicus curiae* with human rights expertise to help the court create good jurisprudence[102]. A similar approach is needed in the field of data protection where judges and commissions do not have the specialised knowledge. In Asia there is an ongoing concern about the sale or misuse of data both outside of government control, and in concert with government actors.

101 Personal Data Protection Bill 2021, *https://moitt.gov.pk/SiteImage/Misc/files/25821%20DPA%20Bill%20Consultation%20Draft(1).pdf*
102 UNOHCHR, *Submissions to courts*, *https://www.ohchr.org/en/special-procedures/wg-women-and-girls/submissions-courts*

4.3 Synthesis of Observations from Virtual Dialogue

In terms of remedies, criminal liability for data or privacy breaches is controversial. Data protections laws can be used against journalists and political opponents. Users of a technology who do not understand either how the technology works or how the law works are more likely to violate complex rules. Criminalisation may result in targeting the most vulnerable.

Fines work in some contexts if they are proportionate and enforced. In one case under the Hong Kong's Personal Data (Privacy) Ordinance[103], the data of 9.4 million customers was leaked. The UK Information Commissioner's Office fined the company HK$5 million for failing to protect users' data[104], but the company received no domestic penalty because the Hong Kong Ordinance does not set out enforceable penalties. For enforcement and fines to work, the underlying law must be clear, with strict penalties, and then must be interpreted by independent decisions-makers.

4.3.1 Industry or Corporate Oversight

In some instances, the industry or even the technology company itself might adopt more rigorous oversight, especially if the company has adopted stringent international standards. Self-regulation or voluntary adherence to established standards like those issued by the Global Network Initiative (GNI)[105] are avenues for greater protection. These industry-wide commissions and regulatory regimes are an area of soft law that is not explicitly backed-up by government power but is also more independent and transparent than self-regulation. These may exert market pressure to develop industry standards.

However voluntary corporate compliance is not always consistent between jurisdictions. The Digital Rights Foundation assessed how well social media companies follow their own privacy policies and Pakistan's data protection rules. It used a Ranking Digital Rights (RDR)[106] process and found that global companies had different privacy policies for their Pakistani operations. Extensive protections were applied to European users, while in Pakistan only a very basic privacy policy was in place, with no legal recourse or remedies in the event of a breach. Users were not given any information about data retention or processing, or storage of data. In response to the assessment, companies asked for guidance on privacy policies, rather than looking to their own global practices and adopting the high standards adhered to in other countries.

In some contexts, private social media companies have more flexibility to address hate speech or terrorist content than governments do[107]. For example, the US First Amendment on free speech does not apply to private companies, allowing Twitter to exert more authority than the government does when reviewing harmful content on its platform. The difference comes down to who already holds the power – governments or private companies – and who will use the increased authority to better protect users' privacy.

When holding companies accountable in countries that do not have strong rule of law or existing data protection, civil society organisations can rely on UN guiding principles on business and human rights[108], the GNI principles and other international standards. Public pressure can continue to call for companies to meet the strictest standards such as those outlined in the GDPR, regardless of the national laws.

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103 The Personal Data (Privacy) Ordinance (the "PDPO") 1995, *https://www.pcpd.org.hk/english/data_privacy_law/ordinance_at_a_Glance/ordinance.html#:~:text=DPP3%20prohibits%20the%20use%20of,previously%20given%20by%20written%20notice.*

104 *Cathay Pacific fined by UK watchdog over massive data breach*, Mar 5, 2020. *https://timesofindia.indiatimes.com/cathay-pacific-fined-by-uk-watchdog-over-massive-data-breach/articleshow/74487724.cms*

105 Global Network Initiative, *https://globalnetworkinitiative.org/*

106 Ranking Digital Rights, *https://rankingdigitalrights.org/*

107 For an example of corporate approaches to independent oversight, see Meta's Oversight Board at *https://about.facebook.com/actions/oversight-board-facts*

108 UN OHCHR, Guiding Principles on Business and Human Rights, 2011, *https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf*

4.3.2 Data Protection and National Security

The protection of privacy and data gets more complicated in countries that integrate their civil and state functions. The Chinese Military-Civil Fusion (CMCF) approach to technology deliberately blurs the line between military and civil applications of the development and use of technologies with serious ramifications for data protection. Under this approach, user data is siphoned from civilians. Data vulnerabilities might be introduced deliberately, for military purposes.

While not exclusively a Chinese strategy, China is the primary proponent of this approach. In response to the CMCF approach, the US government uses several strategies to combat the collection and misuse of personal data, both for national security purposes and to protect users of technology and social media platforms. One of the keys tools is to reveal how data is being collected and demonstrate the range of these technology platforms.

The US government also produces lists of companies whose data collection, storage or use poses a threat to US security or to users as the basis for sanctions against these companies. US companies and governments are expected to scrutinise these lists to avoid doing business with companies participating in the CMCF. For example, the Chinese Military Industrial Complex List is maintained by the Treasury Department and lists companies at the heart of the CMCF.

The US has issued indictments against state-sponsored hackers in Iran and China. While these indictments have not led to extraditions, they have been effective to name-and-shame known hackers and reveal their practices and affiliations.

Countries are also working together at the political level to establish international norms, including a 2015 agreement between the US and China, made at the presidential level, to prohibit hacking for industrial espionage[109].

Taking the CMCF example, it is clear that data protection must be approached in a proactive way, with law makers and those interpreting or enforcing the law understanding not just the text of the law, but the user-focused data and privacy protection motivations behind it.

4.3.3 Education about Data Protection Issues

Issues of data and privacy protection require a nuanced understanding of both the technology and the purposes of the legislative regimes. Education about the rationale for different regulations and practices is needed to improve interpretation and enforcement of current protections and to increase the effectiveness of coordination efforts across borders. In particular, education can focus on:

- Consumer education about the scope of current data collection and the risks it poses to individuals;
- Corporate education about the obligations of companies to scrutinise the compliance level of their partners to protect consumers, their own intellectual property and national security interests;
- Judges and lawyers whose advocacy and decisions must be informed by the purposes of data protection legislation and avoid narrow interpretations that evade the protective purposes of data protection;
- Policy makers developing and amending legal regimes who are expected to understand nuanced data handling, as well as the complexity of multi-jurisdictional legal parameters; and
- Politicians working at the national and international level to effectively coordinate efforts, set standards and establish norms for data handling.

109 Kim Zetter, *US and China Reach Historic Agreement on Economic Espionage,* Wired, Sept 25, 2015. *https://www.wired.com/2015/09/us-china-reach-historic-agreement-economic-espionage/*

4.4 Conclusion and Recommendations

4.4.1 Recommendations for Lawyers and Bar Associations to Advance Data and Privacy Protections

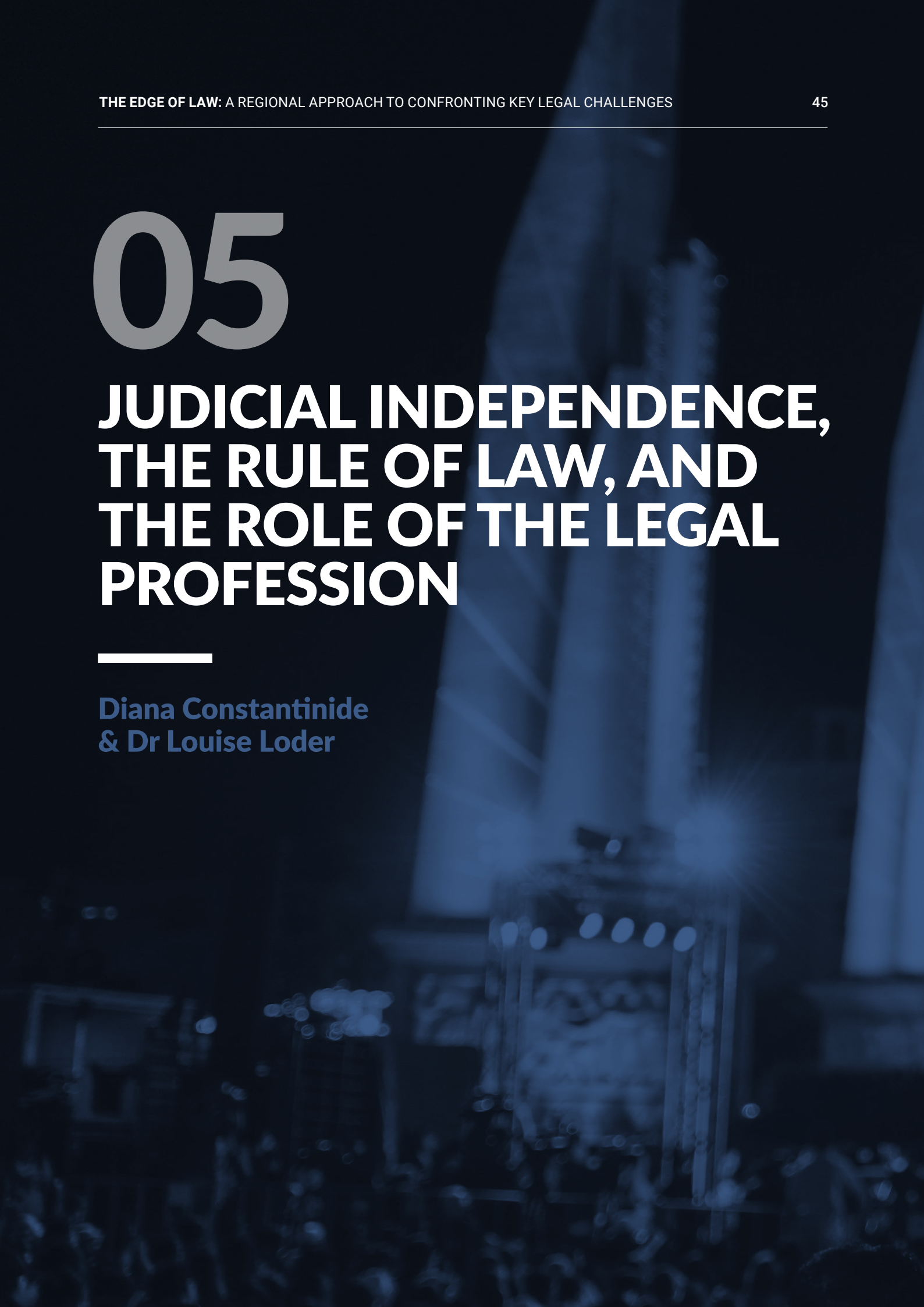
- As data protection and digital privacy continues to evolve, lawyers and bar associations can play important roles in building broad understanding and implementing a purposeful approach to data that protects individual users' rights:
  - Lawyers can influence data protection and digital privacy in several ways, both preventative and reactive, depending on their role.
  - As policymakers, lawyers can draft legislation with clear purposes to minimise misinterpretation or avoid strict interpretation. Instead of listing companies involved in the CMCF, they could state "any company that does x." This type of clear indication of the legislative goal helps judges and regulators to understand the purpose.
  - As corporate counsel, lawyers can draft clear privacy policies explaining in plain language how data will be used, who will have access to it and how it will be stored so that people can understand and make decisions about their privacy. These policies and access to remedies should be published in the language that users speak, not just in the contractual or policy language.
  - When advising companies, lawyers can do due diligence from a legal perspective, but also from an ethical and privacy perspective to focus corporate practices on more than the minimum requirements, and on privacy approaches that reflect a company's standards, and which help its consumers. Lawyers advising their clients should not be a conduit for minimal or passive approaches to privacy but should help their clients understand the larger implications and push for a system of data protection that is good for the individuals and, in the long term, better for the company as well.
  - As members on adjudicative and regulatory bodies, lawyers can interpret the mandate expansively to give meaning to the purpose of privacy protections. This may require adjudicators to push for more effective enforcement mechanisms and interpreting their authority broadly to protect as many people as possible.
- Bar Associations can do more to identify the need for professional upgrading on the changing nature of privacy protections. This can include engaging with experts and organisations to mainstream the discussion of data within the profession. Bar Associations should also:
  - Actively participate in consultations to bring a rigorous privacy protection perspective to legislation or policy development.
  - Lawyers and Bar Associations can collaborate with civil society organizations that often have expertise in privacy issues but are not given the same space or freedom to raise civil liberties concerns.
- Judicial academies can also offer ongoing educational opportunities for judges both at the beginning of their career and as an ongoing professional development. The technology and global nature of personal data protection is changing much faster than the legal analysis, making it hard for judges to apply jurisprudence on these issues.
- Together, the judiciary, lawyers and Bar Associations should strive to work holistically toward the explicit goal of improving data protections and digital privacy by building up the understanding of practitioners, of clients and of the general public, avoiding silos and jurisdictional restrictions; recognising common ground (across agencies, countries, laws) and finding ways to strengthen those commonalities; and developing expertise and appreciation for the cultural differences across the Asia Pacific region.
- Lawyers and Bar Associations should aim to put the United Nations International Human Rights Framework at the centre of drafting and interpreting privacy and data protection frameworks[110].
- Corporate actors should commit to transparency and accessibility whilst ensuring that the Global North and Global South are considered and treated equally.

110 United Nations, *https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/human-rights-law/*

05

JUDICIAL INDEPENDENCE, THE RULE OF LAW, AND THE ROLE OF THE LEGAL PROFESSION

Diana Constantinide
& Dr Louise Loder



5.1 Introduction

In all regions, achieving justice for all depends on having independent judges in courts that are not compromised by efforts to undermine their impartiality, who can deliver decisions that are respected by the public and enforced by the executive and legislative branches of government. Judicial independence empowers judges to protect the rights of people from executive overreach and oppose corruption without fear of reprisal. An independent judiciary is a hallmark of a democratic society, but the enjoyment of democratic freedoms varies greatly from country to country in the Asia-Pacific region, and the challenges confronting judicial independence in each country are complex and deeply entrenched. At this fraught moment in history, the rule of law is facing unprecedented and urgent challenges which are manifesting in a steep rise in attacks on judicial and legal institutions collectively, and on lawyers and judges more personally, both physically and rhetorically, posing a serious threat to the ability of judges and lawyers to render justice to the nations and communities they serve.

Across the region, from military rule and emergency decrees that invoke national security to eclipse the rule of law to corruption and authoritarian disregard for the separation of powers doctrine, the judiciary is under attack. Judges who attempt to enforce the rule of law can find themselves dismissed from office, imprisoned, or facing serious risks to their personal safety as well as more subtle, insidious forms of harassment and intimidation. The Hong Kong judiciary has recorded "abusive graffiti, doxing, and even death threats against judges to insult and intimidate them for having decided politically controversial cases in a particular way, or to pressure and influence how they adjudicate in future cases"[111]. The legal profession has rigorously defended the judiciary in many Asia-Pacific countries, including in Hong Kong, China, Pakistan, Bangladesh, Brunei, and others, as the responsibility for protecting the institution cannot lie solely with courts and judges. Of equal importance to judicial independence is the independence of lawyers; it is essential that lawyers are unencumbered by political pressure or threats to safety and to life. For both judges and legal practitioners, independent professional bodies are an important mechanism by which independence across the whole spectrum of the justice and legal systems can be realised, offering a shield of protection from executive overreach, political interference and manipulation, and creeping authoritarianism.

In this light, the fourth and final session of the *Edge of Law* series explored the role of the legal profession in maintaining judicial independence in the face of threats to the rule of law, and examined how judicial independence, integrity, and impartiality can become more deeply rooted in the legal institutions of the Asia-Pacific region. For this event, BHRC and ABA ROLI welcomed CM Chan, President of the Law Society of Hong Kong; Desi Hanara, International human rights practitioner; Professor Hoong Lee, Emeritus Professor, Monash University; and Sarah McCoubrey, Strategist on Access to Justice & Partner, CALIBRATE. Panel presenters discussed current models for judicial appointments, and how such processes around appointments and tenure might be reformed to be made more transparent and to support judicial integrity, impartiality, and independence.

Presenters also elaborated on the role of the legal profession and other entities, such as bar councils and lawyers' associations, in defending courts and judges, and on the role of international bodies and regional councils in protecting judicial independence in the Asia- Pacific and other regions. Recognising that the Asia-Pacific region is not a monolith and that the rich diversity of races, languages, religions, and cultures make it difficult to prescribe an overarching 'one size fits all' solution, the session reiterated the paramount importance of a judicial system that is not only independent but is consistently seen to be independent. Differences between concepts of judicial independence in common law and civil law systems were critically considered, as was the gender dimension of judicial independence and the need for greater inclusivity and non-discrimination in all aspects of the judicial appointments process and in all areas of judicial conduct. Lastly, the presenters offered a series of recommendations for how a culture of judicial independence might be firmly established in the region to promote judicial integrity, prevent corruption, and deepen respect for human rights and democracy.

111 CM Chan, Judicial Independence, Hong Kong Lawyer (The Official Journal of the Law Society of Hong Kong),November 2021, *https://www.hk-lawyer.org/content/judicial-independence-0*

5.2 Legal Frameworks and Current Challenges

5.2.1 International Law Treaties and Conventions

Judicial integrity, impartiality and independence are essential components of the right to a fair trial and the rule of law, and the independence of the judiciary should be regarded by every citizen as a guarantee of respect for human rights and impartial justice free from external influence[112]. Judges are stewards of the individual rights of litigants in their courtrooms, and so judicial integrity is critical to public confidence in the justice system and to the stability of democratic processes and institutions, economic markets, and global relations[113].

The legal framework relating to the independence of the judiciary extends to international and regional standards. On international standards it includes treaty law, such as Article 14 of the International Covenant on Civil and Political Rights (ICCPR) which guarantees that all persons shall be equal before the courts and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent, and impartial tribunal established by law[114]. Similar protection is offered under Article 10 of the Universal Declaration of Human Rights (UDHR) that recognises the fundamental principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge[115].

The intrinsic link between a competent, independent, and impartial judiciary and the protection of human rights was endorsed in 1985 in Milan, during the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, from which the UN Basic Principles on the Independence of the Judiciary (hereafter, the 'UN Basic Principles') emerged[116]. These are primarily addressed to States and set out:

1. **General principles about the importance of judicial independence and the duty of all governmental and other institutions to respect and observe the independence of the judiciary;**
2. **The importance of fundamental rights of judges being respected (including freedom of expression, belief, association, and assembly), and ensuring that judges are free to form and join judicial associations and organisations;**
3. **Standards to determine the professional background, selection process, and training competencies to fill a judicial position;**
4. **Conditions of service and tenure;**
5. **The duty of judges to maintain professional secrecy and the protection of judicial immunity; as well as**
6. **Disciplinary measures, suspension, and removal from office (only for reasons of incapacity or behaviours that render judges unfit to discharge their duties).**

In 2001, the Chief Justices of the Judicial Group on Strengthening Judicial Integrity recognised the need for universally acceptable standards of judicial integrity[117]. This was the genesis of the Bangalore Principles of Judicial Conduct[118], which identified six core values:

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112 Diego Garcia-Sayan, *'Report of the Special Rapporteur on the independence of judges and lawyers'* UN General Assembly, A/HRC/38/38, Human Rights Council, 2 May 2018 based on the Human Rights Council resolution 35/11, para 7

113 Sarah McCoubrey, '*Emerging Technologies and Judicial Integrity in ASEAN'* JIN ASEAN, UNDP, 2021, p.5

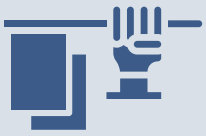
114 Article 14, International Covenant on Civil and Political Rights (ICCPR)

115 Article 10, Universal Declaration on Human Rights

116 Adopted 6 September 1985 by the Seventh United Nations Congress on the Prevention of Crime and theTreatment of Offenders held at Milan from 26 August to 6 September 1984 *'Basic Principles on the Independence of the Judiciary'* endorsed by General Assembly resolutions 40/32 and 40/146

117 Judicial Group on Strengthening Judicial Integrity, *https://www.judicialintegritygroup.org*

118 Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hauge, November 25-26, 2002, *'The Bangalore Principles of Judicial Conduct'*



Value 1
Independence

Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Value 2
Impartiality

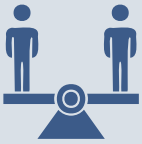
Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Value 3
Integrity

Integrity is essential to the proper discharge of the judicial office.

Value 4
Propriety

Propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge.



Value 5
Equality

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Value 6
Competence and diligence

Competence and diligence are prerequisitesto the due performance of judicial office.

The Bangalore Principles apply to both civil law and common law systems. The mechanism and infrastructure in achieving the Bangalore Principles may differ from country to country but the concept of judicial integrity and independence will apply in both systems. In 2018, a Report of the Special Rapporteur on the Independence of Judges and Lawyers underlined the importance of states establishing a Judicial Council to help guarantee the independence and autonomy of the judiciary[119].

5.2.2 Current challenges

The fundamental values and principles conveyed in both the UN Basic Principles and the Bangalore Principles should ideally be reflected in regional human rights instruments, in domestic constitutions, statute and common law, and in judicial conventions and traditions. However, the Asia-Pacific region lacks binding regional human rights instruments as well as enforcement and supervisory mechanisms, including a regional human rights court, a cohesive communication mechanism, or reporting procedures[120]. This has serious implications for the realisation of human rights standards and for the creation of a human rights culture in the region: the judiciary in the region, in comparison to judiciaries in other regions in the world, is neither equipped nor supported in their adjudication of human right matters at the regional level, nor in their delivery of recourse and remedy for the victims of human rights violations[121].

119 See also *Universal Charter of the Judge*, approved by the Central Council of the International Association of Judges in Taipei, Taiwan Province of China on 17 November 1999 and updated in Santiago on 14 November 2017

120 Desi Hanara, *'Mainstreaming Human Rights in the Asian Judiciary'*, accessed 28 February 2022 4

121 Desi Hanara, *'A Decade in Review: Assessing the Performance of the AICHR to Uphold the Protection Mandates'*, accessed 28 February 2022

5.3 Synthesis of Observations from Virtual Dialogue

At the outset of the session, the panel presenters unanimously recognised, as explained above, a 'one-size fits all' approach cannot be applied to the whole Asia-Pacific region for the effective and impartial functioning of judicial institutions, encompassing procedures and protocols for judicial appointments, security of tenure, independence and integrity, and removal. Inevitably, any clash in these elements can become volatile for society (as we have seen in instances of civil unrest across the region in recent years), and when turbulence is generated in a society, the judiciary is often caught in the crossfire – especially when there is contention between the State and its citizens. Judicial integrity, independence and impartiality therefore become critical to the functioning and protection of democracy, the rule of law and human rights.

5.3.1 Judicial Integrity, Independence, and Impartiality

The judiciary is one of the most fundamental institutions for upholding the rule of law, democracy, and human rights, with judges "charged with the ultimate decision over life, freedoms, rights, duties and property of citizens", according to the UN Basic Principles[122]. For the judiciary to carry out its role as a 'balance wheel'[123] of a constitutional system, or as the guardians of the constitution, it must be respected as an independent entity comprising judicial officers of the highest integrity and free of bias.

As noted by Professor Hoong Lee (an esteemed academic from Monash University in Australia who is widely published on the topic of judicial independence in Asia[124]), analysis of the judicial institutions in the Asia-Pacific region reveals a 'chequered story', with several region-specific factors at play which make establishing judicial independence in the Asia- Pacific countries problematic[125]. One of these factors is the inconsistent, incohesive, and opaque judicial appointments process in some countries and the flagrant, endemic manipulation of these processes. This risks a judiciary that is or is seen by the public to be servile and deferential to the executive and therefore vulnerable to overreach and corruption. Other issues include a lack of security of tenure of terms of judicial office, and a lack of protection against retaliatory diminution of judicial remuneration, both of which ultimately undermine efforts to adhere to international anti-corruption standards. An additional concern is wrongful interference with the disciplinary and removal procedures for judges.

As Professor Lee observed, it is relatively easy to manipulate the judicial appointments process in the Asia-Pacific region because vastly different systems for judicial appointments have been adopted in different countries, and there is no transparent, recognisable regional 'standard' to benchmark. Similarly for the judicial removal process, countries have either adopted a parliamentary system of judicial removal or have enshrined provisions within their constitutions for the establishment of special tribunals to conduct removal proceedings and accordingly make recommendations for judicial removal. These processes are overwhelmingly susceptible to abuse; as Professor Lee recalled that in 1988, three judges of the Supreme Court of Malaysia (including the Lord President Tun Salleh Abas) were controversially removed on the grounds of "misbehaviour" (entailing criticism of the executive)[126]. Although the Malaysian Constitution legitimately provided for a tribunal to facilitate the removal, it was widely acknowledged that the process had been manipulated in such a way as to bring about the politically expedient removal of not just the most senior judge in the land but two other Supreme Court judges, ultimately triggering a constitutional crisis from which the Malaysian judiciary is said to have "not yet fully recovered"[127].

122 Preamble, UN *'Basic Principles on the Independence of the Judiciary'* endorsed by General Assembly resolutions 40/32 and 40/146

123 W Wilson, Constitutional Government in the United States (Columbia University Press, 1908) 143

124 Emeritus Professor HP Lee, *https://research.monash.edu/en/persons/hoong-lee*

125 See generally HP Lee and Marilyn Pittard (eds), Asia-Pacific Judiciaries: Independence, Impartiality and Integrity (Cambridge University Press, 2018)

126 Mark Gillen and Ted L McDorman, The Removal of the Three Judges of the Supreme Court of Malaysia, University of British Columbia Law Review 25 (1991), p 183

127 See Malay Mail, *Ex-judge: Judiciary never fully recovered from 1988 crisis*, 20 September 2015

Fundamentally, there are two essential elements to judicial independence, according to Mark Gillen and Ted McDorman: "the independence of individual judges, both substantive and personal, and the collective independence of the judiciary as a body"[128]. On the individual level, for a judiciary to command the respect of the people, judges must be people of impeccable character and absolute integrity, who will be impervious to corruption and for whom respect for human rights, democratic institutions and practices, and the rule of law is at the core of their professional values. Collectively, as Desi Hanara stated during the session, judges should be free to form and join associations that will represent their interests, offer continued professional development and training opportunities as well as cross-jurisdictional networking and experience exchange, and promote the sacrosanct nature of judicial independence and its critical role in the creation and functioning of free, fair judicial and legal institutions.

To promote a culture of judicial independence in the courts of the Asia-Pacific region, serious attention should be paid to the various models for judicial appointment to determine which of these models represents the most effective process for ensuring the appointment of judges of the highest integrity who will operate in an independent manner. As Professor Lee noted during the session, there are two common methods of appointing judges – firstly, where the power of judicial appointment is vested solely in the hands of the executive arms of government as a prerogative of the executive, or for jurisdictions to adopt a Judicial Appointments Commission which remains independent of the government of the day and prevents a situation where the executive may appoint judges who are indebted to them for their judicial position. The impartiality and success of a Judicial Appointments Commission will be determined largely by its structure and whether it is created and composed as a truly independent body which can make appointments without any undue political interference. The decision of the Commission should be final, but very often such Commissions only make a recommendation, and it is up to the government whether to accept the recommendation. Both Professor Lee and CM Chan agreed at this juncture that there is no 'perfect' model that will work for every country in the region, as even within the various common law jurisdictions there are very different models. As Mr Chan pointed out, judicial appointments are a controversial topic in most states; in the US, judges are directly elected in some cases and Supreme Court Justices are plainly political appointees.

As Sarah McCoubrey shared, the most important feature of a judicial appointment process is its transparency, which can be achieved through a rigorous matrix that is made available for the public to see and which makes clear the requirements for skills and experience. Ideally, a Committee or Commission should be able to scrutinise the appointment outside of the political process. Transparency of the process is critical and helps move the region away from the explicitly corrupt use of judicial appointments to shore up political power. Desi Hanara also reiterated

128 Mark Gillen and Ted L McDorman. The Removal of the Three Judges of the Supreme Court of Malaysia, University of British Columbia Law Review 25 (1991), p 183

that merit, qualifications, skill, capacities, independence, and impartiality are all important in the judicial selection process but from a human rights perspective, there should also be no discrimination against candidates based on race, colour, language, religion, sex, disability, or any other grounds.

Another challenge is how to protect judges from unfair dismissal while the process of strengthening and buttressing judicial removal procedures is underway. In Professor Lee's estimation, this is where international organisations (such as LawAsia, the International Bar Association, and others) can contribute most meaningfully to the protection of judicial independence in countries like Malaysia and others in the region where past expressions of concern by international bodies over unfair, politically motivated dismissals of senior judges have successfully compelled external parties to investigate and amplify civil society advocacy on these matters, thereby offering the judiciary a shield of protection from executive overreach and interference.

Further advancing the importance of judicial integrity, CM Chan (President of the Law Society of Hong Kong[129]) explained the importance of judicial integrity and independence in Hong Kong which is enshrined in the Basic Law. This is to be found in Article 2, which guarantees Hong Kong's right to exercise a high degree of autonomy and independent judicial power, including that of final adjudication; in Article 19, which provides that Hong Kong shall be vested with independent judicial power; in Article 39, which incorporates the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) into the constitution, making specific reference to an independent judiciary; and in Article 85, which provides that the courts of Hong Kong shall exercise judicial power independently, free from any interference, and members of the judiciary shall be immune from legal action in the performance of their judicial functions[130].

Article 88 further provides that judges shall be appointed by the Chief Executive "on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors"; and Article 92 clarifies that judges shall be selected based on their judicial and professional qualifications[131]. As CM Chan has previously written: "The selection of Hong Kong judicial officers is very stringent, ensuring that only those with the required ethical standards of integrity, independence, professionalism and substantial legal experience are considered and appointed to judicial office"[132]. In addition, Article 85 of the Basic Law provides that judges must exercise their judicial power independently and free from any interference[133].

The judicial oath taken by all judges reiterates this principle, requiring new judges to pledge that they will "conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit"[134]. Further, Article 82 of the Basic Law provides that the Court of Final Appeal may "as required invite judges from other common law jurisdictions to sit" on the Court of Final Appeal[135]; these are overseas non-permanent judges from the UK, Canada, Australia, and other common law jurisdictions. The former President of the UK Supreme Court, Lord Neuberger of Abbotsbury, is one of the Court of Final Appeal's overseas non-permanent judges[136]. As Mr Chan has noted, Hong Kong's is a "unique system of open justice with highly esteemed foreign judges serving on the final appellate court", which has significantly contributed to what has traditionally been a high level of public confidence in a robust Hong Kong judiciary[137], well respected for its independence, clarity, and transparency[138]. In recent years, however, Hong Kong has repeatedly confronted challenges with maintaining law and order in the face of intimidation against judges and legal practitioners.

129 CM Chan, President of the Law Society of Hong Kong 2022

130 Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

131 Ibid

132 CM Chan, Judicial Independence, Hong Kong Lawyer (The Official Journal of the Law Society of Hong Kong), November 2021, *https://www.hk-lawyer.org/content/judicial-independence-0*

133 Article 84, Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

134 Part V: The Judicial Oath, *https://www.elegislation.gov.hk/hk/cap11?pmc=0&xpid=ID_1438402571376_001&m=0&pm=1*

135 Article 82, Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

136 Hong Kong Court of Final Appeal, Overseas Non-Permanent Judges, *https://www.hkcfa.hk/en/about/who/judges/npjs/index.html*

137 CM Chan, Judicial Independence, Hong Kong Lawyer (The Official Journal of the Law Society of Hong Kong), November 2021, *https://www.hk-lawyer.org/content/judicial-independence-0*

138 Hong Kong ranked 19th across 139 jurisdictions according to the Rule of Law Index of the World Justice Project, No. 8 globally and No. 2 in Asia for judicial independence in the Global Competitiveness Report 2019 published by the World Economic Forum.

5.3.2 Separation of Powers

When considering judicial independence, the divesting of the courts' judicial power strikes at the heart of the separation of powers doctrine. Judicial independence is "a corollary of the democratic principle of separation of powers", and a "guarantee of truth, freedom, respect for human rights and impartial justice free from external influence"[139]. The approach of separation varies in every jurisdiction but if all three powers – legislative, executive, and judicial – are exercised by the same person or body, that (according to Montesquieu) would be "the end of everything"[140]. As Professor Lee put it, "separation of judicial power not only protects against the exercise of arbitrary powers" but also "assists in maintaining the independence of the judiciary and contributes to public confidence in the administration of justice"[141]. Nevertheless, the most powerful executive governments consumed with the retention of such power typically find the separation of powers doctrine an impediment to their unchecked accretion of power.

The judiciary in the Asia-Pacific region encounters a crucial dilemma which arises from the invocation of constitutionalised emergency powers and the power of preventive detention. States of emergency are on occasions declared when a government's grip on political power is affected. Opposition members are rounded up and placed under preventive detention orders. At this instance, the courts have little room to manoeuvre as the constitutional provisions embodying the emergency powers expressly restrict the scope of judicial review. These pressures can put judges in a difficult position of trying to balance competing interests while ensuring that the system advances human rights and the rule of law. Professor Lee explained that in the Malaysian Constitution, an amendment substantively precludes any form of judicial review in relation to an emergency proclamation or emergency measures[142].

Another example was provided by CM Chan in relation to the social unrest that occurred in 2019 in Hong Kong, where the Basic Law structure is encapsulated in the principle known as 'one country, two systems'. Citizens opposed the extradition bill that effectively would allow defendants in criminal cases to be extradited to China. Eventually, this movement turned against Hong Kong's government, but the issue here is that China maintains the authority to interpret Hong's Kong's Basic Law, a power it has rarely used until recently. It was further noted that China is currently undergoing a judicial reform in terms of eradicating corruption. Hong Kong's judiciary is well respected for its independence, clarity, and transparency[143], but in recent years the country has repeatedly confronted challenges with maintaining law and order in the form of intimidation against judges and legal practitioners.

For the judiciary to display independence, there must be recognition and support for the doctrine of separation of powers. Here, the approaches of different jurisdictions vary in terms of the strength given to the doctrine under the constitution, especially the separation of judicial power. An executive arm of government which is more concerned with maintaining its grip on government powers will not give much prominence to the doctrine of separation of powers under its constitution. How does one counter executive power and overreach to effectively defend the separation of powers doctrine? As the Malaysia Federal Court has shown, if the court displays courage and draws upon the jurisprudence of other countries (such as that of the Indian Supreme Court in its use of the Basic Structure doctrine to counter constitutional modifications that contradict long-held general principles of equality, rule of law, and judicial independence), it can collectively negate the effect of constitutional amendments which have the effect of undermining separation of powers.

Lastly, as CM Chan noted, a self-regulatory legal profession is critical to the rule of law and to protecting the judiciary from undue political interference. For example, the Law Society of Hong Kong is a self-regulatory body, vested with confidence and trust from the judicial and legal communities to regulate law firms and solicitors effectively and fairly in Hong Kong. As Mr Chan shared, apart from its self-regulatory role, the Law Society of Hong Kong is mandated to safeguard the rule of law and uphold the principles upon which this core value is founded.

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139 Diego Garcia-Sayan, *'Report of the Special Rapporteur on the independence of judges and lawyers'* UN General Assembly, A/HRC/38/38, Human Rights Council, 2 May 2018 based on the Human Rights Council resolution 35/11, para 7-8

140 Montesquieu, The Spirit of the Law (Thomas Nugent trans, Hafner Press, 1949) at 151

141 A Mason, 'A New Perspective on Separation of Powers' (1996) 82 Canberra Bulleting of Public Administration 1, 6

142 See Article 150(8), Constitution of Malaysia

143 Hong Kong ranked 19th across 139 jurisdictions according to the Rule of Law Index of the World Justice Project, No. 8 globally and No. 2 in Asia for judicial independence in the Global Competitiveness Report 2019 published by the World Economic Forum.

5.3.3 Judicial Independence and Human Rights

Desi Hanara, a distinguished academic widely cited for her work on judicial independence and human rights mainstreaming in the region[144], elaborated on the link between the independence of the judiciary and the realisation of a culture of respect for human rights. According to the World Economic Forum, countries with poor human rights and democracy records have correspondingly low levels of judicial freedom, such as the Philippines, Cambodia, Viet Nam, Pakistan, Lao PDR, Brunei Darussalam, and China[145]. The judiciary has a substantial responsibility to safeguard human rights and the rule of law, to ensure that citizens are treated equally and that the other branches of government can function effectively[146].

For judicial independence, integrity, and impartiality to take root in the legal institutions of the Asia-Pacific region, the rule of law must be nurtured together with efforts to mainstream and strengthen human rights in the region. The UN Basic Principles on the Independence of the Judiciary underline the need to guarantee fundamental freedoms to members of the judiciary, including freedom of expression, belief, association, and assembly, provided however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office, impartiality, and independence of the judiciary. Judges must also be free to form and join associations of judges or other organisations to represent their interests, promote professional training and protect their judicial independence.

Judicial independence in its connection with human rights cannot escape from the fact that the Asian region lacks binding regional human rights instruments as well as enforcement and supervisory mechanisms, including a regional human rights court, a communication mechanism and reporting procedures[147]. This demonstrates that the judiciary in the Asia- Pacific region, as opposed to the other continents in the world, is not equipped with adequate mandates to adjudicate human rights matters at the regional level, or to deliver regional recourse for the victims of human rights violations whose own states have failed to protect them at the national level[148].

Desi Hanara expanded on the need to strengthen the regional bodies, including the Association of Asian Constitutional Court and Equivalent Institutions (AACC) which has issued the Bali Declaration on the Promotion and Protection of Citizens' Constitutional Rights[149]. The Declaration encourages the practice of judicial independence among its member countries and considers necessary interventions, such as systematic scrutiny of rule of law when a threat to judicial independence occurs in any of its member countries. The AACC serves as the only Asian platform to exchange experience and information and deliberate upon issues related to constitutional practice and jurisprudence beneficial for the development of constitutional courts and similar institutions in the Asian region. AACC and other regional bodies such as Council of ASEAN Chief Judges (CACJ) can serve as a strategic platform to discuss and consider the feasibility of the establishment of an Asian Human Rights Court and the development of binding regional human rights instruments. The 2018 Report of the Special Rapporteur on the Independence of Judges and Lawyers further underlines the importance of the establishment of judicial councils to guarantee the independence and autonomy of the judiciary[150], and it is a core recommendation of this session that countries in the Asia Pacific should encourage the establishment of judicial councils or similar independent institutions and improve the standards of those already in existence.

144 Senior Officer for External Relations at the (Association of Southeast Asian Nations) ASEAN Secretariat

145 See the Nation Thailand, Judicial Independence in Asia, accessed on 28 February 2002, *Judicial Independence in Asia (nationthailand.com)*

146 See, among others: Fahed Abul-Ethem, "The Role of the Judiciary in the Protection of Human Rights and Development: Middle Eastern Perspective," Fordham International Law Journal 26(3) (2003); Ackermann, L.W.H., "Constitutional protection of human rights: Judicial review," Columbia Human Rights Law Review 21(1) (1989): 59-71; Eugene Cotran and Adel Omar Sherif, International Conference on the Role of the Judiciary in the Protection of Human Rights: The Role of the Judiciary in the Protection of Human Rights (London: Brill,1997); Frank B Cross, "The Relevance of Law in Human Rights Protection," International Review of Law & Economics 19, no. 1 (1999): 87-98; Saldi Isra, "The Role of the Constitutional Court of Indonesia in Strengthening Human Rights in Indonesia. Constitutional Journal," Jurnal Konstitusi, accessed March 25, 2018, *https://ejournal.mahkamahkonstitusi.go.id/index.php/jk/article/viewFile/33/32*.

147 Desi Hanara, *'Mainstreaming Human Rights in the Asian Judiciary'*, accessed 28 February 2022

148 Desi Hanara, *'A Decade in Review: Assessing the Performance of the AICHR to Uphold the Protection Mandates'*, accessed 28 February 2022

149 AACC, *'Bali Declaration on the Promotion and Protection of Citizens' Constitutional Rights'*, accessed 28 February 2022

150 Diego Garcia-Sayan, 'Report of the Special Rapporteur on the independence of judges and lawyers' UN General Assembly, A/HRC/38/38, Human Rights Council, 2 May 2018 based on the Human Rights Council resolution 35/11, para 7

5.3.4 Digitisation and Judicial Independence

Sarah McCoubrey (judicial integrity expert and the founder of CALIBRATE[151]) identified two trends that are critical to the discussion of judicial independence, human rights, transparency, and equality in the Asia Pacific Region, as revealed in research conducted in 2021 by the Judicial Integrity Network ASEAN (JIN ASEAN) and the United Nations Development Programme (UNDP)[152], surveying local perspectives on judicial integrity and independence and using these findings to develop a new toolkit for judges focused on emerging technologies in the courtroom. JIN ASEAN and UNDP heard from judges across the region about the different types of technologies used in their courtrooms and in the administration of their courts, acknowledging that the focus on technology was motivated by the pandemic experience.

The first trend revealed in the JIN ASEAN / UNDP research focuses on various kinds of technologies used in the courtroom and the administration of the court. Some courts had ongoing digitisation projects before the pandemic and some others were facing the challenges of remote, fully virtual communications suddenly and for the first time. There is a vast range of academic, practitioner and judicial perspectives on the use of technology in the courtroom, especially in the areas of artificial intelligence and machine learning, and although there are judges who have significant experience in handling witnesses testifying online, digital receipts of evidence, predicted or auto-populated judgments and digital case management, there are also judges who have indicated that they do not see a role for technology in the judging process at all. Many judges do not understand or are overwhelmed by the emerging technology, which is problematic because judges must not only have the confidence in the technology used but they must be able to convey such confidence to the public, to ensure adherence to the rule of law and to open justice principles, and demonstrably meet obligations to guard against individual right violations. The second trend indicated enhanced accessibility of the courts to larger numbers of people, especially people who are vulnerable due to gender, sexual orientation, race, refugee or displaced status, people with disabilities, people who live in poverty or in remote areas and those whose identity of political participation puts them at risk.

This work resulted in nine recommendations to judiciaries focused on strengthening judicial excellence using new technologies and emphasised the importance of incorporating rights protections into the design and development of new technologies from the earliest iteration (noting also that technology is not uniformly available across all communities which may raise access to justice concerns in a digital-be-default courtroom of the future). The nine recommendations included:

- **Ask questions about the data being used to train algorithms;**
- **Identify gender, racial and identity-based bias in machine learning processes;**
- **Receive detailed briefings about the training of AI systems;**
- **Prepare litigants and witnesses for the virtual court process, decorum and technology use;**
- **Raise rule of law and trial fairness criteria when new technology is proposed;**
- **Scrutinise evidence and witness testimony presented through new technologies;**
- **Promote an understanding of the court processes with litigants and witnesses;**
- **Support judicial colleagues to build the skills and understanding of new technologies; and**
- **Maintain rigorous attention to avenues for corruption.**

When contemplating justice sector technologies, the judiciary (as the expert on rights protection) is a key voice in the planning, implementation, and monitoring of emerging technologies. Issues such as data privacy, security of evidence, and trial fairness must be addressed in the context of ensuring human rights protections are in place from the outset of technology design and design of digitised court processes, and not tacked on as an afterthought. As Sarah McCoubrey stated during the session, "we need to find ways to support informed, engaged judicial leadership and bring rights-respecting perspectives into the design process of court technologies, rather than waiting until a case is underway and a lawyer raises these concerns".

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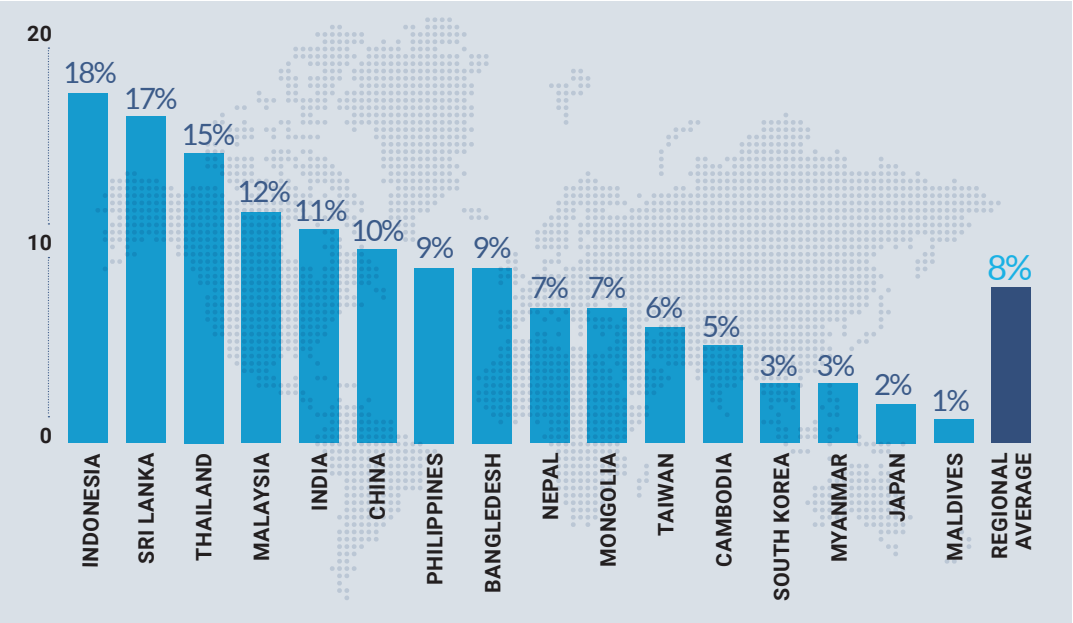
151 Sarah McCoubrey is a judicial integrity expert at Judicial Integrity Network ASEAN (JIN ASEAN). JIN ASEAN was established by the UNDP in 2018 as a network of judges, connecting each other across the region to share knowledge and approaches to protect and strengthen judicial integrity. Current member countries include Indonesia, Lao PDR, Malaysia, The Philippines, Thailand, and Viet Nam. Also see Sarah McCoubrey, ibid see footnote 113

152 Judicial Integrity Network ASEAN / UNDP, Emerging Technologies and Judicial Integrity in ASEAN, December2021, *https://www.undp.org/publications/emerging-technologies-and-judicial-integrity-asean*; also see Judicial Integrity Network ASEAN / UNDP, Emerging Technologies and Judicial Integrity Toolkit for Judges, January 2022, *https://www.undp.org/publications/emerging-technologies-and-judicial-integrity-toolkit-judges*

5.3.5 Gender Equality and Sextortion in the Courts

DIAGRAM 1 SEXTORTION RATES BY COUNTRY AND PERCENTAGE OF CITIZENS WHO HAVE EXPERIENCED SEXTORTION OR KNOW SOMEONE WHO HAS[153].



Source: *Transparency International, Global Corruption Barometer: Asia 2020, p 26*

Sarah McCoubrey highlighted the salient but largely underexplored issue of how gender discrimination and 'sextortion' are undermining judicial independence in countries of the Asia-Pacific region. Sextortion, as defined by the International Association of Women Judges (IAWJ), refers to 'a form of sexual exploitation and corruption that occurs when people in positions of authority .... seek to extort sexual favors in exchange for something within their power to grant or withhold. In effect, sextortion is a form of corruption in which sex, rather than money, is the currency of the bribe'[154]. It is predominantly women who are being extorted for sex in exchange for basic services, identity documents, school registration or healthcare, and the problem is serious enough to warrant closer examination of how gender discrimination and sextortion, as the gendered dimension of corruption, is impacting equality, fairness, and independence of the courts.

Data reveals that sextortion is rampant all over the world, and that this is not exclusively an ASEAN problem, as shown by the research conducted in 2021 by the Judicial Integrity Network (JIN ASEAN) and UNDP[155]. Collective attention to this problem needs to come from lawyers arguing cases that deal with aspects of extortion, and from public officials and judges who encounter sextortion in their courtrooms and are in prime position to call out gender discrimination in their own courts, or when they experience it in their own career paths, or observe it in the treatment of court staff, through the language and behaviour of experts and witnesses or in the arguments made by counsel. Upholding the highest standards of equal treatment for everyone in the court process and calling out discrimination at every level is an integral part of how a judge cultivates confidence in the justice system overall.

Undoubtedly, greater participation of women in the judiciary and in the legal profession overall is a key strategy to address sextortion and corruption more generally, and create a more transparent, inclusive, and representative judiciary. As Imelda Deinla notes, the relationship between gender and judicial independence is "an understudied

153 *Global Corruption Barometer*: Asia 2020

154 International Bar Association, Sextortion, Accessed at https://www.ibanet.org/LPRU/Sextortion

155 Judicial Integrity Network ASEAN / UNDP, Emerging Technologies and Judicial Integrity in ASEAN, December2021, *https://www.undp.org/publications/emerging-technologies-and-judicial-integrity-asean*

area, particularly in the context of non-Western democracies"[156]. Across the Asia-Pacific region, there has been a promising increase in the number of women judges, but they are disproportionately assigned to lower or family courts[157]. Therefore, it is a core recommendation of this session that the intersection between gender equality, human rights and judicial independence be more closely studied in the context of the Asia-Pacific region in particular and non-Western jurisdictions more broadly, to deliver evidence-based frameworks that will support judges in challenging inequality, corruption, and abuses in their many facets. A further recommendation to emerge from this session is that members of the judicial and legal communities, as representatives of law societies, bar associations and civil society, should urgently address gender imbalances in the judiciary. This could be achieved by establishing peer to peer support networks for women judges across borders and between levels of court, to identify the specific impacts of gender inequality and sextortion and build consensus on how to most effectively steer institutional change in this regard.

5.3.6 Judicial Independence in Common and Civil Law Systems

During live audience Q&A in the session, a question arose as to any differences in the role and concept of judicial independence in common law and civil law systems. Professor Lee shared that the concept of judicial independence is rooted in two facets – institutional independence and the independence of the individual judges. "If one looks at the judiciary as a holistic institution, mechanisms should be put in place to protect the institution as a whole", he said. "The institution clearly comprises individual judges, and so there should be mechanisms in place within that institution to protect individual judges from influence which may be detrimental to the public perception of justice". This, he stated, was the case in both common law and civil law jurisdictions. Sarah McCoubrey highlighted the Bangalore Principles and their blanket applicability in both civil and common law systems, noting that whilst the mechanisms and infrastructure might be different, the concepts of judicial integrity and independence apply equally in both systems. This was supported by Desi Hanara, who agreed that the Bangalore Principles could be promoted further within the region as widespread adoption and implementation at regional level remained to be seen, and regional bodies are integral to promoting and mainstreaming international standards towards a culture of respect for human rights and the rule of law.

5.4 Conclusion and Recommendations

Judicial integrity, impartiality and independence are essential components of the right to a fair trial and the rule of law. The requirement of independence and impartiality of judges is not a prerogative or privilege granted in their own interest but an essential pre-requisite that enables judges to fulfil their role as guardians of the rule of law, human rights, and the fundamental freedoms of the people. Reforming judicial independence requires paying specific attention to models for judicial appointments and removal which are aligned with international standards, and which support a judiciary which is free, fair, independent, and impartial. Addressing gender inequality on the bench will go some way to creating a more inclusive, transparent, and corruption-free judiciary. Supporting the judiciary in its adoption of technology-driven solutions that aim to digitise courtroom processes is necessary, as is working closely with judges themselves to ensure that data privacy rights are incorporated into technology design and development from the outset, and not tacked on as an afterthought. It is impossible to consider the issue of judicial independence in the region without recognising the urgent need for a regional human rights treaty which enshrines judicial independence, and for a regional human rights court and other enforcement mechanisms to support and mainstream a culture of human rights in the region. This session has delivered conclusive recommendations for strengthening judicial independence in the Asia Pacific region, and these include:

156 Imelda Deinla, Filipino Women Judges and Their Role in Advancing Judicial Independence in the Philippines, in Women and the Judiciary in the Asia-Pacific, Cambridge University Press (2021), pp 178 - 208

157 See Judicial Integrity Network ASEAN / UNDP, Emerging Technologies and Judicial Integrity in ASEAN, December 2021, *https://www.undp.org/publications/emerging-technologies-and-judicial-integrity-asean*

International standards

- International instruments, such as UN Basic Principles of the Judiciary and the Bangalore Principles, should be drawn upon to provide guidance to judicial communities seeking to strengthen their judicial institutions.
- The international judicial community should pay attention to 'good' emerging international and regional practices and support judges who are trying to bring standards of judicial excellence up within their judiciaries at an individual level, calling their peers to account, self-learning from international experience exchange, and raising the bar to support and strengthen a culture of judicial integrity in the region.

Regional standards and national stakeholder engagement

- Asian Pacific States should take steps to ensure that international rules and standards aimed at dealing with the issues of judicial independence are integrated into domestic law and applied by domestic courts. These should include:
  - Strengthening regional bodies, including the Association of Asian Constitutional Court and Equivalent Institutions (AACC);
  - Protecting the ability of the judiciary and the legal profession to self-regulate;
  - Reforming the judicial appointment / removal processes and introducing an independent codification of judicial ethical behaviour and conduct;
  - Establishing an independent body mandated to protect and promote the independence of the judiciary.
- The role of professional bodies, such as bar associations and international human rights organisations, should include providing a check on any erosion of judicial independence. Bar Associations and civil society should consider necessary interventions such as systematic scrutiny of rule of law when a threat to judicial independence occurs.
- Members of the judicial and legal communities, as representatives of law societies, bar associations and civil society, should urgently address gender imbalances in the judiciary. Actions could include:
  - Establishing peer to peer support networks for women judges across borders and between levels of court, to identify the specific impact of gender inequality and sextortion and build consensus on how to most effectively steer institutional change in this regard.
  - Working with academic researchers to spotlight the intersection between gender equality, human rights and judicial independence in the Asia-Pacific region in particular and non-Western jurisdictions more broadly, and deliver evidencebased frameworks that will support judges in challenging inequality, corruption, and abuses in their many facets. Further research on the intersection between judicial independence, human rights and gender equality can help identify 'good' emerging practices in other regions that bolster the representation of female judges on the benches in the Asia-Pacific region.
  - Bringing collective attention to the problem of sextortion and addressing it with judges and lawyers that deal with sextortion cases.
- Civil society should highlight the link between independence of judiciary with human rights and democracy in the Asia Pacific region, as efforts to enhance judicial independence, impartiality and integrity must go hand in hand with efforts to mainstream and strengthen human rights in the region more broadly. To this end, civil society efforts should:
  - Centre on the need for a binding regional human rights instrument and mechanisms, which the Asia-Pacific region is lacking in comparison to other regions. Scholars have explored the feasibility of the establishment of a human rights court in Asia, but this has not been properly considered in terms of implementation.

- Enhance links between the judiciary, the legal profession and civil society – this is fundamental to the promotion of the rule of law. Embattled judiciaries need the open support of civil society, and bodies such as the bar councils and bar associations play a significant role in promoting judicial independence and an upward trajectory for constitutionalism in the Asia Pacific region.

Strengthening the role of the judiciary in technological change

Judges in all courts across the region would benefit from the following guidelines in the development and adoption of digitised legal processes and court proceedings:

- Asking questions about the data being used to train the algorithms;
- Identifying gender, racial and identity-based bias in machine learning processes;
- Receiving detailed briefings about the training of artificial intelligence systems;
- Preparing litigants and witnesses for the virtual court process, decorum, and technology use;
- Raising rule of law and trial fairness criteria when new technology is proposed;
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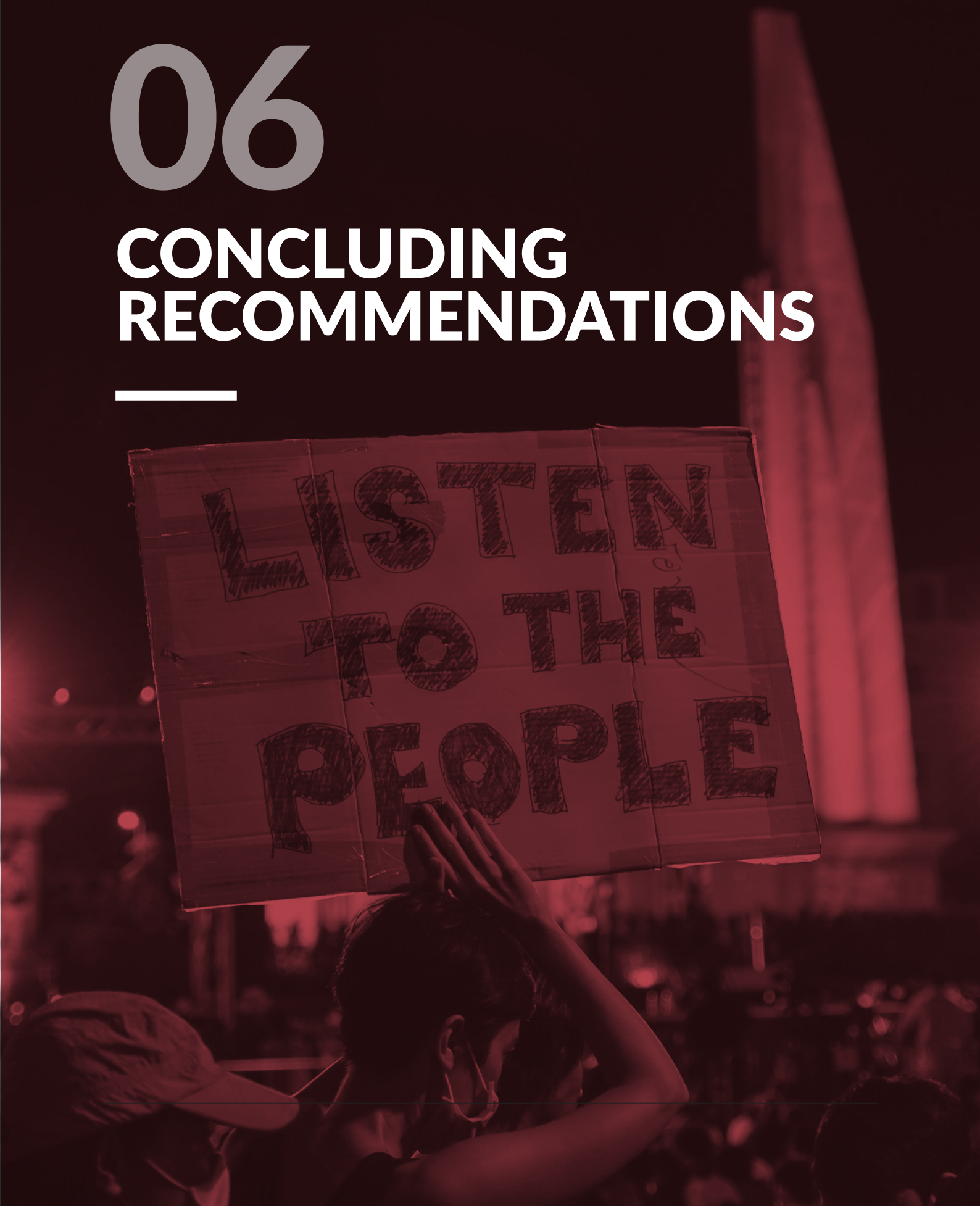
- Promoting understanding of the court processes with litigants and witnesses;
- Support judicial colleagues to build the skills and understanding of the new technologies;
- Maintaining rigorous attentions to avenues for corruption and uphold the value the role of free and independent judicial leadership;
- Calling on judges to bring their judicial scrutiny to the intersection of technology and individual rights, human rights issues, and discrimination. It is essential to find ways to support informed and engaged judicial leadership into the design process of court technology; and lastly,
- Engaging judges in the evolution of the courts.

06

CONCLUDING RECOMMENDATIONS



6.1 Recommendations to Bar Associations & Law Societies

- Targeted sanctions programmes can allow states to support human rights and promote rule of law abroad. In creating such programmes, bar associations and law societies should hold governments to account in order to ensure the following:
  - that they are fair and impose appropriate penalties for documented violations of the rule of law;
  - that they have requisite flexibility to cover a wide range of violations;
  - that they take into account the role of civil society and provide a mechanism for civil society to share their perspectives on potential persons to sanction;
  - that they cover a diverse range of actors in multiple countries; and
  - that they have a well-funded strong team at implementation and enforcement level.
- Lawyers play an essential role in (a) promotion and reform of sanctions programmes, (b) collecting evidence to identify perpetrators and (c) even assuring enforcement and compliance. Bar Associations can take steps to share ideas for reform and innovation, enabling greater discussion and providing oversight for budding sanctions programmes. Lawyers should also ensure that their corporate clients are in full compliance with all sanctions-related laws. Lawyers can also provide pro bono assistance to civil society actors to help build evidence against certain perpetrators. As retaliatory sanctions programmes emerge as in China, Bar Associations and their human rights committees can play a particularly strong role in defending lawyers and human rights activists and call for the removal of sanctions that are against the rule of law and human rights.
- Work with bar associations in developing guidance about ways for lawyers to overcome dilemmas concerning the perceived clash of professional standards between serving interests of corporate clients and social justice considerations. And/or amend professional standards for lawyers to reflect human rights concerns in order to address the dilemma when corporate clients' profits and protecting human rights fail to converge. In all cases and whatever is attempted or accomplished, the human rights responsibility of lawyers and law firms should be stressed so that their legal advice is not used to inadvertently to undermine the protection of human rights.
- Use litigation to bring meaningful change under domestic law, in the ECtHR or other international courts. Guide lawyers who engage in risk management about the exposure to their corporate clients through lawsuits related to human rights problems. Point to successes at the ECtHR to advocate for enforcement mechanisms outside of domestic courts in other human rights conventions and courts.
- Make it easier for corporate clients to do the right thing, meaning things that are productive and good for society. Attorneys can do this by influencing corporate clients to change their business model to empower workers and worker-led initiatives; working with corporate clients and colleagues in bar associations to adopt human rights-focused contractual obligations that include (i) HRDD for buyers and suppliers before and during the term of the contract, (ii) requiring buyers and suppliers to each engage in responsible sourcing and purchasing practices, and (iii) prioritise stakeholder-centred remedies for human rights harms before or in conjunction with conventional contract remedies and damage assessments.
- Strengthen training and peer learning for attorneys and judges, including:
  - Learning about human rights among stakeholders and bottom-up capacity building. This means keeping rights-holders and victims central to the discussion.
  - Training for criminal defence attorneys and prosecutors to recognise victims of human trafficking so that they can facilitate implementation of protection and non-punishment principles. National authorities should divert trafficking victims from the criminal justice system as offenders and safeguard them as victims when the conditions for the non-punishment principle have been met. Where this diversion has failed at first

instance and such trafficking victims are charged or prosecuted, national authorities are under the duty to discontinue the proceedings brought against victims of trafficking for the commission of trafficking-dependent offences as early as possible. Criminal defence attorneys and prosecutors are essential to these efforts at all stages.
    - Endorsing experiential learning that takes judges, lawyers, and business leaders to the places where human rights abuses are taking place and allows them to gain a more meaningful understanding of the perspectives of victims of such abuses.

- As data protection and digital privacy continues to evolve, lawyers and bar associations can play important roles in building broad understanding and implementing a purposeful approach to data that protects individual users' rights:
    - Lawyers can influence data protecting and digital privacy in several ways, both preventative and reactive, depending on their role.
    - As policymakers, lawyers can draft legislation with clear purposes to minimise misinterpretation or avoid strict interpretation. Instead of listing companies involved in the CMCF, state "any company that does x." This type of clear indication of the legislative goal helps judges and regulators to understand the purpose.
    - As corporate counsel, draft clear privacy policies explaining in plain language how data will be used, who will have access to it and how it will be stored so that people can understand and make decisions about their privacy. These policies and access to remedies should be published in the language that users speak, not just in the contractual or policy language.
    - When advising companies, do due diligence from a legal perspective, but also from an ethical and privacy perspective to focus corporate practices on more than the minimum requirements, and also on privacy approaches that reflect a company's standards, and which help its consumers. Lawyers advising their clients should not be a conduit for minimal or passive approaches to privacy but should help their clients understand the larger implications and push for a system of data protection that is good for the individuals and, in the long term, better for the company as well.
    - As members on adjudicative and regulatory bodies, lawyers can interpret the mandate expansively to give meaning to the purpose of privacy protections. This may require adjudicators to push for more effective enforcement mechanisms and interpreting their authority broadly to protect as many people as possible.
- Bar Associations can also do more to identify the need for professional upgrading on the changing nature of privacy protections. This can include engaging with experts and organisations to mainstream the discussion of data within the profession. Bar Associations should actively participate in consultations to bring a rigorous privacy protection perspective to legislation or policy development.
- Lawyers and Bar Associations can collaborate with civil society organisations that often have expertise in privacy issues but are not given the same space or freedom to raise civil liberties concerns.
- Judicial academies can offer ongoing educational opportunities for judges both at the beginning of their careers and as ongoing professional development. The technology and global nature of personal data protection is changing much faster than legislation and legal analysis, making it hard for judges to apply jurisprudence on these issues.
- Work holistically toward the explicit goal of improving data protections and digital privacy. Avoid silos and jurisdictional restrictions. Recognise common ground (across agencies, countries, laws) and find ways to strengthen those commonalities.
- Develop expertise and appreciation for the cultural differences across the Asia Pacific region and treat the Global North and Global South equally.
- Put the United Nations International Human Rights Framework at the centre of drafting and interpreting privacy and data protection frameworks.

- The role of professional bodies, such as bar associations and international human rights organisations, should include providing a check on any erosion of judicial independence. Bar Associations and civil society should consider necessary interventions such as systematic scrutiny of rule of law when a threat to judicial independence occurs.
- Members of the judicial and legal communities, as representatives of law societies, bar associations and civil society, should urgently address gender imbalances in the judiciary. Actions could include:
  - Establishing peer to peer support networks for women judges across borders and between levels of court, to identify the specific impact of gender inequality and sextortion and build consensus on how to most effectively steer institutional change in this regard.
  - Working with academic researchers to spotlight the intersection between gender equality, human rights and judicial independence in the Asia-Pacific region in particular and non-Western jurisdictions more broadly, and deliver evidence-based frameworks that will support judges in challenging inequality, corruption, and abuses in their many facets. Further research on the intersection between judicial independence, human rights and gender equality can help identify 'good' emerging practices in other regions that bolster the representation of female judges on the benches in the Asia-Pacific region.
  - Bringing collective attention to the problem of sextortion and addressing it with judges and lawyers that deal with sextortion cases.

6.2 Recommendations to Civil Society Actors

- Work with bar associations to push for domestic law that mandates core human rights obligations including but not limited to criminal justice responses, such as effective implementation of labour and human rights standards. Simultaneously, push for long term social protection for victims of FL/MS to replace short term, conditional assistance measures to avoid risks of re-trafficking and secondary victimisation.
- Address autocracy and strengthen rule of law by working with policymakers, NGOs and partners in Asia to build structural protection, such as constitutionalism and separation of powers, against excessive executive power.
- Assist in drafting guidance on FL/MS to clarify the definition of terms and legal standards related to FL/MS, making them accessible and operational for lawyers in all areas of practice (not just human rights law) as well as usable across national and cultural boundaries.
- Civil society plays a core role in facilitating sanctions programmes and later identifying potential individuals to sanction, and therefore a sustained level of engagement and enthusiasm from civil society is critical to the growth and development of these programmes. NGOs and civil society organisations should learn from past examples of success.
- In countries where sanctions programmes are still not in place, NGOs and civil society actors must help to promote draft legislation. This includes early discussions on legislative language and political advocacy, as well as engaging with state officials, academics, and all other concerned actors, creating a united front in favour of targeted sanctions. Where there are sanctions, civil society actors should ensure that they accompany their recommendations of the individuals or entities to be sanctioned with detailed evidence that is easy for state officials to approve and implement. In making these recommendations, civil society actors should also both look to reflect the voices of the local affected communities and build relationships of trust with state officials.
- Civil society should highlight the link between independence of judiciary with human rights and democracy in the Asia Pacific region, as efforts to enhance judicial independence, impartiality and integrity must go hand in hand with efforts to mainstream and strengthen human rights in the region more broadly. To this end, civil society efforts should:

  - Centre on the need for a binding regional human rights instrument and mechanisms, which the Asia-Pacific region is lacking in comparison to other regions. Scholars have explored the feasibility of the establishment of a human rights court in Asia, but this has not been properly considered in terms of implementation.
  - Enhance links between the judiciary, the legal profession and civil society – this is fundamental to the promotion of the rule of law. Embattled judiciaries need the open support of civil society, and bodies such as the bar councils and bar associations play a significant role in promoting judicial independence and an upward trajectory for constitutionalism in the Asia Pacific region.
- Civil society can lead efforts to encourage states to reform the judicial appointment / removal processes whilst introducing an independent codification of judicial ethical behaviour and conduct and establishing an independent body in charge of protecting and promoting the independence of the judiciary.

6.3 Recommendations to the International Community

- Eliminate the silos in corporate structures, which tend to have 'sustainability departments' or similar, which 'take care' of human rights concerns so that others do not have to pay attention to them. As corporate actors, commit to transparency and accessibility.
- International instruments, such as UN Basic Principles of the Judiciary and Bangalore Principles can provide guidance to fledging societies seeking to strengthen their judicial institutions. Strengthen the regional bodies, including the Association of Asian Constitutional Court and Equivalent Institutions (AACC). Take steps to ensure that international rules and standards aimed at dealing with the issues of judicial independence are integrated into domestic law and applied by domestic courts.
- Strengthen the role of the judiciary in technological change. Judges in all courts across the region would benefit from the following guidelines in the development and adoption of digitised legal processes and court proceedings:
  - Asking questions about the data being used to train the algorithms;
  - Identifying gender, racial and identity-based bias in machine learning processes;
  - Receiving detailed briefings about the training of artificial intelligence systems;
  - Preparing litigants and witnesses for the virtual court process, decorum, and technology use;
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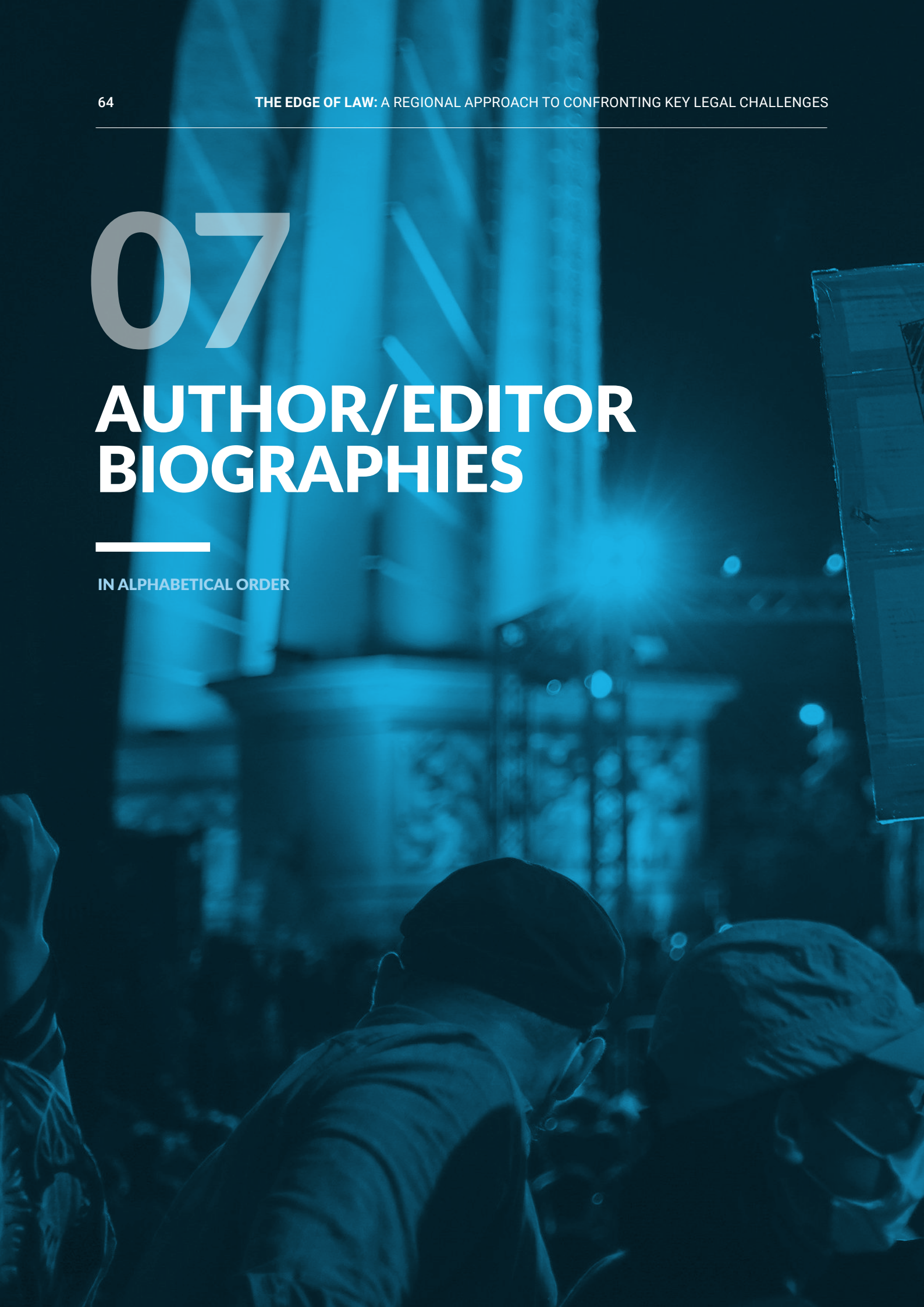
07

AUTHOR/EDITOR BIOGRAPHIES

IN ALPHABETICAL ORDER



Diana Constantinide

Diana transferred to the Bar in November 2017 as a Cypriot qualified lawyer with 5 years of PQE working in the private and international sector. Diana specialises in public international law, international criminal law, and human rights. She represents a group of victims before the International Criminal Court and she also represents clients before domestic courts in the UK and the Republic of Cyprus. Diana advises associations and individuals on legal issues in her areas of her expertise. She is fluent in Greek, Swedish and English. Prior to joining the Bar of England & Wales, Diana worked in the Republic of Cyprus and handled complex cross boarder cases. Soon after completing her legal training, she was offered partnership in a newly established firm and successfully lead the Litigation Department; in which she introduced a clientele of over 350 cases. She was elected president of the European Lawyers Student Association (ELSA) Cypriot Branch and attained access to the International Forum at the Council of Europe. Diana is active on the betterment of Cyprus's post-conflict legal education and maintains an active role liaising with both legal communities through her humanitarian activities on the island. Diana is a member of the BHRC Executive Committee 2022-2023.

Stephen Cragg KC

Stephen Cragg KC is Chair of BHRC and an experienced specialist in public law and human rights law in a range of areas. He is team leader for Doughty Street's Data Protection and Information Rights Team, and sits as a judge in the Information Rights Tribunal, ruling on Freedom of Information Act and Data Protection Act appeals. Stephen's public law practice includes human rights areas, data protection, regulatory, commercial, and social welfare law. He has a special interest in public law cases involving the criminal justice system, information rights, community care and health law, and coroners' inquests. His other area of expertise is in civil actions involving public authorities, and he is as at home cross-examining witnesses as making detailed submissions in public law cases. He has been lead counsel in a number of landmark Supreme Court and Court of Appeal cases involving retention/disclosure of information by the police, following his success in the European Court of Human Rights DNA retention case of S and Marper v UK [2009] 48 EHRR 50.

Stephen has been a Special Advocate since 2008, appearing for appellants in many national security appeals before SIAC, as well as acting in control order and TPIM cases, judicial review applications, and cases before the Security Vetting Appeal Panel. As well as acting for individual and commercial claimants in a series of important cases often testing the frontiers of public law and human rights, Stephen also provides advice and representation for a number of local authorities and NHS bodies in public law cases. He has acted for and advised a range of NGOs and other organisations over the last few years, including the Law Society, the Equality and Human Rights Commission, Liberty, Amnesty International, and Big Brother Watch. He is general editor of Police Misconduct: Legal Remedies, the fifth edition of which will be published in 2022, and a regular contributor of articles to Legal Action and other journals. As Chair of BHRC, he has an ongoing involvement in international human rights law, carrying out training and trial observations in Albania, Palestine, Turkey, the Maldives, and Nigeria. He was the co-author of a July 2016 BHRC report into conditions at the Calais refugee camps. He was a member of the Independent Advisory Panel on Deaths in Custody (2014-2018), and in this role he was part of the Harris Review into the deaths of young people in prison, which reported in 2016. Stephen was Chair of the Public Law Project between 2008-2015 during which time the charity won a number of prestigious awards, and he remained a trustee until 2018. Stephen sits as a Recorder in the Crown Court on the South-Eastern Circuit.

Nighat Dad

Nighat Dad is the Executive Director of Digital Rights Foundation, Pakistan. She is an accomplished lawyer and a human rights activist. Nighat Dad is one of the pioneers who have been campaigning around access to open internet in Pakistan and globally. She has been actively campaigning and engaging at a policy level on issues focusing on Internet Freedom, Women and technology, Digital Security and Women's empowerment. Ms Dad has been recently included in Next Generation Leaders List by TIME's magazine for her work on helping women fight online harassment. She is a Member of the Meta Oversight Board.

Surya Deva

Surya Deva is a Professor at the Macquarie Law School. Deva is an internationally recognised scholar in the field of business and human rights. He served as a member of the UN Working Group on Business and Human Rights (2016-22). Deva has advised UN agencies, governments, national human rights institutions, multinational corporations, trade unions and civil society organisations on issues related to business and human rights. He also researches in the areas of India-China constitutional law, international human rights

law, sustainable development, climate change, and gender discrimination. Deva has published extensively in areas of his research expertise, and his publications have been cited in reports of international organisations, parliamentary bodies, and civil society organisations. Deva's publications have made significant impact on shaping law and policy at national, regional and international levels in the business and human rights field. He also regularly contributes op-eds and blogs on topical issues in diverse outlets. He has presented over 100 papers at international conferences and workshops and delivered keynote address at several conferences such as those organised by the Council of Europe, National Human Rights Commission of Korea, University of Oslo, Canadian Network on Corporate Accountability, LAWASIA, Korea University Human Rights Center, Vietnam Academy of Social Sciences, and Jawaharlal Nehru University. Deva was invited to speak at the American Society of International Law Annual Meeting (2016) and (2022), one of the most prestigious annual conferences in the field of international law.

Deva has also delivered seminars and guest lectures at institutions such as University College Oxford, Essex Law School, UCL Faculty of Laws, British Academy, British Institute of International and Comparative Law, Cambridge's Lauterpacht Centre of International Law, UCLA School of Law, Duke Law School, University of Oslo, University of Vienna, University of Cape Town, University of Heidelberg, Seoul National University, Lee Kuan Yew School of Public Policy Singapore, Renmin University of China Law School, University of Hong Kong, UNSW Faculty Law, and Sydney Law School. Prior to joining Macquarie, Deva was an Associate Professor at the School of Law of City University of Hong Kong. Previously he taught at the University of Delhi and the National Law Institute University Bhopal. He holds BA (Hons) Political Science, LLB and LLM from the University of Delhi and a PhD from the University of Sydney. Deva is one of the founding Editors-in-Chief of the Business and Human Rights Journal and sits on the Editorial / Advisory Board of the Netherlands Quarterly of Human Rights, the Vienna Journal on International Constitutional Law, the Indian Law Review, and the Australian Journal of Human Rights. He is an elected member of the Executive Committee of the International Association of Constitutional Law (2014-18; 2018-22). Deva regularly comments in mainstream media, including ABC TV, Al Jazeera, Channel 4, CNN Digital, The New York Times, The Guardian, Reuters, Financial Times, The Atlantic, Le Temps, South China Moring Post, The Huffington Post, India Today, and RTHK Radio 3.

Felicity Gerry KC

Professor Felicity Gerry KC is an international KC at Libertas Chambers, London and Crockett Chambers, Melbourne, largely defending in serious and complex criminal trials and appeals, often with an international element. She was Solicitor's Journal Legal Personality of the Year 2016 and Australian Barrister of the Year 2020. She is listed in the Legal 500 as a leading silk and recommended as "fearless and independent minded" and "at the forefront of the development of criminal law. She is a true inspiration to junior lawyers. She is a leader in her field. Clients feel she will fight their corner at every stage of a case."

Admitted to the list of counsel for the International Criminal Court and the Kosovo Specialist Chambers in The Hague and in England & Wales and in Australia (Victoria and the High Court Roll) and has had ad hoc admission in Hong Kong and Gibraltar. She led the appeal in R v Jogee in the UK Supreme Court which was described by the BBC as a 'moment of genuine legal history', and she led the intervention for JUSTICE in the UK Supreme Court Shamima Begum Appeals. Felicity is one of the few women silks to defend in a terrorism trial and led a team of academics and practitioners who were given leave to file an Amicus Curiae brief in the ICTY on JCEIII liability. She has also advised in relation to death penalty matters in Indonesia and the Philippines, on citizens held in Syrian camps and on complicity in international criminal cases.

Felicity is Honorary Professor at Salford University in the School of Health and Society where her research focus is on Autism and criminal law, FGM law and Child Rights. She is also Professor of Legal Practice at Deakin University where she is unit chair for Contemporary International Legal Challenges – topics have included Modern Slavery, Terrorism, War Crimes and Climate Change law – and is involved in the clinical programs.

Pamela Katz

Pamela S Katz holds a BA, with honors, in Political Science from the State University of New York at Binghamton (1983) and a JD, cum laude, from Georgetown University Law Center (1986). She has worked as an attorney in the private sector at the Manhattan law firm Shea & Gould and in the public interest law sector at the New York Civil Liberties Union. From 1997-2020, she was a tenured Professor of Political Science and Legal Studies at Russell Sage College in Troy, New York.

Katz is a two-time Fulbright Scholar (2012-13, Vietnam, Vietnam National University; 2021, Turkey, Bilkent University) and, in addition, has taught, held seminars, and conducted research in China, Japan, Malawi and India. Her primary research area is civil rights and

civil liberties and her latest law review article, Now Something for the Glass Half-Empty Crowd: Bostock v. Clayton County, Georgia Explained, published in the Tulane Journal of Law & Sexuality, analyzes the 2020 US Supreme Court decision expanding federal civil rights protection to LGBTQ+ employees. As a Professor Emerita, she continues her teaching and research as well as her consultancy, LL.M. Admissions Consultants (LLMAC), which assists foreign attorneys to gain admission to Master of Laws programs in the US. She also continues her work with Digital Grandparents, Inc. (DGI), a non-profit corporation, which she co-founded and directs, dedicated to improving computer literacy among older adults.

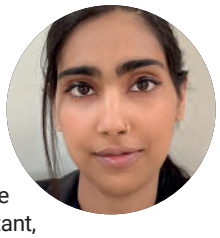
Dr Louise Loder

Dr Louise Loder has worked with the Bar Human Rights Committee of England & Wales on international advocacy projects, communications, events and human rights education initiatives since 2021. After a first career in corporate communications, public affairs, and film festival management, she has worked for over a decade as a senior advisor and consultant in the field of Business & Human Rights for various NGOs, higher education institutions, and multinational corporations, working on programme design, virtual and major conference event management, and launching consensus-building initiatives centred on the rule of law, forced labour and modern slavery, gender violence, youth empowerment, the future of work, and the SDGs. She has taught Business and Human Rights, Constitutional Law, Intellectual Property, and Information Law at undergraduate and postgraduate level. She has a PhD in international human rights law, culture, and education from the University of Exeter, an LLM with Merit in International Human Rights (also from Exeter), and graduated from the University of the West of England with a First Class LLB. She has completed several professional development programmes in human rights, law and strategic project management, most recently with the Said Business School at the University of Oxford.

Sarah McCoubrey

Sarah McCoubrey founded CALIBRATE in 2014, a consultancy where she works with small and large organisations to tackle access to justice challenges internationally, nationally, and locally. She provides access to justice strategy to UN agencies and Canadian organisations. Her international work focuses on the rule of law, gender and equality initiatives, technology and systemic changes through strategic design, evaluation, and capacity building. She received her Bachelors' degree in Women's Studies and Fine Arts and her Juris Doctor in Law from the University of Victoria, and her Masters of Education from the Ontario Institute for Studies in Education, in Toronto, Canada. Sarah practiced law in Toronto, followed by 10 years as the Executive Director of a youth-serving justice non-profit, combining her interests in law, education, and social justice. She has been the Strategic Advisor to Canada's Action Committee on Access to Justice in Civil and Family Matters since 2015.

Beenish Riaz



Beenish is currently the first Fellow in Non-profit Law at the Ford Foundation. She graduated from New York University School of Law in 2020, specialising in international human rights law, and was elected to the Order of the Coif upon her graduation. While at NYU Law, she was a student advocate at the Global Justice Clinic, an Institute of International Law and Justice Scholar, an International Law and Human Rights fellow and the Book Annotations editor for the Journal of International Law and Politics. She also served as a teacher's assistant, a research assistant and published several articles. After graduating from law school, she was granted the Arthur Helton Global Human Rights Fellowship to work at a women's rights organization, the Aurat Foundation, in Pakistan. Prior to law school, Beenish graduated summa cum laude from Macalester College with a BA in Political Science and English.

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SPEAKER BIOGRAPHIES

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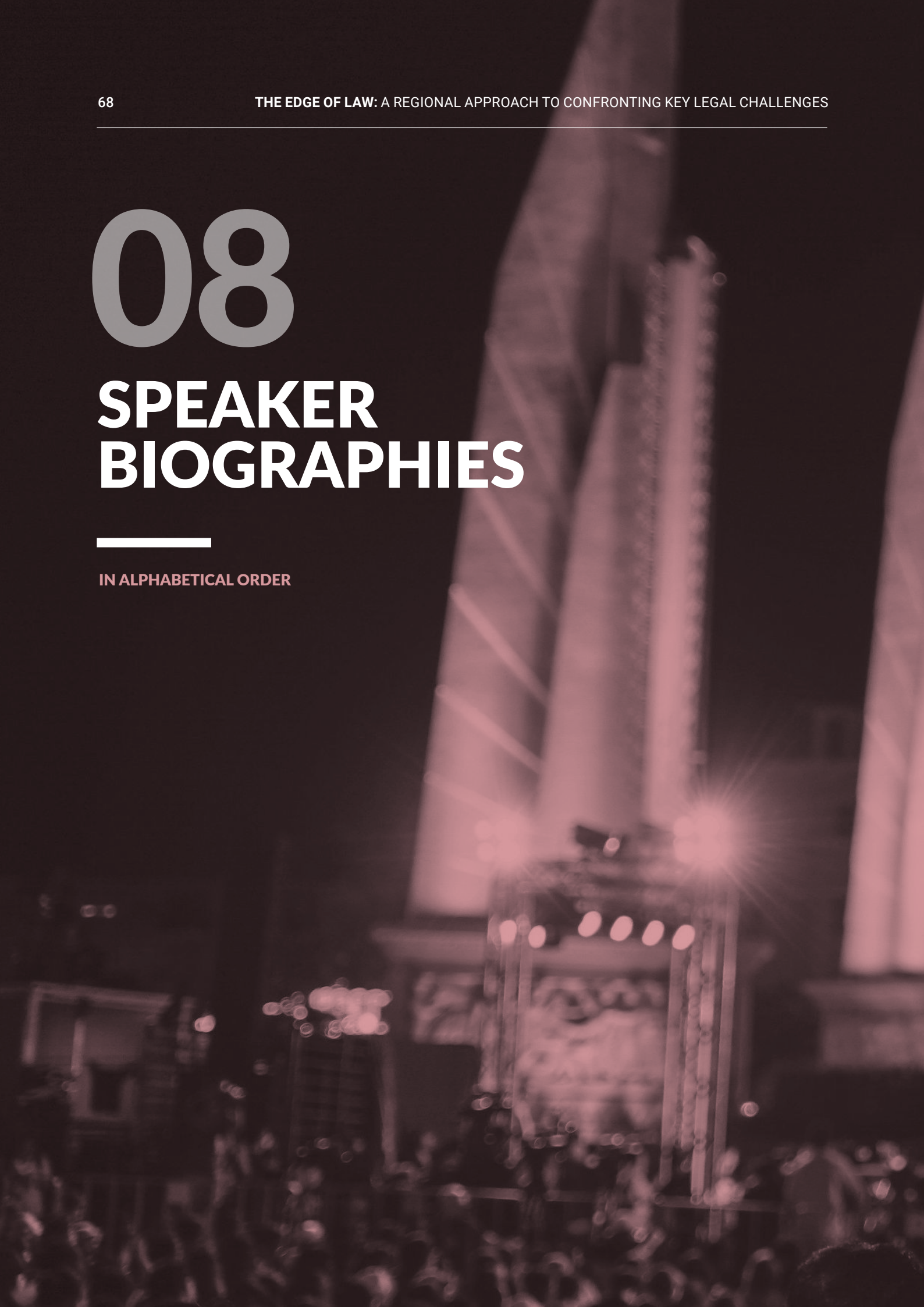


Jordan A Brunner

Jordan A Brunner is a graduate of the Sandra Day O'Connor College of Law at Arizona State University and was a national security intern at the Brookings Institution. Prior to law school, he was a Research Fellow with the New America Foundation / ASU Center for the Future of War, where he researched cybersecurity, cyber war, and cyber conflict alongside Shane Harris, author of @War: The Rise of the Military-Internet Complex. He graduated summa cum laude from Arizona State University with a BS in Political Science.

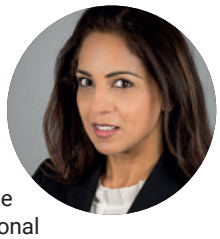
C. M. Chan

Mr C. M. Chan first joined the Council of The Law Society of Hong Kong in 2016. In 2018, he was elected Vice-President of The Law Society and was re-elected in 2019 and 2020. In 2021, Mr Chan was elected as President of The Law Society, and re-elected as President in 2022. He was a member of the International Bar Association Corporate Social Responsibility Committee (2007 - 2012) and LAWASIA as EXCO Member (since 2020). He serves on a number of statutory bodies, including the Board of Review (Inland Revenue) (2013 - 2018), the Committee on Provision of Space in the Legal Hub (2016 - 2020), HKICPA Disciplinary Panel (since 2016), the Land Survey Disciplinary Board Panel (since 2021), the Law Reform Commission (since 2021) and the Trade and Industry Advisory Board (since 2022) and as a member of the Advisory Body on Outcome Related Fee Structures for Arbitration (since 2022). He is also an external examiner of the Department of Professional Legal Education, The University of Hong Kong, and the School of Law, City University of Hong Kong.

Mr Chan is qualified to practise as a solicitor in Hong Kong (1997) and England and Wales (2002). He is also a Civil Celebrant, Registered Financial Planner, and Chartered Tax Advisor. Mr Chan holds an LLM degree from the London School of Economics, an MBA degree from the University of Oxford and an MPA degree from Harvard University.

Mr Chan had practised in a notable law firm, where he advised high net-worth clients and corporations in relation to their asset management, trust, succession and tax planning matters. Thereafter, he became a legal adviser of different Family Offices for prominent families. Mr Chan is now a General Counsel of an investment company, a part-time consultant of a local law firm and the Head of the Centre for the Rule of Law, Hong Kong Policy Research Institute, a local think tank.

Parosha Chandran



Parosha Chandran is the UK's leading anti-slavery lawyer and she has been practicing at the Bar of England and Wales for 25 years. Parosha Chandran is a human rights barrister based in London and a world-leading expert on the law relating to human trafficking for the UN, Council of Europe and OSCE. She represents adult and child victims of modern slavery and human trafficking and has set critical legal trafficking precedents in the asylum, slavery, criminal non-punishment, civil and public law contexts. She has contributed to key international legal guidance on trafficking, provides judicial training and has advised on legislation including the Modern Slavery Act 2015. She has received many honours for her work including the Trafficking in Persons Hero Award 2015 from John Kerry in Washington DC for her work in developing the rule of law on trafficking in the UK and abroad and for her "unparalleled achievements in providing legal services to survivors of modern slavery". She is a Legal Advisor to Parliament's Modern Slavery Project which supports Commonwealth States in improving their trafficking and modern slavery laws. She is the General Editor of the leading textbook, "Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK" (LexisNexis, 2011). In 2018 she received the distinction of being appointed the first Professor of Modern Slavery Law at King's College London. She practices in immigration and asylum law (including adult & children's cases, HIV appeals, deportation and EU law). She has appeared in the High Court of England and Wales, the Court of Appeal (both Civil and Criminal divisions), the Privy Council, the Asylum and Immigration Tribunal and Chamber, the Employment Tribunal and she has drafted several successful applications to the European Court of Human Rights (ECtHR).

Nighat Dad

Please see Section 7, Author / Editor Biographies.

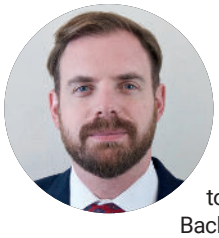
Dr Felicity Gerry KC

Please see Section 7, Author / Editor Biographies.

Desi Hanara

Desi holds Bachelor of Law from Al-Azhar University, Egypt and obtained her Master of Laws (LLM) in Public International Law from Leiden University, the Netherlands. Desi published her academic works related to Human Rights Mechanisms in ASEAN and Asia and freedom of religion or belief (FoRB) in the Jakarta Post, the Diplomat, Elgaronline and Journal of the Constitutional Court of the Republic Indonesia. Desi authors the Report on the Ten-Years Performance of the ASEAN Intergovernmental Commission on Human Rights (AICHR), published by FORUM ASIA. Desi has more than ten years professional experience in the sectors of human rights, international law and international relations. She has worked for the Southeast Asia region for more than a decade, from within and outside the ASEAN system. She is currently overseeing ASEAN external relations with the ASEAN Political Security Department of the ASEAN Secretariat. Previously she handled ASEAN Secretariat's portfolios related to the AICHR, the ASEAN Inter-Parliamentary Assembly (AIPA), ASEAN Foundation and Entities Associated with ASEAN.

Desi previously served as a Regional Coordinator for IPPFoRB's project in Southeast Asia, undertaken in partnership with APHR. Under the framework of this project, she successfully (a) led the establishment of a working group of parliamentarians and politicians in Southeast Asia working to advance FoRB in the region; (b) coordinated the undertaking of fact-finding missions on FoRB; (c) co-organised the implementation of policy dialogues related to mitigating religious tensions, tackling hate speech and legislating religious freedom; and (d) conducted a number of regional trainings and forums on FoRB and human rights. In February 2019, the Project was selected to be featured at the UN Headquarter in New York, showcasing the successful works of the Project in empowering parliamentarians to safeguard FoRB protection in the region.



Simon Henderson

Simon is an international human rights lawyer and policy analyst with experience in Australia and the Indo-Pacific. Prior to Save the Children, he was Senior Policy Adviser at Justice Centre Hong Kong, where he led a civil society human rights project on the United Nations Universal Periodic Review for China as it applies to Hong Kong. He also worked at the Law Council of Australia, DFAT and Human Rights in China. He holds a Bachelor of Commerce, Bachelor of Laws, and Graduate Diploma in Legal Practice from ANU, and a Masters of Laws in International Law from The Fletcher School of Law and Diplomacy at Tufts University. Simon is admitted as a lawyer of the High Court of Australia and the Supreme Court of the ACT.

Scott Johnston

Scott Johnston is Staff Attorney for Human Rights Accountability, where he manages the day-to-day operations of Human Rights First's Targeted Human Rights and Anti-Corruption Sanctions Coalition, a group of over 250 NGOs using the Global Magnitsky Act—among other sanctions mechanisms—to seek accountability for serious human rights abuses and corruption perpetrated around the world. His role includes training civil society on how targeted sanctions work, consulting with them on specific cases, and crafting and submitting sanctions recommendations to the US government. Scott received his juris doctor from Columbia Law School, where he was a member of the Human Rights Clinic. He has a BA in Sociology from Harvard University.

Professor Hoong Lee

Professor Hoong Phun Lee commenced his academic career as a Teaching Fellow at Monash in 1973. He was Acting Dean (Aug 2009-Oct 2009, and Oct 2003 - Jan 2004), Deputy Dean (2003-04, 2006-09), Associate Dean (Staffing) (2001-03), Associate Dean (International) (1998-99), He held the Sir John Latham Chair of Law at Monash University from 1995-2014. He is an Emeritus Professor and a Teaching Associate, and co-convenor, with Professor Marilyn Pittard, of the Lucinda Lecture Series and the Fiat Justitia Lecture Series. He was a visiting scholar at Wolfson College, Cambridge University in 1985-86. He was appointed an Adjunct Professor of Law at the Northern Territory University (now the Charles Darwin University) (1995-2001), Adjunct Professor at the City University of Hong Kong (2009-11 and 2011-14), The Cheng Chan Lan Yue Distinguished Visitor in Constitutional Law, Hong Kong University (27/3/17 – 31/3/17).

Professor Lee was Chairman, International Humanitarian Law Advisory Committee of the Australian Red Cross Victoria (1998-2000). He was a member of the Australian Press Council (1987-2010), Deputy Chair of the Freedom of the Press Committee (1994-2010), Vice-Chairman of the Australian Press Council (2004-2010). He was a member of the International Board of Advisors of the Weeramantry International Centre for Peace Education and Research. He is an advisory member for Journal of International and Comparative Law, Singapore Journal of Legal Studies, Singapore Academy of Law Journal, and Asian Journal of Comparative Law.

Sarah McCoubrey

Please see Section 7, Author / Editor Biographies.

Professor David Snyder

David V Snyder was appointed professor of law at the American University Washington College of Law in the fall of 2007 and was appointed director of the Business Law Program in 2008. During 2021-2022, he also holds a Fernand Braudel Senior Fellowship at the European University Institute (Florence). He graduated summa cum laude from Tulane University Law School in 1991, and he has been a professor of law at Tulane, Indiana (Bloomington), and Cleveland-Marshall College of Law. He has been a regular visiting professor at the law school of the University of Paris II (Panthéon-Assas) since 2012 and has also been a visiting professor at the University of Paris 10 (Nanterre La Défense), Boston University, and the College of William and Mary. In addition, he has taught summer courses at the University of Mainz (Germany). After graduating from law school, Professor Snyder served as a law clerk to the Honorable John M Duhé Jr of the United States Court of Appeals for the Fifth Circuit, and subsequently joined the DC firm of Hogan & Hartson (now Hogan Lovells). In 2014 Professor Snyder was awarded a MacCormick Fellowship during which he delivered the annual Wilson Memorial Lecture at the University of Edinburgh.

Professor Snyder's teaching and research interests are primarily in contracts and commercial law, including their international and comparative aspects. He was chair of the Section on Contracts of the Association of American Law Schools (2005-2006) and chaired the Washington steering committee for the XVIIIth International Congress of Comparative Law (2010). He is an elected member of the American Law Institute, a titular member of the International Academy of Comparative Law and has served on the board of directors of the Washington Foreign Law Society and the board of editors of the American Journal of Comparative Law. He currently chairs the American Bar Association Business Law Section Working Group to Draft Human Rights Protections in International Supply Contracts and also chairs the Implementation Task Force for the ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor.

For enquiries related to this report, please email the Bar Human Rights Committee of England & Wales at coordination@barhumanrights.org.uk.

American Bar Association
1050 Connecticut Ave NW, Suite 400
Washington, DC 20036
United States
Tel: (202) 662 1000
americanbar.org

Bar Human Rights Committee
289-293 High Holborn
London WC1V 7HZ
United Kingdom
Tel: (44) 204 534 1879
barhumanrights.org.uk

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