

## HUMAN RIGHTS BRIEF

### PROTECTING THE RIGHTS OF THE INDIGENOUS PEOPLE OF SOUTHEAST ASIA: UNDRIP AND THE CURRENT STATE OF PLAY<sup>1</sup>

Dr. Ayesah Uy Abubakar, Dr. Sanen Marshall<sup>2</sup>

#### Context: UNDRIP in Southeast Asia

All ten members of the Association of Southeast Asian Nations (ASEAN) voted to adopt the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. There were 144 States in favour of its adoption.<sup>3</sup> The Declaration establishes a 'universal framework of minimum standards' for the 'survival, dignity and well-being' of indigenous peoples (United Nations, 2007). It articulates rights fundamental to the life, survival, and future of the indigenous people (IP) from all parts of the world, including the right to self-determination as a collective group. Still, 15% of the world's poor comprise IPs despite them making up only 5% of the global population (Hall & Gandolfo, 2016).

UNDRIP also obliges governments to promote and protect the rights of the indigenous. Unfortunately, ASEAN has yet to drive its members to ensure their national frameworks effectively protect IP rights. Only a few ASEAN member states have specific IP laws, such as the Philippines' Indigenous Peoples Rights Act 1997 (Bello, 2020) and Malaysia's Aboriginal Peoples Act 1954.

Regionally, UNDRIP is often neglected by ASEAN. Its implementation is still a considerable challenge. This is so because ASEAN, as a regional bloc, has not reached a consensus on whether IPs have rights. The ASEAN Human Rights Declaration (AHRD) does not expressly include the rights of IP due to disagreement between member states on how IPs are to be defined.

Encouragingly however, the ASEAN Intergovernmental Commission on Human Rights (AICHR) still saw fit to grant the Asia Indigenous Peoples Pact (AIPP) consultative status giving civil society a voice to speak on IP's issues. Nevertheless, without recognising the

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<sup>2</sup> Research Fellows at Borneo Institute for Indigenous Studies, Universiti Malaysia Sabah (BorIIS-UMS).

<sup>3</sup> According to the United Nations (2007), four of the states – Australia, Canada, New Zealand, and the United States – that were not in favour of UNDRIP, have reversed their position and support UNDRIP.

range of IP rights within the context of the AHRD, AICHR has been hamstrung to include work on the same in its programmes.

Even as international human rights law recognises that indigenous rights are interconnected and inextricably linked to their ancestral territories, environment, culture, heritage, language, education and development, ASEAN has not been able to adopt the same view.

This non-exhaustive brief outlines the challenges to protecting the rights of the indigenous in Southeast Asia and makes key recommendations that should be adopted by ASEAN and ASEAN member states.

**Figure 1:** Estimated population of indigenous peoples in Southeast Asia



Note. From Asia Indigenous Peoples' Pact, International Work Group for Indigenous Affairs, & Asian Forum for Human Rights and Development [AIPP, IWGIA, & FORUM-ASIA]. (2010). *ASEAN Indigenous Peoples Report*.

## The struggle to protect the rights of IPs in the region

There are four main challenges.

While UNDRIP serves as a universal instrument that sets out the collective rights of IPs, several countries in Southeast Asia continue to grapple with the term ‘indigenous people’. There is no standard or uniform definition.

To some, ‘indigenous peoples’ denote the first people to live in a country. There is some truth to this: Indigenous peoples have been, and still are, residing in their specific localities since pre-colonial times.

But with time and different national policies attempting to assimilate IPs into mainstream society, they lose their uniqueness through definitions that do not necessarily consider them as the ‘first peoples’. They become no different from the larger national communities, also identified as indigenous.

For political reasons, IPs are mischaracterised. They are identified by different definitions such as ethnic nationalities, ethnic minorities, ethnic groups, hill tribes, *Orang Asli* (‘original peoples’), *masyarakat adat* (‘custom communities’) and natives. Terms like *bumiputra* (‘sons of the soil’) and *anak negeri* (‘native person’) are also used.

While some ASEAN member states have constitutional guarantees and national or state laws supporting the rights of IPs, executive decrees are also common. This, however, is not uniform across every country, which leads us to the second problem: Where there are legal provisions on IPs, many are outdated and inadequate to meet the present challenges faced by indigenous groups. Worse, some countries do not recognise IPs. Without justiciable rights, IPs cannot seek court redress for violations committed against them on matters such as land, culture, and livelihood. This legal displacement consequently creates conditions for their vulnerability that may be exploited by both State and non-State actors.

The third challenge we have identified is the lack of reliable statistics and data on IPs. They are often ‘invisible’ because they are poorly accounted for in the national civil registries (Petchamesree, 2021). According to different estimates, there are between 90 to 150 million IPs comprising 1210 ethnic groups in Southeast Asia. Most of them live in the peripheral and border territories, and lack the awareness to register themselves and access national registration centres. As such, they do not have valid documents, and this situation continues from generation to generation. Ultimately, indigenous children grow up unable to trace their ancestry if they wish to regularise their identity and status. The problem also increases the threats to human security due to transmigration and human trafficking.

**Table 1:** Terms, population and laws on indigenous peoples in Southeast Asia

Country	Terms used	Population of IPs	Percentage of national population	Recognition of indigenous peoples in Constitution	Laws, policies, or executive decrees
Brunei Darussalam	N/A	71,000 / between 7-11 groups	16.7	N/A	N/A
Cambodia	Indigenous minorities	197,000 / 24 groups	1.37	No recognition of indigenous peoples	<ol style="list-style-type: none"> <li>1. Land Law 2001</li> <li>2. Law on Forestry 2002</li> <li>3. Policy on Registration and Right to Use of Land of Indigenous Communities (2009)</li> <li>4. Policy of Development for Indigenous Peoples (2009)</li> </ol>
Indonesia	<i>Masyarakat adat</i>	50-70 million / 700 groups	20-29	Article 26 of the 1945 Constitution of the Republic of Indonesia, the Second Amendment of 2000	<ol style="list-style-type: none"> <li>1. Decree No. IX/MPR/2001 on Agrarian Reform and Management of Natural Resources</li> </ol>

					<ol style="list-style-type: none"> <li>2. Act No. 5 of 1960 Concerning Basic Regulations on Agrarian Principles</li> <li>3. Law of the Republic of Indonesia Number 39 of 1999 on Human Rights</li> </ol>
Lao PDR	Ethnic minorities	2.4-4.8 million / 49 officially recognised “ethnic minorities”	35-70	1991 Constitution provides for the rights of ethnic groups but they are not considered IPs.	<ol style="list-style-type: none"> <li>1. Hmong Policy (1981). The policy was adjusted into the Resolution of the Party Central Organization Concerning Ethnic Minority Affairs in the New Era 1992 (also known as the Ethnic Minority Policy 1992)</li> <li>2. Decree No. 207 on Ethnic Group Affairs (2020)</li> </ol>

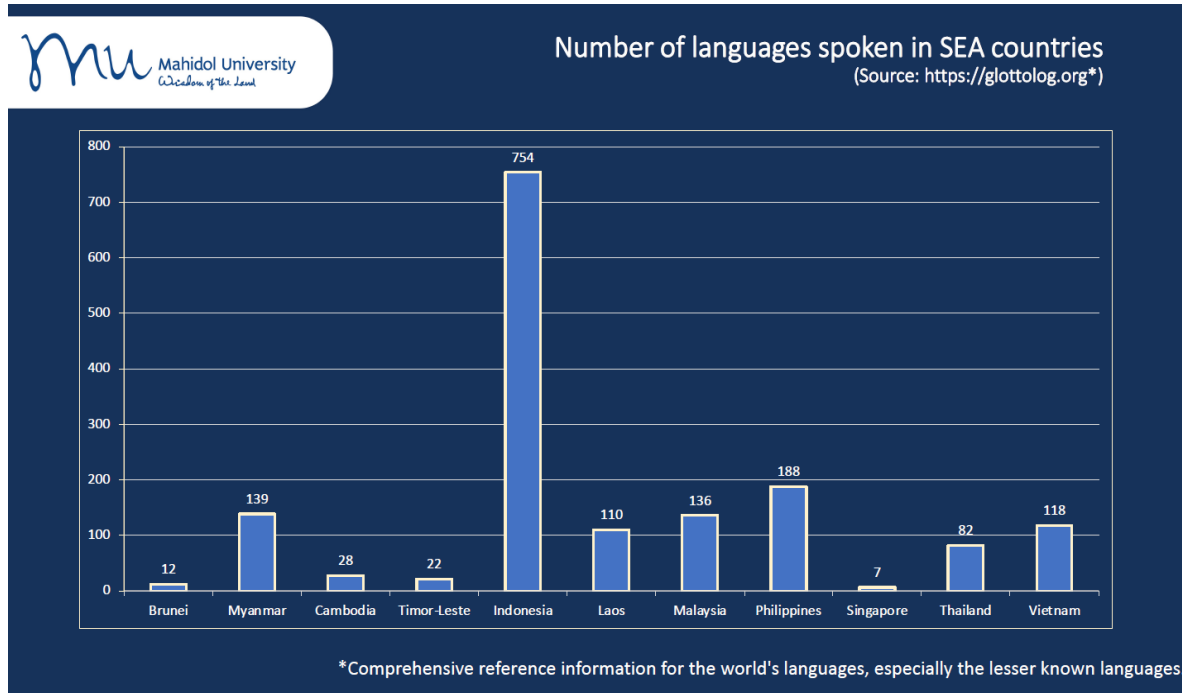
Malaysia	Natives, <i>anak negeri, Orang Asal, Orang Asli</i>	3.4 million / 97 groups	12	<p>Article 161A of the Federal Constitution 1957 recognises the special protection of natives of Sarawak and Sabah.</p> <p>Article 160(2) refers <i>Orang Asli</i> as ‘aborigine’.</p>	<ol style="list-style-type: none"> <li>1. Aboriginal Peoples Act 1954</li> <li>2. Native Courts Enactment 1992 (3-tier system in Sabah, 6-level court system in Sarawak)</li> </ol>
Myanmar	Ethnic minorities	14.4-19.2 million / 135 groups	30-40	2008 Constitution does not recognise IPs <i>per se</i> but as ‘ethnic nationalities’ alongside with the mainstream Burmans.	<ol style="list-style-type: none"> <li>1. Ethnic Rights Protection Law 2015</li> </ol>
Philippines	Indigenous peoples, indigenous cultural communities	10-15 million / 110 officially recognised groups	10-15	1987 Constitution of the Philippines recognises the rights of indigenous cultural communities.	<ol style="list-style-type: none"> <li>1. Republic Act No. 8371 (Indigenous Peoples’ Right Act of 1997)</li> </ol>

Thailand	Ethnic minorities, hill tribes, hill / mountain people	1.1 million / 50 groups, 10 officially recognised as “hill tribes”	1.5	Constitution of Thailand 2017 does not recognise IPs.	Several ministerial decrees from 2010 recognise the collective rights to land and culture for ‘local communities’ and certain ‘ethnic groups’. However, these rights have not been fully implemented.
Viet Nam	Ethnic minorities	10 million / 90 groups, 43 officially recognised “ethnic minorities”	13.8	Article 5 of the 2013 Constitution guarantees the same rights to all citizens while also protecting the rights of ethnic minorities.	Between 2011 and 2015, the government issued 180 legal documents referencing the rights and legal interests of ethnic minorities.

Note. Adapted from Corpuz-Tauli, V. (2021). *Session 1: Is UNDRIP Making Inroads in Southeast Asia?* [Presentation]. Online Regional Dialogue on “Protecting the Rights of Indigenous Peoples and the State of Play of the UNDRIP In Southeast Asia” (henceforth referred to as Online Regional Dialogue); and AIPP, IWGIA, & FORUM-ASIA. (2010). *ASEAN Indigenous Peoples Report*.

The fourth challenge is specific to language. Preserving indigenous languages poses another challenge in protecting the identity and rights of IPs in Southeast Asia. This is crucial as endangered languages in the region seem to follow the global trend of language endangerment and extinction (Woodbury, n.d.; Bromham et al., 2022).

**Figure 2:** Number of languages spoken in Southeast Asia

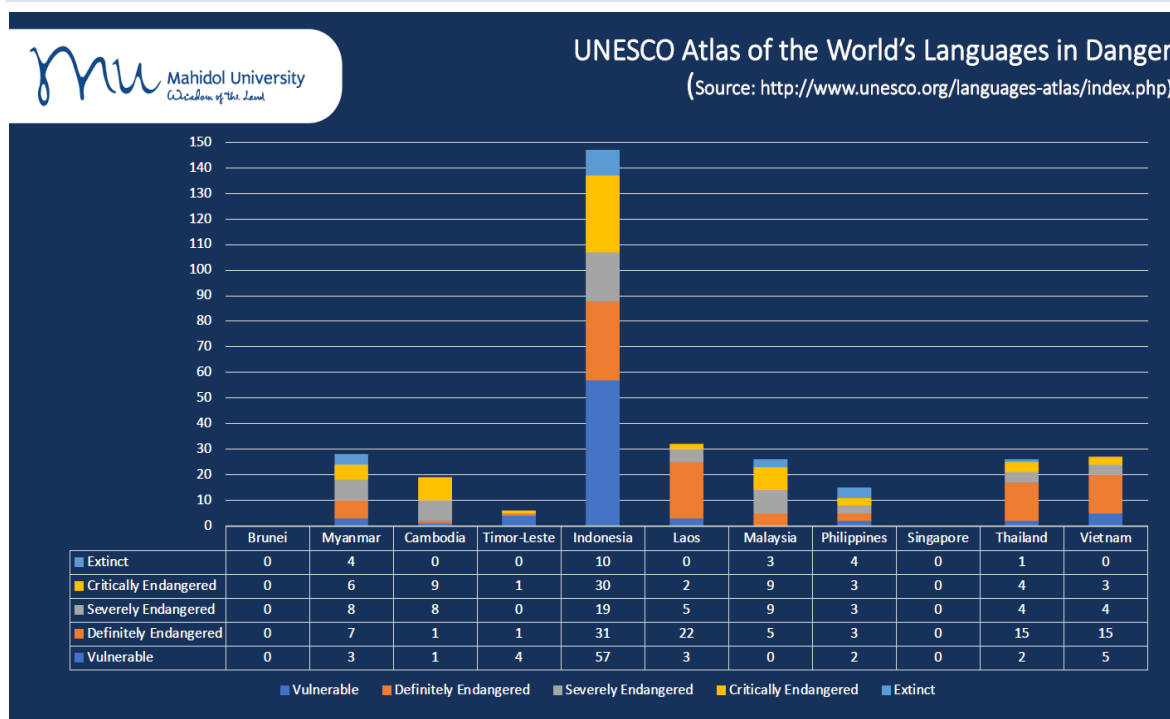


Note. From Suraratdecha, S. (2021). Session 2: Languages of the Indigenous Peoples and their Survival [Presentation]. Online Regional Dialogue.

Indonesia reportedly has the most languages, with 754, followed by the Philippines (188) and Myanmar (139). States may overlook languages that are close to extinction or may already be extinct, particularly where the number of 'domains' or fields of social activity where the languages are used has been significantly reduced (see Figure 3).



**Figure 3:** Endangered languages in Southeast Asia



Note. From Suraratdecha, S. (2021). *Session 2: Languages of the Indigenous Peoples and their Survival* [Presentation]. Online Regional Dialogue on “Protecting the Rights of Indigenous Peoples and the State of Play of the UNDRIP In Southeast Asia”.

More Southeast Asian indigenous languages will likely be extinct in the near future. Language endangerment affects indigenous children as their culture and identity are expressed through using and maintaining their indigenous languages. In research and conservation work on indigenous languages, we note cases in Borneo where a language that was once thought to belong to one sub-group turned out to belong to a completely different sub-group of languages, and an entire sub-group of languages turned out to be more closely affiliated with another sub-group than previously thought thus requiring a re-classification and re-categorisation of the entire language families.

There is also a serious concern for the inter-generational aspect of language transmission. This partly is because communities speak the national language instead of their indigenous or native language at home. While individuals have the right to self-determination, the reduced or discontinued use of native languages delinks them from their past.

### **Recommendations for ASEAN and ASEAN member states**

The just and actual realisation of IP rights is crucial to our region’s civilisation. ASEAN and its sectoral bodies must extensively work towards promoting and protecting indigenous

rights to ensure that IPs are not left behind. The following are several recommendations to be considered.

**1. Implementing UNDRIP through an ASEAN human rights document emphasising the protection of IP rights.**

ASEAN needs to agree on how it will implement UNDRIP by adopting an ASEAN human rights document recognising IPs and their rights. An action plan must also be drawn up to enlist ASEAN's sectoral bodies and delegate actions to be undertaken by them.

**2. Establishing a special IP protection mechanism by AICHR.**

The AICHR should establish a special mechanism to receive and adjudicate complaints of IP rights violations and document trends on issues concerning the indigenous in the region. The mechanism can also empower IPs to participate in decision-making processes requiring their free, prior and informed consent.

**3. Incorporating indigenous languages as part of formal education curriculum, and spreading awareness of the importance of indigenous languages and promoting their use.**

ASEAN bodies, including the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), ASEAN Institute for Peace and Reconciliation (AIPR) and ASEAN University Network (AUN), should advocate for the incorporation of indigenous languages into a child's formal education and enabling the child's use of the same in that setting. They should also leverage available knowledge and resources to fund and support programmes designed to preserve and transmit indigenous languages and promote their use. Given the importance of communication in indigenous languages, key human rights documents and those that bear on IP rights should be translated into indigenous languages for dissemination and greater understanding among IPs.

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*The Working Group for an ASEAN Human Rights Mechanism (WGAHRM) is a coalition of national working groups from ASEAN Member States, comprising of individuals and groups who have devoted immense effort to advancing human rights at a local level as well as at the regional level. It is the only human rights group which has been recognised as an entity associated with ASEAN to-date, pursuant to Annex II of the ASEAN Charter 2007. The Malaysian National Working Group for an ASEAN Human Rights Mechanism (MNWG), being the linkage between the WGAHRM and Malaysia’s civil society organisations (CSOs), provides a platform for engagement between CSOs to collaborate and to take collective action in establishing and developing credible and effective human rights mechanisms in Southeast Asia.*

*The Collective of Applied Law and Legal Realism (CALR), a non-profit organisation with an area of focus on business and human rights (BHR), is the Secretariat of the MNWG.*