

## **SEEKING JUSTICE FOR THE UNDOCUMENTED BURMESE MIGRANTS LIVING ALONG THAILAND-MYAMMAR BORDER**

**Sopit Cheevapanich**

College of Politics and Governance, Mahasarakham University

E-mail:sopitcheevapanich@hotmail.com

### **ABSTRACT**

The right to access to justice for all is one of the universal human rights and guaranteed by the state law on a non-discriminatory basis. In a border area of Thailand where the Burmese migrants live with a Thai community, a different level of protection has been exercised to them through either the formal or informal justice system. In other words, the right to access to justice of Burmese migrants could be secured by the community or the state justice system. Particularly, the undocumented Burmese migrants are more vulnerable than those documented when claiming their legal rights in the country. For the formal justice system, the right to access to justice of the undocumented migrants has also challenged the capacity of the state in guaranteeing the fundamental human rights of people in a justice process. This paper aims to investigate how the undocumented Burmese migrants who live with a Thai community in a border area of Thailand seek justice when they face a legal problem and how the justice mechanism has worked in this context.

**Keyword:** Justice, Burmese, Migrants, Undocumented, Right, Access to Justice

### **Introduction**

This paper aims to review the situation of access to justice of the undocumented Burmese migrants who are found to be more vulnerable than those documented in Mae Sot, a border area of Thailand. The paper questions are firstly, how the undocumented Burmese migrants who live with a Thai community in a border area seek justice in Thailand despite of their irregular status and secondly how the justice both formal and informal has worked to guarantee the right to access to justice of the Burmese migrants. The paper is based on a documentary review, an in-depth interview with a human rights lawyer working in the field

and the author's non-participatory observation to the work of civil society and the Burmese community in Mae Sot in October 2015.

### **Background of the undocumented Burmese migrants in Mae Sot**

Mae Sot District located in Tak province is a border to Myanmar where Burmese migrants have flowed to work in Thailand and as a transit to other urban parts such as Bangkok and Samut Sakorn.<sup>1</sup> During 1980s due to the internal conflict and economic downturn in Myanmar, Burmese migrants have flowed to Thailand either to run away from the internal conflicts in the country or to work. This paper focuses only the group that falls under the definition of migrants in irregular situation. It means the group of migrants from the perspective of destination countries who enter, stay or work in a country without the necessary authorization or documents required under immigration regulations. (IOM Glossary, 2011) This group will be called in this paper as "the undocumented migrants", which includes also those persons who have entered a transit or host country lawfully but have stayed for a longer period than authorized or subsequently taken up unauthorized employment. (IOM Glossary, 2011) The study will not cover the refugee even though the line between the refugee and the migrants has never been clear.<sup>2</sup>

Protecting the rights of the undocumented migrants including the right to access to justice has been a challenging issue for the government of Thailand for years under the human rights and humanitarian principle. The Human Rights Committee in 2005 as a human rights body to the International Covenant on Civil and Political rights (ICCPR) expressed concerned on the full protection of rights of both registered and unregistered migrant workers in Thailand for various issues for example, liberty of movement, social service, education and personal document. The Committee notes that "ethnic minorities and migrants from

---

<sup>1</sup>In 2015, One Stop Service, Tak Province provided registration numbers of 34,220 undocumented Burmese and 458 family members. This number was higher in 2014 when 57,644 displaced Burmese and 1,286 family members were registered. However, because of their very nature, there are no accurate statistics for the number of undocumented Burmese in Mae Sot.

<sup>2</sup> Refugee who leaves a temporary shelter will become a migrant in irregular situation and can be charged with the immigration law.

Myanmar are particularly vulnerable to exploitation by employers as well as to deportation by the Thai authorities”. (Concluding Observations to Thailand under ICCPR, 2005, item 23)

It is interesting that the Committee suggest that apart from taking measures to effectively implement the existing legislation providing for the rights of migrant workers, the state should consider “establishing a governmental mechanism to which migrant workers can report violations of their rights by their employers, including illegal withholding of their personal documents” (Concluding Observations to Thailand under ICCPR, 2005, item 23). This refers to the mechanism established for the members of a particular group like migrants who have a communication problem and a legal basis to live in the country is up to the state registration system for migrants. The US Human Rights Report in 2015 revealed that the children migrants in Thailand were facing the situation of forced and child labour in urban area of Mae Sot especially in a garment factory. (US Human Rights Report Thailand, 2015)

The study of the vulnerability of displaced Burmese in Mae Sot by the Feinstein International Center in 2011 revealed that there were significant differences emerge between documented migrants, undocumented migrants, and Thai citizens. For example, “there are major differences between undocumented migrants, those with legal status, and Thai citizens as the undocumented migrants are significantly more likely to feel unsafe in their neighborhood than documented migrants, who in turn, are significantly more likely to feel unsafe than Thai citizens”. (Feinstein International Center, 2011, pp. 32-33)

For the rights awareness of the migrants in Mae Sot, the study found that “nearly twice the percentage of undocumented migrants compared to those documented responded that they do not have the right to complain to the police if they were the victim of a crime” (Feinstein International Center reveal the report, 2011, p.32). Also, “less than half of undocumented migrants feel they know how to safely access justice in Thailand, compared to close to 60% of documented migrants and 88% of Thai citizens” (Feinstein International Center reveal the report, 2011, p. 32).

For the faith to Thai justice system, the report in 2011 revealed that there was no significant difference between the undocumented and documented migrants on the perception or faith to the Thai justice system (such as police, court) but the documented migrants felt more confident in asserting their rights in Thai justice system than the undocumented. (Feinstein International Center reveal the report, 2011, pp. 32-33)

Particular to migrants in Mae Sot, a high number of cases on the rights violation relates to the labour rights. In response to mass irregular migrants in the country, the government of Thailand launched the registration policy designed for the migrants entering the country illegally. However, such policy did not fit in with the nature of the migration flow in the border area as the registration policy is uncertain but the people have never stop migrating between the two countries. In this regard, Human Rights Watch in 2015 reported that Thailand's labor laws provided little protection to migrant workers, while a migrant registration scheme failed to effectively counter the impunity with which employers violate worker's rights. This situation put women migrants in a risk to sexual violation not only at home but also in the workplace.

The human rights lawyer<sup>3</sup> explained the obstacle of the undocumented migrants in claiming their rights as the undocumented migrants could be arrested for illegal entering the country just on their way to the police station or the labour protection office in order to assert their claims in a formal state complaint mechanism. In addition, the bureaucratic process of the complaint mechanism takes times and requires the migrant to travel back and forth between Myanmar and Thailand. The migrants have to apply for a one-day border pass to travel to Thailand and run the process of their complaints. In many cases, the victim of rights violation who had made a complaint in a formal justice system did not get a remedy because they cannot apply for a border pass if they do not have a Burmese household registration.

In the community, there is an existing informal justice system or a community justice system run by the Thai village head. At some extent, this informal system has worked with both Thais and Burmese in a Thai community. It has been found that in Mae Sot a civil society plays an important role in assisting the Burmese migrants to be able to access to justice. Some non-governmental organizations working in Mae Sot are for example MAP Foundation and Suwannimit Foundation (SNF), both provide legal service and protection of women as well as support the work of Community-Based Organization (CBOs) such as Social Action for Women (SAW), the CBO working with the Burmese community in the gender issue. The CBOs in Mae Sot provide the first hand legal service to the migrants. They are highly recognized among the Burmese migrants in their protection work. Their work include assisting migrants in asserting a legal complaint both in the informal and formal justice system, providing shelter for the victims of gender-based violence and providing a

---

<sup>3</sup> Interviewed with Koreeyor Manuchae, a human rights lawyer with 10 years experience working with a Burmese migrant community in Mae Sot.

health care to Burmese migrants. To fulfill the work of NGOs and CBOs, the community volunteers (Burmese migrants) have been trained to supplement their works on the ground. The new initiative in Mae Sot is a legal clinic as a result of cooperation between the Lawyer Council of Thailand (Mae Sot Branch) and Suwannimit Foundation (SNF). The legal clinic opened in March 2013 is providing legal service to the Burmese migrants living in Mae Sot urban areas.

### **The International Standards for the Protection of the Rights of Non-Citizens in the Country**

This part will consider the international principles and standards relating to rights' protection that obliges the state to protect the non-Thais in the country. The Universal Declaration of Human Rights (UDHR) lays foundation on humanitarian assistance that all people have to be protected regardless of their legal status or nationality. This includes the right to access to justice of Thais and non-Thais. The right to access to justice under the Universal Declaration of Human Rights is a fundamental human right universally accepted since 1948. For example, Article 8 of the UDHR provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" and in particular for the offender in a criminal case by Article 11(1) providing that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense"

Apart from the UDHR, the human rights bills that Thailand is a party to contain similar contents. For example, Article 14 (1) provides that

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

To this specific provision, the Human Rights Committee explained to the non-citizens that "the right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of

nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party”. (ICCPR General Comment No. 32, 2007)

This is also based on the principle of non-discrimination stipulated in Article 26 of the same covenant that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

When the migrant is the alleged person in a criminal case, Article 14 (3) of ICCPR also covers the migrants by having the state guaranteed that the person was able to defend himself in person or through legal assistance of his own choosing and being provided a free legal service if he cannot afford to pay.

Obligation of the state to implement the international law has emphasized the importance of the international standards as “the doctrine under which non-nationals benefit from a group of rights directly determined by public international law, independently of rights internally determined by the State in which the non-national finds him or herself” (IOM Glossary). Under the international law, there is a specific mechanism particularly the human rights bills. This mechanism is useful to monitor the human rights violation for non-Thais and it is a channel to suggest the government for a good practice on human rights.

Apart from international laws, the United Nations launched the guidelines for the state to provide a legal aid in a criminal case which is called “the United Nations Principles and Guidelines on Access to Legal Aid in a Criminal Justice System” adopted in December 2012. This document is a framework to guide the UN member States on how to arrange a legal aid system for a criminal justice in the country. It focuses on the obligation of the state under the international human rights law and provides the recommendations for the state to ensure the access to legal aid in its criminal justice system. The guidelines themselves are actually drawn from international standards and based on good practices for state to provide a legal aid system in criminal justice including providing legal advice, legal assistance and the representation for persons detained, arrested or imprisoned, those

suspected or accused of or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. This guideline has been used not only by the state but also the civil society work in the rights' protection in Thailand.

The civil society has a significant role with regard to the protection of migrants in Thailand. The civil society works with the government units and at the same time the Burmese migrants in the community to implement the protection component of their work. In this regard, the basis of the civil society program should be also considered in order to understand their scope of work with justice system. For example, the concept of "protection" under the development scheme is key to the work of civil society. The concept "encompasses all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law." (IOM Glossary, 2011). Thus, the civil society like NGOs and CBOs have advocated their work based on the human rights treaties and the international law at large but the protection component of civil society work has covered more activities than the implementation of the laws. The humanitarian organizations in Mae Sot also based their work on another specific international guideline called "the Humanitarian Charter and Minimum Standards in Humanitarian Response" (Sphere), initiated in 1997. This principle of humanitarian work is based on two core beliefs as those affected by disaster or conflict should have the right to life with dignity of and all possible steps should be taken to alleviate human suffering arising out of disaster or conflict. Therefore, as their basis concept and framework, the civil society in Mae Sot has been working on rights protection issue which include the ability to access to justice of the Burmese migrants.

### **Access to Justice of the Undocumented Burmese Migrants through a Formal Justice System of the State**

In principle, Thai justice system protects all people living in the country regardless of a legal status of a person. The state basically has the obligation to ensure a fair justice system, while the study of the Feinstein International Center in 2011 revealed the barriers to access to justice for the undocumented Burmese in Mae Sot as similar to the factors that made them lack confidence to go to police such as a communication (cannot speak Thai), lack of legal

knowledge and lack of a legal status. To fulfill this duty, the state needs to consider additional measures to ensure that the non-Thais get a fair justice. This part will discuss more on the problems barring the undocumented to access to a formal state justice system by reflecting what happened on the ground in Mae Sot.

The problem in a communication of non-Thais continues to be a debate on the protection of the fundamental rights of migrants in the justice system. It can bar the victim or the defendant in a crime from fully access to the state justice mechanism since providing an interpreter is not standard practice for every legal institution especially in border areas. For example, the Mae Sot Provincial Court as located in the border area and recieved a high number of cases involved with the Burmese migrnats does not always provide an interpreter for the language in need. The police station is worse as not having hired any translator for the complaint and investigation system. Some police officers in Mae Sot police station sometimes act as an interpreter but they were not trained for this specific task and this could bring the bias to the case in term of impartiality. The NGOs have been providing the translators to the court and the police upon request and on the cases they have involved but they are not enough to the need of translator in the border areas.

The influence of work for the state officials is another issue that can push their work in the protection of migrants. It is obvious that the central policy of the National Police Office has much influenced the police in the border area to be active in receiving the cases related to the migrants. For example, the Police Order No. 419/56 dated 1 July 2013 on the facilitating of justice in criminal case has on the ground alerted the polices in Mae Sot to receive and facilitate the criminal cases. According to the lawyer, the police in practice hesitates to receive the cases involving Burmese migrants since it is hard to collect the evidence and follow the witness but the police does receive it upon the coordination with the NGOs/CBOs in assisting the police in collecting such evidence.

The migrants themselves have in mind some perception in the justice system and feel reluctant to report the case to the police. The Human Rights Watch report (2010, p.90) reviewed that the migrants feel powerless to resist to the intimidation due to various factors such as lack of legal status, local connections to influential persons and the backing of a social network or local community. Also, the unconfident feeling to the police relates to the fact that some police involved with extortion and abuses against migrants. For the report in 2010, it is extremely that in the grievous cases of human rights abuse, “relatively few



migrants are willing to bring formal complaints to Thai authorities unless they can secure assistance from NGOs who will help provide protection and financial support to the migrants as their case progresses. (Human Rights Watch report, 2010, p.90)”

For the government human rights organization like the sub-committee on human rights of National Human Rights Commission of Thailand had suggested in 2011 that the government in guaranteeing and protecting the dignity, fundamental rights and the right to access to justice of migrant workers should for examples, supporting the mechanism for the protection of the right of migrant worker including the legal service regardless of the immigration status, guaranteeing the right to have the interpretation in the court including during the complaint mechanism and permit the migrant workers who are dismissed from work to temporary stay in the country for the sake of legal process (NHRC sub-committee report, p.89) The report added that this problem does not derive from law but rather from the bad attitude of the state officials. (NHRC sub-committee report, p.90)

As the problems exist in access to justice, there is the example of a success case that Thai Court through a formal justice system has sentenced Thais who commit a serious crime against the Burmese migrants in Mae Sot.<sup>4</sup> On 13 March 2013, the Mae Sot Provincial Court read the appeal court decision to insist on the court of the first instance decision on the life imprisonment of two Thai defendants in a murder case of five Burmese migrants. On 9 November 2007, the employer shoot five Burmese migrants in Mae Sot, four died and one got serious injured. After that, the employer has burned four bodies in the corn field in Mae Sot district, Thailand- Myanmar border. The court ordered to sentence life imprisonment two defendants on the offense of life, liberty, law on weapon and offense for the justice officials. It should be noted that in this case the Human Rights and Development Foundation provided legal assistance to the victim including the legal representative (a lawyer) as a co-plaintiff in the court trial.

There is a new initiative that the Lawyer Council of Thailand (Mae Sot branch) started two years ago to work with the migrants group through the supporting of the NGOs. Through this initiative, the community volunteers work for a rights awareness in the community and connected the lawyer/legal clinic with the Burmese communities. As interviewed with a lawyer, she suggested that the current work on rights protection of the migrants either by a

---

<sup>4</sup> News from <http://hrdfoundation.org/?p=659>.

Thai justice system or the community justice had ignored the larger concept of protection, which could explain the vulnerable situation of migrants rather than only the legal case per se. With the protection framework, the issues are explained to not only human rights abuse but also the actions that related or led to the abuse such as using violence in the workplace, using impolite speech to worker or even hit the worker on face. In many cases, the violence in the workplace is not a crime or just a petty offense under the criminal law but it falls under the concept of protection especially the labour protection regime which the labour protection officer has the power to order for protection of the migrant workers. In addition, there is no complaint mechanism in place for the migrants who come to work in Thailand to easily access to report their case. This also reflects the gap of the complaint mechanism in the workplace which being ignored by the state and the civil society.

### **A Protection of Burmese Migrants Living at the Community Level**

Most of the legal disputes were settled in an informal way rather than a formal Thai justice system (such as the police and the court). The Community justice system plays a role in settling disputes in the community but whether it works effectively with migrants needs more research on the topic. In the community, there are different levels of protection to Burmese migrants such as a kinship, a Burmese community leader, a Thai community leader, NGOs/CBOs, a religious group and a political group. Normally, the community justice system is involved in settling legal disputes of non-serious offences, while the serious criminal cases will be transferred to Thai justice system (police).

In the community level the Thai village heads (*Phuyai Ban*) is a main actor in monitoring the security of people in the community. The village heads will be trained for the official mediators for the village-level conflicts as part of the Ministry of Justice (MOJ)'s project on the alternative justice system but it is not clear that this system has included the undocumented Burmese migrants living with Thai communities in the border area. There is an attempt of the legal clinic (in the cooperation of the Lawyer Council Mae Sot and the NGO) to work with the Ministry of Justice in training the community leaders both Thais and Burmese the skills on the mediators. The project is still in the beginning of the process and there is no concrete outcome so far.

Recently, the village headmen have issued a registration to the undocumented Burmese

migrants as part of a project of the Ministry of Interior (MOI) to survey the number of the Burmese migrants in the community. The undocumented migrants being issued such paper have to pay a fee to the village head but this could not be implied that the migrants would get more protection. At the same time, the migrants have recognized the paper as a document showing their status in Thailand but are not confident in using it with the police as well.

In certain communities in Mae Sot, the informal Burmese community leader was appointed either by Thai community leader or the migrants themselves to deal with the disputes among the Burmese migrants themselves. If the conflict involved with Thai counterpart especially the Thai village security, the Burmese community leader tends leave the case or stand in favor of the Thai security side while the Burmese migrants were afraid to the report the case to the police due to their security concern to live in the village.

Burmese protection volunteer group has appeared in Mae Sot as a political group established by the Burmese claiming as a volunteer to protect the Burmese migrants in accessing their rights. At some extent, it has been reported that this volunteer group has handled the criminal case among the Burmese migrant groups internally, if true, this is the serious breach of human rights existing in Thailand. In other words, the political group like this one would appear when the justice system failed to ensure the fair justice and provide the channel for people to lodge a complaint.

The civil society (NGOs/CBOs) works to connect the Burmese migrants having legal problem to the village head or the Thai justice agencies. In addition, the civil society plays a crucial role in empowering the CBO and volunteers on the ground. The community volunteers have significant role in monitoring any concern about protection and promoting right to access to justice of the Burmese migrants. With the capacity, role and resource of the civil society in Mae Sot, Feinstein International Center (2011) particularly suggested the civil society to work with the Mae Sot District office to designate greater numbers of Thai village heads (*Phuyai ban*) as official mediators for village-level conflicts, work with key Thai justice agencies to put together a series of trainings for village heads on Thai law regarding migrant workers and engage more with for example CBO/vigilante groups claiming to provide justice on behalf of Burmese migrants.

## **Conclusion**

As the mass flow of migrants in the irregular situation in the border area, the undocumented Burmese migrants have formed a large group of populations in Mea Sot living with Thai communities. The undocumented Burmese migrants are found to be more vulnerable compared to the documented migrants and Thais. Under the human rights instruments, the state has the obligation to protect all in the country the right to access to justice regardless of a legal status and ensure the fair justice for all. There are two main justice systems in the country, firstly the state formal justice system and secondly the community justice system. The state formal justice system involves not only main justice bodies such as the police, the public prosecutor and the court but also various governmental units such as the labour rights protection office. The civil society has played an important role in supplementing the state justice mechanism and assisting the migrants to access to justice. At the community level, the village head under the Ministry of Interior is a key actor in administrating the community justice. The protection of the rights of the migrants in Thailand has been the issue of concern for the international monitoring bodies both the United Nations and the civil society. However, Thai justice system does not exclude the undocumented Burmese migrants from the main system and rather treat them equal to Thais. The problem is the lack of interest and resources of the state to improve the measures guaranteed the rights of non-Thais in the justice system for example, providing sufficient interpreters in the justice units especially in the border area, establishing mechanism for complaint process which the migrants can easily access to and allowing the non-Thais to stay in the country to get a remedy for a legal case. In the community, the village head under the MOI is a main actor in monitoring the conflict in the responsible community and acts as a mediator for legal disputes as part of the MOJ's concept on alternative justice system. The inclusion of Burmese migrants under the protection of the Thai village heads is not clear. Even the village head is assigned to do survey of non-Thais in the village, it cannot implied the increase in the level of protection in this regard. Also, at the community level the community volunteers (Burmese migrants) have been largely recognized their roles in assisting the migrants in legal service for example, connecting the migrant with a legal problem to the village head or referred the case to the NGO/CBOs. It is interesting that when the state failed to provide the access to justice for migrants, there will appear a kind of political group (Burmese) claiming to work for ensuring the migrants rights but handling the legal case of Burmese migrants internally despite of a serious criminal case. This situation has reflected the state's failure in protection

people under its jurisdiction to fair justice.

## References

Feinstein International Center. (2011). *Developing a Profiling Methodology for Displaced People in Urban Areas Case Study Mae Sot, Thailand 2011*. Massachusetts: Feinstein International Center.

Human Rights Watch. (2010). *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*. The United States of America: Human Rights Watch.

Human Rights Watch. (2015). *Country Summary Thailand (Event of 2014)*. Retrieved from <https://www.hrw.org/world-report/2015/country-chapters/thailand>

International Organization for Migration. (2011). *Glossary on Migration (2<sup>nd</sup> Edition)*. Geneva: International Organization for Migration.

National Human Rights Commission of Thailand. (2011). *Policy and Measures in Solving the Problems of Migrant Workers*. Bangkok: Rak Thai Foundation,

The Sphere Project. (2015). *The Core Humanitarian Standard and the Sphere Core Standards: Analysis and Comparison Interim Guidance, March 2015 (Version 2)*. Retrieve from [http://www.spherehandbook.org/~sh\\_resources/resources/Sphere\\_Core\\_Standards\\_and\\_CHS.pdf](http://www.spherehandbook.org/~sh_resources/resources/Sphere_Core_Standards_and_CHS.pdf)

US Department of State, Bureau of Democracy, Human Rights and Labor. (2015). *Thailand Country Report on Human Rights Practice 2014*. Retrieved from <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>

## United Nations Documents

The Universal Declaration of Human Rights (UDHR)

International Covenant on Civil and Political Rights (ICCPR)

Human Rights Committee, Concluding Observations of the Human Rights Committee to Thailand, CCPR/CO/84/THA, adopted 8 July 2005, Human Rights Committee,

Eighty-Fourth Session,

Human Rights Committee, General Comment No. 32 (Article 14 : The Right to Equality before Courts and Tribunals and to a Fair Trial), CCPR/C/GC/32, adopted on 23 August 2007, Human Rights Committee, Ninetieth Session

The United Nations the United Nations Principles and Guidelines on Access to Legal Aid in a Criminal Justice System, adopted by the General in December 2012