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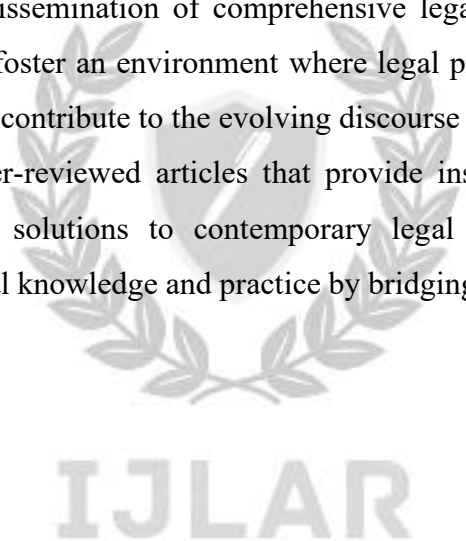
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Introduction

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Preface

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MIGRATION GOVERNANCE IN SOUTH ASIA: A HUMAN RIGHTS–BASED EVALUATION OF LEGAL AND POLICY FRAMEWORKS

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Abstract:

Migration governance in South Asia is characterized by fragmented legal regimes, uneven institutional capacities, and persistent tensions between state sovereignty and human rights obligations. With India positioned as a major country of origin, destination, and transit, this chapter undertakes a comparative assessment of migration governance frameworks in India and select South Asian states, including Bangladesh, Nepal, Sri Lanka, and Pakistan. The study is based exclusively on secondary data, comprising constitutional texts, statutory provisions, policy documents, judicial decisions, international legal instruments, and reports of international organisations and civil society actors.

Using a human rights–based analytical framework, the chapter evaluates the extent to which domestic migration policies align with international standards articulated in instruments such as the ICCPR, ICESCR, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The analysis reveals that while constitutional commitments to equality, dignity, and non-discrimination are prominent particularly within India’s constitutional jurisprudence these norms are insufficiently translated into comprehensive statutory protection and coordinated governance mechanisms across the region.

Through comparative policy analysis, the chapter identifies common governance challenges, including securitised border management, exclusion of migrants from welfare regimes, weak institutional accountability, and limited regional cooperation. It also highlights selective best practices and judicial interventions that offer normative guidance for reform. The chapter

concludes by proposing rights-based and governance-oriented policy reforms aimed at legal harmonisation, institutional coherence, and enhanced regional cooperation. By relying on secondary data and comparative legal analysis, the chapter contributes to scholarly debates on migration governance and human rights in South Asia.

Keywords: Migration governance; Human rights; South Asia; India; Public policy; Comparative legal analysis

1. Introduction:

Migration has always been a decisive factor in the social, economic and political environment of South Asia. Regional patterns of cross-border mobility are entrenched in the colonial administrative geography, footprints of disruptive legacy following the Partition of the subcontinent, and nation-building actions of post-independence. Modern migration trends are also fuelled by the labour market inequalities, political war, environmental degradation, climatic susceptibility, and uneven development across and within states ¹(Castles, de Haas and Miller, 2014). The combination of all these factors has left South Asia as one of the most complicated migration areas in the world, which at the same time serves as a source, destination and transit area of migrants. In this regional structure, India is a core country of origin of overseas labour migrants, destination of regional and international migrants, and transits between countries with neighbours ²(Skeldon, 2018).

The governance structures in South Asia, regardless of the magnitude, migration volumes, and the permanence, are uncoordinated, responsive, and largely state-based. The migration policies in the region are mostly influenced by the issues of national security, territorial sovereignty, border control, and the regulation of labour market, and less attention is paid to the rights of migrants as individuals with rights. This means that human rights are usually seen as peripheral, discretionary, or dependent on citizenship status as opposed to being part of the migration governance ³(Cholewinski, 2007). This tension of sovereignty of states and human rights is particularly visible in the juridical and policy treatment of irregular migrants, refugees, asylum seekers and the low-skilled labour migrants, who are often subjected to legal ProClarity, limited

¹ Castles, S., de Haas, H., & Miller, M. (2014). *The Age of Migration* (5th ed.). London: Palgrave Macmillan.

² Skeldon, R. (2018). *International Migration in Asia*. London: Routledge.

³ Cholewinski, R. (2007). "The Rights of Migrant Workers." In R. Cholewinski et al. (eds.), *Migration and Human Rights*. Cambridge: Cambridge University Press.

access to welfare and justice systems, and are more susceptible to exploitation and marginalization.

It is against this backdrop that this chapter is an attempt to give a human rights based assessment of the migration governance in India and in some South Asian nations, that is, Bangladesh, Nepal, Sri Lanka and Pakistan. It critically reviews how far domestic constitutional, statutory and policy frameworks are congruent with international human rights standards and norms including those expressed in the main international human rights instruments. The chapter aims to emphasise the typical governance problems along with the normative possibility of reform in the region by pinpointing structural, legal and institutional loopholes that lead to poor protection of migrants.

2. Conceptual Framework: Migration Governance and Human Rights

Migration governance can be defined as that combination of legislations, policies, institutions, and administrative practices by which states govern, control and regulate human movements across and within the borders ⁴(Betts, 2011). It also includes not only admission, stay, and removal of migrants, but also access to employment, welfare, justice, and social protection.

Migration governance has become a place of normative contestation in recent scholarly and policy discussions, as state security, border control, and labour regulation interests face-off and usually clash with international human rights commitments. Subsequently, there has been an increased interest in the incorporation of human rights principles in migration governance as a way of offsetting restrictive, exclusionary, and securitised policies, which have since become predominant in migration policy across the globe ⁵(Pécoud & de Guchteneire, 2007). A The human rights based approach (HRBA) to migration governance aims at reshaping the current state practice by seeing, instead of object of administrative control, migrants as bearers of rights. This strategy is based on a number of principles, such as universality and non-discrimination, respects in the human dignity, accountability of the authorities in the state, the participation of the affected population, the indivisibility and interdependence of civil and political rights as well as the economic, social, and cultural rights ⁶(OHCHR, 2006). In this sense, migrants should be granted basic rights regardless of their nationality, legal status, or

⁴ Betts, A. (2011). *Global Migration Governance*. Oxford: Oxford University Press

⁵ Pécoud, A., & de Guchteneire, P. (2007). "Migration without Borders." *UNESCO Policy Paper*.

⁶ OHCHR (2006). *Principles and Guidelines for a Human Rights-Based Approach*. Geneva: United Nations.

entry mode and states must make certain that the migration policies do not lead to arbitrary rights denial or institutional exclusion.

The international legal instruments offer a strong normative structure in the practice of HRBA in migration governance. International Covenant on civil and political rights (ICCPR) provides fundamental civil liberties, encompassing equality before the law, due process, and repudiation of arbitrary imprisonment and expulsion. Extended in the International Covenant on Economic, Social and Cultural Rights (ICESCR) are the rights of work, health, education and proper standard of living, especially relevant to migrant populations. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) also explicitly spells out detailed protection in relation to migrant workers such as non-discrimination, human working conditions and remedies regardless of regular and irregular status.

The process of adoption, domestication, and internalisation of these international standards is however uneven and not wide-ranged in South Asia. Although the majority of states in the region are parties to the main human rights documents e.g. ICCPR and ICESCR, the migration specific obligations especially those in ICMW have received low political acceptance, as well as poor implementation by the legislative system. Domestic migration policies still place a lot of trust on executive discretion, sectoral policies and colonial era laws that lead to patchy protection and uneven enforcement ⁷(UNESCO, 2019). This lack of all-inclusive migration law and effective accountability systems has ensured that international human rights standards are more of an aspiration and not an operation thus a perennial disparity between official promises and practical experiences of the migrants in South Asia.

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⁷ UNESCO (2019). *Human Rights of Migrants in Asia*. Paris: UNESCO.

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3. Methodology and Scope of the Study

This chapter will be founded solely on the analysis of secondary data and will use the research design of a doctrinal and policy-driven research. The paper relies on a vast pool of sources of authority, such as constitutional documents, legislation, subordinate laws, executive policies, and administrative directives, which regulate migration in the chosen nations. The judicial rulings of the constitutional courts and high courts are reviewed to evaluate the manner in which the rights and powers of the state as they relate to migration have been interpreted and applied in practice. Besides that, the chapter also addresses international law tools, the interpretations of treaty bodies, and even the soft-law norms that apply to the issue of migration governance. International organisations, including the International Labor Organization (ILO), the International Organization of Migration (IOM), and the United Nations High Commissioner of refugees (UNHCR), and publications by civil society organisations and academia are also part of the evidentiary base. The comparative legal and policy analysis is used to evaluate migration governing systems in India, Bangladesh, Nepal, Sri Lanka and Pakistan. These jurisdictions are chosen because of their common historical legacies, geographical closeness, and the relation in migration patterns, and also they have a diverging

⁸ UNESCO (2019). *Human Rights of Migrants in Asia*. Paris: UNESCO.

constitutional arrangement and policy strategies. The comparative approach allows specifying both the similar regional patterns and country-specific differences in the control of migration, which allows making a delicate assessment of the governance practice in South Asia. The discussion is designed into three dimensions that are interrelated. First, it analyses constitutional and statutory acknowledgement of the rights of the migrants entailing equality, non-discrimination, due process and access to justice and the scope to which these guarantees apply to the non-citizens. Second, it assists in assessing those institutional and policy instruments of migration, such as the functions of executive powers, labour and welfare institutions, border control organizations, and inter-governmental coordination. Third, it evaluates the consistency of national legal and policy practices with international human rights commitments, especially that which are embedded in core human rights documents and those unique to migration. The chapter is an overall evaluation of migration governance in South Asia based on the human rights approach by combining these dimensions.

4. Migration Governance Frameworks in South Asia

4.1 India

India lacks elaborate or unified migration legislation. Rather, migration governance can be governed by a disjointed series of colonial-era laws, most notably the Foreigners Act, 1946, the Passport (Entry into India) Act, 1920 and the Registration of Foreigners Act, 1939, reinforced with executive rules, notifications and policy instruments. These legal frameworks are largely geared towards controlling entry and exit as well as deportation and empower the executive authority with broad discretionary authority especially in issues to do with detention, expulsion and movement restrictions. Consequently, the statutory framework is giving preference to sovereign authority and administrative convenience rather than rights-based protection of migrants and non-citizens ⁹(Bhatia, 2019).

Without effective legislative protection, the Indian constitutional jurisprudence has become an important place of refuge to migrants. The Supreme Court of India has steadily considered the fundamental rights in Part III of the Constitution and in particular Articles 14 (equality before the law) and 21 (protection of life and personal liberty) to apply to every individual, regardless of citizenship status. *Kapitan v. National Human Rights Commission*, 1985. The Court stated in *State of Arunachal Pradesh* (1996), that the state had a duty to safeguard the life and liberty

⁹ Bhatia, A. (2019). "The Foreigners Act and India's Migration Regime." *Economic and Political Weekly*, 54(4), 45–52.

of Chakma refugees, and that constitutional provisions applicable to citizens were applicable to non citizens who lived on Indian soil. The post-judicial interventions have strengthened the doctrine of due process, non-arbitrariness and human treatment in detention and deportation matters. In spite of these jurisprudential developments, there are still major gaps in the reality of migrants in India. The right to welfare programmes, health, education and social security largely depends on documents and statuses of residence and policies established by the states. The procedural protections against arbitrary arrest and deportation are not consistently enforced, and the effective legal protections are typically unavailable to the populations that are at risk among migrants. As such, constitutional safeguards, though normatively strong, have not been institutionalized in statutory and administrative formations that control migration.

4.2 Bangladesh and Nepal

The migration governance structure in Bangladesh is mostly influenced by the fact that the country is a key country of origin of foreign labour migrant. Policy and legal focus is thus put on labour export, regulation in terms of recruitment and remittances facilitation but not inward movement or protection of foreign migrants in the country. The Overseas Employment and Migrants Act, 2013 is an important effort to institutionalize some rights and welfare provisions of migrant workers of Bangladeshi origin in foreign jurisdictions, such as those on the recruitment procedure and conflict of interest. Nevertheless, the efficiency of enforcement tools is still low, and the insufficiency of institutional capacity still prevents the absence of the effective protection of rights ¹⁰(Siddiqui, 2017). In Nepal, the same situation is witnessed with regard to its migration governance which is labour-centric. The legal and policy frameworks are more concerned with how to control foreign employment and support the Nepali employees abroad, and there is little statutory concerns on the rights of migrants within Nepal. Although policy tools and bilateral contracts deal with some aspects of labour migration, the rights provisions are dealt with mostly by executive policies but not determined by legal entitlements. Such dependence on policy-driven processes leads to disproportionate enforcement and lack of responsibility either on vulnerable migrant populations ¹¹(Thieme, 2016).

¹⁰ Siddiqui, T. (2017). Labour Migration from Bangladesh: Governance, Migration Rights and Protection Gaps. Dhaka: Refugee and Migratory Movements Research Unit (RMMRU)

¹¹ Thieme, S. (2016). Nepal's Labour Migration: Patterns, Policies and Governance Challenges. Kathmandu: Centre for the Study of Labour and Mobility.

4.3 Sri Lanka and Pakistan

There has been the emergence of comparatively well-organised labour migration governance structures in Sri Lanka such as national migration policies and bilateral labour agreements with destination countries. The frameworks will strive to control recruitment processes and improve the well-being of the Sri Lankan migrant workers in the foreign countries. However, in Sri Lanka, the protection of migrant workers, refugees and asylum seekers under the law created domestically is very weak, there is no asylum law in the country. Consequently, the non-citizen protection can frequently rely on improvised administrative solutions and the participation of the international organisations, especially the UNHCR ¹²(ILO, 2020). The system of migration governance in Pakistan is marked by institutional divisiveness and a high level of security-orientedness. Although Pakistan has traditionally taken in high numbers of refugees including the Afghan refugees, over the decades, the legal status of refugees and asylum seekers is not that safe considering that there is no official legislation on refugee status. The administration of migration is handled by a mixture of executive orders, registration regimes, and security policies, which tend to focus on the issue of border control and national security aspects rather than the protection based on the rights. The practice has led to legal ambiguity, limited access to the services, and increased vulnerability among the migrant and refugee groups ¹³(Khan, 2021).

5. Key Governance Challenges

In South Asia, there are various overlapping and similar issues that can be observed in migration governance that are manifested through structural gaps that cut across national legal and policy frameworks. These predicaments outline the disconnect between the official promises of human rights and the realities of migration management in the area.

To begin with, the concept of securitised border management has occupied the leading role in the management of migration in states within South Asia. Migration is often positioned to be a menace to national security, demographic equilibrium, or domestic tranquility, and is the cause of policies that concentrate on fortifying the border, surveillance, detention, and deportation rather than protection and integration.

¹² ILO (2020). *Review of Labour Migration Policies in Sri Lanka*. Geneva: ILO.

¹³ Khan, A. (2021). "Refugees, Security and Migration Governance in Pakistan." *Journal of South Asian Studies*, 44(3), 421–438.

These solutions can be largely based on sweeping executive discretion and emergency-type regulatory authority and lead to practices that subvert procedural protections, due process, and human dignity ¹⁴(Guild, 2009). Securitised regimes are particularly unfriendly to irregular migrants, asylum seekers and refugees since their legal status is easily perjured with criminality or illegality.

Second, there is a consistent exclusion of migrants in the region by welfare regimes and social protection systems, such as healthcare, educational, housing and social security. Such exclusion is more intense in destination countries like India, whereby the access to governmental services is often based on citizenship, domicile or official paperwork. Both internal and cross-border migrants are exposed to obstacles to welfare scheme enrolment, which leads to the increasing socio-economic vulnerability and perpetuates marginalisation loops ¹⁵(Deshingkar and Akter, 2009). The deprivation of social and economic rights does not only harm the well-being of migrants but also compromises the constitutional and international human rights law concerning equality and non-discrimination.

Third, migration governance institutional accountability mechanisms are weak and poorly developed. The decision making process involved in migration is largely executive based and little legislative review, transparency or participative supervision are in place. Deportation, cancellation of visa, or detention are administrative activities that are frequently administered in shrouded processes, which leaves the concerned migrants with limited opportunities to corrective law enforcement or judicial examination. Lack of independent oversight institutions and methodical data gathering is further hampering accountability and policy coherence in the region.

Lastly, there is minimum migration governance cooperation in South Asia on a regional basis. Although migration flows are transnational, regional institutions like South Asian Association of Regional Cooperation (SAARC) have not created any binding legal frameworks, or synchronized policy mechanisms within the area that deals with migration and migrant rights. The current practice of regional programs is based on the non-binding statements and technical collaboration, so migration control remains mostly unilateral, dispersed, and reactive

¹⁴ Guild, E. (2009). *Security and Migration in the 21st Century*. Cambridge: Polity Press.

¹⁵ Deshingkar, P., & Akter, S. (2009). "Migration and Human Development in India." *Human Development Research Paper*, UNDP.

¹⁶(Rahman, 2015). The protection gaps are increased by the absence of regional coordination, especially of cross-border and circular migrants, and the limitation of the formation of common standards based on human rights.

6. Judicial Interventions and Emerging Best Practices

Indian and Sri Lankan judicial institutions have, occasionally, served as normative correctives to even restrictive or disjointed migration governance regimes by referring to constitutional and international values and the rule of law principles of human rights. Constitutional courts have also had a very important role in India in attempting to fill gaps created by the lack of action by legislative and executive forces. The Supreme Court of India has on numerous occasions confirmed that international law and international treaty obligations can be used to interpret the core rights in cases where domestic law is silent or unclear so long as such norms do not contradict with the provisions of the constitution. It was this interpretive approach that was stated best in *Vishaka v. State of Rajasthan* (1997)¹⁷ the Court of which said that international conventions and norms, in accordance with the constitutional guarantees, could be depended on in giving content to fundamental rights. Even though this jurisprudence has not been determined in a migration-specific setting, it has facilitated courts to apply these protections, which regard dignity, due process, and non-discrimination, to migrants and non-citizens by interpreting the constitution.

On the same note, judicial intervention in Sri Lanka has sometimes strengthened procedural rights and basic protection of rights of non-citizens based on the constitutional principles and obligations of the country. Although the extent of such interventions is small-scale and case-dependent, they show how the courts can alleviate the negative impact of executive discretion and securitised migration policies. Nevertheless, judicial remedies are limited in themselves, because migrants have limited access to courts because of financial, linguistic and legal obstacles, and that the protection offered by the courts is usually reactive rather than proactive.

Outside the judiciary, isolated policy projects in South Asia have partial examples of new best practices in migration governance. Migrant welfare funds, bilateral labor contracts between source and receiving countries and the pre-departure orientation programs have attempted to

¹⁶ Rahman, M. (2015). "Regional Cooperation on Migration in South Asia." *Asian Journal of International Law*, 5(2), 345–367.

¹⁷ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (Supreme Court of India).

deal with certain vulnerabilities of migrant workers especially in foreign working environments. Although these measures are an indication of recognition of the migrant protection issue, they are not comprehensive, disjointed, and mostly policy-based. Without the presence of comprehensive and enforceable legal regimes, these measures will be too little to have any consistency in the protection of rights or institutionalize accountability. Consequently, the normatively substantial judicial and policy innovation have not translated into region-wide and sustainable migration governance reforms.

7. Towards Rights-Based Migration Governance in South Asia

It proposes a radical transformation in the way migration is governed in South Asia to a system of legal harmonisation, institutional coherence and productive regional cooperation. The current migration regimes that are typified by ad hoc decision-making, executive discretion, and security-related interests are not well equipped to deal with the complex and trans nationalities of modern migration. The migration governance system that is both sustainable and respect of rights should see states abandon reactive and piece-meal approaches and adopt holistic systems of law and policy based expressly on human rights norms¹⁸.

First, there is an important migration legislation that is needed in states of South Asia, specifically India and Pakistan, in which the migration regulation remains based on colonial laws and executive tools¹⁹. This type of legislation must establish the rights and duties of the migrants provide clear procedures on the entry, stay, detention, and removal of such migrants, and include both substantive and procedural protections being in line with the constitutional guarantees and the international human rights law²⁰. The codification would also help curb the excessive executive discretion and create more certainty of the law to both the migrants and the administrators.

Second, it is important to strengthen the institutional accountability and coordination mechanisms. Migration governance is usually decentralized and found in several ministries and agencies thus incomplete implementation and control. States ought to formulate well-defined

¹⁸ Betts, A. (2011). *Global Migration Governance*. Oxford: Oxford University Press

Guild, E. (2009). *Security and Migration in the 21st Century*. Cambridge: Polity Press

¹⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR). (2006). *Principles and Guidelines for a Human Rights-Based Approach*. Geneva: United Nations

²⁰ Bhatia, A. (2019). "India's Migration Regime: The Foreigner, the Citizen and the Constitution." *Indian Journal of Constitutional Law*, 13, 1–28

institutional structures, which have a defined role, inter-agency coordination structures, and independent oversight bodies²¹. It is also important to build data collection infrastructure on migration flows, detention practices and access to services because evidence-based policymaking is severely limited due to the lack of available and disaggregated data²².

Third, states need to increase access to welfare, justice and legal redress of migrants regardless of their citizenship or their migration status. Healthcare, education, housing and social security should not be tied to strict documentation policies, especially when it comes to vulnerable populations of low-skilled workers, irregular migrants, and refugees²³. The procedural safeguards such as access to legal services, interpreters and judicial review are also necessary to make sure that the decisions that are made due to migration adhere to the principles of fairness, proportionality and non-discrimination²⁴.

Lastly, the chapter highlights why regional collaboration and norm setting is significant to dealing with migration governance issues that cross national borders. The South Asian countries ought to strive to establish a regional human rights framework of migration, which may be through SAARC or other regional forums. This framework may define the minimum standards of protection, enable sharing of data, social security benefits portability and enhance collaboration in labour migration and refugee protection²⁵²⁶. Harmonisation on a regional basis would ensure that protection gaps are minimized as well as that the ability to engage in collective governance is increased in a region characterized by overwhelmingly integrated patterns of migrations.

Collectively, these reforms provide a rights-based and governance-oriented avenue of harmonizing the states sovereignty with the migrant dignity and human right protection in South Asia.

²¹ International Labour Organization (ILO). (2020). *Bilateral Labour Agreements and Memoranda of Understanding: Key Elements and Good Practices*. Geneva: ILO

²² International Organization for Migration (IOM). (2017). *Migrant Welfare Funds: Institutional Models and Best Practices*. Geneva: IOM

²³ Deshingkar, P., & Akter, S. (2009). "Migration and Human Development in India." *Human Development Research Paper*, UNDP

²⁴ ICCPR; ICESCR

²⁵ Rahman, M. (2015). "Regional Cooperation on Migration in South Asia." *Asian Journal of International Law*, 5(2), 345–367

²⁶ UNESCO. (2019). *Human Rights of Migrants in Asia*. Paris: UNESCO

8. Conclusion

The migration governance in South Asia remains to be typified by a longstanding gap between normative constitutional commitments and their institutionalization. Even though the legal principles of equality, dignity and non-discrimination are highly institutionalized in the constitutional documents, judicial discourse of the region, they are poorly transferred into consistent statutory provisions, administrative habits and policy instruments, which regulate migration. Consequently, migrants, especially the irregular migrants, the low-skilled workers, refugees and asylum seekers continue to be exposed to legal ambiguities, discretionary rule and structural exclusion²⁷.

This disavowal of constitutional ideals and principles of governance highlights the ability of existing migration regimes to focus more on sovereignty, security and administrative regulation as opposed to rights-based protection²⁸. Without an elaborate migration law and an effective institutional accountability, the constitutional guarantees and judicial interventions merely serve as retrospective protective measures and not as the systematic guarantees. Therefore, migrant protection is sporadic, contingent, and frequently relies on the act of ad hoc or judicial discretion.

A human rights approach provides a feasible and normatively sound avenue of dealing with these structural inadequacies. By re-orienting migration governance to human rights principles that take the form of universally applicable international human rights documents like the ICCPR, the ICESCR and the migration specific conventions, states will be able to shift to governance models where migrants are understood as right-bearing individuals and not as objects of regulation²⁹. This strategy does not only increase the legal transparency and responsibility, but also increases the orderliness and efficiency of the institutions of migration governance.

Notably, the rights-based migration governance in South Asia cannot be realised by using single country reforms. Considering the highly interrelated and transnational characteristics of migration flows in the region, there is a need to have regional cooperation and harmonisation

²⁷ UNESCO. (2019). *Human Rights of Migrants in Asia*. Paris: UNESCO

²⁸ Guild, E. (2009). *Security and Migration in the 21st Century*. Cambridge: Polity Press

²⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR). (2006). *Principles and Guidelines for a Human Rights-Based Approach*. Geneva: United Nations

of the norms. Standardization, coordinated responses to policies, and institutional bases of cooperation would contribute to closing the gaps in the protection, facilitating consistency of state practice, and balancing sovereign interests with collective responsibility³⁰. This can be achieved by basing migration governance on international human rights standards and enhancing regional cooperation, which in turn will allow South Asian states to balance the need to protect the sovereignty of their states with the need to uphold the dignity and rights of migrants and the human security of people.



³⁰ Rahman, M. (2015). "Regional Cooperation on Migration in South Asia." *Asian Journal of International Law*, 5(2), 345–367