

# Social protection and regional migration governance



Access to social security rights and their portability for migrant workers is emerging as a legal dilemma. The urgency of this topic was emphasized in the broader framework of discussions that took place during the ASIA-EU People's Forum (AEPF) held in Ulaan Baatar from 4 to 6 July 2016. 750 participants from civil society, academia and parliaments from 42 countries had a fruitful meeting, under the main theme 'Building New Solidarities: Working for Inclusive, Just and Equal Alternatives in Asia and Europe', which led to the adoption of the 'AEPF11 Final Declaration' submitted to the 11th Asia-Europe Meeting (ASEM) Summit. As emphasized by Tina Ebro, who represented the International Organizing Committee, "we met at a time of growing inequalities, injustices and turmoil world-wide. There was a strong consensus at AEPF11 that the dominant development approach over the last decades – based around deregulation of markets, trade liberalisation, the privatisation of essential services and resources – has failed to meet peoples' needs and rights, and contributed to climate change with its catastrophic consequences".

Elisa Fornalé

THE DIFFICULTIES for migrant workers in accessing social protection can lead to greater vulnerability and discriminatory treatment in the exercise of their rights. In response to this situation, the 'Final Declaration' adopted by the AEPF recommended, in particular, that the ASEM member states "implement universal and comprehensive social protection, guaranteeing decent work, food, essential services and adequate income to vulnerable groups" and that they "respect the rights of migrants and refugees, and adopt legal and political frameworks which allow them safe movement."

Starting from this normative exhortation, the focus of this contribution will be to unpick the contemporary multilayered social protection regime to identify which 'layer' is in charge of migrants' social rights and in particular to explore the role currently played by regions and regional agreements. This contribution discusses two interrelated issues: the legal implications of emerging regional migration regimes for the social protection of migrant workers and how this level of analysis interacts with the global migration governance.

## Social protection, regionalism and migration

To make sense of this analysis, it is necessary to clarify the interaction between social protection, regionalism and migration. Social protection' is part of a progressive shift from the domestic domain to a composite multilevel legal environment that draws upon migration law, labour law and human rights

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Migrant worker in  
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law.<sup>2</sup> This shift is partly due to greater cross-border mobility and the emergence of new legal-political arenas, such as regional regimes, which have made the need to recognize the rights of non-citizens a supranational issue. Equally important is that the states no longer have sole responsibility for providing social justice and "the idea of social solidarity can no longer be treated as a national or local monopoly".<sup>3</sup> At the international level, the human right to social security was first recognized in the Universal Declaration of Human Rights (art. 22), a non-binding instrument, which inspired the establishment of a universal international system of social security.<sup>4</sup>

Social protection of migrant workers has been a central theme since the inception of the International Labour Organization (ILO): 31 Conventions and 24 Recommendations have been adopted to "make social protection a reality for all" (ILO, 2016). In the case of migrant workers, the Social Security (Minimum Standards) Convention n. 102 (art. 68); the Equality of Treatment (Accident Compensation) Convention n. 19; and the Equality of Treatment (Social Security) Convention 1962 n. 118, are relevant. Additionally, in 2012, the 'ILO Recommendation concerning National Floors of Social Protection (no. 202)' was adopted to guarantee social protection to "all residents".

The *portability* of social security can be defined as a corollary of this basic human right. In particular, the Maintenance of Social Security Rights Convention 1982 n. 157, and

Recommendation n. 167, established an international system for the maintenance of acquired rights emphasizing the key role of bilateral and multilateral social security agreements. As stated by the UN Committee on Economic, Social and Cultural Rights in its comment no. 19 with respect to the specific issue of portability, "where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or receive their contribution if they leave their country". With a view to facilitating the effective implementation and exercise of social protection at a domestic level, the member states have taken various measures at the bilateral and multilateral levels through which migrant workers can maintain and export the social security rights acquired in their country of employment.

From a historical perspective, the first instrument developed by member states to guarantee equal access to social protection for migrant workers was the bilateral social security agreement. These agreements originated in the nineteenth century as a response to several emerging issues related to the movement of foreign workers. At that time, the development of social security standards was very limited and these kinds of instruments facilitated only a minimum level of protection. After World War II, the issue of social security became increasingly relevant and the number of bilateral agreements concluded rose considerably.<sup>5</sup> Bilateral agree-

# Some insights from ASEAN

ments are the preferred option for extending social security coverage, because the countries involved can easily reach an agreement on their content and the drafting process generally requires less diplomatic effort. At the same time, the diffusion of these agreements can put at risk the promotion of universal coverage; in fact Olivier raised the concern that this multitude of agreements can create “different entitlements for different categories of migrant workers”.<sup>6</sup>

In parallel with the bilateral agreements, regionalism started to emerge as an efficient level of cooperation to ensure cross-border coordination and to influence bilateral and domestic measures. Regional social security agreements soon started to develop.<sup>7</sup> A significant example is the European–Mediterranean Agreements adopted between the European Union (EU) and Maghreb countries in the 1990s (Morocco, Algeria and Tunisia) that address the protection of social rights for migrant workers working in the EU. In addition, in Africa, the Economic Community of West African States adopted the General Convention on Social Security in 1993, to guarantee the equality of treatment between national and non-national workers and the preservation of acquired rights. It is becoming clear that regions should play a paramount role in ensuring that migrants’ social rights are respected. This can best be explained by examining the strong relationship between migration and regionalism.

Regional projects are developing in various geographical<sup>8</sup> contexts and “migration in the form of free circulation of people” is a key element in achieving real regional integration.<sup>9</sup> The implementation of these regimes is shifting the normative debate from a global scenario to a regional domain where the needs of people involved in the free movement dynamics can be better looked after, ensuring that their human rights and social needs are met and overcoming the nationalist perspective by generating comprehensive regulations.

The European experience revealed the challenges and the complexities of this issue. It has been identified as a best practice example of how to overcome the fragmented scenario that results from the simultaneous existence of several bilateral agreements and to establish a more consistent regulatory framework. This framework includes the protection of social security rights of third-country nationals.<sup>10</sup> It is increasingly clear that “constitutional commitment to respect for human dignity and ‘market freedoms’ (e.g. free movement of workers and their families) may require legal protection of ‘positive liberties’ by means of social rights (e.g. to education, health protection) in order to empower individuals to develop their ‘human capacities’ autonomously”.<sup>11</sup>

To test this idea of the advantages of linking regionalism, migration and social protection, I would like to introduce some insights from the Association of South-East Asian Nations (ASEAN). These insights will be used in an attempt to determine whether the regional layer has a major role in increasing access to social rights by facilitating, for instance, the adoption of social security agreements or whether states will opt for new forms of unilateralism to deal with contemporary legal gaps.

## Intra-ASEAN mobility and access to social protection

When ASEAN was established in 1967 by means of the Bangkok Declaration (the so-called ASEAN Declaration), its focus was primarily on promoting stability and economic development in the region. There was no clear framework to deal with intra-regional mobility. The two founding principles were “non-intervention at a national level” and “a consensus to clearly avoid any delegation of sovereignty”.

The ASEAN regional project was developed around three pillars, namely the ASEAN Political-Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community. The ASEAN Economic Community has contributed to the ‘mobility agenda’ by implementing policies allowing the movement of highly skilled migrant workers. Meanwhile, ASEAN’s socio-cultural and political communities have addressed the mobility of low-skilled or irregular migrants, in particular, with respect to issues such as the protection of migrant workers.

Access to social protection for migrant workers is a complex issue in the region and it is destined to become a priority in the establishment of the ASEAN community. First, several legislative barriers are present at national levels that affect the ability of individuals to gain full access to social benefits and *de facto* limit their equal treatment. For instance, they have to fulfil specific requirements, such as minimum length of residency or minimum contributions, to be entitled to social security benefits. Second, they are increasingly facing difficulties linked with absence of effective portability of acquired rights, which can affect their decision to return to their countries of origin. In fact, contrary to the practice of the majority of states worldwide, no bilateral social security agreements exist between ASEAN member states. Finally, the level of ratification of international standards is not uniform and this results in a persistent lack of adequate instruments or appropriate enforcement mechanisms that puts the “greater integration of the ASEAN region” at risk.<sup>12</sup>

## Regionalising social protection for migrant workers in ASEAN?

The ongoing research project on Regional Migration Governance (R\_emigra) explores whether ASEAN regional project can potentially improve the current underdeveloped scenario advancing in the idea of a “socially integrated region”.<sup>13</sup>

Driven by the intention to safeguard the fundamental human rights of migrant workers, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers adopted in 2007 establishes that a comprehensive social security system needs to be implemented progressively as an indispensable precondition for ensuring their integration. This Declaration is inspired by international human rights instruments and it is conceived not as a binding treaty but as a common standard to be achieved by the ASEAN member states to underpin the social rights of migrant workers. This understanding of social protection is supported by the overall importance of fostering the social protection system at a domestic level, in particular the adoption of regional standards.<sup>14</sup>

The normative process in this context evolved with the adoption of the ASEAN Socio-Cultural Community Blueprint, adopted in 2009,<sup>15</sup> and with the recent adoption of the ASEAN Declaration on Strengthening Social Protection in 2013. This non-binding instrument recognizes that “everyone at risk, migrant workers and other vulnerable groups, are entitled to have equitable access to social protection that is a basic human right” and this requires the development of appropriate tools, such as the establishment of “universal health coverage”. These steps paved the way for ASEAN member states to commit to developing specific measures and to increasing the capacity to expand the coverage of social protection to strengthen ASEAN’s economic integration. Indeed, due to the non-ratification and implementation of international standards or social security agreements, a major emphasis on the crucial role of regionalism is imperative.

This situation can be illustrated with reference to progressive implementation of the ASEAN Declaration on Strengthening Social Protection. This requires the drafting at domestic level by each ASEAN member state of new plans of action on “common social protection gaps and concrete actions”.<sup>16</sup> This will lead to the definition of national SPFs (social protection floors; a set of basic guarantees) and more comprehensive social security systems. In this regional effort, the member states will attempt to foster the implementation of the new ILO Recommendation n. 202 in the four sectors identified: access to essential health care, to basic income security for children, to basic income security for persons of working age, and to basic security income for older persons. In particular, one SPF entitles all elderly people to social protection and countries will be fully responsible for developing national schemes for providing universal pension coverage. It is noteworthy that many citizens in Asia currently receive no, or very low, pensions.

The project of deploying regional migration governance as a meaningful tool to implement international human rights standards at the domestic level could reveal this to be an effective framework, even though criticism can be raised about the potential delays and challenges in the implementation of regional norms at the national level. This cannot invalidate its relevance. Thus, given the slow progress of unilateral frameworks, it has the potential to capture and to strengthen the global-domestic dialogue by achieving greater social integration. In fact, this normative process will facilitate the adoption at the domestic level of new regulations in line with the content of the ILO standards through fostering the implementation of a regional tool. And it can facilitate the future adoption of new bilateral or multilateral agreements to improve cooperation between countries and facilitate the portability of social security benefits, an emerging legal imperative.

As remarked by Betts: “at the moment, social contracts remain state-centric and ill-adapted to a transnational world. Education, health care, pensions and taxation systems remain rigidly fixed to particular states and territories. Over time, there will be a need to conceive of ways in which the provision of social services can be adapted to be mobile across international borders in a transnational world”.<sup>17</sup>

## Conclusion

Acknowledgement of the relationship between migrant workers’ access to social protection and regionalism invites an exploration of the potential and limits of regional frameworks for identifying mechanisms to increase the protection of the human rights of migrant workers. Domestic law, in particular in the ASEAN context, has thus far proven limited as a tool for framing adequate responses, not only because of the scarcity of resources, but also because of the difficulty in utilizing international law.

The case for supporting regional migration governance as a meaningful layer on which to meet the human rights needs of cross-border migrant workers is strengthened by the reality of the current situation in ASEAN. The relationships and processes of ASEAN’s members offer a unique platform to translate into practice the content of international instruments and to adopt new measures. Taking regionalism as the ‘operational basis’ for overcoming persistent limits of social protection may be a better way to address the need to develop a coherent and solid social protection floor and to enable people to move freely across borders.

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## References

- 1 This article uses social ‘protection’ and social ‘security’ interchangeably. With respect to social protection, the article uses the definition adopted by the International Labour Office: “interchangeable with social security; as protection provided by social security in case of social risks and needs.” (ILO, 2011). The ILO defines social protection as policy measures to protect its members against social and economic distress that would be caused by the absence or reduction of income due to different causes (“sickness, maternity, unemployment injury, unemployment, disability, old age, and death of the breadwinner); the provision of health care; and the provision of benefits for families with children”.
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- 3 Dougan, M. & E. Spaventa. 2005. “Wish you weren’t here ...’ New Models of Social Solidarity in the European Union”, in Spaventa, E. & M. Dougan (eds.) 2005. *Social Welfare and EU Law*. Hart Publishing.
- 4 See the following: adoption of the International Covenant on Economic Social and Cultural Rights (art. 9) and the most recent International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 27).
- 5 See supra Blanpain.
- 6 Olivier, M. 2015. *Social Protection for intra-ASEAN migrant workers: developments, challenges, and prospects*, ILO Presentation, ASEAN Tripartite Seminar, Jakarta, November 2015.
- 7 The first multilateral social security agreement was concluded by the Scandinavian countries (Denmark, Norway and Sweden) in 1919.
- 8 Such as the European Union (EU), the Economic Community of West African States (ECOWAS), the Southern Common Market (MERCOSUR), or the North American Free Trade Agreement (NAFTA).
- 9 Acosta, D. & A. Geddes. 2014. “Transnational Diffusion or Different Models? Regional Approaches to Migration Governance in the European Union and MERCOSUR”, *European Journal of Migration and Law* 16(1):19-44; Deacon, B. 2013. *Regions, Migration and Social Policy: What are and what could be the linkages?*, Keynote address delivered at the UNRISD Conference on Regional Governance of Migration and Socio-Political Rights: Institutions, Actors and Processes.
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- 11 Petersmann, E.U. 2014. “The Promise of Linking Trade and Human Rights”, in Drache, D. & and L. Jacob (eds.) 2014. *Linking Global Trade and Human Rights*. Cambridge University Press, pp. 46–64.
- 12 See supra Tamagno.
- 13 See supra Deacon.
- 14 See the ASEAN Economic Community Blueprint, 2007.
- 15 In the Declaration, member states committed to “ensure that all ASEAN peoples are provided with social welfare and protection from the possible negative impacts of globalization and integration by improving the quality, coverage and sustainability of social protection and increasing the capacity of social risk management”.
- 16 *The state of social protection in ASEAN at the dawn of integration*. ILO, Geneva (2015).
- 17 Betts, A. 2010. *Migration Governance: Alternative Futures, Background Paper for World Migration Report*. IOM, Geneva.

Below: A Thai vendor sells produce to Cambodian migrant workers. Image reproduced under a creative commons license, courtesy of ILO/Areluck Phankhian on flickr.

