

# Free Movement and Migration Governance in ASEAN

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## Introduction.

With the rising scale and complexity of migration systems worldwide, Southeast Asia, as one of the most populated areas, has witnessed a growing number of intra- and interregional migration flows over the decades (Hugo 1). Dramatic socioeconomic changes since the 1970s led specifically to a rise in largely unskilled or semi-skilled labor migration (Nonnenmacher 348). At the same time, recurrent political turmoil and environmental disasters have forced 2.7 million people to move within Southeast Asia (UNHCR 1).

Nonnenmacher identifies three groups of countries that make up the subcontinental migration system (349): The first group consists of high-income, highly developed nations that are the primary destinations for skilled labor. This group includes Thailand, Singapore, Malaysia, and Brunei Darussalam. Middle- to low-income countries, such as Indonesia, Vietnam, and the Philippines, constitute the second group, experiencing significant emigration within and outside the region. The last group comprises the lowest-income countries of Southeast Asia, a significant source of migrant labor with relatively little immigration, including countries such as Laos, Cambodia, and Myanmar. The 90% of migration within the subregion seems to follow five corridors: Indonesia to Malaysia; Malaysia to Singapore; and Cambodia, Laos, and Myanmar to Thailand (Lee 136).

Southeast Asian policy-makers increasingly stated the necessity for migration cooperation with the increasing complexity of migration patterns. As the leading regional body, the Association of Southeast Asian Nations (ASEAN) attempted to promote a harmonized governance of migrants, especially following the Association's aspiration for deeper economic integration. ASEAN's recent milestones of integration shifted the Association from a set of political relationships towards a regional mechanism with shared experiences, purposes, and norms (Kneebone 145; Nonnenmacher 352). These include the signing of the ASEAN Charter in 2008, which provided legal personality to the body, the ASEAN Human Rights declaration in 2012, and the establishment of the ASEAN Economic Community in 2015. As part of an economic community, member states promised the "free movement of goods, services, investment, skilled labor, and freer flow of capital" (ASEAN Secretariat, *ASEAN Economic Community Blueprint* 5). Migration has been tackled mostly as an economic factor, with most if not all ASEAN cooperation revolving around skilled labor flows and anti-trafficking measures targeting irregular migrants. Serious shortcomings arise from the lack of legislation protecting and supporting low-skilled migrants or handling irregular migrants humanely, as the latter group makes up about one-third of all migrants (International Labour Organization 1).

The lack of strong legislation promoting the rights of migrant workers and mutually beneficial labor migration question how much regional free(r) movement has been achieved and why alternatives have not emerged. Indeed, the diverging political interests, economic foundations, and contestation by civil society lead to uneven support for actual integration by policy-makers across countries. While trade integration to promote economic gains have

found a shared political will, the promotion of service mobility remains superficial or non-existent, calling for examination of progress to promote rights of migrants and the political, economic, and societal roadblocks that have prevented a strong regional instrument from emerging.

## **Promoting Migrant Rights in ASEAN.**

### *Global Conventions and Human Rights Frameworks*

A crucial area of shared mobility governance is the protection of migrant rights. Existing national frameworks in receiving countries are limited to documented migrants, leaving out the 40% of migrant labor that is or has become irregular (Abella 148). Irregularity seems to be a way for migrants to regain certain flexibility from restrictive policies, such as employers' ability to retain passports preventing workers from changing employment. The existence of abuse *despite* regular status further reduces incentives for regularity (Arisman and Jaya, 'Labour Migration in ASEAN' 32). The rising gendered nature of migration in the subcontinent has evoked attention towards the reluctance by states, such as Malaysia, to acknowledge domestic workers as formal and placing an uneven burden on female migrants (Elias 282). The private nature of migration governance allows countries to outsource responsibility to private actors favoring employers' rights (Arisman and Jaya, 'Labour Migration in ASEAN' 30; Bal and Gerard 811; Marti 1355). With increasing securitization of the discourse on Indonesian migrants in Malaysia (Arifianto 627), one of the major corridors, hostile policies have grown with various incidents of deportation, exploitation, and death, despite efforts by sending countries to protect migrants and various bilateral agreements (Bal and Gerard 801).

The engagement of ASEAN countries in international conventions on migrant workers' rights is poor. Only Indonesia, Cambodia, and the Philippines have ratified all eight fundamental ILO conventions, with the Philippines the only ASEAN country to ratify all six Conventions relating to migrant workers (Arisman and Jaya, Protection of Human Rights and Labour Migration for Employment Purpose Across ASEAN 10). Although without an independent judicial body, a shared consensus on human rights has emerged within the region. With the establishment of ASEAN as a legal body in 2007, members stated the need to establish a regional human rights body and expressed their aspirations towards integration in areas including social protections (Hall 32; Nonnenmacher 353; Yazid and Septiyana 99). Two years later, the ASEAN Intergovernmental Committee on Human Rights (AICHR) was established as a consultative body that aims to protect human rights through dialogue with member states, academics, and Civil Society Organizations (CSO) (Yazid and Septiyana 100). Nevertheless, the AICHR lacks independence as members are appointed by their respective states. Finally, the ASEAN Human Rights Declaration provides a shared, although non-binding and particularistic, expression of Human Rights but does not seem to have promoted any improvement in the treatment of migrants. In short, global or regional human rights frameworks may have created a consensus where tools are not-binding but have not led to a sustainable solution to prevent recurring migrant abuses in Southeast Asia.

### *Towards Legally-Binding Institutions: The Declaration*

The first regional understanding of irregularity and migrant rights emerged in the 1990s but has given way to a security-based understanding. Only recently, in two Bangkok Declarations in 1993 and 1997, ASEAN members have reinvigorated a rights-based approach. Countries, especially sending ones, acknowledge the role of inequalities in migration and the link between regular and irregular migration, which ought to be understood together (Kneebone 157). The most concrete regional instrument has been mandated as an outcome of the Vientiane Action Programme (2004-2010), obliging member states to elaborate a regional instrument protecting and promoting migrant labor rights (Kneebone 159; Yazid and Septiyana 104). The resulting ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (Cebu Declaration) of 2007 calls for the dignity of migrants to promote freedom, equity, and stability (ASEAN Secretariat, *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers* 1). The Declaration acknowledges the mutual benefits of (regular) migration for sending and receiving countries. However, undocumented migrants are subject to humanitarian assistance rather than any entitlements that mirror regular workers (Kneebone 160), as the declaration uses the phrasing of ‘adequate rights’ in contrast to the ICRMW’s clause on the right to equal treatment. By itself, the Cebu Declaration is mostly aspirational and remains weak in obligations for member states, featuring repeated reservations for state sovereignty and the supremacy of national laws (Kneebone 161; Lee 145). In the context of regional integration, however, it can be seen as a landmark as it mandates a first regional instrument to protect migrant rights, of which the drafting has been delegated to the ASEAN Committee on Migrant Workers (ACMW) established in the following year (Hall 16; Yazid and Septiyana 104).

The negotiations for a regional instrument in the ACMW illuminate the divergent political interests in the Association and how interests are shaped in the major states. Indeed, as a research participant cited by Auethavornpipat has observed, “[...] the [Cebu] Declaration itself, it’s general enough that it would be realistically hard to really object to anything that is in it” (135) and thus few shared norms existed prior to negotiations. A drafting team has been set up, including two sending states (Indonesia, Philippines) and two receiving countries (Thailand, Malaysia). As one of the major corridors, the negotiations were dominated by the tensions between Indonesia and Malaysia, and revolved around three issues: The inclusion of irregular migrants, their families, and the legally-binding nature of the instrument (Auethavornpipat and Palmer 92).

Until the turn of the century, Indonesia has put little attention on protecting migrants abroad. The rights of emigrating workers have only been brought to public attention after the fall of the New Order regime with increasing engagement of NGOs in challenging migrant treatment. A turning point arose in 2002 during the Nunukan incident when 400,000 undocumented Indonesian citizens were forcefully expelled from Malaysia to the 40,000 inhabitant island of Nunukan. Auethavornpipat and Palmer described how these and later incidents of abuse created a type of ‘normative baggage’ that ultimately led the Indonesian government to promote the welfare of Indonesians abroad (84). The failure to respond appropriately by the government caused the death of 81 migrants and children, leading to migrant advocacy groups filing lawsuits. Although unsuccessful in the second instance, it demanded that the government increase efforts to protect migrants abroad for the first time.

Over the following years, a shared norm of migrant rights protection originated from activists to policy-makers. These domestic pressures led the Indonesian government to play a key role in drafting the Cebu declaration next to the Philippines and demanding a legally-binding instrument that includes irregular migrants and their families.

While domestic pressures have arisen in receiving countries, such as Malaysia and Singapore, their responses to grant better protection have been limited, opportunistic, or based on domestic responses. At the same time, civil society engagement may be more limited in authoritarian Singapore, where a general human rights discourse is a political taboo (Marti 1354). The increasing securitization of Indonesian migrants shifted ethnic relations from a view of brotherhood to seeing Indonesians as a security threat. This discourse enabled toughening control by Malaysian policy-makers and little reform, even though migrant strikes and the inclusion of migrant rights in Malaysia's national trade union center have come hand-in-hand with international pressures by Amnesty International, UNHCR, and the US Department of State (Bal and Gerard 808). In Thailand, on the other hand, international pressures of important trading partners, such as the EU or US, did lead to domestic reforms to protect export products and thus preserve stability and appease the private elite in the wake of the 2014 coup (Auethavornpipat 130). Nevertheless, these domestic dynamics have not led receiving countries to endorse the legally-binding instrument promoted by Indonesia and the Philippines. Bal and Gerard (809) argue, based on a political economy approach, that national interests must be understood as an outcome of conflicts between social groups, where employers and national elites in receiving countries want to retain their economic standing and international reputation without conceding power to CSOs or unions which may arise from legally-binding instruments. The same approach helped explain the promotion of such an instrument by Indonesia and the Philippines. Economic elites in both countries benefit from the export of migrant labor and rarely question deployment. Rather, they aim to promote tools that shift the burden of protection towards receiving states. While employer's rights and migrant protection are more delicately balanced in Indonesia, better protection has been described as a 'win-win-win' for oligarchs, society, and the state in the Philippines. Domestic interests, especially those of economic elites, and the relative ability of CSOs using judicial activism and public awareness to pressure governments, especially in Indonesia, can explain diverging interests in the instrument.

Negotiations within the ACMW came to a standstill in 2009, leading the secretariat to expand the drafting team to include all ten member states the following year (Auethavornpipat and Palmer 92). The authors chronicle the last developments of the ACMW drafting. Large differences continued to preclude an agreement until 2012, when states adopted a 'zero-draft' that merely reiterates the recommendations of each member. By dividing the negotiation into three phases based on the three key issues, it was possible to reignite the meetings, including pressure from the Philippines, who aimed to complete the instrument in anticipation of becoming the ASEAN chair in 2017, which also marks the 10th anniversary of Cebu and 50th anniversary of the Association. The new approach allowed negotiators to share a consensus on irregular migrants and their families before coming to the contentious issue of its legally-binding nature. Interests have not shifted, with Indonesia and the Philippines supporting the motion but Malaysia, Singapore, and Brunei opposing. Interestingly, Thailand did not position itself, and Vietnam could not continue

negotiations because of technical and financial difficulties. While the Philippines attempted to become an honest broker, Filipino negotiators ultimately prioritized the deliverable over the legally-binding nature, to the detriment of Indonesia, who continued to push back its ratification. In the end, ASEAN adopted the *ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers* in 2017, which represents a landmark in including irregular migrants, for which ASEAN states are demanded to assist for humanitarian reasons, while including family members in the entire migration journey, with rights to family visits and reunions. The large divergence between ASEAN countries also creates an uneven terrain of domestic and international pressures. While such preconditions are never absolute, and policy-makers could have promoted alternative norms, they help understand the position of policy-makers in why certain positions are supported over others.

### **Conclusion.**

While there have been aspirational commitments towards service mobility, free movement in Southeast Asia remains limited, and it does little in addressing the reality of most migrants who become irregular and receive comparatively weak protection. Even for skilled labour, integration has remained superficial, with few MRAs implemented and even fewer certifications awarded. While we can observe a progression to extend rights towards undocumented migrants and refugees, including their families, which might have been unimaginable earlier, the actual protection that arises from such a shared understanding is weak. While the Association seems to push for deeper integration, it is questionable whether the necessary political will exists.

Practical roadblocks are expected in an Association that comprise both some of the least developed countries, like Myanmar, and countries close to high-income status, such as Singapore or Malaysia. Lower-income countries have been lacking the capacity to implement MRAs and even to continue negotiations, as in the case of Vietnam. This may not be a barrier per se, as ASEAN has proven creativity in providing assistance and additional time for implementation for late-comers or lower-income countries. As such, one must look at political interests that explain the lack of migration integration.

While one might argue that the principles of non-interference and sovereignty already preclude strong integration, Bal and Gerard convincingly argue that this norm is used opportunistically and must thus be understood to be based on other interests (802). A political economy approach, the authors suggest, seems to be most suitable in understanding the divergent political interests and stances taken in negotiations. Most importantly, economic and trade integration in ASEAN remains weak enough that for most countries, the major trading partners remain *outside* the region. In consequence, policy-makers have avoided to make bigger concessions as opposed to with other states, a pattern termed 'open regionalism.' This includes commitments to service mobility but also explains why non-ASEAN states have been more effective in demanding migrant rights. Members have preferred unilateral solutions over ASEAN, presumably to avoid stringent commitments. Domestic pressures had an uneven impact too across the region: On the one hand, it led Indonesia and the Philippines to promote a legally-binding tool to promote undocumented migrants and their families. On the other, Singapore has adopted some measures although they continue to exclude migrant workers from equal rights. Such a

divergence in the impact of civil society can be partially explained by the different positions, as human rights remain a taboo in Singapore. Still, economic realities seem to also play a role. Unlike Malaysia and Singapore, the protection of migrant rights represent a 'win-win-win' position for Indonesia and the Philippines, with little domestic opposition. Although Bal and Gerard argue that this support also conveniently shifted the burden onto receiving countries (810), one must acknowledge the challenges faced by sending countries to promote rights abroad and the uneven bargaining power of host countries. In sum, economic realities have led some countries to adopt weak domestic or no protections at all, while they have allowed a strong norm to crystallize in others.

In conclusion, it is questionable whether ASEAN has moved far beyond its initial principles of a security association based on non-interference. The political will to integrate, both economically and on migration governance, continues to be framed in less controversial terms, such as service mobility and securitization. Across policy-makers, there is little belief in the shared gains of deep integration over 'open regionalism.' It remains to be seen whether increasing trade can promote shared norms and identities across the region that may ultimately lead to stronger regional migration governance.

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