

Protection of Migrant Workers under the ICMW: Incompatibility with Malaysian Laws and Position in ASEAN

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Abstract: The International Convention on The Protection of The Rights of All Migrant Workers and Members of Their Families (ICMW) is the only Human Rights Convention that distinguishes between normal and irregular migrants in great detail. An analysis of the situation in Malaysia, based on feedback from relevant stakeholders, shows that there are insurmountable obstacles to ratification in relation to the ambiguous policy status for migrant workers, which is based on ad hoc policies. Malaysian legislation appears to be straightforward in its approach to labour migration policies, as it defines and categorises migrants into two distinct 'categories': registered migrant (regular migrant) and undocumented migrant (irregular migrant), regardless of ability level. This article demonstrates that, despite the barriers and incompatibilities with national laws, the Convention, which is primarily a human rights instrument aimed at protecting the fundamental rights of all migrants, could assist Malaysia in ensuring a holistic and sustainable migration management that takes into account the needs of a whole approach and support from all parties involved, including but not limited to the Malaysian government. Part I of the article will go through the history of the convention's adoption, followed by Part II on the state of Malaysia's migration laws and policies, Part III on the compatibility and incompatibility of Malaysian laws with the ICMW and the position in ASEAN, and Part IV on recommendations.

Keywords: Human Rights; International Law; Migrant Workers; Malaysia; Ratification

1. Introduction

After reaching the threshold of 20 ratifying States in March 2003, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) entered into force on July 1, 2003. This threshold was crossed on March 14, 2003, when El Salvador and Guatemala ratified it¹, 13 years after it was formally opened for ratification in 1990. It has, however, received little support from governments, with the recent ratifications of Fiji and Gambia bringing the total number of State Parties to 55.²

¹ Office of The United Nations High Commissioner for Human Rights (OHCHR). (2005). The International Convention on Migrant Workers and its Committee Fact Sheet No. 24 (Rev.1). Available at <https://www.ohchr.org/documents/publications/factsheet24rev.1en.pdf> [Accessed on 4 July 2021].

² UNHCR. (2021). UN Treaty Bodies Database. Available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CMW&Lan%20 [Accessed on 4 July 2021].

Malaysia has long been and continues to be a popular migration destination. Migrant labour was a core plank of British colonial policy in the late nineteenth and early twentieth centuries, and it was consistent with the country's position as a commodity supplier to the industrialised West. A number of export-oriented manufacturing industries associated with labor-intensive production has been the leading sector in economic development since the 1970s and 1980s. The Malaysian government faces new challenges as a result of resurfacing labour shortages, strengthened transportation and communication networks, and a revival of migration³ The existing reasons for migration vary as well. People are no longer migrating solely for financial reasons. Migration across borders is also a result of political, cultural, and religious turmoil in the region. To better manage migration, Malaysia has had to develop policies in areas such as labour migration, refugee influx, and human trafficking. The state's existing regulatory frameworks and border control mechanisms are changing, and the state's periodic amnesty and deportation programmes are taking place in the context of migrants' human rights.⁴

In ASEAN countries, labour migration has become a regular feature of the labour market, and Malaysia is no exception. Malaysia has reaped significant benefits from the employment of migrant workers in a number of economically significant sectors. These jobs have helped to supply the labour that has fueled the country's rise to upper middle-income status over the last two decades. However, with allegations of corruption, discrimination, and appalling living conditions in many major industries, ensuring that migrant workers receive equal and humane care remains a challenge. The international community has increased pressure on Malaysia to implement policy and structural changes that will better secure the rights of migrants as a result of developments in international trade and international law, as well as increased scrutiny of global labour supply chains.⁵

For decades, local and international civil society organisations, including the Malaysian Human Rights Commission (SUHAKAM), have urged the Malaysian government to ratify and implement international human rights instruments. Malaysia has acceded three of the nine main human rights treaties: the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD).

As mentioned above, Malaysia has inevitably seen a growing number of documented migrant workers in the past few years with the number at 1,678,939 as of 31 August 2020⁶ and roughly among these, the number of irregular foreign workers is estimated to

³ Kaur, Amarjit. "International migration and governance in Malaysia: policy and performance." *UNEAC Asia Papers* 22 (2008): 4-18.

⁴ Minister of Higher Education. 2017. Foreign Labour in Malaysia: Selected Works. Available at <http://mycc.my/document/files/PDF%20Dokumen/Foreign%20Labour%20in%20Malaysia%20Selected%20Works.pdf> [Accessed on 4 July 2021].

⁵ ILO. (2020). Public attitudes towards migrant workers in Malaysia. Available at https://www.ilo.org/wcmsp5/groups/public/--asia/--robangkok/documents/briefingnote/wcms_766632.pdf [Accessed on 4 July 2021].

⁶ Immigration Department. 2020. *Data Collected during interview with the Director of Foreign Workers Department*. Malaysian Immigration Department.

be 1.23 million – 1.46 million.⁷ In addition, for the Trafficking in Persons report in 2021 Malaysia had slipped to the Tier-3 Watch list as there were indicators in the reports warning of the practices that indicated forced labour; this makes it relevant for the Malaysian government to consider acceding to ICMW to combat human trafficking.⁸ Therefore, this article will discuss in detail on the projection on Malaysian policy regarding migrant workers through the lense on ICMW.

2. Method

This study employs a doctrinal analysis methodology. It is primarily bibliographical and internet-based and is performed using a qualitative doctrinal legal analysis process.⁹ This method is suggested to be the most appropriate since it is a problem framework that includes various stages such as contextual reading, finding primary documents, recognizing current legal problems, collecting relevant information, scrutinising the void in the law, and reviewing all subject matter within the context. The primary goal is to acquire new information and analyse ideas to propose improvement or change.¹⁰ This method was chosen for this article because it entails identifying relevant gaps within the framework as well as an examination of the issue of migrant workers focusing on the issue of compatibilities and incompatibilities of national laws as well as the ratification of the ICMW. Apart from that, this article is also an excerpt from interviews conducted with the relevant Malaysian stakeholders such as the Ministry of Human Resources, Immigration Department, NGO (Migrant Care) and Ministry of Foreign Affairs.

3. Brief History of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Several international conventions were adopted during the twentieth century to address and regulate migration for employment through various international agreements, but it was not until the economic downturn of the 1970s that the international community recognised the need for a new instrument to address the protection of all migrant workers, including irregular migrant workers, who are often subjected to violence. The first instrument to seek to resolve these particular concerns was the 1975 ILO Convention No. 143, which includes clauses on the prevention of illegal migration and clandestine movements, as well as rights protecting migrant workers from workplace abuse.¹¹ Around the time of the ILO convention's adoption, a movement for a human rights instrument

⁷ World Bank Group. (2020). Who is Keeping Score? Estimating the Number of Foreign Workers in Malaysia. <https://openknowledge.worldbank.org/bitstream/handle/10986/33730/Who-is-KeepingScore-Estimating-the-Number-of-Foreign-Workers-inMalaysia.pdf?sequence=1&isAllowed=y> [Accessed on 4 July 2021].

⁸ Department of State United States of America. (2021) Trafficking in Person Report Available at https://reliefweb.int/sites/reliefweb.int/files/resources/TIP_Report_Final_20210701.pdf [Accessed on 4 July 2021].

⁹ Yaqin, Anwarul. *Legal research and writing methods*. LexisNexis Butterworths Wadhwa Nagpur, 2008.

¹⁰ Hutchinson, Terry, and Nigel Duncan. "Defining and describing what we do: Doctrinal legal research." *Deakin L. Rev.* 17 (2012): 83. <https://doi.10.21153/dlr2012vol17no1art70>

¹¹ Cholewinski, Ryszard. 'International Labour Migration', in P. Opeskin, R. Perruchoud, J. RedpathCross (eds.), *Foundations of International Migration Law*, CUP, Cambridge, 2012, p. 288.

began, and a working group led by Mexico and Morocco was formed to develop the principles that would ultimately become the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter ICMW or the Convention). The UN General Assembly adopted the ICMW on 18 December 1990, and it entered into force in 2003 after thirteen years and twenty ratifications.¹²

The ICMW is a systematic instrument that covers the entire migration process, from recruitment and departure in the country of origin to migrant rights during transit, in the country of destination, and on return. It is divided into nine parts. Parts I and II contain definitions and a general anti-discrimination provision that adds "nationality," "conviction," "age," "marital status," "birth" or "other status," and "economic condition" to the non-exhaustive list of covered grounds contained in the previous core human rights instruments. This was done to represent the traditional grounds for discrimination against migrant workers. Part III establishes rights of general application, i.e., those that extend to all migrant workers and their family members, regardless of their status. Then, in Part IV, special privileges are defined for those who are in a normal situation. Part V relates to the interests of particular groups of migrant workers. Part VI outlines States' responsibilities regarding cooperation and the promotion of secure, equal, humane, and lawful migration conditions. The remaining sections (VII–IX) discuss the ICMW's application, general provisions, and possible constraints.¹³

The ICMW's aim is to recognise that all migrant workers, both normal and irregular, are first and foremost human beings entitled to unrestricted enjoyment of fundamental rights. The Convention does not create new rights; rather, it reaffirms the standards established by the International Bill of Human Rights, including the right to life (Article 6, ICCPR), the right to be free from torture (Article 7, ICCPR), the right to freedom of thought, conscience, and religion (Article 18, ICCPR), the right to equality, freedom of movement, and peaceful assembly, and the right to a fair trial. It essentially builds on rights and entitlements already protected in full or in part by previous instruments¹⁴.

The approach follows the same logic as the arguments in favour of establishing specific international law in relation to women, children, and people with disabilities, which is to codify and expand on the specificities of applying international human rights law to these vulnerable groups. Numerous rights thus have a distinct "migrant orientation," expanding on established rights that affect migrant workers and their families. One novel feature of the ICMW is that it defines a migrant worker broadly, focusing on individuals in their country of origin who are preparing to take up a remunerated activity in a country where

¹² Touzenis, Kristina, and Alice Sironi. *Current Challenges in the Implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: Study*. EUR-OP, 2013.

¹³ Office of The United Nations High Commissioner for Human Rights (OHCHR). 2005. The International Convention on Migrant Workers and its Committee Fact Sheet No. 24 (Rev.1). Available at <https://www.ohchr.org/documents/publications/factsheet24rev.1en.pdf> [Accessed on 4 July 2021].

¹⁴ European Parliament Directorate-General for External Policies of The Union. (2013). *Current Challenges in The Implementation of The UN International Convention on The Protection of The Rights of All Migrant Workers and Members of Their Families*. Available at [https://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/433715/EXPO-DROI_ET\(2013\)433715_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/433715/EXPO-DROI_ET(2013)433715_EN.pdf) accessed on 5 July 2021

they are not citizens, those who are already working in such a country, and those who have ceased working but remain in the country. Additionally, the ICMW defines various types of migrant workers, such as "seasonal workers" and "project-tied workers," as well as a definition of "family members" who are also entitled to protection under the Convention. Additionally, the ICMW covers some types of migrant workers, such as "frontier workers" and "self-employed individuals," who are exempt under ILO migrant-specific conventions such as the 1949 (No. 97) Migration for Employment Convention (Revised) and the 1975 Migrant Workers (Supplementary Provisions) Convention (No. 143).¹⁵ Notably, the Convention seeks to encourage effective security, for example, by including many provisions ensuring migrants' access to legal redress, thus bridging the divide between legal protection and de facto enjoyment of rights.

3.1. Position of Acceptance of ICMW by Malaysian stakeholders and Migration Policies and laws in Malaysia

For some time, the International Division of the Malaysian Ministry of Human Resource (MOHR) has been concerned about ICMW. The most recent update on ICMW occurred in late 2018, prior to a change of government, which allowed the government's position to remain unchanged. Now that a new government has taken office, the aforementioned department has immediately resumed work on the issue of Convention accession. The MOHR then convened a series of Focus Group Discussions with various government stakeholders, including the Immigration Department, the Ministry of Home Affairs, and the Ministry of Foreign Affairs, to discuss the ICMW's provisions and the importance of Malaysia joining. Numerous government stakeholders oppose Malaysia's accession to ICMW, deeming it an unnecessary burden. On the other hand, the MOHR leaves it open, recognising that ICMW could be applicable to Malaysian migrant workers who work abroad. Additionally, the Ministry states that the majority of ICMW parties are sending countries. The MOHR also recognises the importance of applying the ICMW to migrants working in Malaysia and the need for them to be reunited with their families.

However, this concern must be balanced against fiscal constraints. Consider the critical need for education. The government should subsidise RM30,000 per student enrolled in government colleges, it was pointed out. Allowing migrant workers' families to accompany them and enroll their children in government schools would undoubtedly contribute to the government's financial burden. The consultants were told that the ILO is responsible for several awareness programmes that are supported by or in partnership with the MOHR. The MOHR recognises the importance of treating migrant workers fairly and upholding their human rights. In every case, the MOHR must make every effort to assist migrant workers. Currently, the MOHR maintains the position of the former Human Resources, Foreign Affairs, and Home Affairs ministers, who claimed that Malaysia does not have an urgent need to join the ICMW. Regardless, the MOHR retains its position that the ICMW has a number of benefits and that Malaysia joining the Convention will improve

¹⁵ Ibid n 14.

Malaysia's attractiveness as a destination country and provide better security for Malaysians working abroad.¹⁶

The Malaysian Ministry of Foreign Affairs (MOFA) concurs that ICMW is a growing concern, especially for receiving countries such as Malaysia. Considering the Ministry's foreign profile, its members could have agreed to accession solely to escape criticism from other states. The MOFA participated in the Focus Group Discussions and holds the majority opinion that Malaysia does not need to join ICMW¹⁷.

Additionally, Malaysia's Immigration Department has stated unequivocally that Malaysia would not consider joining the ICMW. The Director of Foreign Workers made it abundantly clear that migrants to Malaysia, who totaled 1,678,939 as of 31 August 2020, are not permitted to marry or bring their families to Malaysia as a result of their work visa¹⁸. The Immigration Department's explanation was heavily weighted toward the country's defense. The Immigration Department argued that allowing migrants' family members to enter Malaysia was "unmanageable" in light of the existing migrant population, and this is without even mentioning the problem of irregular migrants.¹⁹

The issue of bringing in family members of legitimate migrant workers occurs only when the legitimate migrant worker is the family's primary breadwinner, i.e., the husband/father and not the wife and children. All workplace benefits will apply only to the employee and not to his or her family members. The critical issue would occur if, for example, a family member was involved in an accident or became ill, in which case the benefit would not be applied to the family member. Employers in Malaysia are unlikely to offer benefits to a family member in this situation. To compound the problem, suppose there is an accident that results in death. This would be an additional layer of security that will require extensive discussion. Inequality for children who may need educational assistance must also be considered, which includes the number of children per family. The right of a child to an education is a fundamental human right, and no migrant should be prejudiced against this right solely due to the destination country's lack of security.

Additionally, if Malaysia were to join the ICMW, the right to social security would be a factor to consider. This relates to migrant workers' social security in Malaysia, where their right to the same is not clear. The right to retirement insurance is also a problem, as it affects the family members who are taken in under the ICMW provisions. It was proposed that the Portable Social Protection System, which was discussed at one of the ASEAN meetings, be considered. Further the issue on social security for a specific worker from a specific country was proposed to be flexible and follow the migrant worker wherever he or she works. This will assist and alleviate the strain placed on a destination country, such

¹⁶ N. Haryantie N.S. (2020). Principal Assistant Secretary, Ministry Of Human Resource, International Division. Interview conducted on 23 July 2020 at MOHR, Putrajaya.

¹⁷ Subashini, K. (2020). Principle Assistant Secretary, Ministry of Foreign Affairs, Human Rights and Humanities Division. Interview conducted on 3 August 2020 via telephone conversation.

¹⁸ Immigration Department. 2020. Data Collected during interview with the Director of Foreign Workers Department on 2 October 2020 at the Malaysian Immigration Department.

¹⁹ M. Abiddin A. R. (2020). Director, Malaysian Immigration Department, Foreign Workers Department. Interview conducted on 2 October 2020 at the Malaysian Immigration Department's HQ, Putrajaya.

as Malaysia—in implementing the ICMW. It is also important to provide a workable minimum wage that is applicable to migrant workers. Additionally, it was proposed that certain countries' activities be investigated, including but not limited to other ASEAN countries such as the Philippines and EU member states, as well as the Abu Dhabi protocol and other relevant international instruments. Finally, it was decided that Malaysia would need to improve its security for migrants before committing to the ICMW, as we do not wish to prejudice either group by doing so.²⁰

3.2. Migration Policies and laws in Malaysia and Analysis on the Compatibility and Incompatibility of Malaysian Laws with ICMW

Since the employment of migrant workers in Malaysia acts as a "interim solution" to fill labour shortages over two decades ago, policies to handle labour migration have largely remained ad hoc. The policy process has prominently featured a detailed quota scheme for migrant workers' entry and attempts to regularise illegal migration through temporary amnesties. These steps are often accompanied by bans on new admissions and large-scale law enforcement efforts to arrest and expel unregistered migrants. While policies have changed frequently, they have remained consistent in their emphasis on admitting migrant workers to meet employers' immediate labour needs rather than allowing for longer term settlement²¹.

Despite their widespread presence in the labour market, the Malaysian government has been slow to acknowledge the importance of migrant workers in meeting the demand for low-skilled labour (with a few notable sectoral exceptions such as in domestic work). For several years, goals and policies have been developed to reduce the country's workforce in order to promote economic restructuring. Malaysia's 2010 New Economic Model and subsequent policy documents aimed to minimise reliance on migrant workers through a range of policies, including levying them for jobs, instituting a minimum wage, raising the retirement age, and rising the number of women entering paid employment. However, shifting the composition of the labour force has proved difficult, with employers complaining of extreme shortages in some sectors following the implementation of more stringent policies. Private sector opposition has led to some uncomfortable policy changes and incoherence, such as the sudden decision to allow payment of the migrant workers' levy to be returned to workers following the implementation of a minimum wage. The target of capping migrant jobs at 1.5 million employees by 2015 seems impractical once again, contributing to a situation in which up to half of the migrant workforce could now be undocumented²². The Eleventh Malaysia

²⁰ Alex, O. (2020). Migrant Care, NGO working on Migrant rights in Malaysia. Interview, on 16 July 2020 via Google Meet.

²¹ Harkins, Benjamin. Review of labour migration policy in Malaysia/Tripartite Action to Enhance the Contribution of Labour Migration to Growth and Development in ASEAN (TRIANGLE II Project), ILO Regional Office for Asia and the Pacific. Bangkok: ILO, 2016.

²² Ibid

Plan (2016–2020) reaffirmed this goal, limiting low-skilled migrant workers to 15% of the total workforce by 2020²³.

Political and public debate have often converged on depicting migrant workers as possible threats to national security and impeding the country's long-term social and economic growth. As a result, the Government has traditionally framed labour migration policy through the lens of immigration control and public safety, as demonstrated by the Ministry of Home Affairs' (MOHA) authority over migration issues. The mass media has increasingly virulent rhetoric against migrants in recent years, blaming them for a variety of social issues ranging from electoral fraud to a spike in street crime. Scapegoating refugees, regardless of their circumstances, has led to an atmosphere in which exploitation and violence are occasionally considered appropriate. Although nearly 40% of respondents believed that migrants contributed positively to the economy, more than 80% believed that illegal migrants should be denied employment rights and that government policy should be more restrictive²⁴

Malaysian national policy imposes strict requirements on legal migrants. Foreign low skilled workers are a subset of the low-income group who enter Malaysia in search of economic opportunity. This onerous national strategy has compelled a large number of them to migrate illegally. Mobility is not a right for low skilled employees. These foreign workers tend to emigrate in order to avoid substandard living conditions in their home countries, which is the primary reason they move and seek jobs elsewhere.²⁵

Despite Malaysia's diverse policy approaches to immigrant entry and stay, as well as its diverse institutional circumstances, it is possible to observe parallels in terms of the reservations about the ICMW frequently raised by the state, which prevents the state from adhering to the Convention. The Convention is widely regarded as the most extensive international treaty addressing migrant workers' rights beyond the field of employment, having been influenced by existing legally binding agreements, United Nations human rights reports, expert meetings' findings and recommendations, and United Nations body debates and resolutions on the migrant worker issue over the last two decades.

Numerous provisions of national law may be incompatible (or, in some cases, incompatible) with the Convention's provisions. The following Table 1 summaries all of the ICMW's requirements and discusses their inconsistency or incompatibility with Malaysian law.

²³ INTAN. (2015). National Agenda. Available at <https://www.intanbk.intan.my/iportal/en/rmk11#:~:text=The%20Eleventh%20Malaysia%20Plan%2C%202016,cultural%20%2D%20by%20the%20year%202020>. [Accessed on 5 July 2021].

²⁴ ILO. (2020). Public attitudes towards migrant workers in Malaysia. Available at https://www.ilo.org/wcmsp5/groups/public/--asia/--robangkok/documents/briefingnote/wcms_766632.pdf [Accessed on 5 July 2021].

²⁵ S. Nadia A. A. and Salawati M. B. (2018). Labour Mobility in the ASEAN Community: Impact of Policies and Law on Foreign Workers in Malaysia, the ASEAN Community, Legal Issues, UKM Press.

Table 1. Analysis of Compatibilities and Incompatibilities of Malaysian Laws with ICMW

No	Provisions in ICMW	Compatibility with Malaysian Laws	Incompatibility with Malaysian laws
1	(i) Article 7 -No Discrimination (ii) Article 10 -Not subject to torture or to cruel, inhuman or degrading treatment or punishment.	(i) Art 8 Federal Constitution (FC) Equality	-
2	(i) Article 9 -Right to life (ii) Article 16 -Right to liberty and security of person (iii) Article 24 -Recognition as a person before the law	(i) Art 5 FC - Liberty of person	-
3	(i) Article 11 -Not in slavery or servitude	(i) Art 6 FC – Slavery and forced labour prohibited (ii) Section 374 Penal Code (iii) Sec 2 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM)	-
4	(i) Article 12 -Freedom of thought, conscience and religion	(i) Art 11 FC Freedom of Religion	
5	(i) Article 13 - Freedom of expression	-	(i) Art 10 FC – Freedom of speech, assembly & association only applicable to citizens.
6	(i) Article 14 -Right to the protection of the law against such interference or attacks.	-	(i) Art. 8 FC , right to equal protection of the law. Access to justice is a basic fundamental human right for all persons, regardless of their citizenship or immigration status. Migrant workers face numerous barriers in accessing the administrative legal system provided under the labour laws, and the civil and criminal justice systems in Malaysia. Migrant workers are often fired by employers for filing complaints with government officials, NGOs or trade unions. Termination of employment results in the cancellation of the work permit which is the basis in law for the migrant's right to stay in Malaysia. Thus, filing a complaint prompts action by the employer that makes the migrant complainant subject to immediate deportation. ²⁶
8	(i) Article 18 -Right to equality with nationals of the State concerned before the courts and tribunals	(i) Article 8 Federal Constitution Equality extends to all persons whether citizens or not; and, accordingly, to all migrant workers whether documented or undocumented. and	-

²⁶ M. Hishamudin, Y. (2019). Migrants and the law. Available at <https://www.lh-ag.com/wp-content/uploads/2019/06/06-Migrants-and-the-Law-by-Dato-Seri-Mohd-Hishamudin-Yunus.pdf> [Accessed on 5 July 2021].

		<p>(ii) Employment Act 1955 applies to all workers, irrespective of whether the person is a local worker or a foreign worker. Even a migrant worker is accorded the right to make a complaint about discrimination at work to the Director General of Labour.</p> <p>and</p> <p>(iii) Section 20(1) of the Industrial Relations Act 1967</p>	
9	<p>(i) Article 21 -Unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits.</p>	<p>(i) Section 12(1)(f) Passports Act 1966</p>	<p>Nevertheless, the withholding of migrant workers' passports is widely used as a mechanism of control by employers over the workers which enhances their vulnerability and restricts their movements.²⁷</p>
10	<p>(i) Article 26-Right to Association and Trade Union</p>	<p>(i) Sec 28(1)(a) & Sec 29 (2)(a) Trade Union Act 1965</p>	<p>Although the Trade Unions Act 1959 provides that a migrant worker can be a member of a trade union, yet under the law, he/she is prohibited from holding an executive position in trade unions. It can be argued that this prohibition is discriminatory in nature and is in contravention of Article 8 of the Federal Constitution.</p>
11	<p>(i) Article 27 -Social Security</p>	<p>(i) Employees' Social Security Act 1969 (Act 4)</p> <p>and</p> <p>(ii) Workers Compensation Act 1953</p> <p>-Foreign Worker Compensation Scheme (FWCS)</p> <p>-Foreign Worker Hospitalisation and Surgical Insurance Scheme (FWHSS)</p>	<p>Employee Provident Fund²⁸</p> <p>Employment insurance system²⁹</p>
12	<p>(i) Article 28 -Right to receive any medical care</p>	<p>(i) Occupational Safety and Health Act 1994</p> <p>and</p> <p>(ii) Occupational Safety and Health (Use and Standards of Chemicals Hazardous to Health) Regulations 2000 are only applicable to documented migrant workers.</p>	<p>It is a common complaint that the premium cost is unduly high and the RM20,000 overall coverage annual limit is insufficient to accommodate a major medical emergency.</p>
13	<p>(i) Article 29-Right to a name, to registration of birth and to a nationality</p> <p>and</p> <p>(ii) Article 44- Family unity and reunification</p>	<p>(i) Art 15 A FC</p> <p>Special power to register children and</p> <p>(ii) Sec 2 Child Act 2001</p>	<p>Immigration Act 1959/63 disallows migrant workers with the Temporary Employment Pass from marrying locals.</p> <p>Malaysia does not grant automatic citizenship upon birth within the territory; these children will be considered irregular migrant unless their parents can provide relevant documents to the National Registration Department (passport, working permit, marriage certificate,</p>

²⁷ Ibid

²⁸ The Employees Provident Fund Scheme is governed by the Employees Provident Fund Act 1991.

²⁹ The Employment Insurance System is governed by the Employment Insurance System Act 2017. The EIS is primarily aimed at helping laid-off employees who are looking for another job and who contribute to SOCSO. The scheme took effect on 1 January 2018 and is administered by SOCSO.

		among others) as proof of their 'valid & legal existence'.
		(i) Sec 27 of the Contracts Act 1950
		Low skilled migrant workers are not allowed to bring family members or allowed to get married in Malaysia.
14	(i) Article 30 -Right of access to education and (ii) Art 43 – Equality of treatment with nationals in relation to Access to educational institutions and services subject to admission requirements	(i) Sec 29A Education Act 1996 (Act 550) and (ii) Sec 3 Child Act 2001
		(i) Section 2 of the Human Rights Commission Act 1999 (Act 597) defines human rights as fundamental liberties as enshrined in (ii) Art 12 FC- Right to Education Right to education is not friendly towards irregular migrant children living in the country as the legislations have not guarantee this right to the children. The main obstacle faced by these children is the lack of documentation. As a result of the denial into public schools, these children receive informal education at home or from their respective communities.
15	(i) Article 41 -Right to vote and to be elected at elections of that State	(i) Art 119 of the FC only allows citizens and permanent residents to vote in elections.

4. CMW Position in ASEAN

ASEAN, as a regional integration cooperation deals with migration. Each ASEAN member state (AMS) acts as either sending countries, or receiving countries, or both. Undeniably, ASEAN have their own legal instruments in handling migrant workers, notably the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers 2007 and ASEAN Consensus on the Protection and Promotion of The Rights of Migrant Workers 2017. In relation to ICMW, it is fair to say that most AMS are not a party to the said convention. Nevertheless, there are two (2) member states which act as sending countries who are parties to the ICMW. Only Indonesia and the Philippines are parties to the Convention³⁰ The Philippines and Indonesia have a long history of sending workers not only to ASEAN member countries but to other countries as well.

4.1. ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (hereinafter referred to as the Declaration) was adopted in 2007, and it is particularly significant because it calls on both origin and destination countries to promote migrant workers' full potential and dignity. The Declaration recognises the significant contributions of migrant workers to society and economies in both host (receiving) and sending states in ASEAN and recognises the importance of cooperation between states in resolving cases of migrant workers who have become undocumented

³⁰ Cambodia is NOT a party to the ICMW. It is a signatory only. But it has NOT RATIFIED the Convention Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4 accessed on 5 July 2021

due to no fault of their own. Additionally, it recognises the importance of taking into account the fundamental rights of migrant workers and their families already resident in the destination country. The Declaration calls on member states to strengthen cooperation on issues affecting migrant workers but cautions that "nothing in this declaration shall be construed as indicating the regularisation of the situation of undocumented migrant workers." Additionally, the Declaration calls for a "intensification of efforts to promote migrant workers' wellbeing" and for destination nations to "enable access to relevant social welfare services."

The ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of Migrant Workers' Rights (AICMW) developed its action plan in 2008. Four areas of cooperation were mentioned in this work plan. The first was aimed at promoting best practises and enhancing the distribution of information. The second objective was to advance the rights of migratory workers through improved labour-migration governance. The third focused on human trafficking in relation to the issue of migratory workers. The fourth was devoted to the establishment of ASEAN-wide norms. The 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers and the 2008 Action Plan laid the groundwork for ASEAN member nations' policies on migrant workers. Each country has attempted to develop local rules and regulations to handle migrant workers based on these documents. To monitor the declaration's implementation, the AICMW was founded in 2008, and the ASEAN Forum on Migrant Labour served as a forum for broad discussion.³¹

4.1.1 ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers

Ten years after the ASEAN Declaration on the Promotion and Protection of Migrant Workers was adopted in February 2007 during the Philippines' chairmanship of ASEAN, the ASEAN heads of state/government signed the ASEAN Consensus on the Promotion and Protection of Migrant Workers 2017 – a document aimed at implementing the Declaration's commitments. The mere fact that ASEAN's labour-sending and labor-receiving countries have reached an agreement on a difficult issue after nearly eight years of negotiation is a relief. It was delivered in paragraph 22 of the 2007 Declaration, which called for the development of an ASEAN instrument to advance the Declaration's principles and tasked the ASEAN Secretary-General with submitting an annual report to the Summit via the ASEAN Foreign Ministers on the status of implementing the Declaration's commitments. Although negotiations for a regional instrument began in 2009 with the goal of developing a legally binding instrument, the ASEAN Consensus lacks legal force and will not need member nations to adopt the text on a national level before it can be implemented. Rather than that, it carries a moral obligation on national governments to implement steps that address the document's commitments. This may not satisfy both the sending and receiving governments, as well as the civil society and

³¹ Hatsukano, Naomi. "Improving the regulatory and support environment for migrant workers for greater productivity, competitiveness, and social welfare in ASEAN." ERIA discussion paper series). Jakarta, Indonesia: Economic Research Institute for ASEAN and East Asia (2015). ERIA Discussion Paper Series. ERIA-DP-2015-76.

stakeholder organisations involved in the negotiations. The paper reflects the nature of agreement-making in an ASEAN context and hence represents the negotiated compromise that ASEAN states are willing to accept now. Chapter 7 of the document emphasises that ASEAN member states' pledges shall be "consistent with national laws, regulations, and policies."

The ASEAN Consensus establishes who qualifies as a migrant worker and who is considered undocumented in ASEAN. This distinction is deemed critical because ASEAN member states are obligated to give social protection and other benefits to migrant workers. The inclusion of undocumented workers and their families in the scope of access to shelter, medical, and legal services was one of the negotiation's sticking points. However, the document's negotiating process exemplifies inclusive participation in regional policy discussions. Established in 2008, the ASEAN Forum on Migrant Labor (AFML)³² as a broad-based platform for discussing migrant labour issues within the framework of the ASEAN Senior Labour Officials, is the first of its kind for a regional organisation, and should continue to serve as a forum for discussing national-level implementation progress as well as issues and concerns affecting migrant workers in ASEAN.³³

4.2. Recommendations

The Convention establishes a legal structure for the effective and long-term management of migration. It discusses many critical issues concerning migration governance modalities, including but not limited to management issues such as entry, stay, and return. Thus, it establishes a framework for migration management while keeping the person at the core. As a thematic human rights instrument focused on a specific category of people, it seeks to ensure that individuals crossing borders remain secure, with a special emphasis on their potential vulnerabilities and needs.

Recommendation 1: Address incompatibilities with Malaysian law by amending and modifying statutes -ICMW as a benchmark.

The Constitution usually protects foreigners on the basis of equality, even if the Constitution's prohibited grounds of discrimination do not explicitly include nationality. The provision is applicable to all individuals, regardless of their nationality. Malaysia's current laws against forced labour are included in the Penal Code and the Anti-Trafficking

³² The 1st meeting of the Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (AICMW) was held from 15 to 16 September 2008 in Singapore. The meeting adopted its work plan with four areas of cooperation. Under thrust 2, which pertains to strengthening protection and promotion of the rights of migrant workers by enhancing labour migration governance in ASEAN Countries, one of the recommended activities was to organize an "ASEAN Forum on Migrant Labour. The 1st AFML was held with the Department of Labor and Employment, Philippines from 24 to 25 April, 2008 in Manila, Philippines. Available at https://www.ilo.org/asia/WCMS_214213/lang--en/index.htm [Accessed on 5 July 2021].

³³ Moe, T. (2017). "The ASEAN "Consensus" on Migrant Workers: Not Ideal but a Basis to Continue Working". Available at <https://www.iseas.edu.sg/media/commentaries/the-asean-consensus-on-migrant-workers-not-ideal-but-a-basis-to-continue-working-by-moe-thuzar/> [Accessed on 5 July 2021].

in Persons and Migrants Act 2007. Malaysia must take immediate enforcement action to resolve this problem.³⁴

Even though the Constitution is silent on nationality, Art 11 applies to all persons. Section 4 of the Act on Peaceful Assembly is compatible with Article 10 of the FC. As a result, the government must take this seriously and amend in accordance with its adherence to international human rights conventions. It is critical to overhaul the administrative and legal structure regulating foreign workers in order to eliminate the numerous barriers that foreign workers face when seeking justice in Malaysia's administrative and legal systems. International employees should have access to the Legal Aid Bureau (*Biro Bantuan Guaman*) and the *Yayasan Bantuan Guaman Kebangsaan* (YBGK) schemes. By extending these schemes to foreign employees, they will gain access to the Malaysian administrative and legal systems.

Malaysian courts are yet to enforce the Workers Compensation Act 1953 (WCA) in a case involving an undocumented migrant worker. Where an employer's act or omission results in illegality, it is clearly not fair to penalise a worker who has suffered damage. In the case of migrant workers, notwithstanding their illegal status, the actions of both parties may imply an employment relationship. The Malaysian government is required to recognise practices in other countries that include board and lodging for migrant workers while they pursue their rights in Labor Departments, Labor Courts, Industrial Courts, and even Civil Courts. It is critical to establish a system for dealing with employers who refuse to surrender the passports of returning migrants, posing the risk that such passports would end up on the black market or used to facilitate the travel of another citizen.

In 2008, the Malaysian Trade Union Congress (MTUC) filed a complaint with the International Labour Organization's Governing Body claiming that Malaysia had denied the right to organise to migrant domestic workers. The Committee determined that the claim was valid and recommended that Malaysia "ensure the association of migrant domestic workers is immediately registered." Malaysia has long overdue to follow through on this suggestion.³⁵

Employers are required to insure all foreign employees on their payroll. Employers seeking to purchase such insurance plans for their international employees must do so through the *Skim Perlindungan Insurans Kesihatan Pekerja Asing* (SPIKPA), a designated third-party service provider that handles foreign employees' healthcare needs, including bundled health insurance and hospitalisation benefits³⁶. Additionally, ensure that the Foreign Worker Compensation Scheme, which includes injuries suffered away from the workplace, is adequately funded.

³⁴ M. Hishamudin, Y. (2019). Migrants and the law. Available at <https://www.lh-ag.com/wp-content/uploads/2019/06/06-Migrants-and-the-Law-by-Dato-Seri-Mohd-Hishamudin-Yunus.pdf> [Accessed on 5 July 2021].

³⁵ Report in which the committee requests to be kept informed of development - Report No 353, March 2009, Case No. 2637, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911366 [Accessed on 5 July 2021].

³⁶ M. Hishamudin, Y. (2019). *Op.Cit.*

Employers and migrant workers should be required to contribute to the EPF or similar pension-saving funds. Contributions made by migrant workers and employers should be equal to those made by Malaysian workers and employers. Additionally, it is recommended that foreign employees be included in the EIS. Insurance to cover out-of-hospital care.

Enhance employers' duties and obligations in reducing workplace accidents and diseases by amending the Occupational Safety and Health Act 1994. The government's policies of barring family members of migrant workers from joining them in this country and banning marriage are discriminatory and violate international human rights standards and should be checked.

The MOHR should develop a strategy that is consistent with international standards, Malaysia's CEDAW obligations, and domestic law. Since the Education Act specifically prohibits discrimination against children based on their citizenship status, immigrant children can attend any publicly funded school. The Ministry of Education should develop a policy that is consistent with international standards and Malaysia's obligations under the Convention on the Rights of the Child.

Many of Malaysia's migrant workers are working on a contractual basis. It is critical to ensure that Malaysia possesses legal competence with regard to third-country nationals' voting rights.

Recommendation 2: Develop a programme of security as part of a comprehensive migration strategy, integrating the substantive provisions of the ILO migration instruments. Such a programme should include at least the following:

- Orientations to provide adequate information to migrant workers in their native language and other assistance services, including effective consular services for both female and male staff;
- Oversight of private recruitment agencies to prevent fraudulent practices; effective enforcement mechanisms to protect migrant workers' rights; and human rights education for all.
- Social services to support migrant workers in obtaining safe accommodation, obtaining an education and language training, and locating job opportunities.

Recommendation 3: Use the ICMW as a reference point for international human rights law in the formulation and analysis of Malaysian migration legislation and other migration management activities, as well as a migrant management tool.

This will ensure that a rights-based approach to both normal and, more importantly, irregular labour migration is further mainstreamed into Malaysian internal policy. Additional enhancements to the mainstreaming of migration and the preservation of migrants' rights through development cooperation programming will also be suggested.

To accomplish this, it is important to:

- Employers, especially those who recruit a large number of migrants, should be made aware of the issues surrounding migrant workers and hiring practises, and they should be encouraged to participate in promoting migrants' rights and welfare.
- Collaborate with governments, labour unions, and non-governmental organisations to campaign for informed, open, and rights-based migration policies, including the prevention and defence against abusive migration activities such as smuggling, human trafficking, and forced and child labour.

5. Conclusion

The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families enshrined in international law a new standard of care for migrants. Nonetheless, the low ratification percentage underscores the difficulty many sovereign nations confront in shifting their perceptions of migrants from intruders/ supplicants to rights-bearing people. Improving the rights of migrant workers will never be a two-week project. When it comes to migrant worker protections, a sovereign state must balance a range of causes, customs, and regulations. Due to Malaysia's non-compliance with the ICMW, this study investigated all domestic legislation and regulations applicable in Malaysia. The analysis determined if the ICMW provisions are compatible with Malaysian national legislation/provisions and, if not, why they are incompatible. Perhaps it is reasonable to conclude that Malaysia has always accorded migrant workers several rights and protections. Malaysia's membership in the ICMW will contribute to the broadening of rights/protection on a global scale.

Security and human rights are constantly evolving. The ICMW appears to have covered virtually every area of migrant labour. Malaysia must acknowledge migrants' contributions to the country's economic success and maintain a zero-tolerance policy toward them. They should not be considered as desperate or defenceless individuals who may be abused or maltreated by their employers. Apart from that, they demand a living income and safe working conditions, as well as full legal equality.

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List of Treaties/Conventions

United Nations

- Universal Declaration of Human Rights (UDHR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Covenant on Civil and Political Rights (ICCPR)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- Convention on the Rights of Persons with Disabilities (CRPD)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)

ILO

- International Labour Organization (ILO), Migration for Employment Convention, 1939 (No. 66) (withdrawn), ILO, Inspection of Emigrants Convention, 1926 (No. 21) (shelved)
- ILO, Migration for Employment Convention (revised), 1949 (No. 97)
- ILO Migrant Workers (Supplementary Provisions) Convention, 1975, (No. 143)

Malaysian Legislations

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM)

Contracts Act 1950

Employees Provident Fund Act 1991

Employees Social Security Act 1969

Employment Act 1955

Employment Insurance System Act 2017 And The EIS

Employment Restriction Act 1968

Federal Constitution

Immigration Act 1959

Industrial Relations Act and 1967

Occupational Safety and Health Act 1994

Passport Act 1966

Penal Code

Private Employment Agencies Act 1981

Trade Union Act 1959

Workmen's Compensation Act 1952

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