

Regional migration governance and social security regimes

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Dr Elisa Fornalé¹

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Introduction

This chapter explores the evolution and origins of provisions on social protection² for migrant workers as well as reviewing the relationship with the current debate on regional migration governance. In particular, it aims to draw attention to the role played by regional processes in this area of increasing interest. To this end, this chapter attempts to develop a legal analysis of the normative development in two geographical contexts, namely the Southern Common Market (MERCOSUR) and the Association of Southeast Asian Nations (ASEAN).

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² Social protection and social security are used interchangeably. The definition of social protection used here is the one adopted by the International Labour Organization (ILO). 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' (Harkins, 2014).

The extent to which regional units, such as MERCOSUR and ASEAN, deal with intra-regional migration governance and how this interacts with human rights protection is examined, with a specific focus on social protection.

Member states of both MERCOSUR and ASEAN have shown an interest in tackling increasing intra-regional migration (Giupponi, 2011). In Latin America, intra-regional migration, including both temporary and permanent mobility, has risen to 46% of the total migratory flow (OAS, 2015). This is of particular interest with regard to the development of a sophisticated policy of intra-regional mobility in the region, as in the context of MERCOSUR, and how this can impact on the protection of the human rights of the thousands of women and men who cross national borders.

Intra-regional mobility is an particularly pertinent issue in Asia. In ASEAN between 1990 and 2013 intra-regional migration increased from 1.5 million to 6.5 million (ADB, 2015; Olivier, 2015). Countries in Southeast Asia, are engaged in implementing a new migratory regime intended to move beyond unilateral measures by promoting free movement for skilled labour (e.g. in the fields of engineering, architecture, nursing, medicine, dentistry). Thus it is important to assess the potential impact of the increasing formalization of ASEAN by the progressive liberalization of labour mobility, and how this will have a direct effect on regulatory areas such as regional social policy.

This chapter seeks to provide new insights into the complex relationship of territoriality concerns, the implications of human mobility and the implementation of human rights instruments both at the regional and the international level. The tension that is emerging can have profound implications for the individual who needs protection and the capacity of the state to provide it.

To this end, the chapter will look at the emerging initiatives in the two specific regions and how these progressive frameworks will address emerging policy challenges and highlight new legislative steps aiming at filling existing protection gaps. This should reveal whether regional integration is playing a major role in the progressive protection of social rights by increasing the development of bilateral and multilateral social security agreements, or if contemporary challenges linked to human mobility will increase what has been defined as 'new forms of unilateralism' where bilateral or multilateral cooperation is not in place (Blanpain, 2014).

The evolution of regional migration governance and its implications for social protection

Regionalism has been a significant phenomenon in international relations. A dynamic debate about the evolution of the concept of regionalism is ongoing, mainly linked with its flexible nature and the complex issues it raises (Fornalé, 2016). The 'multidimensionality and pluralism' of this process makes it increasingly difficult to settle on a common definition (Soderbaum, 2012). Most scholars engaged in the debate seem to agree that there is not a predefined or natural region, but that 'definitions vary according to the particular problem or question under investigation' (Soderbaum, 2012). The difficulty is compounded by an increasing lack of communication between scholars from different theoretical perspectives. Furthermore, the use of a comparative approach is limited in this field of research and can result, as argued by Soderbaum, in *parochialism*. The present study will address this legal gap by increasing the potential for cross-fertilization among different regional debates.

An interesting attempt to define regionalism and study its legal significance has been described by Crawford (Crawford, 1997). In his preliminary study conducted for the International Law Commission in 1997, he uses regionalism to refer to claims to special treatment by reference to (or regulatory systems based on) historical, economic or geographical sub-classification of states.

In his analysis he draws attention to the tendency towards regionalism as applied to specific areas, such as human rights, where universal values are at. He is quite sceptical about the relevance of this concept; in particular he notes that the International Law Commission refrains from including regionalism in international law.

The debate about regionalism has also attracted the interest of migration scholars especially with respect to its relationship with multilayered migration governance (Panizzon, 2016). Given the absence of a global international migratory regime, scholars started to refer to multilayered migration governance as a promising approach to identify regulations and potential tools to appropriately address emerging issues (Betts, 2010; Panizzon, forthcoming 2017). Multilayered migration governance includes three specific layers: an international, a regional and a bilateral one (Gamlen and Marsh, 2012).

Within the 'international mode', the multilateral or global mode represents the softer layer where there are no international instruments in place to provide full coverage of migration-related issues. The regional mode is 'the least well-known of the three layers' (Geddes, 2012). Regional projects are developing in different geographical contexts, mainly with the adoption of free movement protocols, but the extent of their implementation is varied and fragmented.

Very interesting studies have been conducted on the normative dialogue in place between the national and the regional layer, mainly aiming to understand whether the respective

formulation is inspired by a cooperative approach or if it replicates domestic prerogatives in the supranational dimension (Panizzon, forthcoming 2017). In particular, the work conducted by Lavenex at the European level seems to confirm that EU migratory measures replicate the closure more than the openness of national policies, but this analysis is poorly developed in other regional contexts (Panizzon, forthcoming 2017). What is clear is that regional processes have the advantage of being more effective than global initiatives because they allow states to engage in less complex negotiation processes and to benefit from an easier confidence-building process (Panizzon, forthcoming 2017). Nonetheless, it is important to bear in mind, as Ghosh emphasizes, that 'intra-regional migration asymmetry is often too important to be contained or managed within the limits of each specific region' and weaker states may prefer to be involved in multilateral drafting processes to avoid facing 'the hegemonic influence of dominant states within a regional grouping' (Panizzon, 2016; Panizzon, forthcoming 2017).

The key is to understand how regional regimes, and in particular regional migration regimes, interact with or complement universal human rights (especially social rights) in their definition, implementation and practical application. In particular, it is necessary to explore whether the content of regulation on the human rights of migrants is nuanced in regional regimes and whether such nuances constitute significant variations.

It is of special interest to consider the potential and the limitations of regional mechanisms to increase the protection of individuals' human rights, in particular the rights of migrants. In the European context, access to social security is emerging as a particularly sensitive issue. In fact, certain categories, as irregular migrants, risk exclusion as from protection. What is becoming evident is a progressive tension between the principle of territoriality, which prevails in the context of social security, and the principle of equality that requires non-discriminatory access to human rights.

This chapter takes as its starting point the statement made by Ortiz et al. that 'regional policy frameworks play a core role in enhancing social security coverage extension' (Blanplain, 2014) in reflecting on regional processes as drivers for developing an alternative human rights approach to protect migrant workers.

Migration governance and social protection

Access to social protection for migrant workers is becoming more and more problematic, in some cases as a direct consequence of the tendency of countries of destination to limit migratory movements (Ginneken van, 2013). National initiatives suggesting restricted access to social protection for particular categories of migrant workers raise the need for an accurate analysis of the legal implications of such unilateralism. In particular, it is necessary to understand which mechanisms are in place to grant a right to a benefit, such

as a pension, medical care or child allowances, for an individual who has worked and contributed in different countries.

The most significant instruments in this context are bilateral and multilateral social security agreements conceived as international instruments to address the main issues of concern related to the protection of social rights of migrant workers (Cifuentes Lillo, 2011).

Bilateral agreements are the preferred option to extend social security coverage, because the countries involved can “relatively” easily reach an agreement on their content and the drafting process generally requires less diplomatic effort. At the same time, there is a risk that the diffusion of these agreements could affect the promotion of universal coverage; in fact Olivier raised the concern that this multitude can create ‘different entitlements for different categories of migrant workers’ (Olivier, 2015).

In addition, regionalism and, in particular, regional migration governance, is emerging as efficient level of cooperation to ensure cross-border coordination and to manage bilateral and domestic measures (Olivier, 2015). As highlighted by Ginneken, a regional migration framework can provide the ideal platform to promote the protection of migrants, both documented and undocumented, and to facilitate the identification of a common agenda on formal social protection (Ginneken, 2013).

Finally, as discussed below, unilateral measures in the countries of origin are developed in response to the absence of international agreements. These measures can include specific provisions for the portability of social security benefits or to offer the opportunity to choose whether or not to remain affiliated to national security schemes.

MERCOSUR

In Latin America, social security agreements play an important role in light of an increasing adoption of bilateral and multilateral agreements. In fact, according to the Organization of American States (OAS) they cover 5,669.1 million contributors and 7,133.7 million retired people (OAS, 2015). Since the middle of the year 1960 Latin American states have signed this type of agreement to provide full coverage of social security rights for their citizens.

In 2013, the OAS and the Inter-American Conference on Social Security conducted the first comprehensive study on the role played by social security agreements in the region to better understand the reality of protection of the human rights of migrant workers and their access to social protection and to a pension in particular (OAS, 2015).³ This normative

³ Art. 6e of the Plan of Action of Medellín established to ‘analyze experiences with bilateral and multilateral social security agreements in order to identify alternatives for designing and proposing a hemispheric mechanism that could facilitate the recognition of nominal pension contributions and pension rights of migrant workers in OAS member states, according to national legislation and as appropriate’.

analysis covered 83 existing agreements in the Americas. A clear distinction was made between bilateral and regional initiatives in order to identify the challenges and the potential of existing instruments.

In this context, MERCOSUR adopted specific provisions related to the movements of migrant workers in the region aiming to strengthen their access to social protection. In 1998 the Social-Labor Declaration was adopted and this instrument, which was revised in 2015, is intended to provide guidelines in this area without creating a binding environment (Bernal et al. 2015). Even though regional and multilateral agreements are emerging, as discussed below, the bilateral approach is still a relevant way of promoting non-discriminatory treatment for migrant workers and especially for ensuring that pension contributions are recognized. In particular, these are the types of agreements signed with third party countries, outside the regional context.

3.1 MERCOSUR Multilateral Agreement on Social Security

The Multilateral Agreement on Social Security entered into force in 2005 in Argentina, Brazil, Paraguay and Uruguay. According to Article 17, this agreement replaces all bilateral agreements in place among signatory countries and it is a significant achievement of the regional integration process.

This agreement has been described by the OAS as ‘one of the most advanced in the region due to its effectiveness and coverage’ (OAS, 2015). Its aim is to develop a coordination process among member states for providing social protection in a similar way, and this specific mechanism does not require any normative change at the domestic level, but should ensure a correspondence between the two levels. The agreement covers health and pension benefits for a 12-month minimum ‘country-of-domicile’ change. In the case of pensions, for contribution periods of less than 12 months each national state has the discretion to decide whether or not to cover the cost of the benefits. The signatory countries have created the ‘MERCOSUR Buss System’ a unified database to deal with individual requests for benefits.

3.2 Ibero-American Multilateral Agreement on Social Security (CMISS)

In this context, another recent initiative was the adoption of the Ibero-American Multilateral Agreement on Social Security in 2007 – an ‘intercontinental agreement’ (Blanpain, 2014) in the field of coordination.⁴ This instrument replaced the Ibero-American

⁴ This agreement is in force for 3 MERCOSUR member states (Brazil, Uruguay and Paraguay), and Argentina and Venezuela have yet to sign the Implementation Agreement.

Social Security Agreement, signed in 1978. The CMISS is the result of a complex negotiation process that attempted to find an appropriate scenario for a context where different requirements are in place in the various signatory countries.

The purpose of this agreement is 'to comprise an instrument for coordinating national legislation on pensions that guarantee the rights of migrant workers and their families, (provide) protection under the social security schemes of the different Ibero-American States, in order that they might reap the benefits of their work while residing in their host countries'. As noted by OAS, the potential role of this instrument is limited by a lack of 'direct effectiveness' that risks weakening the protection of migrant workers and undermining the role of the principle of equality (Cassagne in OAS, 2015).

ASEAN

ASEAN was created in 1967⁵ with the primarily focus to promote stability and economic development. This regional framework was oriented towards prioritizing non-binding instruments over legally binding instruments, and there was no intention to develop regional institutions as 'these may have decreased the ability of Member States to act in accordance with their national interests' (Nonnenmacher, 2012).

It is important to recall the groundbreaking work of Acharya who emphasize how ASEAN can be considered an 'anomaly' if compared with other regional processes. They argue: 'one of the main lines of difference is between the "formal" informality of Asian institutions and the "formal" formality of those of other regions. That is, the ASEAN states, for instance, have deliberately and carefully designed their institutions to be informal. And in other regions the formality of the institutions has been a cover for the informality or the weakly legalized way in which they have functioned'.

The ASEAN regional project comprises three pillars, namely the ASEAN Political-Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community. The mobility agenda is captured in two pillars with a clear definition of the respective priorities for the next initiatives: the achievement of the ASEAN Economic Community in 2016 includes the implementation of the free movement of highly skilled migrant workers; and the mobility of low-skilled or irregular migrants is mainly addressed in the ASEAN socio-cultural and political agenda, in particular with respect to issues such as the protection of migrant workers.

Social protection of intra-ASEAN migrant workers

⁵ The ASEAN Declaration was signed in 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei Darussalam joined in 1984, Vietnam in 1995, Lao PDR and Myanmar in 1997, and Cambodia in 1999.

Access to social protection for migrant workers is a complex issue in the region. Several legislative barriers are present at a national level that affect the ability of individuals to gain full access to social benefits. As identified by Tamagno, these obstacles derive from both the lack of adequate instruments in place and the lack of appropriate enforcement mechanisms (Tamagno, 2008). The key point is that at the international level, bilaterally or regionally, no specific instruments or guarantees are in place because even now national member states lack the capacity or the ability to act in this normative context (Tamagno, 2008). Bilateral social security agreements on portability, are absent, apart from a few concluded with third countries (e.g. between the Philippines and Switzerland in 2001 and between the Philippines and Germany in 2014). Also, bilateral migration agreements or memoranda of understanding generally do not include specific provisions on social protection (Olivier, 2015). An interesting exception is the adoption of the Republic of Korea Employment Permit System in 2004, a bilateral tool, signed with several ASEAN countries (Thailand, Myanmar, Vietnam, Indonesia, the Philippines, Cambodia), which provides specific health insurance coverage, accident compensation insurance and employment insurance (Harkins, 2014).

Several scholars have emphasized the key role of the ASEAN project in improving the social security provisions for intra-ASEAN migrant workers in the region (Olivier, 2015). In fact, ASEAN has provided the opportunity to progress in the protection of human rights standards, to start a debate on the development of international agreements in this context, and to foster the implementation of international standards. For instance, Dosch argues that 'ASEAN has slowly but gradually embarked on a process of engaging in a discourse on liberal norms and values'. The enhancement of social protection is included as a key element of the ASEAN Socio-Cultural Community Blueprint, adopted in 2009, and the 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 basic human rights and this requires the development of appropriate tools, such as the establishment of an "universal health coverage"'.

Also, the ASEAN Economic Community Blueprint adopted in 2007 recommends its members to '(1) establish an integrated social protection and social risk management system...and (3) strengthen systems of social protection at the national level and work toward adoption of appropriate measures at the regional level' (Hall, 2011).

There is a correlation between free movement and social protection. There is a risk that different treatment will be given to migrant workers subject to a free movement regime, than to regular and irregular migrant workers. Olivier, who is conducting a comprehensive

study for ILO Asia on this specific topic, recognized the need to identify a regional normative framework (Olivier, 2015).

Equal treatment for migrant workers?

Due to the absence of a bilateral or multilateral legal framework, the analysis has to focus mainly on the domestic dimension of this issue. At the domestic level the situation is highly variable and not coherent. Even though in some states access to social security is increasing, such as in Thailand,⁶ several states do not recognize universal access to social security schemes. Specifically, domestic regulations lack any extra-territoriality application and strict criteria, such as nationality or permanent residence, must be met in order for migrant workers to gain access to social benefits in their countries of destination.⁷ For instance, in Thailand, specific categories such as seasonal workers, migrant domestic workers, workers in agriculture and fisheries, are excluded from these benefits (CEACR, 2015).⁸

In theory the principle of equality suggests that all migrant workers are entitled to the same benefits as national workers, but the reality shows a fragmented picture. Olivier identifies three main issues of concern at the national level: lack of existing arrangements, lack of protection while abroad and lack of arrangements for returning migrants (Olivier, 2015).⁹

There are interesting exceptions, such as in the case of the Philippines, which as a country of origin decided to develop a specific policy to extend social security protection to its citizens abroad. The 1987 Constitution of the Philippines, together with the Migrant Workers and Overseas Filipinos Act of 1995, provides the legal framework to ensure appropriate protection for migrant workers. To complement this policy, various measures

⁶ The Government of Thailand in the report submitted to CEACR recalls 'that, while documented workers are registered and protected by the Social Security Fund (SSF) with the same conditions as national workers, undocumented foreign workers with no proof of national identity are not entitled to benefits under the social security system. These persons are, however, eligible to receive work-related compensation at the same rate as national workers under the Workmen's Compensation Fund (WCF) in accordance with section 50 of the Workmen's Compensation Act allowing the Social Security Office (SSO) to order the employer to pay compensation. Employers are also responsible for paying the health insurance contributions for undocumented workers (1,150 Thailand Baht (THB)) for workers awaiting registration with the SSF and THB2,800 for those not covered by the SSF'. Observation (CEACR) – adopted 2014, published 104th ILC session (2015) *Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) – Thailand (Ratification: 1968)*.

⁷ The Committee recalls 'that these categories of workers are fully covered by the Convention and therefore entitled to equal treatment with national workers in respect of employment injuries'.

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have been adopted to guarantee the protection of citizens abroad, such as the establishment of a Special Overseas Workers Welfare Fund.

As mentioned above, the Philippines remain a unique case because in most other ASEAN countries, such as in Indonesia or Thailand, social security systems do not apply to migrants abroad.

Closing Observations

The access of migrant workers to social protection raises several challenges at a global level and, in particular, is emerging as a cause of tension in the progressive implementation of a free movement regime at the regional level. The underlying approach in this chapter was to acquire a multilayered understanding of the emerging legal scenario, keeping a specific focus on how different standards and instruments can interact to expand the coverage of and access to social protection benefits for migrant workers.

Bilateral agreements were the most common instruments used to regulate social protection, but mostly they dealt only with specific issues, such as pensions, without providing full coverage, and thus they contributed to developing a fragmented and incomplete framework.

A primary observation of this chapter is that in the current debate on migration governance the regional layer is emerging as a facilitative tool to address the complex equilibrium between domestic prerogatives and human rights implications and to produce insights on how different standards interact. This framework brings on the legal scenario the opportunity for domestic systems to engage in a broad range of opportunities and to go far beyond existing regulations and to work in a complementary way. This was apparent in the case of MERCOSUR where the texture of regional instruments is connected to bilateral and unilateral regulations as overarching standard. Seeing ASEAN, offers the opportunity to consider regionalism as another legal layer with the potential to address the current absence of appropriate instruments, as bilateral social security agreements, and to directly affect the situation of migrant workers who are exposed to increasingly discriminatory treatment due to the lack of comprehensive national regulations.

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