



วารสารนิติศาสตร์
มหาวิทยาลัยธรรมศาสตร์
THAMMASAT LAW JOURNAL

ชื่อเรื่อง: Malaysia's and Thailand's Management of Low-Skilled Migrant Labour in the Light of the Sustainable Development Goals

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การอ้างอิงที่แนะนำ: Usanee Aimsiranun and Saidatul Nadia Abd Aziz, 'Malaysia's and Thailand's Management of Low-Skilled Migrant Labour in the Light of the Sustainable Development Goals' (2564) 4 Thammasat Law Journal 637.

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คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ เลขที่ 2 ถนนพระจันทร์ แขวงพระบรมมหาราชวัง

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Malaysia's and Thailand's Management of
Low-Skilled Migrant Labour in the Light of the
Sustainable Development Goals*
การบริหารจัดการแรงงานต่างด้าวทักษะต่ำ
ของประเทศมาเลเซียและประเทศไทย
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วันที่รับบทความ 17 สิงหาคม 2564; วันแก้ไขบทความ 20 กันยายน 2564; วันตอบรับบทความ 4 ตุลาคม 2564

Abstract

As the main regional migration hub, receiving more than two-third of ASEAN migrant workers, Malaysia and Thailand face challenges in managing low-skilled

* This article is the summarised and updated version of the research report entitled “Malaysia's and Thailand's Management of Low-Skilled Migration and Sustainable Development Goals” sponsored by and submitted to the Faculty of Law, Chiang Mai University in September 2019.

and largely irregular migration. The article examines Malaysia's and Thailand's national policies and legal frameworks regarding low-skilled migrant workers in the light of labour migration-related UN Sustainable Development Goals. The article focuses on the migration regime and the protection of migrant workers' rights. The article highlights the progress realised as well as the remaining gaps. It recommends the steps to take to move towards achieving the labour migration-related SDG targets.

Keywords: Labour rights, Malaysia, Migration policy, SDGs, Thailand

บทคัดย่อ

ในฐานะศูนย์กลางการอพยพย้ายถิ่นหลักที่รับแรงงานข้ามชาติจากอาเซียนมากกว่าสองในสามของแรงงานข้ามชาติอาเซียนทั้งหมด ประเทศมาเลเซียและประเทศไทยต้องเผชิญกับความท้าทายในการจัดการการย้ายถิ่นของแรงงานทักษะต่ำซึ่งส่วนใหญ่เข้าเมืองโดยผิดกฎหมาย บทความชิ้นนี้มุ่งศึกษานโยบายและกรอบกฎหมายระดับชาติของประเทศมาเลเซียและประเทศไทยตามเป้าหมายการพัฒนาที่ยั่งยืนของสหประชาชาติที่เกี่ยวข้องกับการย้ายถิ่นของแรงงาน โดยมุ่งเน้นไปที่การย้ายถิ่นและการคุ้มครองสิทธิแรงงานข้ามชาติทักษะต่ำ บทความแสดงให้เห็นถึงความก้าวหน้าและช่องว่างระหว่างเป้าหมายการพัฒนาที่ยั่งยืนกับนโยบายการย้ายถิ่นและกรอบทางกฎหมายของประเทศมาเลเซียและประเทศไทยในปัจจุบัน พร้อมทั้งเสนอแนะแนวทางในการดำเนินการเพื่อมุ่งสู่การบรรลุเป้าหมายการพัฒนาที่ยั่งยืนที่เกี่ยวข้อง

คำสำคัญ: สิทธิแรงงาน ประเทศมาเลเซีย นโยบายการย้ายถิ่น เป้าหมายการพัฒนาที่ยั่งยืน ประเทศไทย

1. Introduction

On 25 September 2015, the United Nations' 2030 Agenda for Sustainable Development was adopted by the General Assembly, and the member countries have agreed to try to achieve the Sustainable Development Goals (SDGs), including 17 goals and 169 targets, by 2030. Based on the recognition of its contribution to the development of both countries of destination and countries of origin as well as of the development migrants and their families, international migration is included in the development agenda. The Declaration of 2030 Agenda highlights the vulnerabilities facing migrants and calls on member countries to “strengthen international cooperation to ensure safe, orderly and regular migration with full respect for human rights and for the humane treatment of migrants, regardless of their migration status”.¹

As the main destination of low-skilled migrant workers from neighbouring countries, hosting almost 80% of intra ASEAN migration,² Malaysia and Thailand have been facing the challenge in managing intraregional migration, which is predominantly irregular. At the same time, they are committed, as UN member countries, to work towards sustainable development goals.

The article examines Malaysia's and Thailand's national policies and legal frameworks concerning low-skilled migrant workers in the light of two SDG migration-related targets. SDG target 10.7 focuses on facilitating orderly, safe, regular, and responsible migration through the implementation of well-managed migration policies, while the protection of migrant workers' rights is enshrined in SDG target 8.8. The article aims to provide policy and legal development suggestions for both Governments to address the challenges of ensuring safe and regular migration as well as protection of migrant workers' rights in accordance with the SDG targets.

The article is based on four main conceptual frameworks. First, as enshrined in the 2030 Agenda on Sustainable Development, migrant labour is seen as a “development agent” contributing to reducing inequality and promoting development both in countries of origin and destination in the context of widening

¹ United Nations, 'Integrating migration into the 2030 Agenda for Sustainable Development' (United Nations, December 2015) <https://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2015-5.pdf> accessed 6 August 2020.

² United Nations, *Trends in International Migrant Stock: The 2015 Revision* (United Nations 2015).



of incomes disparities among countries.³ Second, based on the rights-based approach to migration, the article considers that the regulation and treatment of migrant labour should rely on and be directed towards the promotion and protection of international labour standards.⁴ Third, international labour standards are seen as an important tool to achieve social justice in the context of a rise in inequality as a result of globalisation through the promotion of decent work in conditions of freedom, equity, security, and dignity for all workers.⁵ In this perspective, the article highlights the essential contribution of international labour standards to the UN Sustainable Development Agenda. Fourth, since States in Southeast Asia remain the main actor in shaping legal and policy framework on labour migration and protection, the article underlines the necessary interaction and cooperation between national and international levels as the works of international organisations, especially International Organization for Migration (IOM) and International Labour Organization (ILO) provide an important framework on regulation and protection of labour migration.

2. Malaysia's Policy and Framework on Employment and Protection of Low-Skilled Migrant Workers

Estimation suggests that there are currently 3-4 million migrant workers in Malaysia, constituting 22% of the labour force.⁶ The very large majority of migrant workers in Malaysia are low-skilled workers, and about half of them are irregular.⁷ Migrant workers make up about one-third of the workforce in the agricultural, manufacturing and construction sectors. Indonesians form the largest group of ASEAN

³ The General Discussion on Migrant Workers at the 92nd session of the International Labour Conference in June 2004; OECD, *Interrelations between Public Policies, Migration and Development* (OECD Publishing 2017).

⁴ ILO, *International labour migration: A rights-based approach* (ILO 2010); Patrick A Taran, 'The need for a rights-based approach to migration in the age of globalization' in Ryszard Cholewinski, Paul de Guchteneire and Antoine Pecoud (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press 2009).

⁵ ILO, *Rules of the Game: An introduction to the standards-related work of the International Labour Organization* (ILO 2019).

⁶ ILO, *Review of Labour Policy in Malaysia* (ILO 2016).

⁷ Vijayakumari Kanapathy, 'High Skilled versus Low Skilled Labour Migration: Managing a Complex Agenda in Malaysia' (International Conference and Panel Discussion on East Asian Labour Migration, Manila, 9 March 2007).

migrant workers in Malaysia, followed by workers from Myanmar, the Philippines and Vietnam.⁸

2.1 Law and policy on entry and recruitment of low-skilled migrant workers

Migration policy and recruitment strategy in Malaysia are formed by bilateral agreements with the sending countries, domestic politics, and employers' lobbying power.⁹ Migration policy in Malaysia during 1970-1980 could be characterised as laissez-faire since there was no specific legal framework or policy to regulate the entry or employment of low-skilled foreign workers, the Immigration Act 1957/63 and the Employment Restriction Act 1968 dealing only with high-skilled labour (termed as Expatriates).¹⁰ Starting from the 1980's, labour and skill shortages in Malaysia had pushed the Government to create a legal channel for recruitment of low-skilled labour and to sign bilateral agreements with the sending countries.¹¹ With the goal to shift toward a knowledge-based economy, Malaysian policy aimed mainly to regulate and control the flows of foreign labour as well as to discourage the long-term dependence on foreign labour.¹² During the Asian economic crisis, Malaysian Government imposed a restriction on further intake of migrant workers but later lifted the ban for some sectors.¹³

At present, the Malaysian system distinguishes between different categories of migrant workers, whose entry and recruitment are managed by separate divisions of the Immigration Department under the Ministry of Home Affairs. "Expatriates" are mid and high-skilled migrant workers earning between RM2,500-5,000 (US\$589-1,179) per month.

⁸ ILO, *Triangle in ASEAN Quarterly Briefing Note: Malaysia (July - December 2020)* (ILO 2020).

⁹ Amarjit Kaur, 'International Labor Migration in Southeast Asia: Governance of Migration and Women Domestic Workers' (2007) 15 *Intersections: Gender, History and Culture in the Asian context*.

¹⁰ Vijayakumari Kanapathy, *Controlling Irregular Migration: The Malaysian Experience* (ILO 2008).

¹¹ Amarjit Kaur, (n 9).

¹² Vijayakumari Kanapathy, 'International Migration and Labour Market Developments in Asia: Economic Recovery, the Labour Market and Migrant Workers in Malaysia' (2004) 373 <http://www.jil.go.jp/event/ko_work/documents> accessed 1 October 2019; Lin Mei, 'A Study on Indonesian Labor Migrants in Malaysia' (2006) 1 <<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.127.248&rep=rep1&type=pdf>> accessed 1 October 2019.

¹³ Rajah Rasiah, 'Economic Implications of ASEAN Integration for Malaysia's Labour Market' (2014) ILO, ILO Asia - Pacific Working Paper Series <<https://www.ilo.org/public/libdoc/ilo/2014/486524.pdf>> accessed 1 October 2019.



They are under the responsibility of the Expatriate Service Division. They enter Malaysia through Employment Pass (divided into three categories),¹⁴ receive preferential treatment in terms of admission, duration of stay and are allowed to be accompanied by dependents.¹⁵ “Contract workers” are low-skilled migrant workers earning less than RM2,400 (US\$566) per month. They are administered by the Foreign Workers division. They enter Malaysia through Visit Pass (Temporary Employment) and are employed under Temporary Employment Pass issued by the Immigration Department.¹⁶ Migrant workers’ right to remain in the country is linked to their employer, restricting, in consequence, their possibility to change jobs.¹⁷

Regarding the admission of foreign workers, Malaysia has established a detailed quota system based on many factors, including sector, gender, nationality, and availability of national workers. The objective is to protect national workers as well as to limit the dependence on any specific population of foreign workers.¹⁸ To recruit foreign workers, employers must follow the following steps. They must obtain confirmation from the Department of Labour of Peninsular Malaysia of the impossibility to secure local workers through Job Clearance System,¹⁹ then obtain the quota of foreign workers from Ministry of Home Affairs, One Stop Centre (OSC) and apply to the Immigration Department for a Visa with Reference (VDR) approval. Employers have to pay levy and security bonds which vary depending on the country of origin and sector, as well as contribute to the Foreign Worker Compensation Scheme and Health Insurance Protection Scheme Foreign Workers (SPIKPA), except for the plantation sector.²⁰ The recruitment by Malaysian labour contractors is regulated

¹⁴ Mauro Testaverde and others, *Migrating to Opportunity Overcoming Barriers to Labor Mobility in Southeast Asia* (World Bank 2017).

¹⁵ Amarjit Kaur, 'International Migration and Governance in Malaysia: Policy and Performance' (2008) 22 UNEAC Asia Papers 4.

¹⁶ Malaysian Employers Federation, 'Practical guidelines for employers on the recruitment, placement, employment and repatriation of foreign workers in Malaysia' (Malaysian Employers Federation, 19 December 2014) <https://apmigration.ilo.org/resources/practical-guidelines-for-employers-on-the-recruitment-placement-employment-and-repatriation-of-foreign-workers-in-malaysia/at_download/file1> accessed 6 August 2021.

¹⁷ ILO (n 6).

¹⁸ *ibid.*

¹⁹ Malaysian Employers Federation (n 16).

²⁰ Immigration Department Ministry of Home Affairs Malaysia, 'Foreign Worker' (Immigration Department Ministry of Home Affairs Malaysia, 28 September 2019) <<https://www.imi.gov.my/index.php/en/main-services/foreign-workers.html>> accessed 1 July 2021.

by the Private Employment Agencies Act 2017, requiring, for instance, licence and money guarantee requirements.

Besides levy, introduced to balance the social cost and encourage reconstruction, foreign workers are required to pay various kinds of administration fees. While the minimum wage in Malaysia, from 1 February 2020, has been RM1,200 (US\$283) per month and RM5.77 (US\$1.36) per hour,²¹ the final costs to hire a foreign worker through recruitment agents can go up to RM15,000 (US\$3,537) to RM20,000 (US\$4,716) per worker.²² All these requirements make the recruitment of an irregular migrant more time saving, easier, and cheaper for the employers and even for the workers themselves.²³ Since the foreign worker levy is lower for occupations and skills in shortage, employers often sponsor working visas for low-levy occupations, and even the workers are to perform other sorts of work. When the workers realise that they perform a different and higher skill type of work, some leave the employers and with that become irregular migrants.²⁴

In response to a rapid increase of irregular migrant workers, the 1959 Immigration Act was amended in 2002. Migrants, who violate Malaysian immigration policies relating to entry, stay and work, are liable to be arrested by the authorities of the People's Volunteer Corps (RELA). The stringent punishments, for both irregular migrants and the employers who hire them, include a fine of up to RM10,000 (US\$2,358), imprisonment up to five years, canning and fast-tracked deportation.²⁵ In 2006, the government set up Immigration Courts in several detention centres. The aim was to rationalise the deportation process by centralising detention, trial, and

²¹ Ayman Falak Medina, 'Malaysia Increases Minimum Wage' (ASEAN Briefing, 26 February 2020) <<https://www.aseanbriefing.com/news/malaysia-increases-minimum-wage/>> accessed 19 September 2021; Ayman Falak Medina, 'Minimum Wages in ASEAN for 2021' (ASEAN Briefing, 4 May 2021) <<https://www.aseanbriefing.com/news/minimum-wages-in-asean-for-2021/>> accessed 19 September 2021.

²² Nur Hanani Azman, 'Cheaper labour, but local workers not easy to attract' (The Malaysian Reserve, 31 March 2021) <https://themalaysianreserve.com/2021/03/31/cheaper-labour-but-local-workers-not-easy-to-attract/?__cf_chl_jschl_tk__=pmd_wE1m9YujbQMjI0nUKIznYqQPj00O9D40cjWzWOxOl3w-1634925120-0-gqNtZGzNAqWjcnBszQJR> accessed 1 July 2021.

²³ Vijayakumari Kanapathy, *Managing Cross Border Labour Mobility in Malaysia: Two Decades of Policy Experiments, semakan semula selepas konferens PECC-ABAC* (Institute of Strategic and International Studies 2008).

²⁴ *ibid.*

²⁵ Vijayakumari Kanapathy, 'Migrant Workers in Malaysia: An Overview' (2006) <<https://www.isis.org.my/2006/12/06/migrant-workers-in-malaysia-an-overview/>> accessed 1 October 2019.



punishment of illegal migrants in the same place.²⁶ Nevertheless, the legal process before these Courts does not sufficiently guarantee migrants' fundamental rights, such as the right to legal counsel or the right to be informed about the charge against them in their own language. Up to 20 migrants may be tried together at court hearings. If found guilty, the detainee must bear the deportation cost, which may result in prolonged detention for those who cannot pay.²⁷

In 2011, the Malaysian Ministry of Home Affairs implemented the broadest amnesty policy called "6P", consisting of measures for amnesty, registration, legalisation, supervision, enforcement, and deportation of migrants.²⁸ Under this program, a total of 2.3 million migrant workers were registered, including 1 million regular and 1.3 million irregular migrant workers.²⁹ However, due to ineffective communication with workers and employers, the number of irregular migrant workers in Malaysia was not significantly reduced. In January 2013, Malaysia introduced a legal minimum wage to make low-skilled works more attractive to nationals to reduce dependency on foreign workers.³⁰ This policy increased the wages of migrant workers by about 16-78%.³¹ However, it did not have a significant impact on attracting Malaysians for this type of work since they had already earned higher wages.³² The target to limit the employment of migrant workers to 1.5 million as of 2015 was not achieved.³³

2.2 Protection of low-skilled migrant workers' rights

As far as low-skilled migrant workers' rights are concerned, relevant legislations include the Employment Act, Occupational Safety and Health Act,

²⁶ Ravi Neeko, *Arrest, Detention and Prosecution of Migrant Workers, in Developing a comprehensive policy Framework for Migrant Labour* (ILO 2008).

²⁷ ILO (n 6).

²⁸ *ibid.*

²⁹ Institute of Labour Market Information and Analysis, *Immigration in Malaysia: Assessment of its Economic Effects, and a Review of the Policy and System* (World Bank 2013).

³⁰ ILO (n 6).

³¹ Manolo Abella and Philip Martin, *Guide on Measuring Migration Policy Impacts in ASEAN* (ILO 2016).

³² Malaysia Department of Statistics, 'Salaries & Wages Survey Report 2014' (Malaysia Department of Statistics, 30 June 2015) <https://www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=157&bul_id=R1pZQ0RqRjY0aFJjcUM4cS9zcUdTZz09&menu_id=Tm8zcnRjdVRNWWlpWjRlbmtlaDk1UT09> accessed 1 October 2019.

³³ ILO, *Triangle in ASEAN Quarterly Briefing Note: Malaysia (July - September 2017)* (ILO 2017).

Women's Compensation Act, Industrial Relations Act and Trade Union Act. In principle, this framework provides equal treatment for regular migrant workers with nationals in terms of wages, work hours, holidays, terminations, freedom of association, access to the complaint mechanism and other protection. However, this is not happening in practice as labour laws are often ineffectively enforced towards migrant workers.³⁴ Above all, it should be noted that irregular migrants and informal work arrangements are not guaranteed similar rights to redress, of which making it impossible for the migrant workers to uphold their rights and address their problems and grievances.³⁵

While about 7 per cent of migrant workers in Malaysia work as domestic workers,³⁶ they are excluded, according to the Employment Act 1955, from basic labour rights such as maternity and termination benefits, annual or sick leave and days off.³⁷ Reports suggest exploitation and abuses of foreign domestic workers, including withholding passports, unpaid wages, and insufficient rest periods.³⁸ This situation led the main countries of origin, including Indonesia, Cambodia, and the Philippines, to suspend the deployment of their nationals to Malaysia at some point. To address the issue, the Malaysian government concluded MOUs with the major sending countries. The MOUs aim to provide a regular channel for migration and to provide better protection for migrant domestic workers. However, the fixed recruitment fees have an adverse effect as they deter migrants from using a regular migratory channel. For instance, in 2013, only 669 Indonesian domestic workers were reported to use regular channels³⁹ while the irregular flow continued. Moreover, improving protection via MOUs implies the possibility of segmented and differed protection based on the nationality of foreign workers. The better option is to ensure better protection to the whole sector through national legislation.⁴⁰

³⁴ ILO (n 6).

³⁵ *ibid.*

³⁶ ILO (n 8).

³⁷ Philippa Smales, *The Right to Unite: A Handbook on Domestic Worker Rights across Asia* (Asia Pacific Forum on Women, Law and Development 2010).

³⁸ Human Rights Watch, 'Indonesia, Malaysia: Overhaul Labor Agreement on Domestic Workers' (Human Rights Watch, 21 February 2007) <<https://www.hrw.org/news/2007/02/21/indonesia-malaysia-overhaul-labor-agreement-domestic-workers>> accessed 1 October 2019.

³⁹ The Star, 'No Changes to Existing Terms for New MoU' (The Star, 27 December 2013) <<https://www.thestar.com.my/news/nation/2013/12/27/no-changes-to-existing-terms-for-new-mou>> accessed 1 October 2019.

⁴⁰ ILO (n 6).

3. Thailand's Policy and Framework on Employment and Protection of Irregular Low-Skilled Migrant Workers

The gap in economic growth between Thailand and its neighbouring countries, as well as domestic situations in the latter, has made Thailand the main destination of low-skilled labour from neighbouring countries since the early 1990s. Currently, there are approximately 3.25 million migrants from Myanmar, Lao PDR and Cambodia working in Thailand, representing 8.5% of the country's labour force.⁴¹ Migrant workers from Myanmar constitute the largest group, about 80% of all migrant workers, followed by Cambodia and Lao PDR. They are predominately employed in low-skilled and labour-intensive jobs where Thai workers prefer not to do, especially in fisheries, agriculture, construction, manufacturing, and domestic works.

Most low-skilled migrant workers from Myanmar, Lao PDR and Cambodia in Thailand have been primarily irregular. Their entry into Thailand is facilitated by long and porous borders, which complicate immigration control. Since they enter Thailand without identification documents nor appropriate visa and/or acting in breach of Thai immigration law,⁴² they are in principle liable to be arrested, prosecuted, and repatriated to the country of origin. Moreover, they majorly work without a work permit, contrary to Thai Foreign Employment law,⁴³ which subjects the work of foreigners to the grant of work permit as well as prohibits foreign workers in some sectors reserved for Thais.

3.1 Law and policy on entry and recruitment of low-skilled migrant workers

Contrary to high-skilled labour, the closed-door policy had prevailed regarding low-skilled migrant workers. Thai law did not provide any formal channel of recruitment for such category of migrants. Nevertheless, from 1990's onwards, undeniable need for low-skilled foreign workers pushed Thai government to adopt a

⁴¹ ILO, *Triangle II Quarterly Briefing Note. Thailand (October- December 2016)* (ILO 2016).

⁴² พระราชบัญญัติคนเข้าเมือง พ.ศ. 2522 [Immigration Act 1979].

⁴³ พระราชบัญญัติการทำงานของคนต่างด้าว พ.ศ. 2521, replaced by พระราชบัญญัติการทำงานของคนต่างด้าว พ.ศ. 2551, later replaced by พระราชกำหนดการบริหารจัดการการทำงานของคนต่างด้าว พ.ศ. 2560 [Foreign Employment Act 1978, replaced by Foreign Employment Act 2008, later replaced by 2017 Emergency Decree on Management of Employment of Migrant Workers].

more flexible policy in practice. Starting from 1996, Thai government used cabinet resolutions as a regulatory tool to manage irregular migrant workers in Thailand. The policy consisted of granting a temporary amnesty to irregular migrant workers who, entering Thailand in violation of immigration laws, came forward and registered under the government scheme. Registered migrants were allowed to stay temporarily in Thailand (1-2 years) to work as labourers and domestic workers. The registration only postponed their deportation but did not imply legalisation of migrants' status. When the amnesty period nearly came to an end, successive annual cabinet resolutions extended the amnesty period with possible modifications concerning the sectors and the provinces. From 1996-2001, five rounds of registration were organised.⁴⁴ Nevertheless, the registration policy failed to reduce illegal migration from neighbouring countries which continued to flourish.

The Cabinet resolution of April 2004 aimed to manage labour migration more systematically and to end irregular migration. To survey the more realistic number of migrant workers in Thailand, the authority organised civil registration of migrants and their dependence aging one year or older, with the attribution of 13-digit identification number starting with 00. In addition, the Ministry of labour organised the registration of employers, declaring a need for migrant workers. Migrant workers' health checks and health insurance were prerequisites for granting temporary work permits.⁴⁵

The cabinet resolutions between 2004-2007 limited the employment of migrant workers from Myanmar, Lao PDR, and Cambodia to labourer work and domestic work. This legal framework was inconsistent with the market demand for labour since migrant workers from Myanmar, Lao PDR, and Cambodia were employed in practice in various service sectors.⁴⁶ Moreover, Thai management allowing registration of irregular migrants had resulted in a contradictory situation. Low-skilled migrant workers who had a valid passport or travel document who wished to work as a labourer would be excluded from entering Thailand and could not apply for appropriate work permit, except for labourer working in the fishing ships. Nevertheless,

⁴⁴ Rosalia Sciortino and Sureeporn Punpuing, *International migration in Thailand* (IOM 2009).

⁴⁵ *ibid.*

⁴⁶ กฤตยา อาชวนิจกุล และ กุลภา วจนสาระ, 'การจ้างแรงงานข้ามชาติตามพระราชบัญญัติการทำงานของคนต่างด้าว พ.ศ. 2551 กับการจัดทำบัญชีรายชื่ออาชีพ สำหรับคนต่างชาติ' (มหาวิทยาลัยมหิดล สถาบันวิจัยประชากรและสังคม 2552) 23 [Kritaya Archavanitkul and Kulapa Vajanasara, 'Employment of Migrant Workers under the Working of Aliens Act 2008 and the List of Occupations Allowed to Foreigners' (Mahidol University Institute for Population and Social Research 2009) 23].



the foreigners who entered Thailand irregularly could apply for a work permit for every sector of labourer work authorised by law.⁴⁷

In 2002-2003, Thailand signed memoranda of understanding (MOU) on labour cooperation with the governments of Lao PDR,⁴⁸ Cambodia,⁴⁹ and Myanmar,⁵⁰ with the objectives to tackle illegal immigration and human trafficking by establishing a channel for regular labour migration to Thailand from these neighbouring countries, as well as to ensure the repatriation of migrants to the countries of origin. Recently, Thailand has concluded the second version of MOUs with Cambodia (2015), Myanmar and Lao PDR (2016).⁵¹ It has also signed a memorandum of understanding (MOU) with Vietnam to allow regular migration from Vietnam.⁵²

The MOUs provide for two aspects of management of low-skilled labour. First, the MOUs establish a channel for regular labour migration to Thailand by authorised employment agencies of the respective countries. After the completion of a four-year contract, migrant workers need to take a three-year break (reduced to thirty days with the new MOUs signed in 2015-2016) before reapplication. The MOUs require the country of employment to set up and manage a savings fund, to which the migrant workers contribute equivalent to 15 per cent of his or her monthly wage. When the migrant workers leave the country of employment, they will receive the savings with interest after the end of their employment. In case of no return, the right to refund will be revoked.⁵³

Secondly, the MOUs call for the establishment of a procedure to regularise irregular migrants from Lao PDR, Cambodia and Myanmar who have already resided

⁴⁷ อริยพร โพธิส, 'สิทธิในการทำงานของแรงงานต่างด้าวในประเทศไทย' (2554) 4 จุลินิติ 175, 177 [Ariyaporn Pothisai, 'Right to Work of Foreign Workers in Thailand (2011) 4 Julaniti 175, 177].

⁴⁸ Memorandum of Understanding between the Government of the Lao PDR and the Government of the Kingdom of Thailand on Labour Cooperation (18 October 2002).

⁴⁹ Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on Cooperation in the Employment of Workers (31 May 2003).

⁵⁰ Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation in the Employment of Workers (21 June 2003).

⁵¹ ILO (n 41).

⁵² The MOU scope is limited to employment in the fishing and construction sectors, where solely a small proportion of Vietnamese migrants are employed; ILO, *Triangle II Quarterly Briefing Note. Vietnam (April-June 2019): ILO, 2019* (ILO 2019).

⁵³ Srawoath Paitoonpong, 'Managing International Labor Migration in ASEAN: Thailand (Immigration)' (2011) XXXVIII Philippine Journal of Development 163, 177.

and worked in Thailand. A regularisation system, known as the nationality verification process, is set up. Irregular migrants must go back to their countries of origin for nationality verification. Once they are issued a passport or other identity document (temporary passport, certificate of identity or travel document), they can apply for Thai visa allowing them to stay legally in Thailand for the purpose of labourer work (Non-Immigrant L-A). The work permit is valid for two years and is renewable for another two years. After four years of employment, migrant workers have to return to their country of origin. Their readmission to Thailand for employment has to be implemented under the MOUs. However, the requirement for irregular migrants to return to their country of origin was impractical. Migrants were discouraged by the cost and time for long-distance travel as well as feared to be prevented from returning to Thailand afterwards by the authorities in their home country.⁵⁴

The Emergency Decree on Management of Employment of Migrant Workers, in force since 23 June 2017, aims to streamline Thailand's management of migrant workers. It combines and replaces the 2008 Foreign Employment Act and the 2016 Emergency Decree concerning rules on bringing foreigners to work with employers in the Kingdom. The 2017 Royal Ordinance specifies two modalities of recruitment of migrant workers; 1) Recruitment through permitted licensed recruiters (a limited company with a minimum capital of at least THB one million (US\$29,992) who are required to pay a deposit of THB five million (US\$149,967) and 2) Direct recruitment by employers, with the payment of a deposit to Department of Employment, Ministry of Labour according to the official rate.⁵⁵ The 2017 Emergency Decree insists that recruitment processes cannot incur any fees on migrant workers (Article 42, 49 and 53). It also replaces the previous repatriation fund with the "management of employment of migrant workers' fund" with broader objective. In case migrant workers suffer prejudice from violation by employers or licensed recruiters of their obligations, migrant workers can file the request to the Department of Employment to get the compensation deducted from the deposit made by employers or licensed recruiters.⁵⁶

⁵⁴ Inga Gruß, 'The Emergence of the Temporary Migrant: Bureaucracies, Legality and Myanmar Migrants in Thailand' (2017) 32 *Journal of Social Issues in Southeast Asia* 1, 23.

⁵⁵ IOM, 'Migrant Information Note #30' (IOM, December 2016) <https://thailand.iom.int/sites/thailand/files/document/publications/MIN%20No.30_ENG_FINAL.pdf> accessed 1 December 2019.

⁵⁶ *ibid.*



The Government has set the MOU channel and the border employment scheme as formal channels of entry and recruitment, and the number of migrant workers recruited through these channels has augmented. Nonetheless, the government allowed the registration and regularisation of about 1,828,000 irregular migrants in 2016-2018 as well as announced a new amnesty program at the end of 2020 in the context of COVID-19 pandemic.⁵⁷

3.2 Protection of low-skilled migrant workers' rights

Concerning the protection of labour rights, the main legislation is the Labour Protection Act 1998. It applies in principle to all migrant workers, irrespective of their nationality or their migration status. It lays down minimum standards regarding treatment of employees such as working conditions, working and rest periods, holidays, equal treatment and remuneration between men and women in employment, prohibition of child labour and prohibition of sexual harassment against employees.⁵⁸ However, certain sectors, in which migrant workers are majorly employed, are not covered by its provisions. These sectors include agriculture, fisheries, transport, and domestic work. Moreover, other Thai legislations, such as the Labour Relations Act 1975, continue to distinguish between Thai and foreign workers. Article 88 of this Act reserves the right to set up a trade union to Thai workers since membership of the board of the trade union is only open to Thai nationals. Even if migrant workers are not prohibited from becoming members of Thai trade unions, it is in reality difficult, and only a small number of migrant workers are accepted.⁵⁹

As far as access to healthcare is concerned, since 2013, the Ministry of Health has organised health insurance for migrant workers who registered under the government scheme as well as for their followers. There remain nevertheless difficulties regarding access to health insurance. Many hospitals refuse to sell health insurance to migrant workers, to children under the age of seven or to migrants who

⁵⁷ ILO, *Triangle in ASEAN Quarterly Briefing Note: Thailand (January-March 2021)* (ILO 2021).

⁵⁸ Vitit Muntarbhorn, *Employment and Protection of Migrant Workers in Thailand: National Laws/Practices versus International Labour Standards?* (ILO 2005). In 2008, Section 16 of the Labour Protection Act was modified to extend the scope of protection from sexual abuse, harassment, or nuisance to cover not only women and children but employee in general.

⁵⁹ Pracha Vasuprasat, *Agenda for Labour Migration Policy in Thailand: Towards Long-Term Competitiveness* (ILO 2010).

are not in possession of identity document, notwithstanding the fact that such practices are inconsistent with the underlining logic of the government policy.⁶⁰

Thailand's recent legal reform was pushed by international actors. In April 2015, the European Union (EU) issued a formal notice (the yellow card) because of Thailand's shortcomings in its fisheries monitoring, control and sanctioning systems, including the problem of forced labour, in contrary to the IUU regulations (Illegal, Unreported, and Unregulated (IUU) fishing). Unless Thailand had taken satisfactory to resolve the problem, Thai fisheries products risked being banned by the EU.

As a consequence, legislative reform has been adopted with a positive impact on migrant labour's rights. Thailand has ratified the Protocol to the Forced Labour Convention, 1930 (no.29) in June 2018 and has adopted the Emergency Decree on Prevention and Elimination of Human Trafficking to conform with the Protocol to the Forced Labour Convention (P29) in April 2019. The Emergency Decree modifies the Prevention and Elimination of Human Trafficking Act by penalising specifically the practice of forced labour. The offence of forced labour or service is defined as forcing other persons against their will to do labourer work or deliver service by using one of the following means (1) threatening to harm life, body, liberty, reputation or assets of such persons or of others (2) threatening others (3) using force to harm (4) withholding of the identity documents (5) debt bondage (6) other acts similar to the above mentioned if the others are put into the position that cannot resist. Employers who use forced labour is punishable by imprisonment from 6 months to 4 years or THB50,000-400,000 (US\$1499-11,997) fines. In case forced labour leads to the death of the victim, the employer is punishable by life imprisonment or the death penalty. The Emergency Decree grants to victim of forced labour the same rights and protection as victims of human trafficking as well as provides for the competence of Human trafficking court. Thailand has also adopted the Protection of workers in the fishery sector Act in May 2019 to be in line with the Work in Fishing Convention (no.188). If effectively implemented, such change is important progress towards improving the working conditions for migrants in every sector.⁶¹ Moreover, the Ministry of Foreign

⁶⁰ อติสร เกิดมงคล, 'แรงงานข้ามชาติในสังคมไทย: สิทธิและสวัสดิการ' (ASEAN Seminar: ASEAN+ Studies Group, ศูนย์อาเซียนศึกษา มหาวิทยาลัยเชียงใหม่, 29 สิงหาคม 2557) <<https://prachatai.com/journal/2014/09/55361>> accessed 1 December 2019 [Adisorn Kerdmonkol, 'Migrant Workers in Thailand: Rights and Welfare' (ASEAN Seminar: ASEAN+ Studies Group, Center of Asian Studies, Chiang Mai University, 29 August 2014) <<https://prachatai.com/journal/2014/09/55361>> accessed 1 December 2019].

⁶¹ ILO, *Triangle II Quarterly Briefing Note. Thailand (April-June 2019)*: ILO, 2019 (ILO 2019).

Affairs has announced Thailand's intention to ratify the Right to Organise and Collective Bargaining Convention (no.98). The amendment of the Labour Relations Act as a foundation of the ratification was scheduled for the end of 2018 but has not yet been finalised.

Against this background, Thai management of low-skilled migrant workers was criticised as having been dominated by two concerns; a capitalistic concern to have cheap labour for Thai businesses in labour-intensive sectors and a security concern from the government side who consider migrants a threat. The issue of protecting migrants' human rights was raised rather in reaction to international critics.⁶²

4. Malaysia's and Thailand's Policy and Framework in the Light of Labour Migration- Related SDG Targets

The analysis focuses on targets 10.7 and 8.8 regarding the issue of migration and protection of the rights of low-skilled migrant workers. Under Goal 10 to reduce inequality within and among countries, target 10.7 calls on countries to "facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies".⁶³ Target 10.7 is complemented by target 8.8, which seeks "to protect labor rights and promote safe and secure working environments of all workers, including migrant workers, particularly women migrants, and those in precarious employment", under Goal 8 to promote sustained, inclusive, and sustainable economic growth, full and productive employment, and decent work for all.⁶⁴

4.1 SDG target 10.7

Referring to the IOM Migration Governance Framework,⁶⁵ the article assesses national policies and legal frameworks in the light of SDG target 10.7 in two main aspects. The first aspect pertains to the development of a comprehensive, planned, and well-managed migration policy. The second aspect concerns the facilitation of a safe, orderly, regular migration.

⁶² อติสร เกิดมงคล [Adisorn Kerdmonkol] (n 60).

⁶³ UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1.

⁶⁴ *ibid.*

⁶⁵ IOM 'Migration Governance Framework' (2015) UN Doc C/106/04.

4.1.1 A comprehensive, planned, and well-managed migration policy

The IOM Migration Governance Framework⁶⁶ proposes that a comprehensive, planned, and well-managed migration policy should rely on three principles; adherence to international standards on migration; development of migration policy and legal framework based on evidence and a whole-of-government approach; and engagement with partners and stakeholders.

Firstly, concerning the international standards on migration, relevant international instruments include UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, ILO Migration for Employment Convention 1949 (Revised) (no.97) and ILO Migrant Workers (Supplementary Provisions) Convention 1975 (no.143).⁶⁷ As of August 2021, Malaysia⁶⁸ and Thailand have nonetheless not ratified any of these three conventions.

Secondly, regarding comprehensive and coherent migration policy and law, the article has revealed inconsistency regarding policy on foreign low-skilled workers in Malaysia and Thailand due to the mismatch between the Government's vision on foreign workers and the market demand. As reflected in the Eleventh Malaysia plan 2016-2020, as well as in Thai cabinet's Strategies on management of foreign migrant workers 2017-2021, both countries aim to escape the middle-income trap and become developed countries by upgrading their industries. Their policies toward low-skilled migrant workers have been based on the vision that reliance on foreign workers would only be an "interim solution". However, the need for foreign low-skilled labour to fill substantial shortages in key economic sectors has persisted and even increased in both countries. This has resulted in a contradictory situation where a short-term policy has been constantly extended for almost two decades.

Until recently, the Thai Government repeatedly renewed the registration of irregular migrants and extended amnesty period, notwithstanding the existence of

⁶⁶ *ibid.*

⁶⁷ Global Migration Policy Associates, 'The Sustainable Development Goals and Migrants/Migration' (Global Migration Policy Associates, 23 February 2016) <https://www.un.org/en/development/desa/population/migration/events/coordination/14/documents/backgrounddocs/GMPA_14CM.pdf> accessed 6 August 2020.

⁶⁸ This article addresses only the policy and legal framework concerning peninsular Malaysia (leaving aside Sabah and Sarawak where foreign workers management is governed by the State Government accordingly). Sabah has ratified Migration for Employment Convention (Revised), 1949 (no.97), Labour Clauses (Public Contracts) Convention, 1949 (no.94) and Contracts of Employment (Indigenous Workers) Convention, 1947 (no.86) on 3 Mar 1964.

the MOU channel. The possibility of registration indirectly encouraged the hiring as well as the coming of new irregular migrants.⁶⁹ In Malaysia, there has been a gap in policy intent to progressively phase out the use of low-skilled foreign labour while upgrading the skills for the knowledge economy. The emphasis has been mainly put on regulating the flows of foreign workers rather than on the upskilling of national workers.⁷⁰

Moreover, in both countries, policies and legal frameworks on migrant workers are often based on the perception of foreign workers as a security threat. In Malaysia, this perception is reflected in the predominant role of the Ministry of Home Affairs, to the detriment of the Ministry of Human resource, in the management of low-skilled foreign workers. The primary concern of the government has been to increase or reduce the number of migrant workers as well as to combat irregular migrants. The protection of migrant workers' rights has received less attention.⁷¹

The recent approach of Malaysian Government regarding low-skilled labour management as formulated under the Eleventh Malaysian Plan appears to give more emphasis on national development goals as well as on the protection of migrant workers' rights. The government plans to formulate "a comprehensive immigration and employment policy for foreign workers...taking into account the requirements of industry and the welfare of foreign workers."⁷² In Thailand, the recent revision of the legal framework concerning the list of occupations prohibited for foreigners, as unofficially announced in June 2019,⁷³ is welcomed progress. Considering the constant need for foreign workers to fill low-skilled jobs where Thais did not wish to do, this revision, which allows foreigners who have entered Thailand

⁶⁹ ศิริพงษ์ ลดาวัลย์ ณ ออยุธยา, 'การจัดการแรงงานข้ามชาติเข้าเมืองผิดกฎหมาย 3 สัญชาติของไทย: การสำรวจทางกฎหมาย นโยบาย และทางเลือก' (2559) 1 วารสารรัฐศาสตร์และรัฐประศาสนศาสตร์ 49, 60 [Sripong Laddawan na Ayuddhaya, 'Thailand's Management of Three Nationalities Illegal Entry Transnational Migrant Workers: Survey in Law, Policy and Alternative' (2016) 1 Political Science and Public Administration Journal 49, 60].

⁷⁰ Vijayakumari Kanapathy, *Controlling Irregular Migration: The Malaysian Experience* (ILO 2008).

⁷¹ *ibid.*

⁷² Rani Rasiah and PSM, 'Implement 11th Malaysia Plan Policies on Labour Migration' (malaysiakini, 19 December 2016) <<https://www.malaysiakini.com/letters/366523>> accessed 1 July 2019.

⁷³ ไทยรัฐออนไลน์, 'เสียงปลดล็อก 10 อาชีพสงวน ไฟเขียวให้แรงงานต่างด้าวทำได้' (ไทยรัฐออนไลน์, 20 เมษายน 2561) <<https://www.thairath.co.th/business/economics/1260761>> accessed 1 August 2018 [Thairath online, 'Possibility to Authorize Migrant Workers to Work in 10 Occupations Previously Reserved for Thais' (Thairath online, 20 April 2018) <<https://www.thairath.co.th/business/economics/1260761>> accessed 1 August 2018.

in accordance with Thai immigration law to work as labourers legally, corresponds more to the reality.

Thirdly, good migration governance requires policy formulation using a whole government approach and engagement with partners and stakeholders. In Thailand, to address the lack of coordination among various authorities in charge of management of foreign labour, the Emergency Decree on Management of Employment of Migrant Workers 2017 sets up a commission called the “Management of Employment of Migrant Workers’ Policy Commission” with the aim to ensure better coordination among different authorities related to migration issue. Besides Minister of Labour and Permanent Secretaries from Ministries of Defence, Finance, Foreign Affairs, Social Development and Human Security, Interior, Public Health, and Industry, the Secretary-General of the National Economic and Social Development Board is also part of the commission. This inclusion will facilitate the integration of labour migration issues into the National Economic and Social Development Plan. Beyond government authorities, the policy formulation will also involve other partners since up to two representatives of employees’ organisations and four experts in labour, industry, law, and human rights are appointed by the Minister of Labour. The formation of the tripartite committee allows a greater contribution of social partners to the policy formation on foreign workers.

Moreover, the establishment of the nationality verification centres in the major provinces where migrant workers are employed in Thailand, in collaboration with the authorities from Myanmar, Cambodia and Lao PDR, has demonstrated important cooperation between Thailand and the labour sending countries. This also has demonstrated a certain transnational bureaucracy among the ASEAN member states.

In Malaysia, the policy of foreign low-skilled labour is determined by the Cabinet Committee on Foreign Workers and Illegal Immigrants. The Ministry of Home Affairs is the secretary of the Committee, which is chaired by the Deputy Prime Minister and includes representatives from 13 Ministries.⁷⁴ Currently, the management of foreign low-skilled foreign workers is handled by both the Ministry of Home Affairs and the Ministry of Human Resource. The Ministry of Human Resource is responsible for drafting the policy on Malaysian manpower by considering the industries’ needs. The Labour Department under the Ministry of Human Resource is responsible for

⁷⁴ Malaysian Employers Federation (n 16).

examining employers' applications to hire foreign workers by controlling failure to hire local workers as well as employers' compliance with labour laws. The Ministry of Home Affairs oversees coordination of foreign workers' applications via the One-Stop Centre (OSC) and manages immigration affairs.⁷⁵

Nonetheless, Human rights organisations as well as of the Federation of Malaysian Manufacturers have called for the leading role of the Ministry of Human Resource, instead of the Ministry of Home Affairs, regarding recruitment and management of foreign low-skilled workers since it is considered as better placed to understand migrant workers' needs. The change will also reflect the view that migrants do not necessarily represent a security threat to public safety and peace.⁷⁶ The entangled responsibility between the two ministries is susceptible to lead to ineffective management of migrant workers.⁷⁷

4.1.2 Facilitation of a safe, orderly, regular migration

Good migration governance should enable migration to take place in a safe, orderly, regular, and dignified manner. This includes access to regular channel of migration, well-administered entry scheme, limited wait time and reasonable fee for regular migration procedure, as well as the prohibition of illegal cross border activities.⁷⁸

As regards migratory channels, after the first period of laissez-faire, Malaysian government set up a formal channel for recruitment of foreign low-skilled workers in the 1990s. In the contrary, Thailand did not have any direct policy, nor did it provide legal channel for recruitment of low-skilled migrant workers until recently. The government has relied on a registration system and temporary amnesties to exempt irregular migrants from deportation and allow them to work for a determined period. Only with the conclusion of MOUs with Cambodia, Lao PDR, and Myanmar in

⁷⁵ The Star, 'Home and Human Resource ministries both responsible for managing foreign workers' (The Star, 10 July 2019) <<https://www.thestar.com.my/news/nation/2019/07/10/home-and-human-resource-ministries-both-responsible-for-managing-foreign-workers/>> accessed 1 December 2019.

⁷⁶ Soo Wern Jun, 'Let HR ministry take charge of foreign worker recruitment' (Free Malaysia Today, 13 July 2018) <https://www.freemalaysiatoday.com/category/nation/2018/07/13/let-hr-ministry-take-charge-of-foreign-worker-recruitment/?_cf_chl_jschl_tk__=pmd_Nm.wDj8SRoyRDYpeXZFRicDHRnrFh4xyBtMC9gdqhB4-1634926584-0-gqNtZGzNArujcnBszQjR> accessed 1 December 2019.

⁷⁷ *ibid.*

⁷⁸ ESCAP, *International migration, the 2030 Agenda for Sustainable Development and the global compact for safe, orderly and regular migration* (ESCAP 2017).

2002-2004, low-skilled migrants from these countries can enter Thailand via legal admission process.

Migration through legal channels to Malaysia and Thailand, nonetheless, is not without difficulties. For instance, obtaining the Visitor Pass in Malaysia may take from three to twelve months, while recruitment under the MOU process requires 25 steps and the involvement of various agencies both in Thailand and in the sending countries.⁷⁹ In general, migrant workers must bear the costs of recruitment and employment, often through salary deduction when the costs are paid by the employers. The lengthy, costly, and complicated formal migration processes set up by both countries provide, unintendedly and paradoxically, incentives for migrants to opt for irregular channels.

Since 1 August 2015, the Malaysian Government has set up the Foreign Worker One-Stop Approval Agency administered by the Foreign Worker Management Division of the Ministry of Home Affairs. The objective is to expedite and simplify the recruitment application process by reducing bureaucracy.⁸⁰ Thailand has also established 80 One-Stop Service (OSS) centres in Bangkok and each in every province of Thailand to streamline the services (registration of personal information, visa, work permit, health check and enrolment in social security scheme). The establishment of the nationality verification centres (Centre for management for the employment of foreign workers) in Thai provinces where migrant workers are largely employed has simplified the procedure importantly. The collaboration with the authorities from Myanmar, Cambodia and Lao PDR allows the completion of the process in Thailand without requiring the return to the origin country.

The challenges remain to create a greater incentive to use the regular channel of migration through procedural simplification and cost reduction, as well as to reduce abuses. Even though brokerage service is not compulsory in both countries, the complexity of the procedure for migrants, lack of knowledge on concrete steps as well as frequently changing regulations lead to reliance on intermediate. In this regard, Malaysia has recently reformed the Private Employment Agencies Act 2017⁸¹ to better regulate the private agencies and better protect workers from exploitation. It

⁷⁹ Mauro Testaverde and others (n 14).

⁸⁰ Ministry of Home Affairs Malaysia, 'Foreign Workers Management Division' (Ministry of Home Affairs Malaysia, 8 October 2018) <<http://www.moha.gov.my/index.php/en/maklumat-perkhidmatan/pengenalannya>> accessed 1 August 2019.

⁸¹ Entered into force since 1 February 2018.



is also imperative to ensure strict enforcement of the migration law to protect migrants in the entry and recruitment process. Under the Malaysian Eleventh Plan, the government will introduce a strict liability concept of which the migrant workers recruited under a certain company are fully liable for the recruitment process as well the migrant's welfare. On top of that, the government will curb the problem of irregular migrants by having stricter management and enforcement of the law.⁸²

In Thailand, to combat the recruitment of irregular migrant workers as well as human trafficking, the 2017 Emergency Decree on Management of Employment of Migrant Workers imposed very severe penalties. According to Article 102, employers who hired irregular migrants could be fined a maximum of THB800,000 (US\$23,995) for each of them. As for migrants working in prohibited occupations for foreigners or working without a work permit, they could face up to five years of imprisonment or up to THB100,000 (US\$2,999) fine, or both, according to article 101. The abrupt change in policy created, however, chaos. It was reported that in the first week of its entry into force, almost 60,000 migrants left Thailand. Some employers also laid off and abandoned at least 500 irregular migrants to avoid penalties.⁸³ Due to the unintended impact of the Emergency Decree on businesses, Thai government enacted an order postponing the implementation of the 2017 Emergency Decree to 1 January 2018, allowing an adjusting period for employers and migrants to comply with the new regulation.

The new Emergency Decree on Management of Employment of Migrant Workers 2018 adjusts the national legal framework to make it consistent with Thailand's human rights obligation. The use of notification system, instead of the permission system, will allow documented migrant workers to change employers, workplaces, types of work, and allow employers to hire documented foreign workers without having to request permissions from the authority concerned. The new law also lifts restrictions on the residential zoning of migrant workers. As for the punishment, it is adjusted to be reasonable: the penalties for irregular migrants according to Article 101 are reduced to a maximum of THB50,000 (US\$1,499) fine, and the imprisonment term is removed; fine for employers hiring irregular migrants

⁸² Malaysia's Economic Planning Unit, *Eleventh Malaysia Plan 2016-2020: Anchoring Growth on People* (pdf, Percetakan Nasional Malaysia Berhad 2015) 143.

⁸³ Ruji Auethavornpipat, 'Thailand's new migrant worker policy is a step onto uncertain ground' (East Asia Forum, 10 August 2017) <<http://www.eastasiaforum.org/2017/08/10/thailands-new-migrant-worker-policy-is-a-step-onto-uncertain-ground/#more-81103>> accessed 5 September 2019.

according to Article 102 is limited to maximum THB100,000 (US\$2,999) per migrant while recidivist employers can face up to one year of imprisonment. In addition, the new law prohibits employers from collecting fees from foreign workers, except for passport, health check-up, and work permit fees which are determined by the Government. Awaiting their effective implementation, all these improvements in line with SDG target 10.7 are to be welcomed.

4.2 SDG Target 8.8

Target 8.8 seeks to protect labour rights and promote a safe and secure working environment for all workers, including migrant workers, particularly women migrants and those in precarious employment. This article focuses on protection of migrant workers' rights and examines Malaysian and Thai policy and legal framework on two aspects. The first aspect concerns the adoption of international labour standards in national law. The particular focus is on the extension of such standards to include all workers, regardless of nationality, employment or immigration status or existence/nature of contract, as well as the adoption of gender-specific legislation, policy and practice addressing women migrant workers.⁸⁴ The second aspect focuses on the effective enforcement of such standards in practice by governments.

4.2.1 Adherence to international labour standards

Regarding the ratification of international standards on migrant workers, as of August 2021, Malaysia and Thailand have ratified 6 of 8 ILO fundamental conventions on labour standards. Recently ratified Convention no.111 on discrimination in respect of employment and occupation entered into force for Thailand on 13 June 2018. Malaysia has not yet ratified Convention no.87 on freedom of association and no.111 on discrimination in respect of employment and occupation, while Thailand has not yet ratified Convention no.87 on freedom of association and no.98 on collective bargaining.⁸⁵ The ratification of the remaining fundamental conventions is the next step Malaysia and Thailand should consider.

⁸⁴ Global Migration Policy Associates (n 67).

⁸⁵ ILO (n 33); ILO, *Triangle in ASEAN Quarterly Briefing Note: Thailand (July - September 2017)* (ILO 2017).



Table 1: Malaysia's and Thailand's ratifications of ILO Fundamental Conventions on labour standards⁸⁶

ILO Fundamental Conventions	Malaysia		Thailand	
	Date	Status	Date	Status
Forced Labour Convention, 1930 (no.29)	11 Nov 1957	In Force	26 Feb 1969	In Force
Freedom of Association and Protection of the Right to Organise Convention, 1948 (no.87)	-	-	-	-
Right to Organise and Collective Bargaining Convention, 1949 (no.98)	5 Jun 1961	In Force	-	-
Equal Remuneration Convention, 1951 (no.100)	9 Sep 1997	In Force	8 Feb 1999	In Force
Abolition of Forced Labour Convention, 1957 (no.105)	13 Oct 1958	Denounced on 10 Jan 1990	2 Dec 1969	In Force
Discrimination (Employment and Occupation) Convention, 1958 (no.111)	-	-	13 Jun 2017	In Force
Minimum Age Convention, 1973 (no.138)	9 Sep 1997	In Force	11 May 2004	In Force
Worst Forms of Child Labour Convention, 1999 (no.182)	10 Nov 2000	In Force	16 Feb 2001	In Force

As part of Thai legal reform following the European Union's issuance of yellow cards regarding Illegal, Unreported and Unregulated (IUU) Fishing, Thailand has ratified the Convention no.188 on Work in Fishing.⁸⁷ The international pressure has incited Thailand to leverage its international commitment and contributed thus to improving the living and working conditions of migrant workers onboard vessels.

Regarding the application of international labour standards to all workers, Malaysia's and Thailand's challenges include guaranteeing labour rights to all categories of workers, regardless of employment or immigration status or existence/nature of contract. The recent legislations regarding protection of labour rights do not cover

⁸⁶ ILO, 'Ratifications for Malaysia' (ILO) <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102960> accessed 6 August 2021; ILO, 'Ratifications for Thailand' (ILO) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102843> accessed 6 August 2021.

⁸⁷ ILO (n 86).

certain sectors, in which migrant workers are majorly employed, such as agriculture, fisheries, transport and domestic work.

There also remains a difference of treatment toward nationals and foreign workers, as demonstrated by Thai Labour Relations Act 1975, which reserves the right to set up a trade union for only Thai workers. As for the adoption and application of gender-specific legislation, policy and practice addressing women migrant workers, both countries' labour laws do not cover domestic workers who are majorly migrant women. All these differential treatments between nationals and migrant workers as well as between male and female workers are inconsistent with the SDG target 8.8, which emphasises non-discriminated protection of labour rights to all workers.

4.2.2 Effective enforcement of labour protection

Beyond the adoption of national law in compliance with the international labour standards, the challenging difficulties also lie in the effective enforcement of the law towards migrant workers, especially irregular migrants. Even if in law, migrant workers are included in the scope of labour laws, they are often excluded, in practice, from an effective protection. Even though Malaysian and Thai labour laws apply in principle to all migrant workers, irrespective of their nationality or their migration status, there exists in practice a certain gap between the text of the law and its implementation. "As many employers view migrant workers as easier candidates for exploitation",⁸⁸ there has been frequently witnessed violations of their rights, for instance, "noncompliance in accordance with the minimum wage and overtime regulations, uncompensated extended working hours, the use of child labour, practices tantamount to forced labour in the factory and in fishing industries, and the termination of contracts of pregnant migrants."⁸⁹ Many factors constrain systematic enforcement of labour legislation for migrant workers, including insufficiency of resources and shortage of labour inspectors as well as corruption of officials in enforcing the laws, allowing the employment of irregular migrants in exchange for bribery.⁹⁰

Moreover, migrants' illegal status under national law prevents them most of the time from claiming their rights or from reporting abuses of their rights, fearing

⁸⁸ Vitit Muntarbhorn (n 58) 5.

⁸⁹ Srawooth Paitoonpong (n 53) 173.

⁹⁰ Yonyuth Chalamwong, 'Management of Cross-border Low-Skilled Workers in Thailand: An Update' (2011) 26 TDRI Quarterly Review 12, 18.



that employers will stop hiring them or report them to the authorities. Irregular migrants and informal work arrangements are not guaranteed similar rights to redress, of which making it impossible for the migrant workers to uphold their rights and address their problems and grievances.⁹¹ In principle, migrant workers have equal access to legal mechanisms in case of breaches of employment's terms and conditions or unlawful dismissal. However, the number of cases pursued on the negligence of migrant workers is far greater than the number of violations committed against them in Malaysia.⁹² To render migrant workers' rights effective in accordance with target 8.8, it is important to improve migrants' access to complaint and redress mechanisms as well as to provide them with adequate legal assistance.

5. Conclusion

In examining and assessing Malaysia's and Thailand's policies and legal frameworks on management of low-skilled migrant workers in the light of SDG targets 10.7 and 8.8, Malaysia and Thailand have made much progress. From closed door and rather poor migration frameworks, both countries have been moving towards more open and well-managed foreign labour policies and laws. Nonetheless, further effort can be made to enable efficient labour migration in a safe and certain manner while upholding migrants' labour rights in accordance with the SDG.

First, the ratification of the core international standards on migration and the remaining ILO fundamental conventions on labour standards will be a significant and necessary step to demonstrate both countries' commitment to work towards the realisation of the migration-related SDG targets. The international standards will serve as a framework into conformity of which domestic laws and policies will be brought.

Second, notwithstanding the long-term vision to upgrade the economy, the formulation of laws and policies on migrant labour should reflect the reality of both countries' demand for low-skilled migrant labour. Rather than seeing foreign workers mainly from the optic of security threat, both Governments should take into account their positive contribution to the economy when determining the migration policy as well as their rights and protection.

⁹¹ ILO (n 6).

⁹² Anni Santhiago, *Access to Justice for Migrant Workers in Malaysia. Exit and Integration Strategies for Labour Migration in South East Asia: Putting Principles in Practices* (Monash University 2011).

Third, more active involvement of migrant representatives, international organisations and non-state actors will broaden the understanding of the issue and allow the formulation of policies that better reflect and respond to migrants' reality.

Fourth, more effective management of low-skilled migrant labour and protection of labour rights requires Malaysia/Thailand to continue developing closer coordination and cooperation with the sending neighbour countries through the MOUs. The sending neighbour countries may be more willing to coordinate and cooperate in migration management when the regulation includes fair protection of migrant workers rights.

Fifth, the regulation of migrant workers should be based on a clear attribution of the role to authority since entanglement can lead to a gap in management and the denial of responsibility. At the same time, better coordination among the national authorities regarding the formulation and implementation of the policies is also needed.

Sixth, to combat irregular migration, the challenges for Malaysia and Thailand lie mainly in rendering the regular channels for low-skilled labour migration and recruitment attractive and effective by simplifying the process and reducing its costs. It is also necessary to allow migrant workers greater flexibility to change employment or employers. Otherwise, it will be difficult for migrant workers who have entered the country legally to retain their regular status. Moreover, it is important to strictly enforce the laws on migration and employment to discourage irregular migration.

Finally, in terms of migrant workers' rights, both countries have in place policies and legal frameworks to provide them with protection essentially similar to nationals. Further efforts should focus on extending the current legal coverage to sectors in which migrant workers are majorly employed, especially agriculture, fisheries, transport, and domestic work. The most challenging aspect is to ensure that protections available to migrant workers are effectively enforced in practice, despite their informal or irregular status. It is crucial to address legal and practical obstacles to migrants' legal redress against employers violating their rights, including, for instance, the removal of the linkage between migrants' legal status and access to justice.