

## Refugee management in Kenya and Malaysia: Towards a comprehensive legal framework

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### ABSTRACT

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At first glance, Kenya and Malaysia do not seem to have much in common. However, both aspire towards developed status: Malaysia has Wawasan 2020; Kenya has Vision 2030. Both countries are oases of relative calm located in volatile geopolitical regions and, as a result, both host significant refugee populations. What legal framework, if any, governs the registration, management, welfare and, ultimately resettlement and / or repatriation of refugees and asylum-seekers in Malaysia and Kenya? This paper will briefly touch upon customary international law norms and considerations, as well as consider the wider socio-legal landscapes of both countries, which have a shared English common law heritage. I will then give an overview of refugee-related statutes and / or case law in both countries, giving a particular emphasis to Malaysian case law developments. One particular point of comparison is that Kenya has signed the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, whereas Malaysia is party to neither agreement: I will examine to what extent signing the Convention and Protocol have aided refugee management in Kenya, and whether or not Malaysia (or indeed the majority of ASEAN countries) can continue to stay out of Convention and Protocol when 148 out of 193 United Nations member states are party to at least one of the two agreements. I will ultimately argue that there is scope for inter-jurisdiction learning with regards to Malaysia and Kenya, as well as scope to learn from international best practices. I will draw comparisons from both developing and developed economies where appropriate.

#### Keywords:

Refugee management, Kenya, Kenyan vision 2030, Malaysia, Malaysian wawasan 2020

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## 1. Introduction

Few would readily think of Malaysia and Kenya as having a lot in common. However, both are making significant strides towards achieving a developed country status, and both are relatively wealthy and peaceful compared to their neighbouring countries. As a consequence, Malaysia and Kenya both have high Human Development Index (HDI) scores for their respective geographic

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regions (UNDP, 2014). The HDI is primarily a measure of economic development which takes into account—among others, education and health indicators.

Admittedly, compared to each other, Malaysia and Kenya are at dramatically different stages of development. Malaysia's per capita GDP was US\$10,933.50 in 2014. Kenya's was just US\$1358.30 [42]. Nevertheless, Malaysia and Kenya both attract significant populations of Asylum Seekers and Refugees (ASR), as well as considerable numbers of economic migrants (though separating the two can be difficult in practice). Simply put, Malaysia and Kenya are both better off than many of their neighbours in terms of economic development and political stability. They are in a sense, in the same boat.

The latest available figures indicate Malaysia hosts about 150,000 registered ASRs, whereas Kenya hosts about 650,000 registered ASRs [36]. The highest ASR-sending country for Malaysia is Myanmar [36], with many Myanmar-origin ASRs entering Malaysia irregularly with the help of human smugglers [22]. In Kenya, the highest ASR-sending country is Somalia [36].

However, the way ASRs are treated in Kenya and Malaysia vary greatly. Kenya enacted the Refugee Act 2006, directly incorporating international law norms, humanising the treatment of ASRs in Kenya, and granting substantive rights and liberties. In contrast, ASRs in Malaysia exist in a 'liminal' space; there is a legislative vacuum in the sense that there is no specific legislative framework regulating the reception, registration, treatment, repatriation, naturalisation and/or resettlement of ASRs [11].

In this paper, I will outline international refugee law briefly before analysing the domestic refugee law environment in Malaysia and Kenya, and suggesting how the protection of environments in the two countries can be improved.

My argument has three aspects:

- Kenya has a clear legislative framework which is not always respected. In contrast, Malaysia is developing some sort of legislative framework through the judiciary system, though large gaps remain.
- Kenya has a comprehensive welfare net for ASRs, though this is hampered by resource constraints. In Malaysia there is minimal social support, however this may be changing.
- Even if Kenya's implementation of its refugee policies is imperfect, there is a comprehensive legal framework supported by international law. If Malaysia can adopt Kenya's refugee legislation and combine it with more resources and stronger institutions, a strong Malaysian or even regional ASR strategy could develop.

## 2. International Law: Position and Influence

International refugee law is primarily governed by **the 1951 Convention relating to the Status of Refugees** and the **1967 Protocol**. A total of 148 countries have acceded to either Convention or the Protocol or both. Kenya has acceded to both, whereas Malaysia has acceded to neither [36]. The Convention provided for state rights and obligations with respect to refugees in post-World War II Europe. The Protocol extended its application in space and time, giving the Convention its modern universal applicability.

## 2.1 Definition of Refugee

The Convention established the globally-accepted definition of the term 'refugee' as being an individual who:

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (Article 2, 1951 Convention Relating to the Status of Refugees)

## 2.2 Rights of Refugees

The 1951 Convention further obliges state parties to grant various rights to refugees, including:

- The right not to be forcibly returned to their country of origin (Article 32)
- The right not to be prosecuted for illegal entry into the country of refuge (Article 31)
- Economic rights, including the right to seek wage-earning employment (Article 17)
- The right to subsidised or free public education (Article 21)
- The right to housing on terms made available to citizens (Article 22)

## 2.3 Applicability to Malaysia

Though Malaysia has not signed either the 1951 Convention or the 1967 Protocol, these two documents still govern how refugees have been treated in Malaysia through the operation of customary international law. Essentially, customary international law consists of the longstanding shared practices of the international community, which have become normative due to a mixture of moral obligation and a desire by countries to be seen as respecting the international status quo. These give rise to some internalised sense of legal compunction [18]. The terms of the Convention have become so well-established that they therefore form the basis of customary international refugee law, which applies to all countries. Granted, customary international law is often more observed in the breach (one only needs to look at the US and the Iraq War). Further, customary international law often appears to be more like politics than "actual" law [9]. Nevertheless, the Convention should minimally be seen as indicative of how refugees *ought* to be treated in Malaysia.

## 2.4 Expanded Definition

Refugee status can be defined more expansively too. Such a definition would include flight from generalised violence and instability. This expanded definition has been heralded as 'the most influential conceptual standard of refugee status apart from the [1951] Convention itself' [10]. This expanded definition is incorporated into Section 3(2) of Kenya's Refugee Act 2006, which creates the status of *prima facie* refugee. The Kenyan *prima facie* refugee definition is based on Article 1(2) of the **1969 African Union Convention Governing Specific Aspects of Refugee Problems in Africa**, which Kenya has ratified.

## 2.5 Additional International Instruments

Other international instruments also touch on the status of refugees. These include Article 14 of the **1948 Universal Declaration of Human Rights**, and Article 22 of the **1989 Convention on the Rights of the Child** [14]. Malaysia and Kenya are parties to both agreements.

## 3. The Socio-Legal Environment in Kenya and Malaysia

Both Kenya and Malaysia comprise former British colonies and hence have Westminster-modelled governments, and are common law jurisdictions. Both are constitutional democracies (albeit to differing degrees in practice), and both have diverse populations in terms of ethnic and religious composition.

Among other things, being common law jurisdictions means that Malaysia and Kenya have similar judicial structures, and that decisions of UK and other common-law jurisdiction courts remain persuasive in terms of legal reasoning. Further, Commonwealth states are said to have more outward-looking attitudes generally and legal systems specifically [19].

Despite this promising outward appearance, Kenya and Malaysia struggle with (actual or perceived) corruption. Kenya has been making positive strides in tackling corruption but a lack of judicial independence remains a concern [13]. Similarly, the Malaysian Anti-Corruption Commission has been more effective than anticipated in tackling corruption [8], but observers generally have not seen the Malaysian judiciary as being fully independent from the executive branch of government since the abrupt dismissal of certain Malaysian Supreme Court judges in the 1980s [24].

Yet another commonality is, unfortunately, a history of inter-ethnic discord. In Kenya, this was initially caused by the colonial-era 'divide and rule' tactics [30]. In Malaysia, this factor is partly true too but has largely been accentuated by post-independence communal politics [8]. It is therefore against this backdrop that policies are made and laws enacted. Kenya and Malaysia face unique challenges which must be understood within their particular national contexts. However, the two countries have enough in common to make cross-jurisdictional comparisons both meaningful and relevant in the sense that the lessons learnt from refugee management in Kenya can be applied in Malaysia, and potentially vice versa.

## 4. Refugee Law in Malaysia and Kenya: A Thematic Analysis

As mentioned, Kenya enacted the Refugee Act 2006, creating a broad and liberal legislative framework, albeit one which is applied inconsistently in reality [41]. In contrast, given that Malaysia has not signed the main international agreement pertaining to refugees and appears not to have any domestic legislation pertaining to ASR management, it is natural to ask if *any* ASR management framework exists at all.

### 4.1 The Right to Have Rights: Articles 31 and 32 of the Convention

Article 31 of the 1951 Convention is the right of ASRs not to be prosecuted for illegal entry into the country of asylum. Article 32 is the right to non-refoulement, or the right not to be deported to a country where they may face persecution. Taken together, these rights (whether legal or merely notionally normative) give ASRs the right to have rights. Without these two provisions, ASRs can be jailed and deported, and therefore denied refugee status in any meaningful sense. With these

rights, ASRs are able to remain in a country where they are (relatively) safe and will not be persecuted.

## 5. Kenya

### 5.1 Legal Position

Kenya has enacted a legislation which defines refugee status in line with international law norms, and grants ASRs the right to remain in Kenya for as long as they are in need of international protection. However, the implementation of the law is flawed, particularly in light of police abuses, and the reluctance to use *prima facie* recognition.

Article 31 of the 1951 Convention is given effect by Section 13 of the Kenyan Refugee Act 2006:

Notwithstanding the provisions of the Immigration Act or the Aliens Restriction Act, no proceedings shall be instituted against any person ...in respect of his unlawful presence within Kenya –

- (a) If such a person has made a bona fide application ...for recognition as a refugee...; or
- (b) If such person has become a refugee

Article 32 is given effect by Section 18 of the Act:

No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country ... if, as a result ... such person is compelled to return to or remain in a country where –

- (a) The person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or
- (b) The person's life, physical integrity or liberty would be threatened on account of external aggression, occupation foreign domination or events seriously disturbing public order in part of the whole of that country.

Based on the Act, no ASR could ever be deported as long as s/he remains as ASR.

### 5.2 Application

Generally, Kenya has been praised for its generosity in allowing ASRs to live there. The Act appears 'very progressive' but 'many, if not most, of the Act's provisions have not been implemented' [41]. Further, there is little law cases on how the Act is applied in practice.

#### 5.2.1 *Prima facie* refugees

The rights from Articles 31 and 32 are not always respected for *prima facie* refugees. This is because Kenya has been wary of applying the extended definition broadly for fear of opening the floodgates to even more refugees [41]. As such, only Somali and (to a lesser extent) Dafuri refugees have benefitted from the African Union Convention and Refugee Act provision of *prima facie* refugee status. Hence, other individuals who may be deserving of *prima facie* refugee status may be denied refugee status and therefore be subjected to deportation; a breach of international law.

Cases of this occurring in Kenya have not been recorded, though this is known to have occurred in South Africa where a similar legal regime applies. There, asylum-seekers fleeing from generalised violence had their applications rejected as they did not show that they faced persecution above and beyond “normal” inter-clan warfare [41]. In this regard, the correct application of the African Union Convention is reflected in Benin’s case law. In *Decision DCC 14-154 du 19 Août 2014*, refugee status was said to be potentially available to anyone ‘fleeing from a socio-political crisis’ (own translation).

### 5.2.2 Police abuses

However, in Kenya, as with elsewhere in Africa, the gap between law and practice can be wide [26]. ASRs may be subjected to police brutality and arbitrary detention. Thanks to the demonisation of Somali ASRs by certain Kenyan politicians and due to the closure of the Somalia-Kenya border, Kenyan police take advantage of Somali ASRs’ illegal entry into Kenya, their natural vulnerability, and a political environment which is generally insensitive to the needs of ASRs by forcing (Somali) ASRs to pay bribes to proceed from the border into Kenya proper. When they are unable to pay the bribe, they may be thrown into jail without charge, or charged for trumped-up public disorder charges. Female ASRs may be subjected to rape too [29]. Though ASRs have the right not to be prosecuted for illegal entry into Kenya, they are essentially persecuted by bribe-seeking policemen who take advantage of their relative weakness.

Indeed, in practice, Article 32 is not always respected either. For example, in 1996, there was a reported incident of 1300 Somali refugees being forced to return to Somalia by Kenyan police at gunpoint [26]. Though the situation has significantly improved since then, policemen have been known to forcibly return Somali ASRs to Somalia when they were not able to pay bribes. Furthermore, Kenya’s repeated attempts to enforce an encampment policy could amount to indirect refoulement by creating a hostile environment which compels ASRs to leave Kenya, and hence contravening the Kenyan constitution and international law per *Kituo Cha Sheria and Others v Attorney-General and Others* Petition No 19 of 2013 [2013] eKLR.

## 6. Malaysia

In contrast, Malaysia has no overarching legal framework for refugees. However, a certain level of *de facto* and *de jure* recognition and policy is emerging.

Articles 31 and 32 are not fully upheld by Malaysian law. Unlike Kenya, where there is minimally legislative clarity, the situation in Malaysia is one of infinite shades of grey. A study of the Malaysian **Immigration Act 1959/1963** is instructive.

The Immigration Act dates back to the creation of Malaysia as a four-nation federation (Malaya, Sabah, Sarawak and, formerly, Singapore) and regulates entry and exit from Malaysia, as well as internal movement between West Malaysia (Malaya) and East Malaysia (Sabah and Sarawak). The Act is supplemented by the **Immigration Regulations 1963**, a form of delegated legislation. Neither document has ever been comprehensively reviewed or revised, as evinced by Section 1(2) of the Regulations that still says, “In these Regulations ... ‘Malaya’ includes Singapore”. Singapore left Malaysia in 1965.

Partly because it has never been reviewed, the Act and Regulations contain clauses which can be profoundly harsh towards ASRs. Furthermore, the Act restricts court access of the accused. Access to courts is a fundamental requisite of the rule of law and democracy, whether defined formally [27] or substantively [5].

## 6.1 ASRs Liable for Immigration-Related Offences

I will now trace what will happen to an ASR charged under the Immigration Act from the time s/he is arrested until the time s/he is possibly deported.

### 6.1.1 Articles 31 and 32 ignored

As Malaysia lacks any form of refugee-related regulation, ASRs are often liable to be found guilty of immigration-related offences, and may hence be subjected to deportation orders. Section 6(1)C of the Act simply reads, “No person other than a citizen shall enter Malaysia unless he is in possession of a valid Pass lawfully issued to him to enter Malaysia”. No exception is made for ASRs and the Malaysian government does not currently issue Passes to ASRs, although some Myanmar Rohingya ASRs had formerly received special IMM13 discretionary passes from the Malaysian government, temporarily legalising their presence in Malaysia.

### 6.1.2 Extended remand

An ASR—as a non-Malaysian arrested for an immigration-related offence—may be kept in remand for up to 14 days rather than 24 hours, which is the norm stipulated in Article 5(4) of the **Federal Constitution**. Though 14 days may not be a long time in absolute terms, it is hard to see why immigration-related offences require a longer remand period as compared to other criminal offences.

Given that this exception to an otherwise fundamental constitutional guarantee only applies to non-citizens, one would be hard-pressed to *not* come to the conclusion that the foreigner, already potentially overwhelmed by the judicial process because of a lack of knowledge of Malay and/or English, is being marginalised simply because s/he can be marginalised. This contravenes the spirit, if not necessarily, the letter of the law as reflected in Article 8(1) of the Federal Constitution, which declares, ‘All persons are equal before the law’.

### 6.1.3 Charges may be dropped

In practice, the ASR may be fortunate enough to have charges against him/her dropped by the prosecution on discretionary, humanitarian grounds. An example of this would be *PP v Mohd Rafik bin Mohd Kasim Ali and Ors* [2015] (unreported), which I watched from the public gallery. In that case, when the accused was asked how he pleaded, he told Magistrate Zura Shazwin binti Rahman that he was a UNHCR-recognised refugee. The charges were ultimately withdrawn and the ASR released a week later. This is a relatively common occurrence [11], but it is still common for ASRs to be found guilty under Section 6(1)C, necessitating UNHCR’s negotiation with the Federal Government for the release of such ASRs from Immigration Detention Centres (IDCs). The Federal Government is not compelled to release ASRs convicted under the Immigration Act even after they have served their sentences.

### 6.1.4 Lighter sentencing

If charges are not dropped, the ASR will be convicted under the Act. However, s/he will probably be “lucky” enough to receive a lighter sentence. A precedent was set in *Tun Naing Oo v PP* [2009] 6 CLJ 490. In that case, an (unregistered) asylum-seeker who was awaiting the UNHCR

refugee status determination had been charged under Section 6(1)C of the Immigration Act, and had been sentenced to 100 days' imprisonment and two strokes of whipping. In his judgement, Yeoh Wee Siam JC set aside the sentence of whipping and said, 'asylum-seekers and refugees, if they have not committed acts of violence or brutality, or are habitual offenders, or have threatened our public order, should not be punished with whipping'.

However, though Mr Tun Naing Oo escaped whipping, he was still imprisoned for 100 days. Furthermore, whipping may still be imposed for 'habitual offenders', meaning an ASR who is forced by fate to live in Malaysia for an extended period of time could be arrested, charged and convicted under the Act multiple times and thus be regarded as a habitual offender who would be liable for whipping.

### 6.1.2 Special provisions for children

If the ASR charged under the Act (or if charged for any other offence) happens to be a child, UNHCR may ask the judge for leniency on his/her behalf (Malaysia's age of criminal responsibility is 10 as per Section 82 of the **Malaysian Penal Code**).

Under SS 12(3)(b), (c), 90(7) and (11) of the **Child Act 2001**, someone who is 'directly concerned' for a child, or is otherwise a 'responsible person' for a minor who is found guilty of a criminal offence may appear before the court to offer a speech in mitigation. In *Iskandar Abdul Hamid v PP* [2005] 6 CLJ 505, Abdul Kadir Musa J held that UNHCR officers are 'certainly' directly concerned with criminal cases involving refugee children. Indeed, Abdul Kadir Musa J commented that the need for a UNHCR officer's involvement in the case is particularly pressing because 'Iskandar falls within the ambit of "refugee status" by virtue of the "[1989] Convention of the Rights of the Child"... [to which] Malaysia is one of the signatories'.

Hence, there is judicial recognition of refugee status having legal meaning in Malaysia, notwithstanding Malaysia's dualist system where international agreements are not automatically binding as a matter of domestic law, as seen in *Subramaniam Subakaran v PP* [2007] 1 CLJ 470. It is further noteworthy how acceding to an international instrument like the 1989 Convention materially improves (some) aspects of the Malaysian ASR protection environment.

### 6.1.2 Minimal judicial oversight

The ASR, having now served his/her sentence will not be automatically freed. The Act is additionally harsh towards ASRs (and indeed any individual charged for immigration-related offences generally) in that it precludes oversight of the actions of immigration officials. This is particularly significant as immigration officials may issue deportation orders against ASRs convicted under the Act. Such an order would typically be made against one who has completed his/her immigration-related sentence, and one who is subjected to a deportation order can be held in an IDC indefinitely [11]. IDCs are not technically prisons but ASRs are nevertheless deprived of their liberty.

An individual subjected to a deportation order cannot appeal to either the Minister of Home Affairs or Director General for Immigration as per Section 59 of the Act. Section 59A(1) further states, 'There shall be no judicial review in any court of any act done... except in regard to any question relating to compliance with any procedural requirement...'. This means even illogical, unjustifiable decisions taken by an immigration officer cannot be declared *ultra vires*, or illegal, as per the common law 'unreasonableness' doctrine developed in *Associated Provincial Picture Houses*



*Ltd v Wednesbury Corporation* [1948] 1 KB 223 which provides that an official's decision may be set aside if it is "so unreasonable that no reasonable official could have taken it".

Malaysia's Federal Court had initially adopted the *Anisminic v Foreign Corporation Commission* [1969] 2 AC (HL) position on ouster clauses, as reflected in *Syarikat Kenderaan Melayu Kesatuan Bhd v Transport Workers' Union* [1991] 2 MLJ 317 where Gopal Sri Ram JCA expounded:

An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law.

However, this willingness of the courts to protect its jurisdiction over judicial review in the face of (potentially oppressive) ouster clauses has been eroded. Mohamad Dzaiddin FCJ in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan and Anor Appeal* [2002] 4 CLJ 105, considered Section 59A of the Immigration Act 1963. He took an approach which was more submissive to Parliament, saying ouster clauses must be respected, and that overturning validly-delegated discretion on the 'amorphous' grounds of 'substantive fairness' would therefore be impermissible.

As such, Malaysian courts currently will refuse to review immigration-related decisions of the Executive, bearing in mind that judicial review is much less searching than an actual appeal, which ASRs are not automatically entitled to. Further taking into account the wide powers given to immigration officials under the Act and the various restrictions potentially placed on ASRs, the potential suffering the Act causes ASRs needs no elaboration.

#### 6.1.7 No back door for articles 31 and 32

If an ASR is fortunate enough to be either well-educated or represented by a lawyer, s/he may think of invoking the **Human Rights Commission of Malaysia Act 1999**. The Human Rights Commission of Malaysia Act stipulates that 'regard shall be had' of the Universal Declaration of Human Rights 1948 in the interpretation of Malaysian law as long as such an interpretation is consistent with the Malaysian constitution. Such an approach is not dissimilar to that of the UK's **Human Rights Act 1998**, which holds that UK courts should interpret all law in a way which is compatible with the **European Convention on Human Rights** 'wherever possible'.

The ambit of the 1999 Act would therefore include Act 31 of the 1948 Declaration:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on a refugee who, coming directly from a territory where their life or freedom was threatened [...], enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Unfortunately, this has been given limited effect in the Malaysian context. In an Immigration Act revision hearing, Mohd Sofian Abd Razak JC per *Subramaniam Subakaran v PP* [2007] held that 'regard' merely meant that the Declaration had to be considered: it did not mean that the Declaration was 'legally binding on the Malaysian courts'. Mohd Sofian JC acknowledged that Malaysia had an 'implicit' obligation at international law to 'not impose penalties on account of their illegal entry' on ASRs, though he refused the application for revision on the grounds that the applicant had not presented himself 'without delay to the (Malaysian) authorities and show[n] good

cause for his illegal entry'. This is problematic as the applicant was a registered UNHCR asylum-seeker, and the Malaysian authorities do not have any generally applicable system of refugee registration. Understandably, the courts are hesitant to create refugee laws through the back door, but this awareness and regard towards international law norms (on the part of Mohd Sofian JC) is a helpful initial development.

## 6.2 Evaluation

Refugees have the right to not be charged for illegal entry into their country of refuge at international law. Evidently, this right has not been realised in Malaysia yet. There are some promising signs when it comes to the dropping of charges and lighter sentencing, particularly when seen in a comparative context. Section 15(3)(b) of Singapore's **Immigration Act 1959/1963**, which is based on the Malaysian Act, makes caning (whipping) mandatory for any man under the age of 50 who has been found guilty of staying in Singapore illegally for more than 90 days.

However, the fact that ASRs can be charged for immigration-related offences at all is problematic, particularly where an ASR may be deprived of his liberty and deported at the unreviewable discretion of an immigration officer. In particular, there are so many ways an immigration case can end for an ASR: charges may be dropped, s/he may be freed by UNHCR from an IDC, or s/he may even be deported—it appears to depend more on luck than anything else. This lack of legal certainty has rule-of-law implications.

Thus, Malaysia does not offer recognition or protection to ASRs. This is being challenged by judicial precedent and practice, though this is, sadly, constrained by the narrow space given to the Malaysian judiciary by the legislature in which it can legitimately act.

## 6.3 Economic Rights: Article 17 of the Convention

In this context, this refers to the right to work. However, broadly defined, the right to seek gainful employment arguably implies the right to some level of income support for those who are not able to seek gainful employment, such as the elderly or infirm. Kenya performs better on paper, but Malaysia may perform better in reality. The two countries could learn from each other's strengths and weaknesses in this regard.

## 6.4 Learning from Each Other

### 6.4.1 Legal rights in Kenya

#### 6.4.1.1 Legal position

Section 16(1)(a) of the Refugee Act declares that all recognised refugees 'shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party'. This would include the right to work, which is contained in the 1951 Convention. In line with international law, Section 16(4) gives Kenya the right to subject ASRs to the same labour market restrictions that apply to all non-citizens.

#### 6.4.1.2 Reality

The right to work is hampered by a semi-official encampment policy. Kenya attempted to force refugees to settle in camps in 2013, but the ministerial directive was quashed per *Kituo Cha Sheria*

and *Ors v Attorney-General and Ors* [2013] as being unconstitutional. However, Kenya coerces ASRs to settle in camps. ASRs cannot receive humanitarian assistance outside of camps, and face a more stringent and drawn-out refugee status determination process should they settle outside camps, leaving them vulnerable to police harassment in the interim period as undocumented persons [28]. These camps are overcrowded and located in poor, remote parts of Kenya, leaving ASRs with limited access to job opportunities.

#### 6.4.2 *Legal rights in Malaysia*

##### 6.4.2.1 *No right to work*

ASRs are technically not allowed to work in Malaysia (let alone be in Malaysia). Again, ASRs are penalised under the Immigration Act 1963. Section 55B(1) of the Act makes it an offence to hire anyone other than a citizen, a holder of an Entry Permit or one who is 'in possession of a valid Pass', restricting ASRs to casual work in the informal sector.

##### 6.4.2.2 *Reality*

However, the reality of their situation is given some level of both de facto and de jure recognition.

ASRs are entitled to appear before the Malaysian Industrial Court as claimants. In *Ali Salih Khalaf v Taj Mahal Hotel* [2014] 2 MELR 194, a Kuala Lumpur Industrial Court case, YA Dato' Mary Shakila G Azariah held that refugees were entitled to compensation under the **Industrial Relations Act 1967** when unfairly dismissed. This is because the **Employment Act 1955** defines a 'workman' as 'any person ...employed by an employer under a contract of employment', where employment is a 'question of mixed law and fact'.

Indeed, this case is particularly noteworthy as Dato' Mary, the Chairman of the Industrial Court, even postulates that all persons have a constitutional right to seek gainful employment, regardless of immigration status. Encouragingly, Dato' Mary even said '[t]he Court agrees with the sentiments that no persons no human being should ever be illegal', reflecting an incrementally humane ASR protection environment in Malaysia.

In conclusion, Kenya grants economic rights to ASRs but these are hard to exercise in practice due to economic conditions around the main Kenyan refugee camps. Richer Malaysia offers some level of legal protection but would do well to emulate the Kenyan legislation. Further, given how Malaysian ASRs are already integrated into the local labour market as a matter of fact, authorising labour market participation could benefit Malaysia economically. Regulated employment contracts are good for both companies and workers.

##### 6.4.3 *Social rights: Articles 21 and 22 of the convention*

Article 21 refers to ASRs' right to free or subsidised public education. Article 22 refers to ASRs right to housing on the same basis as citizens of the country of asylum. Again, Kenya has a comprehensive legal framework, whereas Malaysia does not.

##### 6.4.3.1 *Kenya's legal position*

Per Section 16(1) of the Refugee Act, ASRs in Kenya are entitled to the 1951 Convention rights, including the right to education and housing.

#### 6.4.3.1.1 *Practical difficulties – education*

Though the right to education is generally respected, resource shortages mean that many schools in camps are understaffed and drop-out rates are high [17]. Conditions may not be ideal but a government-provided basic education is available to any ASR child who wants it. Furthermore, Kenya's encampment policies notwithstanding, ASRs can get "movement passes" to pursue higher education in Nairobi [28].

#### 6.4.3.1.2 *Housing – only in camps*

The right to housing, however, is not guaranteed on the same basis as citizens. ASRs who settle outside of camps receive no financial support [28]. Those who live in camps will be assigned plots of land, or more commonly asked to share plots with other families due to space constraints [28]. Such provisions are clearly inadequate, though perhaps understandable given Kenya's own resource limitations.

#### 6.4.3.3 *The Malaysian situation*

##### 6.4.3.3.1 *No right to education*

Refugee children cannot attend Malaysian schools [23]. This is despite the fact that Malaysia has signed the Convention on the Rights of the Child, which guarantees all children the right to at least primary education. Some ASR children have been permitted to attend government schools on an informal basis (i.e. not officially on the register and not permitted to take national examinations) but the majority of ASR children are educated at small schools run by their respective community self-help groups. Unsurprisingly, such schools often lack facilities and funding.

##### 6.4.3.3.2 *No right to housing*

The Malaysian government generally does not provide ASRs any housing benefits like subsidised accommodation. Indeed, Immigration Act 1963 creates a stumbling block for ASRs who wish to find accommodation. Section 55E(1) of the Act states: 'No occupier shall permit any illegal immigrant to enter or remain at any premises'. Hence, many ASRs are compelled to live in anonymous but cramped and dilapidated flats in urban areas. They do not enjoy either contractual or statutory protection against eviction as they can only rent accommodation on a "no questions asked", cash-only basis [11]. Clearly, ASRs' international law right to housing has not been realised in Malaysia.

##### 6.4.3.3.3 *Subsidised Healthcare*

Contrastingly, the Malaysian government does give recognised refugees a 50.0% discount for treatment at government hospitals [11]. This is perhaps reflective of the fact that the Malaysian government does want to act responsibly towards ASRs and signals that in addition to a nascent legal protection framework, a (fragile) welfare support network may be developing.

Though Kenyan conditions may not be ideal, Malaysia could learn from Kenya, provide education—legal or moral duty. Indeed, Malaysia has a legal and moral duty to provide this. An educated ASR population would be better able to live alongside Malaysians, thus benefitting Malaysia too.

## 7. Analysis, Proposals and Conclusion

### 7.1 Inter-Jurisdiction Comparison

At the risk of oversimplification, the separation of powers in Kenya and Malaysia has led to a curious balancing game. On one hand, seemingly-sound laws are being ignored or flouted outright in Kenya while Malaysia lacks legal framework to protect ASRs. On the other hand, the judiciary attempts to make up for the shortfalls of the executive and legislative branches of government by interpreting laws liberally, such as *Kituo Cha Sheria* in Kenya where encampment was seen as unconstitutional, being in violation of Article 28 of the **Kenyan Constitution**, the Right to Dignity, or *Tun Naing Oo* in Malaysia where a precedent was set to not normally punish ASRs with whipping under the Immigration Act.

Ultimately, to its credit, Kenya has a comprehensive legal framework. If a less developed country can do this, relatively richer Malaysia can do so too.

### 7.2 What Kenya Can Learn from Malaysia

In Kenya, sometimes shocking police abuses, a de facto encampment policy and generally a lack of funding make for a harsh protection environment. In contrast, ASRs in Malaysia are left to their own devices but no government support subject to arrest for immigration-related charges at any time. Nevertheless, refugees in Malaysia have been able to integrate into the local labour market, which benefits both ASRs and employers, and they generally do not face (as much) police brutality as ASRs in Kenya thanks to a stronger enforcement of the rule-of-law. Strong moral and political leadership would be necessary.

### 7.3 What Malaysia Can Learn from Kenya

The key difference between ASR protection in Kenya and Malaysia, however, is that ASRs in Kenya are at least notionally protected by the full weight of domestic law and international law. *Kituo Cha Sheria* made frequent reference to international law, applying concepts from the Universal Declaration of Human Rights, the African Union Convention and the 1951 Convention. Malaysian case laws refer to international law norms too. However, these are not seen as binding per *Subramaniam Subakaran v PP*. Indeed, the Malaysian government maintains that it is not bound by even customary international law, and may deport foreign nationals to their country of origin even if they would face persecution there [25].

### 7.4 More than Signing Conventions

If one were to look at Kenya, the reason why international law is so important is that Kenya has signed multiple international instruments on the status of refugees and these Conventions have been incorporated into domestic law. Malaysia did not sign the 1951 Convention and 1967 Protocol. However, signing a Convention alone will not help—the Kenyan protection environment is by no means perfect. Furthermore, without an endogenous will to adhere to international law; rather than a superficial desire to be seen as ‘doing the right thing’, the terms of any international agreement may not be genuinely respected. From this angle, one can say the relative success of refugee management in Kenya—which is not as economically developed as Malaysia—is due to the fact that the African Union Convention developed naturally through a need to respond to rapid decolonisation in Africa in the 1960s [4]. The signatories therefore feel a sense of ‘ownership’ over

the agreement. Furthermore, being a locally developed instrument, it does not face the charge of being some kind of neo-colonial ploy.

### 7.5 *Transferability to Malaysia*

Certainly, if attitudes change in Malaysia and some sort of meaningful political debate about ASRs in Malaysia develop, then some sort of domestic legal framework regulating ASRs could develop. However, the true strength of ASR legislation in Kenya is that it is backed up by international law.

### 7.6 *Main Challenge*

The Association of Southeast Asian Nations (ASEAN)—the regional body most analogous to the African Union—is currently both unwilling and unable to implement such broad-based, liberal framework. ASEAN has historically put trade before human rights. ASEAN is willing to engage with human rights but only on its own terms and perhaps, only when it is convenient. ASEAN took a strong stand against Vietnam's invasion of Cambodia in 1979 when regional stability was threatened but was happy to admit Myanmar as a member in 1997. Soon after Myanmar's admission to ASEAN, many Singaporean companies invested there [32]. ASEAN prefers a non-confrontational approach, though a parallel model of 'flexible engagement' has emerged too [7].

In contrast, the African Union is more willing and able to enforce agreements made under its auspices such as through the African Court of Human Rights and Peoples' Rights, which enforces the **1981 African Charter on Human and Peoples' Rights** [1].

However, the ASEAN situation is slowly changing. The **2012 ASEAN Human Rights Declaration** (AHRD) was a significant milestone. More importantly, it adopts many provisions of the Universal Declaration of Human Rights directly. However, it is seen as relatively weak. One academic commentator even said, 'Human rights in ASEAN did not take a step forward with the AHRD but rather was part and parcel of ...trying to stifle human rights' [15]. This is perhaps unfair, especially given ASEAN's clear new focus on human rights within the context of international conventions.

In 2009, the ASEAN Intergovernmental Commission on Human Rights was established. As all 10 ASEAN countries have signed the **1979 Convention on the Elimination of all forms of Discrimination against Women** and the Convention on the Rights of the Child; the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children was established in 2010. Both bodies only have consultative, advisory powers but reflect growing 'bottom-up pressure' from the people of ASEAN [6]. Generally, ASEAN can be said to be making 'slow step-by-step' progress in valuing, promoting and enforcing human rights [21].

### 7.7 *Towards an ASEAN Framework*

Given such a background, one can still remain hopeful that an ASEAN refugee Convention and legal framework similar to that of the AU can develop in the foreseeable future. The global tide of refugee protection discourse is moving from one of state sovereignty to one of human rights [4]. It is natural that such arrangements take time. The Organisation for African Unity came into being in 1963 but the African Charter on Human and Peoples' Rights was only signed 18 years on [21]. Some kind of court to uphold any such ASEAN Convention is unlikely given ASEAN's distaste for confrontation and hence the adversarial court process [33], possibly limiting its usefulness. Nevertheless, as the flow of ASRs from Myanmar to the rest of ASEAN mounts, and increasingly

educated and well-off ASEAN citizens become more politically engaged, the need and desire for a proper regional refugee framework will become even more pressing. Should an ASEAN framework be discussed, Malaysia would be well-poised to lead such discussions, having hosted so many ASRs. Malaysia would have some level of moral leadership in comparison to the richer ASEAN states of Brunei and Singapore who have not accepted any ASRs on even a temporary basis in recent years. Perhaps, the embryonic protection framework which has been developing in Malaysia can mature into a fully-developed regional model of good governance and fairness.

In conclusion, Malaysia ought to learn from Kenya to author a proper refugee management framework, even though the notion of an ASEAN human rights culture is still very much developing.

## References

- [1] African Court of Human and Peoples' Rights. (2015, September 28). African Court in Brief. Retrieved from African Court of Human and Peoples' Rights, available online at: <http://www.african-court.org/en/index.php/about-the-court/brief-history>
- [2] Allan, Trevor RS. *Law, liberty, and justice: the legal foundations of British constitutionalism*. Oxford University Press, USA, 1993.
- [3] Betts, Alexander. *Survival migration: Failed governance and the crisis of displacement*. Cornell University Press, 2013.
- [4] Barbour, Brian, and Brian Gorlick. "Embracing the 'responsibility to protect': A repertoire of measures including asylum for potential victims." *International Journal of Refugee Law* 20, no. 4 (2008): 533-566.
- [5] Bingham, Lord. "The rule of law." *The Cambridge Law Journal* (2007): 67-85.
- [6] Ciorciari, John D. "Institutionalizing human rights in Southeast Asia." *Human Rights Quarterly* 34, no. 3 (2012): 695-725.
- [7] Haacke, Jürgen. "The concept of flexible engagement and the practice of enhanced interaction: intramural challenges to the 'ASEAN way'." *The Pacific Review* 12, no. 4 (1999): 581-611.
- [8] Harding, Andrew. *The constitution of Malaysia: a contextual analysis*. Bloomsbury Publishing, 2012.
- [9] Hart, H. L. A. "The Concept of Law (Oxford: Oxford University Press, 1961), Lon L. Fuller, The Morality of Law (New Haven: Yale University Press, 1964), HLA Hart, 'Lon L. Fuller: The Morality of Law', (1965)." *Harvard Law Review* 78: 1281.
- [10] Hathaway, James C. *The law of refugee status*. Vol. 104. Toronto: Butterworths, 1991.
- [11] Hoffstaedter, Gerhard. "Place-making: Chin refugees, citizenship and the state in Malaysia." *Citizenship Studies* 18, no. 8 (2014): 871-884.
- [12] Hoffstaedter, Gerhard. "Urban refugees and the UNHCR in Kuala Lumpur: Dependency, assistance and survival." (2015): 187-205.
- [13] Hope Sr, Kempe Ronald. "Tackling the corruption epidemic in Kenya: Toward a policy of more effective control." *The Journal of Social, Political, and Economic Studies* 38, no. 3 (2013): 287.
- [14] International Justice Resource Center. (2015, August 25). Asylum and the Rights of Refugees. Retrieved from International Justice Resource Center, available online at: <http://www.ijrcenter.org/refugee-law/>
- [15] Jones, William. "Universalizing Human Rights The ASEAN Way." *Journal of Social Sciences* 3, no. 3 (2014): 72.
- [16] Jules-Cesar Bofoka-Litstiongo v Ministere de l'Interieur, Decision DCC 14-154 (Cour Constitutionnelle August 19, 2014).
- [17] Kaburo, N. (2012, May 14). Over 165,000 Children Deprived of Education in Kenya's Refugee Camps. Xinhua 'Feature'.
- [18] Kadens, Emily, and Ernest A. Young. "How Customary is Customary International Law." *Wm. & Mary L. Rev.* 54 (2012): 885.
- [19] Kirby, Michael. "The Commonwealth of Nations and its Values—Bound to Disappoint? (2015)." *European Human Rights Law Review* 3: 223.
- [20] Letchamanan, Hema. "Myanmar's Rohingya Refugees in Malaysia: Education and the Way Forward." *Journal of International and Comparative Education (JICE)* (2013): 86-97.
- [21] Linton, Suzannah. "ASEAN states, their reservations to human rights treaties and the proposed ASEAN Commission on Women and Children." *Human Rights Quarterly* 30, no. 2 (2008): 436-493.
- [22] Mahtani, S. (2015, June 4). Myanmar Rejects Blame for Human-Trafficking Crisis, *Wall Street Journal*, available online at <http://www.wsj.com/articles/myanmar-rejects-blame-for-human-trafficking-crisis-1433410899>.

- [23] Mayberry, K. (2014, November 21). A Rough Journey for Refugees in Malaysia. Retrieved from *Al Jazeera*: <http://www.aljazeera.com/indepth/features/2014/11/rough-journey-refugees-malaysia-2014112011221805562.html>
- [24] Means, Gordon Paul. "Malaysian politics: the second generation." (1991): 14.
- [25] Adnan, Mohd Hamdan. "Refugee issues in Malaysia: the need for a proactive, human rights based solution." *Refugees and Refugee Policies in the Asia-Pacific Region* (2007): 12-18.
- [26] Okoth-Obbo, George. "Thirty years on: a legal review of the 1969 OAU Refugee Convention governing the Specific Aspects of Refugee Problems in Africa." *Refugee Survey Quarterly* 20, no. 1 (2001): 79.
- [27] Shanmugam, K. "The Rule of Law in Singapore." *Sing. J. Legal Stud.* (2012): 357.
- [28] Simpson, Gerry. *From horror to hopelessness: Kenya's forgotten Somali refugee crisis*. Human Rights Watch, 2009.
- [29] Simpson, Gerald, Meghan Rhoad, and Agnes Odhiambo. "Welcome to Kenya": Police Abuse of Somali Refugees. Human Rights Watch, 2010.
- [30] Southall, Aidan. "The illusion of tribe." *Journal of Asian and African Studies* 5, no. 1-2 (1970): 28-50.
- [31] The Economist. (2014, May 17). Getting in the Way. Retrieved from *The Economist*: <http://www.economist.com/news/asia/21602265-south-east-asia-finds-decorum-its-regional-club-rather-rudely-shattered-getting-way>
- [32] Thio, Li-ann. "Implementing human rights in ASEAN countries: Promises to keep and miles to go before I sleep." *Yale Hum. Rts. & Dev. LJ* 2 (1999): 1.
- [33] Li-ann, Thio. "Singapore Human Rights Practice and Legal Policy." *SACJL* 21 (2009): 326.
- [34] UNDP. (2014). *Sustaining Human Progress: Reducing Vulnerabilities*. Geneva: Human Development Report.
- [35] UNHCR. (2014, December). 2015 UNHCR country operations profile – Kenya. Retrieved from UNHCR: <http://www.unhcr.org/pages/49e483a16.html>
- [36] UNHCR. (2015). 2015 UNHCR Country Operations Profile – Kenya. Retrieved from The UN Refugee Agency: <http://www.unhcr.org/pages/49e483a16.html>
- [37] UNHCR. (2015). Figures at a Glance. Retrieved from The UN Refugee Agency: [http://www.unhcr.org/my/About\\_Us-@-Figures\\_At\\_A\\_Glance.aspx](http://www.unhcr.org/my/About_Us-@-Figures_At_A_Glance.aspx)
- [38] UNHCR. (2015). State Parties relating to the 1951 Convention on the Status of Refugees and the 1967 Protocol. Retrieved from United Nations High Commissioner for Refugees: <http://www.unhcr.org/3b73b0d63.html>
- [39] UNHCR. (2015). Statistics and Operational Data. Retrieved from The UN Refugee Agency: <http://www.unhcr.org/pages/49c3646c4d6.html>
- [40] United Nations Office of the Commissioner for Human Rights. (2015, September 26). View the Ratification Status by Country or by Treaty. Retrieved from United Nations Human Rights: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=157andLang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=157andLang=EN)
- [41] Wood, T. (2014). Expanding Protection in Africa? Case Studies in the Implementation of the 1969 African Refugees Convention's Expanded Refugee Definition, *International Journal of Refugee Law* 26(4): 555-80.
- [42] World Bank. (2015, September 28). GDP per Capita (Current US\$). Retrieved from World Bank: <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>



## TABLE OF LEGISLATION AND INTERNATIONAL AGREEMENTS

### KENYA

Kenyan Constitution 2010  
Refugee Act 2006

### MALAYSIA

Child Act 2001  
Employment Act 1955  
Federal Constitution 1957  
Human Rights Commission of Malaysia Act 1999  
Immigration Act 1959/1963 and Immigration Regulations 1963  
Industrial Relations Act 1967  
Penal Code 1936

### SINGAPORE

Immigration Act 1959/1963

### UNITED KINGDOM (UK)

Human Rights Act 1998

### AFRICAN UNION (AU)

1969 Convention Governing Specific Aspects of Refugee Problems in Africa

### ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN)

2012 ASEAN Human Rights Declaration

### COUNCIL OF EUROPE

1951 European Convention on Human Rights

### ORGANISATION FOR AFRICAN UNITY (OAU)

1981 African Charter on Human and Peoples' Rights

### UNITED NATIONS (UN)

1948 Universal Declaration of Human Rights  
1951 Convention relating to the Status of Refugees and the 1967 Protocol  
1979 Convention on the Elimination of all forms of Discrimination against Women  
1989 Convention on the Rights of the Child

## TABLE OF CASES

### BENIN

*Jules-Cesar Bofoka-Litstiongo v Ministere de l'Interieur*, Decision DCC 14-154 (Cour Constitutionnelle August 19, 2014).

### KENYA

*Kituo Cha Sheria and Others v Attorney-General and Others* Petition No 19 of 2013 [2013] eKLR

### MALAYSIA

*Ali Salih Khalaf v Taj Mahal Hotel* [2014] 2 MELR 194  
*Iskandar Abdul Hamid v PP* [2005] 6 CLJ 505  
*Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan and Anor* Appeal [2002] 4 CLJ 105  
*PP v Mohd Rafik bin Mohd Kasim Ali and Ors* [2015] (unreported)  
*Subramaniam Subakaran v PP* [2007] 1 CLJ 470  
*Syarikat Kenderaan Melayu Kesatuan Bhd v Transport Workers' Union* [1991] 2 MLJ 317  
*Tun Naing Oo v PP* [2009] 6 CLJ 490

UNITED KINGDOM

*Anisminic v Foreign Corporation Commission* [1969] 2 AC (HL)

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223