

LEGAL PROTECTION AND ADVOCACY FOR INDONESIAN MIGRANT WORKER

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Abstract

This paper aims to determine how the model of advocacy to solve the problem of migrant workers, and identifying any factor inhibiting the completion of troubled migrant workers in Malaysia especially who worked as a housemaid. The source of this paper obtained through observation, interviews with relevant parties as well as reviewing existing regulations on the protection of migrant workers. Advocacy for migrant workers who have problems with their employer in Malaysia is conducted by the Indonesian Embassy in the form of mediation between employers and migrant workers to achieve a solution and the restitution migrant workers, as well as providing assistance and legal services in case the problem is resolved by litigation. Indonesia has dispute settlement body of whole problem of migrant workers is under authority by BNP2TKI, through the crisis center. In addition, some NGOs such as Migrant Care play a major role in assisting migrant workers in obtaining their rights. Inhibiting factor in solving the problem of migrant workers in Malaysia are generally arising from the placement of migrant workers by PPTKIS that don't meet standards, a lack of understanding of migrant workers about their rights and obligations under the employment contract and the weakness of enforcement against PPTKIS. Law No. 39/2004 concerning The Placement and Protection of Indonesian Migrant Workers Overseas has not optimal in providing protection for migrant workers. It required an educated person and well known concerning an advocacy to prevent problems which repeated with the issue of migrant workers.

Keywords : *advocacy, legal protection, migrant worker.*

INTRODUCTION

The inability of the State of Indonesia providing employment for the population became the driving factor of overseas migration where employment wide open and able to be filled by manpower from Indonesia. Parallel with that motivation of workers choose to work abroad is the problem of poverty that shackles that encourage people troop to leave the country to seek a better life in another country. Migrant workers went to the Country of which typically has economy ratings average higher than in their country.

The laws of the State of Indonesia Year 1945 Article 27 paragraph (2) set the right of every citizen to obtain a job and a decent living for humanity. In addition, under Article 28 D Paragraph (1), everyone has the right to the recognition, protection and legal certainty and equal treatment before the law, as well as in paragraph (2) guarantee the right of every citizen of Indonesia to work and to receive the fair and proper treatment in labor relations. Furthermore, in Article 31 of Law No.13 of 2003 on Labor, regulated the rights of all workers to choose, obtain, or changed jobs and earn a decent income inside or outside the country. The job placement conducted under the principles of open, free, objective, and fair and equal basis without discrimination

Employment abroad stipulated in Law No. 39 / 2004 concerning the Placement and Protection of Indonesian Migrant Workers Overseas, which under the laws of the state shall guarantee and protect the rights of citizens who work both at home and abroad based on the principles of equality, democracy, social justice, equality and gender equality, anti-discrimination and anti-trafficking.

According to article 1 of Law No. 39 / 2004, hereinafter referred to Indonesian Migrant Worker (Tenaga Kerja Indonesia/TKI) is every Indonesian citizen eligible to work abroad in the employment relationship for a given period of time with pay. Through the Act is expected to migrant workers receive the protection and fulfillment of their rights in accordance legislation

Malaysia is one of the destination countries for Indonesian migrant workers (TKI) to work out a clump. The similarity of nation and the relative proximity of country as well as the hope of obtaining a large salary, be the driving factor for Indonesian citizens go to Malaysia. The migrant worker is "foreign exchange heroes" for the country. Data Center for Research and Information (Puslitfo) from National Agency for Placement and Protection of Indonesian Workers (BNP2TKI). BNP2TKI shows that remittances migrant workers throughout 2014 in the amount of USD 8.3 billion, equivalent to 1 percent of GDP in 2014, then 2015 is able to break the USD. 100 trillion, which reached \$ 8.6 million or equivalent to Rp. 119 trillion.

Although migrant worker give a great contribution to the country and is often referred to as foreign exchange heroes but in practice protection for overseas workers, especially women or maids who work in the domestic sector as a housekeeper very weak. Indonesian migrant worker pays the big role for the development of the Indonesian economy as well as for is human resources. While migrant worker contributes greatly to the economic development of Indonesia, with registered remittance accounting for more than USD 6 billion annually, they remain inadequately protected by current law and practices.

As has been recorded in the annals of migration that since the 1990s, women have become the majority of the number of migrant workers. That number continues to increase each year has reached more than 90%. The figure was confirmed by the data that is owned by several agencies both non-governmental organizations as well as government-owned national statistics which ultimately amount to a fact that in the last two decades.¹

As informal workers, female migrant workers who work in the domestic sector can not be classified in the definition of 'worker' under employment law in the State of destination. This means they do not get the same protection to formal workers. Other forms of abuse that often occurs in female migrant workers are often violated the breach of contract by the employer. Long working hours and excessive workloads are examples of cases that frequently arise from a breach of contract. Another case revolves around the issue of low wages, cuts in wages / dealer cost is too large, delayed payments to unpaid wages or salary savings system with a bank account can not be accessed by female migrant workers.

The wages received Indonesian migrant workers are relatively low because of the majority of them, particularly female migrant workers, are working in the informal economy. Because of the vulnerability of their position, meager wages they receive are not necessarily in full. Female migrant workers often do not receive wages according to their rights, even stopped before the contract expired due to various problems, such as fraud, violence, and others.

According to M.Fayyad, the problems that afflict the migrant worker occurred since the departure from Indonesia until his arrival overseas, covering four main issues, namely: 1). Patterns of Employment; The pattern of labor relations between workers and their employers are still built unilaterally by the employer without regard to labor rights and sound. Need to further strengthen the position of the workforce so that it has the same strength in contracts / employment agreements; 2). Right to Organize; The workers did not exercise its right to participate in the labor unions in the local country, so that if at any time there is a problem there is no support from the other; 3). Standard Minimum Wage; Average labor wage standards have not been following the local country and yet get the same rights to labor / workers in the country.4). Conflict; When there is a conflict with an

¹<http://titazee.wordpress.com/2011/03/11/CEDAW-and-embodiment-rights-migrant-workers-women-and-girls-victims-of-trafficking/> August 2016

employer, the average workforce does not have the strength to finish it legally through the courts or mediation of third parties.²

RESEARCH METHODOLOGY

This methodology was used in this research is Socio-Legal Research method. It means to examine the various policies and regulations of the placement and legal protection for Indonesian Migrant worker. The process is carried out with the identification and evaluation of various factors related the problems of Indonesian migrant worker in Malaysia. The data consist of primary and secondary. Primary data is empirical facts that were taken from Indonesian Embassy in Malaysia, the the Body of the Placement and Protection of Indonesian Migrant Worker (BNP2TKI) and the Migrant Care, the NGO's that concern on that issue. Interviews were conducted to the official of Indonesian Embassy of Malaysia, the board of BNP2TKI, and Migrant Care. A broad range of documents was used as secondary data, such as legislation, books, research results, and statistical data. Data obtained was compiled systematically and analyzed with descriptive evaluative and qualitative approach.

The protection of Indonesian Migrant Worker based on The Law No. 39/2004

At this time there are no instruments and national regulations that specifically regulate protection for domestic workers. Nevertheless, there are international legal instruments that are directly or indirectly related to domestic workers such as the Universal Declaration of Human Rights Article 1; Article 4; Article 23 paragraph (1), (2), (3) (4). Indonesia has ratified all eight ILO Convention of 1990 so that Indonesia has an obligation towards domestic workers based on standards of the ILO Convention.³

Protection of migrant workers is all the effort to protect the interests of prospective migrants / migrant workers in realizing the guarantee of fulfillment of their rights in accordance with the legislation, both before, during, and after work. According to Law No. 39 /2004, the protection for Indonesian migrant workers include : 1. The protection provided before / pre-placement :Protection of potential migrant workers on a pre placement include:a. Administrative protection; and b. Technical protection. Administrative protection as referred to: a. Fulfillment placement documents; b. Costing placement; and c. Determination of the conditions and terms of employment. Document placement must be owned by prospective migrant workers include: 1. National Identity Card, latest educational certificate, birth certificate, or certificate of birth recognition; 2. Certificates of competence of labor; 3. Health certificate is based on the results of psychological examination and medical examination; 4. Passports issued by the local Immigration Office; 5. Work visa; 6. Card Overseas Workers (KTKLN); and, 7. Other documents required in accordance with the provisions of the legislation. Technical protection includes: a. Socialization and dissemination of information; b. Improving the quality of prospective workers; c. The defense on the fulfillment of the rights of migrant workers; and d. Guidance and supervision.

The protection provided for / placement period, namely: Protection of migrant workers placement period given by the Country Representative of Indonesia abroad, migrant workers began arriving at the airport / port placement destination country, for work, to get back to the airport disembarkation Indonesia. Protection period of the placement of workers abroad include: a. Guidance and supervision; b. Assistance and consular protection; c. The provision of legal aid; d. The defense on the fulfillment of the rights of migrant workers; e. Protection and other assistance in accordance with the provisions of the legislation as well as international law and practice; and f. Diplomatic efforts.

The protection provided after placement / full-time placement i.e.: According to Article 26 of Law 39/2004, Protection of migrant workers after the placement is given in the form: a. Provision of facilities or facilities homecoming migrant workers; b. Giving efforts to protect migrant workers from possible actions of other parties who are not responsible for and can harm the return of migrant workers in the destination country, in the disembarkation, and on the way up to the area of origin; c. Facilitation handling insurance claims; d. Facilitating the return of migrant workers in the form of

²Nurhidayati, *Protection of Indonesian Migrant Workers in the Humanities Development*, Journal Vol.13 No. 3 December 2013, p.209

³Rahjanto, *HAM Journal* Volume 2, No., December 2, 2010, p. 112

transportation services, financial services, and maintenance services of goods; e. Monitoring the return of migrant workers to the territory of origin; f. Facilitation of migrant workers with problems such as the facilitation of the rights of migrant workers; and g. TKI handling sick form of facilitation of health care and physical and mental rehabilitation.

The Law No 39/2004 give more attention to the administrative process of migrant worker recruitment and are considered to give more space and benefits to the private recruitment agencies: Private Agency on Overseas Labor Placement (*Pelaksana Penempatan Tenaga Kerja Indonesia Swasta/PPTKIS*). There is also a lack of Indonesian government commitment to providing international protection for Indonesian migrant workers since Indonesia only ratified the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW) in April 2012.⁴

The Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW), is assumed to be able to provide more adequate protection not only for the workers but also for their families in the area so foreign. Many NGO played an important role in the ratification process through their consistently proactive attempts to appeal to the government to do so. However, since there is no regulation to manage the implementation of the convention yet, it is likely that there will be no significant improvement in migrant worker protection.⁵

Beside ICRMW there is the ILO Convention 189 On Decent Work for Domestic Workers as one of the international instruments for the protection of the rights of migrant workers who work as domestic workers across the country. But until now Indonesia has not ratified this convention as well as Malaysia, so that the provisions in the convention can not be adopted in the system of protection for domestic workers.

DISCUSSION

The Advocacy for Migrant Worker Protection

The problem of migrant worker occurs in three stages, namely pre-stage placement, during placement and after placement. So that the state must provide legal protection to migrant workers in three stages. The protection of the law are : 1. Protection of dignity and values, as well as the recognition of the rights possessed by the subject of law based on the provisions of the law of arbitrariness; 2. Various remedies must be provided by law enforcement agencies to provide security, both in mind and physical harassment and threats from any party; 3. Set of regulations or rules that can protect a thing from another.⁶

Domestic workers are one group of informal workers are in great demand by the public. Characteristics housekeeper (PRT) in general can be seen from several sides. The first is dominated by the Woman. Both young age. Third time is long. Fourth, low wages. The fifth had no health insurance and social. Sixth, vulnerable to exploitation both by distributors and users of services. These characteristics make the housekeeper as a vulnerable group.⁷The fate of workers in various sectors (including migrant workers and domestic workers) have not shown significant improvement. Various cases of abuse and exploitation of migrant workers in Malaysia a lot going on and it can not be handled satisfactorily.

As stipulated in the Law No 39/2004, Government handling the problems of migrant worker overseas. The Indonesian Embassy seek negotiation and mediation between Indonesian migrant worker and their employer and give the aid to get the legal aid if their case must be solved in litigation process. But in facts there many migrant worker didn't get their compensation that should be given from their employer or agencies.

⁴ Aswatini Raharto and Mita Noveria, Advocacy Groups for Indonesian Women Migrant Worker's Protection, eJurnal kependudukan.lipi.go.id/ojs/248jki/index.php/jki/.../72 28 Sept 2016

⁵ ibid,p.7

⁷ Ministry of Law and Human Rights, Agency for Research and Development of Human Rights, 2009; p. 13

A key problem with any dispute settlement mechanism in an ending country is that judgments cannot typically be forced against employers in the destination country. For this reason, the law in the Philippines deems agencies and foreign employers are *jointly and severally liable* for compensation to migrant workers as determined by the National Labor Relations Commission. This means that Filipino workers can claim against agents for breaches by their foreign employers, after which the agents are free to attempt carrying out a law suit against the employer in the foreign country. For Indonesian migrant workers, a breach of the law or contract by their employer will usually not attract any compensation from any party.⁸

In fact, the government is not the only party which takes responsibility for the protection of migrant workers. Other parties such as NGOs, also have responsibility to protect the workers against any abusive actions. NGOs have long experience in advocacy, particularly aimed to equip prospective migrant workers with adequate knowledge concerning international labor migration. Adequate knowledge has a significant role in protecting migrant workers from violation. Some NGOs work locally, mainly at the village level, while others conduct activities at the regional and international levels. As they differ in activities, the target groups of the NGO activities are also different. Local NGOs target grassroot communities, such as potential migrant workers and their families and also formal and informal leaders of the villages. NGOs that work at global and international level start their activities at the governments of sending and receiving countries and also at the NGOs that have the same mission overseas. This shows the role of the Indonesian government and the NGOs in protecting international migrant workers in all the phases of overseas employment: from their hometowns until they finish their work contract and come back to their places of origin.

The obstacles in solving the problems of the Indonesian Migrant Worker

Article 8 of the Law No. 39 /2004 lists rights of migrant workers, but does not correspond directly with as anctions provision. The rights list edare the rights to: 1. Work or be employed in a foreign country; 2. Receive correct information on job markets in foreign countries and procedures for the placement of Indonesian workers in jobs in foreign countries; 3. Receive equal service and treatment for placement in jobs in foreign countries; 4. Enjoy freedom to adopt his/her religion and belief and to perform/fulfill religious worship/obligations according to that which is required by his/her religion and belief; 5. Receive a wage according to the standard softwages that apply in the destination country of employment; 6. Receive rights, opportunities and treatment equal to the ones received by other foreign workers according to laws and regulations that apply in the destination countries; 7. Receive a guarantee of legal protection according to laws and regulations against action that may; 8. Lower one's dignity and worth as a human being and against violations of rights that are established according to laws and regulations during employment in foreign countries; 9. Receive a guarantee of protection of the safety and security of the Indonesian Worker upon his/her return to his/her place of origin; 10. Receive the text of the original employment agreement.

The mechanism of the agreement and the recruitment of migrant workers as domestic workers in Malaysia is regulated through a Memorandum of Understanding between the Government of Indonesia and Malaysia. According to the MOU between Indonesia and Malaysia on domestic workers 2006, domestic workers who received bids for selection by an employer to work in Malaysia must meet the following initial conditions for entering Malaysia, namely; 1. Be at least 21 years and not more than 45 years; 2. To have adequate knowledge of the laws, cultural and social practices in Malaysia. 3. Have the ability to communicate both the Malay language and / or English. 4. Meet Malaysia in the Malaysian immigration procedures; 5. Must be declared healthy and strongly associated with the requirements of the related of Malaysia and Indonesia authority; 6. Does not have any criminal record.

There is a legal relation between Migrant workers and their employer abroad, based on employment contract. The employment contract contains rights and obligations that became the basis of the legal relationship between them. So that if one party does not fulfill its obligations shall be responsible to replace the losses suffered by the other party.

⁸ ILO, op.cit.p.24

Under the Article 8 of *Migrant Worker Placement and Protection Law*, every candidate migrant worker is entitled to receive a copy of the contract between him/herself and their overseas employer. Article 55 states that the contract must be signed prior to departure, and it lists provisions that must be included: 1. Name and address of the employer; 2. Name and address of the migrant worker; 3. Occupation or type of work of the migrant worker; 4. Rights and obligations of both parties; 5. Terms and conditions of work, including working hours, wages and procedures of payment of wages, leave entitlements and period so far, facilities and social security; 6. Period of employment covered by the work agreement.

A common problem in Indonesia is that candidate migrant workers are asked to sign their contracts on the spot. Apart from not allowing the adequate time to consider the conditions of contract, this often also means that they do not understand it. Given that many have only received limited formal education, it is important for them to be given time to show and discuss their contracts with their family, faith-based groups, NGOs, etc.⁹

The low understanding of the employment agreement, especially the informal sector, resulting in the weakening of the bargaining position of labor migrants. In general, problematic migrant workers accommodated in the Embassy and strive to be repatriated to their homeland. Advocacy given by the Embassy have not been optimally can restore workers' rights in accordance statutory laws and regulations.

The low educational level of female migrants/potential female migrant workers indicates that information in the form of written material would be limited in its impact to empower them. Studies conducted in three origin areas of Indonesian female migrant workers find that female migrants/potential female migrant workers are poorly informed about all aspects of the migration process or the working conditions in foreign countries. Their important sources of information are mainly a recruitment agency (brokers) they know very well. This places migrants/potential migrants in a very weak position and they may easily become victims of exploitation. The involvement of agents/brokers (*sponsor/caló* are the local terms in Indonesia) is also an important factor that puts female migrants/potential female migrant workers at risk of exploitation and discrimination, since the recruitment process becomes longer. Therefore, empowering female migrants/potential female migrant workers is an important element in developing systems to protect them. As a high proportion of female workers/potential female migrant workers have very low educational levels, oral advocacy will be more effective to empower and give them understanding of their rights and obligations.¹⁰

The provision of vocational training in destination countries is an important service for migrant workers. Such training can be provided to workers on their days off or at times they are not working, thus giving them a pretext for leaving their workplace and a chance to build networks with other migrant workers. Destination-country training can also ensure that migrant workers are immediately ready to enter the workforce upon return to their home country.¹¹

Indonesia does not yet have a formal program of destination-country training. One successful example of such training is the Bayanihan Center, which runs a range of courses for Filipino migrant workers in Singapore. The Philippine Embassy in Singapore provides financial support to the Bayanihan Center, which offers certified courses in a range of areas such as hairstyling and nursing.^{12,13}

Within a contractual relationship, the worker and the employer must respect each other, especially relating to the rights and obligations of each party. Both parties must prioritize mutual obligations with full responsibility, sincere and honest. Honesty in carrying out their duties will lead to mutual trust and the implementation of the obligations of each party.¹⁴ This is in accordance the Qur'an Surah Al Maidah verse 1, which states that O who have believed, fulfill all the contracts you have made.

⁹ ILO, Using Indonesia Law to Protect and Empower Indonesian Migrant Worker, Some Lesson from the Philippines, June, 2006, p. 18

¹⁰ Aswatini Raharto and Mita Noveria, op.cit.p.5.

¹¹ ILO, op.cit , p. 24

¹² ibid

¹³ ibid

¹⁴ Iskandar Budiman, *Dilema Buruh di Rantau, Membongkar Sistem Kerja TKI di Malaysia*, Ar Ruzz Yogyakarta, 2004, p. 412

CONCLUSION

The problem of Indonesian migrant workers abroad, especially in Malaysia so far handled through several steps, among others, legal advocacy to mediate between migrant workers with the service users, and provide the attorney if his case should be brought to justice.

Factors that cause the problems of migrant workers, in general, emerged since the pre-placement of migrant workers in the country, with the non-fulfillment of standards in the process of preparation and debriefing BMI by PPTKIS, so BMI does not have the capacity to work in accordance demanded by the work, in addition to a lack of understanding and knowledge BMI the employment agreement on which to base its legal relationship with the service users abroad. BNP2TKI as the competent institutions in the process of placement and protection of migrant workers do not have the authority to sanction the abuse PPTKIS.

To enhance the optimal protection for migrant workers, especially women who are required PLRT policy advocacy to encourage the Government to revise Law No. 39 of 2004 on the Placement and Protection of Indonesian Workers with implementing the provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW), and ratify Convention 189 on Decent Work for domestic workers. In addition, in order to improve knowledge for prospective migrant workers on safe migration and employment contract, which became the basis of a working relationship with the work, needs to be done public advocacy through training and empowerment-oriented education of migrant workers' rights.

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