

INDONESIAN WORKERS PROTECTION ABROAD: INDONESIAN LAW POST – RATIFICATION OF INTERNATIONAL CONVENTION ON MIGRANT WORKERS*

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Abstract

United Nations Secretary-General Ban Ki-moon in the General Assembly on International Migration and Development, stated that since 1990-2010 the growth of international migration has increased significantly. It brings implications for the deployment of migrant workers that draw attention to the sending, transit, recipient countries, or a combination of the three categories. Government should provide a clearer framework for migrant workers' rights to protect the migrant workers during pre-placement, placement, and post-placement. This article draws on the results of the literature study and interviews with respondents in the field of employment. This article found a positive relations between the revised of Law No. 39/2004 and Indonesian Migrant Workers Protection Bill as a follow-up of the ratification of the International Convention on the Protection of the Rights of Migrant Workers and their Families.

Abstrak

Sekretaris Jenderal PBB, Ban Ki Moon, dalam Rapat Majelis Umum mengenai Migrasi dan Perkembangan Internasional mengatakan bahwa dalam kurun waktu tahun 1990-2010, pertumbuhan migrasi internasional telah berkembang sangat pesat. Hal ini memberikan dampak kepada pengiriman buruh migran yang melibatkan negara pengirim, transit, serta penerima, ataupun kombinasi antara ketiga kategori tersebut. Pemerintah harus mengatur hak-hak buruh secara lebih jelas untuk melindungi buruh migran selama pra-penempatan, penempatan, dan setelah penempatan. Artikel ini ditulis berdasarkan studi pustaka dan wawancara dengan responden dalam ranah ketenagakerjaan. Penelitian ini juga menemukan relasi positif antara Undang-undang No. 39/2004 dan Undang-undang Perlindungan Buruh Migran Indonesia sebagai hasil ratifikasi dari International Convention on the Protection of the Rights of Migrant Workers and their Families.

Keywords: International Migration, International Law, Migrant Workers, Indonesian Workers.
Kata Kunci: Migrasi Internasional, Hukum Internasional, Buruh Migran, Pekerja Indonesia

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A. Introduction

United Nations Secretary-General Ban Ki-moon in the middle of 2012 in the General Assembly on International Migration and Development stated that the growth of international migration during the period of 1990-2010 increased significantly. Ban Ki-moon said, "More people live outside their country of origin today than at any time in history. The global number of international migrants increased from 155 million in 1990 to 214 million in 2010. During that period, the number of international migrants in the more developed regions, or the North, grew by 46 million, or 56 per cent, while the immigrant population in the South increased by 13 million, or 18 per cent. By 2010, almost 60 per cent of all international migrants in the world were living in more developed countries, compared with 53 per cent in 1990". (United Nations, 2012)

The data above shows that there are 155 million people migrating internationally in 1990, whereas in 2010 this has increased to 214 million people. Significantly within the last 20 years there is an increase of 59 million people, and then if there is an increase in the international migration averaged up to 3 million people per year. The increase of international migration actors over the years certainly evokes the countries in the world to pay attention to it, either as sending countries, transit countries, recipient countries, as well as a combination of all three. These include the dual role of Indonesia as sending countries, but also as a recipient country.

In accordance with the migration of Indonesian citizens abroad, Chief of Diaspora Desk Ministry of Foreign Affairs of the Republic of Indonesia (Kemlu RI), Wahid Supriyadi, in an interview quoted by Antara stated that the current Indonesian people who are in diaspora

(international migration) is estimated at 8-10 million worldwide. (Antara News, 2013) This estimation includes Indonesian people who works abroad (Indonesian migrant workers).

International Labor Organization (ILO) quotes from the National Agency for the Placement and Protection of Indonesian Workers (BNP2TKI) stated in its report for the period 2006-2012, the number of migrant workers reached approximately 4 million, while the number of migrant workers who are undocumented estimated two to four times greater (ILO, 2013).

Consider the high number of Indonesian people who involved as international migrants, as well as the high number of migrant workers abroad, the government should formulate an effective policy to better manage the issue. In reality, the government did not formulate sufficient policies and not took significant efforts to protect the migrant workers abroad resulted many workers remain unmanaged and tend to become victims of the uncertainty.

Data from the Ministry of Manpower and Transmigration (Menakertrans) cites cases of migrant workers during the year 2010 as 60,399 cases and in 2011 was 44,573 cases. While the NGO Migrant Care Data recorded 5,314 cases of violence experienced by migrant workers abroad during the period of 2009 to 2010, which in details 1,748 cases in Malaysia, 1,048 cases in Saudi Arabia, 1,004 cases in Jordan, 784 cases in Kuwait, 533 cases in Abu Dhabi, 103 cases in Taiwan 103, 78 cases in Hong Kong, and 16 cases in Singapore. (Antara Jatim, 2012)

The above data shows that the government was not serious in the handling of international migration, including the placement of Indonesian workers abroad. Even the government is constitutionally required to take a series of actions to

protect its citizens in seeking for job both within and outside the country without discriminative treatment and put forward comprehensive safeguards for Indonesian workers overseas. The reason of Indonesian people to fight for independency of their country, as mentioned in the preamble of the 1945 Constitution, is to have sovereignty to protect the territory and interest of all Indonesian citizens.

Further in the Universal Declaration of Human Right (UDHR) which adopted by all countries including Indonesia, one of its article recognize the right of any citizens to migrate anywhere to seek for job. In article 23 UDHR stated that everyone has the right to have a job, to choose a job, protection from unemployment, and good working environment in terms of fair wages, as well as life insurance (United Nations, 1948). Furthermore, in article 2 of UDHR declare that everyone is entitled to all the rights and freedoms set forth in this Declaration, with no exceptions whatsoever, such distinction as to race, color, sex, language, religion, political or other views, national origin or community, property, birth or other position.

On the basis of labor law, Indonesian law guarantees the right of every citizen of Indonesia (WNI) to get a job and freedom to choose jobs protected under Indonesian Constitution of 1945 as stipulated in the Article 27 Paragraph 2: “every citizen has the right to a decent livelihood for humanity”. Further arrangements governed by Law No. 13 of Year 2003 regarding Manpower (demand and supply), and the Article 34 of Law No. 13/2003 states that Indonesian worked overseas is regulated through legislation. Regulation related to placement and protection of Indonesia migrant worker overseas is stipulated in Law No. 39/2004.

In addition, in 2012 the government of Indonesia has ratified the International Convention on the Protection of the Rights of

All Migrant Workers and Members of Their Families which consist of basic guidelines on migrant workers protection. Following the ratification, Indonesian government has an obligation to harmonize the national law with the content of the International Convention. This will be great momentum for the fulfillment of Indonesian migrant workers right under the international law.

Realizing the urgency of the issue, the author is interested in reviewing efforts from the government to revitalize Indonesian workers protection through a comparison between Law No. 39/2004 (national law) with International Convention on Migrant Workers (ICMW) regarding the placement and protection of Indonesian workers abroad. Through the comparison of these two laws, the author expects to find common ground, as well as the issues that need to be focused on for the future improvement of the protection of migrant workers by the government.

B. Indonesian Workers in the Perspective of Law No. 39 of Year 2004 and the Respond from Politician and Civil Society

Definition of Indonesian Workers (TKI) and candidate of Indonesian Workers (CTKI) in Law No. 39/2004 has a different meaning. TKI is defined as any Indonesian citizens who are eligible to work in the overseas employment for a specified period of time and been paid. While CTKI defined as every Indonesian citizen who qualifies as job seekers who will work abroad and registered by local government agencies/municipalities which responsible for labor dispatch.

Understanding the definition of TKI and CTKI is very important for further discussion because it is related to their rights and duties from the perspective of Law No. 39/2004. In Chapter III Article 8 regarding Rights and Duties of workers, states that

every prospective migrant workers have the same rights and opportunities to: (a) work abroad, (b) to obtain correct information about the labor market and overseas placement of workers based on procedures applied abroad, (c) obtain services and equal treatment in the placement country; (d) obtain freedom and faith adheres well as the opportunity to perform religious worship and belief espoused; (e) wages in accordance with the standards of wages applicable in the country of destination; (f) acquire the rights, opportunities, and equal treatment of foreign workers obtained in accordance with the laws and regulations in the destination country; (g) obtain legal protection in accordance with the legislation on measures that can be degrading dignity and violation of the rights established in accordance with the laws and regulations for foreign employment; (h) obtain assurance of safety and security protection workers returning to their homes, and (i) obtain the original manuscript agreement.

Later in article 9, each prospective migrants/migrant workers have an obligation to: (a) comply with laws and regulations both domestically, as well as in the country of destination; (b) comply with and carry out work in accordance with the employment agreement, (c) pay the service charge placement of workers abroad appropriate regulatory circuitry, and (d) notify or report the arrival of the existence and the return of migrant workers to the Representative of the Republic of Indonesia in destination countries.

The articles contained in Law No. 39/2004 mentioned above is still too general to provide comprehensive cover for the rights of Indonesian workers overseas. Many politicians, NGOs and migrant workers observers consider that the regulation was more economic oriented as

trade system than efforts to protect Indonesian workers rights.

Rieke Diah Pitaloka, a parliament member in charge of the manpower affair, during an interview with the author on 27 of December 2013, stated that Law No. 39/2004 which is applied for protection of Indonesian migrant workers overseas, also admit the tendency of the law as economic instrument rather than protection on humanity as should be demonstrated by the government on its major responsibility as representative of the State in protecting the citizens. Rieke clearly sees an urgency to revise the existing Law No. 39/2004.

In line with Rieke's opinion, the Advocation Team for Migrant Worker which is consist of number of NGOs such as HRGW, National Commission for Women, ATKI, GPPBM, IWORK, KWI, LBH Apik Jakarta, LBH Jakarta, Migrant Workers Care, SBMI, and Women Solidarity Movement are united in their opinion that Law No. 39/2004 regarding Placement and Protection of Migrant Workers Overseas has a number of weakness in term of rights coverage which will be discussed further below.

The mindset behind Law No. 39/2004 is more focused on the issue of migrant worker placement mechanism. It was clearly shown on the title, which 'placement' stated before than 'protection'. It was logically interpreted that placement is more important than protection. Through exploration of the content, only 8 out of 109 articles regulate about protection. It reflects an attitude that responsibility of the government was sending the workers somewhere else as long as there is a need in foreign countries and some workers are willing to work abroad. Worker are not a commodity that can be easily traded just taking into account its economic aspect. In actuality, State has responsibility to provide job opportunity for the citizen.

Since the State is unable to provide sufficient job opportunities for its citizen, then the alternative is through international cooperation with other countries who lack of manpower in particular areas. The available job opportunity, of course, should be first assessed by Indonesian government comprehensively for the maximum security of the citizens who going to be dispatched later. It is also important to take into account the dignity or pride of our nation not to allow our people to be treated as slaves by other people in foreign countries for the sake of money.

By using the above perspective, the migrant workers who seek and find job abroad by themselves are discriminated because they are considered to be outside the framework of placement as defined by the government in the law. In particular the possibility that the same thing will happen to Indonesian workers independently. One serious principle was forgotten or intentionally omitted: whether the migrant workers are documented or undocumented they are still Indonesian citizens who are supposed to receive equal protection from the State.

In addition, Law No. 39/2004 does not put legal aid as one of the important points in the scheme for the protection of migrant workers. Until now, a Government Regulation on Legal Aid as mandated by the law, was never made by the government. Thus, the issue of legal assistance to migrant workers are limited to ad hoc measures (Gaussyah et. al., 2012: 30-3).

Based on the data and the response as has been described above, we can see that Law No. 39/2004 which regulates the placement and protection of migrant workers abroad urgently needs more attention from the government to be refined. When linked with the problems that afflict Indonesian workers abroad, it can be

concluded that the root cause is the lack of force override placement and protection of migrant workers from the government, as well as the vague description of rights that must be met by the government for migrant workers. This results in the emergence of various problems that afflict both migrant workers in the pre- placement, placement, and post-placement phases.

From the explanation above, we can conclude the actions that can be undertaken by the government is to speed up the revision of Law No. 39/2004. Hopefully with these revisions, better clarity for the migrant workers status who are in a regular situation (have proper documents) as well as in situations of irregularity (incomplete documents) can be handled without discrimination as revealed by the Migrant Workers Advocacy Team. This is, of course, based on the State's obligation to protect all citizens as mandated by the preamble of Indonesia Constitution 1945.

C. The Process to Ratify the International Convention on Migrant Workers and the Standar Rights for Migrant Workers

Ratification of the International Convention on the Protection of the Rights of Migrant Workers by the Indonesian government required quite a long time. As from September 22, 2004, the Indonesian government under the President Megawati Soekarnoputri administration sent Minister of Foreign Affairs Hassan Wirajuda to attend the annual session of the UN agreement during the 59th of UN General Assembly and Hassan to sign the agreement as the Indonesia government representative. Eight years later, or 12 of April 2012 in the Plenary Session of the Indonesian Parliament the bill agreed to be ratified. Furthermore, the Convention was finally legalized by President Susilo Bambang Yudhoyono on May 2, 2012 into

Law No. 6 of Year 2012 on the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Indonesian government then submitted the ratification to the UN Secretary-General before reporting to the United Nations Treaty Collection, which received the report of the ratification on May 31, 2012.

The series of events above shows that Indonesia took eight years (2004-2012) to complete ratification procedures for the Convention, which should have been done not long after the signature. In addition, the Convention was referred in the Action Plan on Human Rights (RANHAM) twice during the 2004-2009 and 2009-2011 periods. The length of time needed shows a lack of concern, interest or at least indicates circumspection of the Indonesian government toward adoption of international law. It can be also assumed that initially the government didn't see a significant link between migrant workers and the economic growth of this country until several lender states finally linked their willingness to invest in Indonesia with the availability of regulation protecting migrant workers. Since then, discourse regarding the importance of the International Convention on Migrant Workers started to be fine tuned with national interest, but mostly in economic point of view. Under the President Yoedhoyono administration, the Ministry of Manpower and Transmigration, Ministry of Law and Human Right, National Agency for the Placement and Protection of Indonesian Workers (BNP2TKI), sought for a way to fit the International Convention into Indonesian law and regulations.

The definition of migrant workers in Article 2 paragraph (1) of the Convention is someone who will be, is being or has been doing paid work in a country where he/she

is not a citizen. Thereafter, the Convention also regulates the Family Members of Migrant Workers which is defined in Article 4 that the members of the family of migrant workers are people who are married to migrant workers or are having a relationship with him/her, which by law has the same result as marriage, and children as their young dependents and other people of their dependents who are recognized as members of the family by applicable law, or under bilateral or multilateral agreements between the States concerned.

Article 5 paragraph (a) and (b) defines two conditions of migrant workers and their family members, namely : (a) they are considered to have a document or in a regular situation if they are allowed to enter, reside and perform activities that are paid in country of employment, in accordance with the laws of that State and international treaties that the state is a party, and (b) are considered not to have a document or in a non- regular situation if they do not comply with the provisions set out in sub-paragraph (a) of this article.

If the understanding contained in the Convention is compared to Law No. 39/2004, we can easily see a significant difference. The Convention has a wide scope related to migrant workers, while Law No. 39/2004 only considers two categorization of migrant workers: those who are recognized by the government through compliance to a number of administrative documents and others which are not. The regulation states that only the migrant workers who hold complete administrative documents will be taken cared by the government and the rest are considered as illegals which means they will be abandoned by the government.

Unlike Law No. 39/2004, the Convention categorizes migrant workers into two category namely regulars, with

complete administrative documents, and irregulars, which do not. Instead of defining the treatment of each category The Convention rather emphasizes the standard of rights which should be possessed by all migrant workers in both regular and irregular conditions. The standard of rights according to the Convention are as follows: the right to life shall be protected by law (article 9); prohibition of degrading treatment or cruel, inhuman and degrading treatment (article 10); prohibition of slavery, forced labor or enslaved conduct (article 11); the right to freedom of thought, opinion and religion (article 12); the right to not be deprived of his possessions arbitrarily (article 15); right to legal assistance when on trial (article 18 paragraph 3d), the right not to be seized or destroyed identity documents, or document entry permit or residence permit or work permit (article 21); the right to consular protection and assistance from their home country or State that represents the interests of the State (Article 23); the right to recognition before the law (article 24); rights get treated the same as the country of destination (article 25 paragraph 1); the right to association and assembly in unions (article 26), the right to social security in accordance with the country of destination (article 27 paragraph 1); rights of health care (article 28); obligation of State parties to ensure respect for the cultural identity migrant workers (article 31); the right to transfer earnings and savings of migrant workers, as well as applicable laws in the countries concerned (article 32).

Another significant part of Convention is article 33 paragraph 1 on the right to be told by the country of origin, country of work, or the transit State regarding: (a) their rights under this Convention; (b) provisions regarding admission, their rights and their obligations under the law and

practice of the State concerned, and other similar things that enable them to comply with the administrative provisions and other provisions in the State. Such information shall be provided free of charge, and as far as possible in the language they understand (article 33, paragraph 3).

After the ratification of the Convention, governments should take appropriate measures so that the ratification of the Convention may used as a vital basis of national law which binds all stakeholders in order to provide migrant workers rights as an international standard that has been described above.

Further in Article 69 paragraph (2) of the Convention it is stated that "If the States Parties concerned consider the possibility of making regular situations such persons in accordance with national laws and bilateral or multilateral agreements in force, appropriate consideration should be taken regarding the condition their entry into the country, the length of their stay in the Country of work, and other considerations, in particular the situation of their families".

Ratification by the Indonesian government is expected to improve the bargaining position of the receiving countries of migrant workers. In addition, the government is carrying out its duty to provide the rights of migrant workers in the pre- placement and post-placement. So that the action taken by the government can be thorough and right on target.

D. Revitalization of National Law Post Ratification of International Convention on Migrant Workers to Protect Indonesian Workers Abroad

After the ratification of the Convention a series of efforts have been undertaken by the government in order to harmonize Law No. 39/2004 which is a reference to the efforts of the placement and protection of migrant workers abroad

with the International Convention on the Protection of the Rights of Migrant Workers. One of the measures taken by the House of Representatives of Commission IX regarding the agenda to revise Law No. 39/2004.

Some important chronology of the plan to revise the Law 39/2004 is as follows: (1) November 2010 Law Revision includes No. 39/2004 on the agenda of the national legislation program (Prolegnas) of House of Representatives; (2) 12 April 2012 ratification of the International Convention on the Protection of the Rights of Migrant Workers; (3) May 23, 2012 harmonizing efforts, rounding, and stabilization bill PPILN (Protection of Indonesian Overseas Workers) conception; (4) Plenary Session held in July, 5 2012 until the House of Representatives passed a draft PPILN Law Revision bill into Parliament initiative; (5) August 2, 2012 issuance of presidential document (No. R.7/Pres/08/2012) that six Ministries are appointed to participate in the discussion of the PPILN bill; (6) 11 September 2012 PPILN drafting committee by the House of Representatives consisting of 30 people from Commission I, III, and IX; (7) October 9, 2012 Chairman of the committee chooses PPILN chairman of committee but experiences deadlocks; (8) October 24, 2012 Chairman of the committee of PPILN bill set Budi Supriyanto from the Golkar Party; (9) February 6, 2013 submission of DIM (Inventory of Problems) by the Government of Indonesia to the PPILN committee; (10) February 26, 2013 meeting conducted between PPILN committee and the agreement to establish a Working Committee of PPILN bill comprising 19 people; and (11) April 8, 2013 meeting of the Committee done the PPILN bill and government to discuss the bill title but no deal (NGO Migrant Care, 2013).

The draft PPILN bill seems unharmonized and gives no new vigor to the protection of migrant workers abroad. Definition of Indonesian workers (PI/IMW) has morphed into any Indonesian citizen who is eligible to work abroad in an employment relationship for a certain period of time with pay, while the candidate of Indonesian workers (CPI/CIMW) is every Indonesian worker who qualifies as job seekers who will work abroad and is registered in local government agencies/municipalities responsible for labor affairs. Definition of IMW when compared with Law No. 39/2004 did not change save only the editorial from TKI to IMW, while the definition of family additions is any person or individual who has a kinship due of blood or birth, appointment or recognition, as well as court decisions, as being part of a family..

As for the rights and obligations of IMW or CIMW, article 6 of the PPILN bill, provides IMWs with the following rights: (a) get a decent job abroad and choose the type of work, (b) obtain a better capacity of self improvement through formal and non-formal education; (c) obtaining correct information about the foreign labor market, workplace location, prospective users, PI placement procedures, working conditions as well as cultural, social security and insurance programs at home and abroad, as well as legislation on employment in the recipient country; (d) obtain professional and humane services, and equal treatment for pre-placement, placement, and post-placement; (e) obtain freedom of religion and belief, as well as the opportunity to perform in accordance with religious worship and beliefs held; (f) obtain wages in accordance with the prevailing wage standards in the recipient country; (g) acquire the rights, opportunities, and equal treatment in accordance with the laws and

regulations in the recipient country; (h) obtaining guarantees of legal protection against degrading actions in accordance with legislation in Indonesia and in the recipient country; (i) obtain protection for the safety and security of pre-placement, placement, and post-placement; (j) determine the rights and obligations as set forth in the Employment Agreement; (k) obtain the original manuscript Employment Agreement, and can store personal documents; (l) to communicate with family, and (m) to socialize, organize and/or association with PI communities in the recipient country.

Then IMW obligations under Article 7 PPILN bill are as follows: (a) provide data and information that is correct in each document, (b) know and understand the entire content of the signed Employment Agreement and (c) comply with laws and regulations both domestically as well as in the recipient country; (d) comply with and carry out its work in accordance with the Employment Agreement, and (e) pay the cost of the placement of Indonesian workers in accordance with the provisions of the legislation.

Additionally contained in Article 8 rights inside PPILN bill include those for the family, among others: (a) have access to determine public policy related to IMW, (b) obtain information about the condition, issue and return of IMW (c) obtain a copy of the document and the Employment Agreement CIMW and/or IMW, (d) access to education and training; (e) receiving the rights obtained by the IMW who died during the work, and (f) acquire all property belonging to the IMW who died.

Significant changes is seen from some of the additions to the rights and obligations of Indonesian workers, as well as additional rights for IMW family in the PPILN bill. But this bill needs improvement to represent the strong commitment of

government regarding the fulfillment of the rights of IMW. Substantially this bill is still in talks at the level of the House of Representatives and not the end result. However, we can only hope that the influence of the International Convention on the Protection of the Rights of Migrant Workers of national law may provide a positive impact on efforts to reduce the problems faced by the IMW with a stronger rule of law.

E. Conclusion

Based on the above discussion, it can be concluded that the ratification of the International Convention on the Protection of the Rights of Migrant Workers gives a positive effect to Indonesian national law, proven with planned revisions of Law No. 39/2004 not long after the ratification of the Convention, so as to produce a bill for Protection of Indonesian Migrant Workers (PPILN).

Some parts of Law 39/2004 and the PPILN bill which is a product of the ratification are adjusted to better suit the Convention. Starting from the definition of a family that adds an element of Indonesian workers as one of the subjects of law. In addition, some additional points on the rights and obligations of the Convention is also an adjustment. However, not all of the standard rights of migrant workers are accommodated in the section of rights and obligations in PPILN bill.

This effort is expected to be a new step to revitalize the protection of Indonesian workers abroad as a form of government's responsibility to protect all Indonesian citizens everywhere, both inside and outside the country without discrimination.

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