

## Legal protection of migrant workers and their families: before, during, and after working

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### ABSTRAK

Konvensi Internasional tentang Perlindungan Hak-Hak Seluruh Pekerja Migran dan Anggota Keluarganya yang dikeluarkan oleh PBB pada tahun 2003 sebagai Hukum Internasional telah diratifikasi oleh 43 negara. Pada tahun 2012, Indonesia meratifikasinya dengan mengesahkan Undang-Undang Nomor 6 Tahun 2012. Bahkan Meski Indonesia telah meratifikasinya, tetapi belum ada langkah konkrit untuk mereformasi berbagai peraturan perundang-undangan terkait perlindungan pekerja migran agar selaras dengan isi konvensi. Penelitian ini bertujuan untuk mengidentifikasi dan menganalisis peran pemerintah daerah serta memecahkan masalah tentang perlindungan pekerja migran dan keluarganya sebelum, selama, dan setelah bekerja. Penelitian ini merupakan penelitian normatif dengan pendekatan undang-undang. Hasil penelitian menunjukkan bahwa pemerintah daerah belum menjalankan perannya secara maksimal untuk melindungi pekerja migran dan keluarganya. Banyak kebijakan yang belum mampu mendorong perlindungan hukum karena ditetapkan berdasarkan undang-undang lama dan lebih menekankan pada administrasi. Kebijakan terbuka bagi calo untuk beroperasi di desa dan banyaknya dokumen palsu. Perlindungan hukum bagi pekerja migran dan keluarganya sangat diperlukan, terutama yang diberikan oleh LSM dan individu yang sadar terhadap perlindungan pekerja migran, dan dengan menetapkan peraturan desa. Perlu digagas perlindungan hukum yang lebih komprehensif, baik secara administratif maupun teknis melalui penyesuaian peraturan daerah dengan peraturan perundang-undangan yang baru. Selain itu, peran desa dan masyarakat/individu dapat diperluas untuk lebih melindungi pekerja migran.

**Kata Kunci:** Hubungan Kerja, Perlindungan Hukum, Buruh Migran dan Keluarganya

### ABSTRACT

The International Convention on The Protection of The Rights of All Migrant Workers and Members of Their Families issued by the UN in 2003 as an International Law has been ratified by 43 countries, and Indonesia in 2012 ratified it by passing Law Number 6 of 2012. Even though Indonesia has ratified it, there have not been any concrete steps to reform various laws and regulations related to the protection of migrant workers to align with the contents of the convention. This study aims to identify and analyze local government role as well as solving the problem concerning protection of

migrant workers and their families before, during, and after working. The research is normative research with statute approach. The results showed that the local governments have not performed their role in maximum level to protect migrant workers and their families. Many policies have not been able to encourage legal protection because they are established on the old laws and emphasized administrative. The policies open for brokers to operate in the village and the number of fake documents. The legal protection for migrant workers and their families is mainly provided by NGOs and individuals who are aware of protecting the migrant workers, and by establishing village regulations. It is necessary to initiate a more comprehensive legal protection, both administratively and technically through adjustment of local regulations to the new laws. In addition, the role of villages and communities/individuals can be expanded to better protect migrant workers.

## I. INTRODUCTION

Indonesia has applied the Law Number 39 of 2004 concerning the Placement and Protection of Indonesian Overseas Workers which emphasized the obligation to protect the rights of Indonesian Overseas Worker, but there are no regulations that specifically regulate and recognize the existence of domestic and domestic-related work as formal work which implies protecting workers.

Many international treaties regulate the rights of migrant workers, the most recent of which is The International Convention on The Protection of The Rights of All Migrant Workers and Members of Their Families issued by the UN in 2003 as an international law. This convention has been ratified by 43 countries, and Indonesia in 2012 ratified it by passing Law Number 6 of 2012. Even though Indonesia has ratified it, there have not been any concrete steps to reform various laws and regulations related to the protection of migrant workers to align with the contents of the convention.

Indonesia has also ratified several international instruments related to discrimination, for example the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and various other International Labor Organization (ILO) conventions. However, the implementation of the policy is tainted with discriminations; in fact, the placement policy for migrant workers has led to human trafficking, because it positions migrant workers as a trade commodity. The umbrella act to protect of migrant workers was scattered in various legal instruments, including national laws, international conventions and diplomatic agreements.

Many cases on overseas migrant workers indicate the lack of legal protection for these workers. The issues have started from the beginning of departure to to their return. The first issue is the legality status of the prospective migrant workers for working by illegal Recruitment Agencies of Indonesian Migrant Workers Placement Agency (PJTKI). The next issue is during the departure process because the prospective migrant workers do not have the contract document, visa and passport. Lastly, issues in the workplace where the migrant workers are deprived of their many rights, such as religious activity and timely salary payment and other rights, as well as suffering from misconducts.

A problem that is often faced by ex-Indonesian migrant worker is the difficulty in getting access to build the family's economy that pushed the former Indonesian migrant worker back to work abroad (Zid et al., 2020). This condition is followed by families that are left behind in Indonesia who received remittances from the work of Indonesian or female workers that could not use the remittances appropriately, so it could not be utilized properly (Siswoyo et al., 2020).

Regarding these issues, the government of Indonesia attempts to apply stricter regulations to protect migrant workers and provide legal guarantee as the foundation of any measures in protecting migrant workers. As such, the government has ratified Law Number 18 Year 2017 on Protection of Indonesian Migrant Workers. The law is formulated to replace Law Number 39 Year 2004 on the Placement and Protection of Indonesian Migrant Workers. In general, Law Number 18 Year 2018 is ratified to emphasize the protection of migrant workers by applying a more comprehensive principles in legal protection for the prospective migrant workers, the migrant workers themselves and their families. The protection should apply before, during and after the migrant workers conduct their employment.

In a smaller area, protection of migrant workers policy is adopted by the local government in a form of the regulation of local government. This regulation is critical considering the first step in recruiting migrant workers takes place in the regional area. Therefore, the local government is the main actors in protecting migrant workers because they hold responsible for the protection of migrant workers before, during and after placement.

Some regions make a regional regulation on migrant worker but to what extent the regulation has given protection to the migrant workers is an important issue in implementing the protection of migrant workers. The regional regulation on migrant workers is expected to give protection to the migrant workers and their family before, during and after placement by filling the jurisdictional gap in workforce protection.

The first objective of the research was to investigate the role of the local government to provide legal protection for the migrant workers before, during and after placement. Secondly, the policy implementation of regional regulations concerning legal protection for the migrant workers and their family before, during and after placement.

## II. RESEARCH METHOD

This study is a legal research which is *"...the process of finding the law that governs activities in human society. It involves locating both the rules which are enforced by the states and commentaries which explain or analyze these rules"* (Marzuki, 2009). The presence of state laws and regulation in this normative research emphasizes *das sollen* aspects – the state legal. The spectrum of normative workforce law emphasizes on laws or regulation of local government concerning the attempts to protect migrant workers residing in the location of the study. Furthermore, an empirical study was conducted in relation to the formulated state policies.

Normative research was conducted on the first legal issue with the main approach to laws and regulations (statute approach). Empirical study was conducted to obtain the primary data by interviewing with selected respondents. The data were supported with focus group discussions involving academics, local government, migrant workers, non-government organizations, and individuals. The research was conducted in three regencies Banyumas, Wonosobo and Kebumen.

The method is optional for original research articles. This method is written in descriptive and should provide a statement regarding the methodology of the research. This method is as much as possible give an idea to the reader.

### III. RESULT AND DISCUSSION

Protection aims to provide safety from human rights violations. The protection is given for the community to get full legal rights. In other words, legal protection refers to any legal efforts from the lawmaker to give a sense of security, both physically and psychologically, of disorders and threats from any parties (Hadjon, 1987). Legal protection is the protection of honor and dignity as well as the acknowledgment of human rights owned by the legal subjects based on the provisions of law or as a set of rules and regulations to protect one entity from others. Regarding consumers, legal protection would protect the consumers' rights from any events or individuals that could lead to the failure in fulfilling those rights.

Kansil stated that legal protection is a semantic narrowing of protection, i.e. protection in the legal context. The protection by the law is related to the rights and obligations bound to human beings as the legal subjects and their interaction with others and their environment. Accordingly, as a legal subject, people are subjected to legal rights and obligations (Kansil, 1989). Legal protection is an action or effort to protect the community from any arbitrary acts committed by rulers that violate laws and regulations in order to establish order and peace and allow people to live honorably as a human being. Thus, legal protection is an activity to protect individuals by synchronizing the relationship between values and regulations embodied in human interaction (Muchsin, 2003). So, legal protection is an entity that protects the legal subjects through laws and regulations which impose certain sanctions.

Legal protection is both preventive and repressive. First, preventive legal protection is the protection bestowed by the government to prevent the occurrence of violations. It is stipulated in the law and regulations to prevent a violation as well as providing a guideline or framework of committing an obligation. Secondly, repressive legal protection is the final protection in form of sanctions, such as fines, imprisonment, and additional punishment after a dispute or violation is committed.

From the normative perspective in positive laws, the legal protection of migrant workers has been explicitly stipulated in Law Number 18 Year 2017 on Indonesian Migrant Workers (Law PMI). As stated in Article 1 number 5 of the law mentioned above, the protection has been explicitly formulated as all efforts to protect the interests of Prospective Indonesian Migrant Worker and/or Indonesian Migrant Workers and their family in order to ensure

the fulfillment of their rights in all activities before, during and after working in legal, economic and social aspects.

Meanwhile, the protection before, during and after placement is formulated in Article 1 Number 6, 7 and 8 Law PPMI. Protection before working means the overall activities to give protection since the registration until the departure. Protection during working means the overall activities to give protection during the time Indonesian Migrant Workers and the members of their family are abroad. At last, protection after working means the entire activities to give protection since Indonesian Migrant Workers and the members of their family arrive at debarkation in Indonesia until they return to their hometown, including the follow-through service to be productive workers.

The formulation above has confirmed the legal standing and the policy of protection of migrant workers before, during and after working, including the legal protection for their family. This legal standing has been the research foundation as the current development of policies in the protection of migrant workers. It is because most of the existing regulation of local government is the policies of the previous law, i.e. Law Number 39 Year 2004 on the Placement and Protection on Indonesian Migrant Workers.

The law can protect the rights and obligations of each individual in the sincerest authenticity, and strong legal protection would enable the embodiment of the general purpose of law – order, security, tranquillity, welfare, peace, truth and justice. Legal certainty is not only stated in the articles of the law but also the consistency of judgement between one ruling and another for a similar case that has been ruled ([Marzuki, 2008](#)).

Legal protection means any effort to protect the honor and dignity of human being and the acknowledgement of human rights in the legal field. The principles of legal protection for the Indonesian people are rooted in Pancasila and the concept of legal state which upholds the acknowledgement and respect to the honor and dignity of human beings. Two means of legal protection are preventive legal protection and repressive legal protection.

The principles of the protection of migrant workers based on Chapter 2 Law PPMI are a. integration; b. equality of rights; c. recognition of human rights and dignity; d. democracy; e. social justice; f. gender equality and fairness; g. non-discrimination; h. anti-human trafficking; i. transparency; j. accountability; and k. sustainability. The protection of migrant workers as stipulated in Chapter 3 Law PMI aims to: a. ensure the fulfillment and enforcement of human rights as a citizen and Indonesian Migrant Workers; and b) ensure legal, economic, and social protection for Indonesian Migrant Workers and their families.

The duty of the government in the placement and protection of migrant workers is to regulate, develop, manage, and supervise the implementation of placement and protection of Indonesian Migrant Workers, and the government can delegate the authority and/or duty of assistance to the local government based on laws and regulations. It is the duty of the government to increase the efforts of protecting Indonesian Migrant Workers.

In the context of Law PPMI 2017, the law has explicitly divided the duty and responsibility of the government (central), provincial government, regency government, and village government in the protection of Indonesian Migrant Workers. Articles 41 Law PPMI posits that concerning the protection of Indonesian Migrant Workers, the Regency/Municipalities Government has duties and responsibilities to:

- a. disseminate the information and demand for Indonesian Migrant Workers to the public;
- b. establish database of Indonesian migrant workers;
- c. report the result of the evaluation on Indonesian migrant workers placement agency periodically to provincial Government;
- d. organize the repatriation of Indonesian migrant workers in the event of war, natural disaster, epidemic, deportation and problematic Indonesian Migrant Workers in accordance with their respective authorities;
- e. provide protection of Indonesian migrant workers before and after working in regency/municipality within their duties and authorities;
- f. manage education and job training for the prospective Indonesian Migrant Workers which can be done in cooperation with state-owned or accredited private-owned educational institutions;
- g. conduct developmental and supervision for the educational institutions and job training institutions in regency/municipality;
- h. perform social and economic reintegration for the Indonesian migrant workers and their families;
- i. provide and facilitate the training for menyediakan and memfasilitasi pelatihan the Prospective Indonesian Migrant Workers through vocational training of which budget comes from the educational function;
- j. regulate, develop, manage and supervise the implementation of Indonesian Migrant Workers placement; and
- k. be able to establish one-stop service for the placement and protection of Indonesian migrant workers in regency/municipality level.

The legal protection by the government allows the citizens to demand their rights for the fulfilment of such protection. Regarding the Protection of Indonesian Migrant Workers, the right for protection applies from the pre-placement, during placement and post-placement.

### **3.1. The government role in legal protection of Indonesian migrant workers before, during and after Working**

The protection of Indonesian Migrant Workers in Banyumas Regency is stated in the Regional Regulation Number 2 Year 2015 on the Protection of TKI (Indonesian Migrant Workers) in Banyumas Regency. The regulation is formulated as a follow-through of Law Number 39 Year 2004 and the perfection of several issues in implementing the previous Regional Regulations, such as the prospective Indonesian Migrant Workers who have babies under 6 months old but insist on departing. Widodo, Head of the Development and

Expansion of Job Opportunities, Work Placement, and Transmigration Division, Dinsosnakertrans, Banyumas Regency stated:

*Many village heads (lurah) grant permission for the prospective migrant workers to depart without inspecting the legal status of the placement agency. Many families of the migrant workers depart without a legal document archive, so they suffer from uncertainty and vague protection. In addition, there are many unlicensed Indonesian Migrant Workers Placement Agency (PJKI).*

Regulation of the Regency of Banyumas Number 2 Year 2015 has accommodated local wisdom to anticipate the potential issues for migrant workers and their families. The prohibition which restricts the prospective Indonesian Migrant Workers who have a child under 6 (six) months old has proven effective to prevent the prospective migrant workers from departing in an attempt to protect the family before the placement process. Protection is also performed through village administration by selecting the interests and talents of the prospective migrant workers and prohibiting migrant workers who are mentally or psychologically ill from working departure. In addition, the migrant workers' families also perform supervision by reporting to the village head or directly to the Manpower and Resettlement Office, stating their names, employer's name, and other information related to their status as migrant workers to the Office's information system development. However, even after the Regional Regulation came into effect, some villages are still granting permits for migrant workers without the proper procedure.

Different issues occurred in Wonosobo Regency which performs the protection of workers based on the Regional Regulation Number 8 Year 2016 on the Placement and Protection of TKI (Indonesian Migrant Workers). Yuwono, Secretary of the Department of Manpower, Industry and Transmigration, Wonosobo Regency stated:

*The initiation of the Regional Regulation is based on the will of the local government to improve the quality of migrant workers, and post-work empowerment through the remittance obtained from the migrant workers. Before the implementation of the Regional Regulation, there were symptoms of discomfort at work, missing and undetectable workers, or lost contact between the workers and their families, consequently, the status of these workers are not certain.*

Nevertheless, the normative policy of the Regional Regulation demonstrates a different formulation where protection is emphasized on protection before and after working. It means that the Regional Regulation has not explicitly stated the efforts to protect the Indonesian migrant workers during the placement. This policy can be understood generally in the context of limited authority of the local government to reach the emerging issues when the migrants are working overseas. From 11 (eleven) authority of the local government stated in the Regional Regulation, the administrative policy emphasizes the pre-placement instrument and prevention of issues to the migrant workers during the placement. The authority is integrated into the government action to conduct training for the former migrant workers so that they can manage and use their earnings productively. After the implementation of Regional Regulation Number 8 Year 2016, the issues faced by the Indonesian Migrant Workers during and after placement have been addressed gradually and showed a positive development in some villages. It is reflected from the

decreasing number of Indonesian Migrant Workers from Wonosobo Regency in the past 3 (three) years from 2016 to July 2018, namely 1916, 1852, and 959, respectively. These numbers show a decrease of total TKI (Indonesian Migrant Workers) by 2,9 percent in 2017. Although the number seems small, it reflects a significant decrease when calculating the growth of new migrant workers.

The policy foundation of the protection of Indonesian Migrant Workers di Kebumen Regency is stated in the Regional Regulation Number 5 Year 2014` on the Placement and Protection of Prospective Indonesian Migrant Workers. The policy foundation is the fact that Kebumen Regency is one of the centres of Indonesian Migrant Workers in Central Java, but the protection to these workers is not optimum. For example, there is no thorough documentation of Indonesian Migrant Workers and many fabrications of names, address, and age committed by the recruiters.

The analysis showed that the politics of legal protection politics in three regency governments are applied differently, either the duty, responsibility or the obligation of protection. The legal politics in Kebumen Regency is similar to that in Wonosobo Regency where the policy only manages the duties and responsibilities, but not the obligation of the local government. It demonstrates variability in the perspective of management and legal protection of the Indonesian Migrant Workers.

In addition, this formulation shows that the government of Banyumas Regency has accommodated the participation of public, social organizations, and/or business entities in the protection of the Prospective Indonesian Migrant Workers or the Indonesian Migrant Workers and their families. The formulation shows that Banyumas Regency is more advanced in the politics of legal protection policy of Indonesian Migrant Workers. Nevertheless, the formulation through the legal politics of the protection of Indonesian Migrant Workers as stated in the Regional Regulation has not given a concrete effect on protecting the rights of migrant workers.

The politics of local laws in the protection of the Indonesian Migrant Workers' families show different tendencies, such as the minimum age requirement for the children of the prospective migrant workers. In Banyumas regency, the protection of the migrant workers' families is bestowed after a set of strict requirements. For example, a prospective migrant worker can be a legal Indonesian Migrant Workers if he has a child aged at least 6 (six) months old. Meanwhile, Wonosobo regency applies a stricter rule regarding their child's age, i.e. a minimum of 2 (two) years old. It demonstrates different perspectives in migrant worker policy where Banyumas seems to focus on extending the economic rights of the prospective Indonesian migrant workers to achieve economic welfare. On the other hand, Wonosobo seems to focus on protecting the rights of the children (family) to get their parents' care as the prospective Indonesian Migrant Workers.

### **3.2. Protection of Indonesian migrant workers and their families before, during and after working**

The non-optimum implementation of the Regional Regulation results in the various issues faced by the migrant workers before, during and after working. From 2017 to 2018, there were at least 18 (eighteen) cases of migrant workers filed to the non-government

organization 'Seruni Banyumas' which provided assistance to the migrant workers. From 18 cases, 11 (eleven) cases or 61,11 percent were solved, and the rest 7 (seven) cases or 38,89 percent were not solved. In this case, the local government has not taken part in providing enlightenment through counseling to be able to change the motivation and mindset of the Indonesian migrant worker.

Prasetyohadi as quoted by Novianti stated that the significant roles of illegal panders and sponsors in recruiting migrant workers result in high proportion of problematic migrant workers, such as document forgery which reached 43,6 percent (Novianty, 2008). Aswatini as cited Rahmawati stated, one of three major problems currently faced by the Indonesian government is how to minimize undocumented (including falsely documented) Indonesian migrant worker (Rahmawati, 2019). This issue has not encompassed the whole problem in Banyumas because many cases are not reported. Nevertheless, document forgery has a considerably high proportion and contribution to the migrant workers' issues. The key factor to document forgery is many TKI panders coming to villages which become the centre of migrant workers.

A similar issue is found in Kebumen regency because a thorough documentation of migrant workers is non-existent. Data forgery on names, addresses and ages of the prospective migrant workers also occurs. It is related to one-sided, bias information from the agency of migrant workers placement to the prospective migrant workers. In addition, village is a very strategic gate for the panders to come and recruit the prospective migrant workers. This is as explained Mariam, ex migrant worker Indonesian women who work in Hongkong and Taiwan:

*A similar case in Wonosobo regency where 50 out of 300 migrant workers were the holders of falsified documents. It means 16,67% of the existing migrant workers.*

Undocumented and falsely documented migrant worker violate immigration rule and potentially give damage toward host state. However many persons exploited them, get advantages from illegal status of the worker (Sefriani, 2013).

There is another important thing related to the formulation of village regulation on the protection of TKI and their families. The Regional Regulation results in the many formations of Village Regulation. Since 2016, some villages in different municipalities have had the draft of Village Regulation, such as Lipursari in Leksono, Rogojati in Sukoharjo, Mergosari in Sukoharjo, Kuripan in Watumalang, Ngadikusuman in Kertek, Gondang in Watumalang, and Sindupaten in Kertek. However, the draft has not been ratified in each of these villages. Meanwhile, most villages did not have the draft of the Village Regulation.

The drafting of Village Regulation concerning the protection of migrant workers in those villages can fill the jurisdictional gap in the Regional Regulation. Village is the common centre of migrant worker panders and document forgery which results in the various issues faced by the Indonesian Migrant Workers overseas. Therefore, Village Regulations play an important role in protecting migrant workers, especially those from the centres of migrant workers.

#### IV. CONCLUSION

The result of this research showed that preventive legal protection for migrant workers is given through the formation of Regional Regulation in each regency. The role of local government is stated in the regulation of normative duty, authority and obligation in the existing Regional Regulation. However, the existing Regional Regulation cannot encourage a maximum guarantee of the legal protection of Indonesian Migrant Workers and their families because:

The preventive legal protection in the Regional Regulation is emphasized on administrative protection which focused on regulating the (PJTKI (Indonesian Migrant Workers Placement Agency)). The tendencies occur because the formulated Regional Regulation is the product of Law Number 39 Year 2004 on the Protection and Placement of Indonesian Migrant Workers and it emphasizes the administrative prevention of migrant workers placement agency. Technical protection has not been the main concern in the protection of Indonesian Migrant Workers in three regencies as the focus of the current study.

The massive recruitment of migrant workers is directly conducted by panders in the villages of migrant workers. It potentially leads to deviant practice, such as document forgery or misinformation that could risk the migrant workers before, during and after working placement. In this case, rural government as the smallest unit of government has not played its maximum role as the partner of the local government in encouraging the protection of Indonesian Migrant Workers and their families, especially in Banyumas and Kebumen regencies.

The role of individuals, NGOs, and rural government, especially in the centres of migrant workers suppliers has a great potential to encourage the protection of Indonesian Migrant Workers and their families, especially in Wonosobo Regency. The rural government would have a more strategic position with its capacity to encourage the formulation of Village Regulation to fill the regulation gap in regency level and serve as the provider of information and administration data of the migrant workers in each village.

## Author Declaration

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