

Ratification of United Nations Convention on Legal Protection of Migran Workers and Members of Their Families in National Employment Law

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ABSTRACT

Working is human rights which have to be protected and guaranteed its fulfillment. Therefore no one can prevent other people from working in their own country or abroad, because working is related to an effort someone makes to sustain his or her life. What really matters is how the country protects its people, especially those who are working abroad so that they can be treated as dignified human beings. Theoretically, Indonesia is a welfare state, i.e. the state is not only to protect the people or the citizen but also to partake to guarantee the welfare of the people. The Act No 39 of 2004 on employment and protection of Indonesian workers abroad, however, gives wide-scale responsibility to the private sector, in this case PTKIS, ranging from informational distribution or circulation, recruitment, education, training, document administration, departure and protection of TKI. This is not in accordance with the welfare state. The Article 7 e in Act 39 of 2004 on protection of TKI ranges from before employment, at the time of and after employment. But in the chapter VI, articles 77-84 on protection of TKI only cover at the time of employment.

Keywords: Migran worker, protection, convention, ratification

INTRODUCTION

Working is human rights which have to be protected and guaranteed its fulfillment. Therefore no one can prevent other people from working in their country or abroad, because working is related to an effort someone makes to sustain his or her life. What really matters is how the country protects its people, especially those who are working abroad so that they can be treated as dignified human beings. Theoretically, Indonesia is a welfare state, i.e. the state is not only to protect the people or the citizen but also to partake to guarantee the welfare of its people. The Act No 39 of 2004 on employment and protection of Indonesian worker abroad, however, gives wide-scale responsibility to the private sector, in this case PTKIS, ranging from informational distribution or circulation, recruitment, education, training, document administration, departure and protection of TKI. This is not in accordance with the welfare state. The Article 7 e in Act 39 of 2004 on protection of TKI ranges from before employment, at the time and after employment. But in the chapter VI, articles 77-84 on protection of TKI only cover at the time of employment.

Increasing number of Indonesian workers who work abroad constitutes one of effects of inadequacy in working opportunities in the country. Therefore, becoming a worker in a foreign country is one of solutions taken by part of citizens or people, in order to fulfill the necessities of life of his or her family. The country also takes advantage of the Indonesian workers who work abroad, becoming the biggest exchange contribution after oil and gas sector. Based on data from Bank Indonesia, the exchange obtained by employment of Indonesian workers abroad in 2008 achieved USD 6.6 billion, in 2009 USD 6 billion, and until semester 1 of 2010 USD 3.3 billion.

Every year, approximately 450.000 of Indonesian citizens (WNI) leave for foreign countries as workers. Not less than for millions of WNI working as Indonesian workers, 70% are

women, and the majority is working in domestic sector. From the number, it is expected that 60% of the workers are sent by illegal procedure.

Dispatch of Indonesian workers to other countries has not complemented with a powerful and comprehensive system of employment and protection, which can respond to the problem of Indonesian workers in foreign countries, before, at the time of, and after employment. The system of protection of TKI in foreign countries is weak, opens the practical opportunities of human trafficking. This employment so far has become one modus of human trafficking, so the workers have been becoming the victims of exploitation, physically, sexually, and psychologically.

The principles contained in the instruments of United Nations on human rights, especially Universal Declaration of Human Rights, International convention on economic, social and cultural rights, international convention on civilian and politic rights, international convention on abolition of all forms of discrimination against women, and convention of children rights.

Considering too the principles and standards written down in the related instruments in the framework of ILO, especially convention on migration for working (No 97), convention on migration in mistreated condition and promotion of equality of opportunities and treatment for migrant workers (No 143), recommendation on migrant workers (No 151), convention on compulsory work/labor or forced labor (No 159), and convention on abolition of forced labor (No 105).

Considering the importance of the principles contained in the convention against discrimination in education from UNESCO of United Nations, considering the convention against abuse and maltreatment. These are in accordance with the 4th declaration of congress of United Nations about prevention of crime and rehabilitation of criminals, code of conduct of law enforcement officers, and convention on slavery.

One of the ILO's objectives is to protect the interest of workers whenever they are employed in the foreign countries, by considering skill and experience of the organization in those things related to workers and members of their families.

The vulnerability frequently suffered from by migrant workers and members of their families, among other things they don't live in their country when difficulties possibly arisen because they work in the foreign countries. Believing that the rights of migrant workers and members of their families are not acknowledged adequately and therefore need proper international protection. Considering that migration frequently causes serious problems for members of families of migrant workers and for the migrant workers themselves.

The main problems of the migrant workers among other things are the job is not in accordance with employment contract, incomplete documents, salary is not paid, the worker is mistreated, sexual harassment, rape, unilateral dissolution of employment, and so forth. "Government has commitment to protect the citizens or the people who work abroad. This can be seen in various regulations, and policies related to employment continuously being revised." In last April, the government has ratified United Nations Convention of 1990 on protection of the rights of all migrant workers and members of their families (convention on migrant workers). And now it has been written down in the Act No 6 of 2012, about legalization of International Convention on the Protection of the Rights of All Migrant workers and Members of Their Families. The ratification constitutes a significant breakthrough for government. Because, it is said, the protection is provided to migrant workers and members of their families as well, so that they can be protected holistically and comprehensively.

The question in this research is do decisions in the United Nations convention of 1990 have been integrated in the regulation and national policy?

INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

On April 12, 2012 Indonesia had ratified United Nations convention of 1990 on the protection of all migrant workers and members of their families (from now on convention of migrant workers). The convention was declared first time in New York, on December 18, 1990 and prevailed as international law on July 1, 2003. Indonesia had signed the convention on September 22, 2004. There were 35 countries had ratified the convention and in Asia there were only 2 countries, Philippine and Indonesia. Indonesia as one of the biggest distributor country of workers to foreign countries should had ratified the convention, even though the countries of destination had not ratified the convention such as Malaysia and Arab Saudi. The ratification is very important because it can show to the world about commitment from a country in carrying out the protection for the workers who work abroad.

On the other hand, by ratifying the convention, the government must provide equal opportunities for foreign/migrant workers and members of their families who work in Indonesia. The convention also regulates the minimal problem of protection standard of the civil, economic, social and cultural rights of migrant workers and members of their families. Therefore the convention is the first step to reform or correct entirely the implementation of the protection of migrant workers.

The convention regulates several important items:

1. Regulates minimum standard of the protection of civil, politic, economic, social and cultural rights of all migrant workers and members of their families. The convention encourages the countries to synchronize their legislations with universal standard contained in the convention.
2. Admits the contribution comes from migrant workers to economy and the people of the country in which they work to and development in the country they come from.
3. Writes down a series of standards of protection for migrant workers and obligation of concerned countries, ranging from home land, transit and the country where migrant workers work.
4. Prevents and abolishes exploitation of all migrant workers and members of their families in the entire process of migration, including prevents human trafficking.
5. The convention is not only to protect migrant workers, but also to protect the interest of the country where the workers work related to access limitation of employment categories to protect its people.

By having ratified the convention on migrant workers, government should take immediate steps to harmonize the regulations related to implementation of the protection for migrant workers. Therefore, the convention should be a basis of reference to do the revision of the Act No 39 of 2004 on employment and protection of Indonesian workers who work abroad.

With this convention, Indonesia can play its diplomacy and raise bargaining position to encourage the recipient countries to accept and respect the rules of the convention. Government, in addition to should do revision of the act no 39 of 2004 on employment and protection of migrant workers, it should evaluate 13 MOUs had been signed with recipient countries.

In providing services for migrant workers, government should look at this convention, so that no more such cases as abandonment, fake documents for migrant workers. With this convention, it should be a moment for law enforcement against violators of migrant workers.

PRINCIPLES AS PHILOSOPHICAL BASIS

Article 2 of the Act No 39 of 2004 states that ‘employment and protection for future workers is based on harmony, rights equality, democracy, social justice, gender justice and equality, non-discrimination, and non-human trafficking.’”

In the article 2, there are principles categorized as one type, such as democracy, equality of rights and nondiscrimination. The meanings of democracy are 1. Form or system of government, all people partake to govern by way of their representatives, government of the people, 2. An idea or a way of life that supports or prioritizes the equality of the rights and duties and equal treatment for all people. It is clearly that democracy means equality of the rights.

Discrimination means to differentiate treatment against fellow citizens (based on color, class, ethnic group, economy, religion and so forth). Relating to employment and protection of the TKI, nondiscrimination means to resist all forms of difference of treatment and opportunities against TKI based on gender, color, class, ethnic group, economy, religion, citizenship and so forth. Therefore, principles of democracy, nondiscrimination can be merged with the principle of equality and add principle of state responsibility as the replacement.

In Article 1, number 1 of the Act No 21 of 2007 on eradication of criminal act of human trafficking states that one of elements of human trafficking is exploitation or to cause other people to be exploited. Related to employment of the TKI abroad, the problem is not just the workers exploited but also they frequently become the victims of violence, sexual harassment and et cetera violating dignified human beings. Therefore, in my opinion, the principle of non-human trafficking is replaced with principle of humanity in order to norm of employment and employment of Indonesian workers (TKI) reflects the rights of the TKI as human beings who have dignity.

Another principle needs to be added in the employment and protection of the TKI in the future is the principle of state responsibility, this is in accordance with mandate of Article 281 point 4 of Indonesian Constitution of 1945 that “state responsibility for protection, promotion, enforcement, fulfillment of human rights (HAM)” and it is also in accordance with *staatidee* or national goal stated in the preamble of the Constitution, i.e. to protect the entire Indonesian nation...

The laws or regulation of workers had been issued by government; the latest was the Act No 39 of 2004 on labor force. In the administration of workers, however, legal source is needed. The source of law is everything where we can find rules about labor force.

The legal source can be differentiated into:

1. Material legal source and
2. Formal legal source.

The material legal source is people sense of justice. Sudikno Mertokusomo said that material legal source is the factor that helps or supports legal formation.

The formal legal source is the place where we can find the law. The formal legal source is the place or source from which a rule obtains force of law.

The formal legal sources of labor force are: (1) legislation; (2) custom; (3) decision; (4) treaty; (5) contract. Iman Soepomo said that legal sources of labor force are the laws, other rule, custom, verdict, contract, and treaty.

Legislation

Meant by legislation is because what will be appointed are the laws or other rules under the laws. The laws are rules set by president with legislative assembly's approval. There is government regulation as substitute laws which have the same position as the laws. The rule or regulation is set by president, in case of an emergency. The regulation must have legislative assembly's approval in the next convention.

The regulations which have the same position as the laws are (1) *wet*; (2) *algemeen maatregel van bestuur*; (3) *ordonnantie*. The regulations which have position under the laws, but they can be called as the laws, i.e. material laws, are:

- a. *Regerings verordening*.
- b. *Regerings besluit*.
- c. *Hoof van de afdeling van arbeid*.

The regulations which have lower positions than the laws are government regulation number 4 of 1953 on obligation to report the company, government regulation number 49 of 1954 on ways to make or to regulate the employment contract, secretary regulation of employment number 9 of 1964 on decision of the amount of severance pay.

Custom

There were many abandoned views which stated that the only one legal source is the laws, since in fact it is impossible to regulate complex people in a static law, whereas change in people's life takes place very quickly. In the sector of employment, in addition to the laws, there is developing law that regulates certain relationships. The developing law is called customary law or unwritten law. Development of customary law in the sector of employment in Indonesia, according to Abdul Rachmad Budiono is because:

- a. Development of issues of employment is faster than the existing legislation;
- b. Many regulations which came from Dutch government were not in accordance with the condition of employment after the independence of Indonesia.

Decision

Decision as legal source of employment, playing a very important role is the committee's decision of dispute resolution of employment, in the regional and central levels. The committee as compulsory arbitration frequently contains the rules stated on its own authority and responsibility, and sets what really prevails between related parties, not to regulate something that should prevail like the regulations in general. Frequently, this committee to do legal interpretation, or even to do *rechtvinding* (discover the law). The committee's decision has great influence, because the decision imposes criminal sanction, in addition to civil sanction. This was stated in article 26 of the Act No 22 of 1957, i.e. is imprisoned with maximum imprisonment three months or maximum fine ten thousand rupiah. After the Act No 2 of 2004 prevails on resolution of industrial relation dispute, the resolution is investigated and brought in a verdict by judges at PPHI (Pengadilan Penyelesaian Hubungan Industri).

Treaty

Treaty is international agreement about issue of employment between Indonesian government with other country. According to the principle “pacta sunt servanda”, each country as rechtspersoon (the public) is bound by the agreement or treaty they made. In international law, there is an understanding or agreement like the treaty, i.e. convention. The convention is a plan of international agreement in the sector of labor set by international conference of ILO (International Labor Organization). Although Indonesia is a member of ILO, but the convention does not automatically bind Indonesia. In order to bind, the convention has to be ratified by Indonesian government. Today there are three conventions had been ratified by the government, those are;

- I. Convention No 98 on basic rights to organize and to negotiate, i.e. in Act No 18 of 1956.
- II. Convention No 100 on equal wage for workingmen and workingwomen for the same-value jobs, i.e. the Act No 80 of 1957.
- III. Convention No 120 on Hygiene in trade and offices, i.e. the Act No 3 of 1969.

Facilitate the Ratification, Advocating and Cooperation

Civil organization, religious institution, union and migrant group have played important roles in communicating and working with government officers, parliamentary members and media of communication in a number of countries which finally ratified the convention on rights of migrant workers. In several countries, they mobilized public opinion through their activities and network to support government and parliamentary steps to do the ratification.

International institutions, especially ILO, IOM, OHCHR, and UNESCO, can help by suggesting advices and technical support to the government and legislative body in considering the ratification.

Argument about the Consequence of Implementing the Convention

The convention promotes non documented migration. The argument stated that to acknowledge explicitly the basic rights of all migrant workers by ratifying the convention will encourage non-documented immigration, and/or “send a false alarm.” Although the acknowledgement from a country for the rights of a certain group can possibly be consider as attraction of the country for members of the group, but there is no empirical evidence that the ratification will increase the arrival of non-documented migrants.

The migrant workers come because they are looking for jobs, and whenever there are demands for manpower, they will come. But, history also shows that people often “choose their legs” to run from oppression, suffering, for migrating to a country which grants greater freedom and opportunity.

Contract

Contracts constituting legal source of employment are: (a) employment contract, and (b) labor contract. The employment contract only binds parties in the contract, i.e. employer and employee (labor). The labor contract can be formulated as a contract between union and employer about the requirements to be considered in the employment contract. As legal source, labor contract plays more important role than employment contract. The more unions and employer groups in the contract, the more parties are bound by clauses in the labor contract. Iman Soepomo said that sometimes labor contract has legal force as the laws.

CONCLUSION

Today problematic workers in foreign countries increase because there are various weaknesses in the Act No 39 of 2004. The system of posting or employment and protection of the TKI regulated in the Act needs to be revised immediately. The posting or employment and protection of the TKI in foreign countries has complexity of problem cannot be resolved partially, but it has to be done comprehensively. A fundamental change needed to be done immediately is to give greater responsibility to government in the process of employment and protection of the TKI. The involvement of private sector in the process of employment and protection of the TKI is only limited to seek job order in foreign countries. The Act No 39 of 2004 is more regulating the process of employment, and less regulating the protection, whereas the protection needs a more comprehensive management, detail and more delineating the types of protection before, at the time of and after employment. In the revised Act No 39 of 2004, CTKI/TKI is not treated as an object but as a legal subject, where the protection is not limited on physical and psychological, but also empowerment of CTKI/TKI in order to defend his or her rights. In revised Act, it is necessary to bring about services of employment and protection of TKI which are not too bureaucratic, but easy, cheap and safe services. Other thing need to be done is program priority of TKI protection in foreign countries, i.e. to hold an effective diplomacy with the government where the workers are placed, among other things it has to be made memo of understanding or MOU clearly and to TKI's advantage. So TKI protection is easier to do, skill requirements and TKI number in each country will be easier to be predicted.

ACKNOWLEDGEMENTS

This article is dedicated to civitas academica of Brawijaya University. They have already contributed significantly to this article.

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