

# AL-QADĀU

PERADILAN dan HUKUM KELUARGA ISLAM

## The Equation on the Justice for Migrant workers: The Urgency of Protection on Prevention Smuggled Migrant worker based on Indonesian laws

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Info Artikel	Abstract
<b>Diterima*</b> 29 Maret 2021	<i>Wilayah laut Indonesia menjadi tantangan besar bagi Pemerintah Indonesia untuk mengelolanya. Kelautan Indonesia saat ini memiliki banyak regulasi di laut. Hal tersebut tidak bisa mencegah kepentingan dasar semua orang yang mencari nafkah dari sana. Banyak migran yang diselundupkan ke dalam dan melalui wilayah laut Indonesia. Kekhawatiran utama yang mengemuka adalah bagaimana seharusnya pemerintah memberikan persamaan bagi pekerja migran Indonesia yang diselundupkan dan bagaimana seharusnya pemerintah menempatkan perlindungan pekerja migran untuk memberikan persamaan bagi mereka. Penelitian ini menggunakan jenis penelitian hukum normatif dengan pendekatan konseptual dari banyaknya regulasi yang berlaku dalam UU Ketenagakerjaan, juga dilengkapi dengan pendekatan literatur berupa literatur hukum Indonesia dan jurnal kelautan. Temuan dalam praktiknya membuktikan bahwa pemerintah harus lebih memperhatikan kesejahteraan dan perlindungan nelayan terkait penangkapan ikan. Perlindungan obyektif terhadap sumber daya laut Indonesia adalah dari mengatur semua regulasi untuk membangun ekonomi Indonesia dari sektor Maritim. Itu semua diperlukan untuk membuat sistem baru dalam perlindungan hukum Nelayan dan Sumber Daya Kelautan di Indonesia.</i>
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<b>Disetujui*</b> 25 Juni 2021	<i>Indonesia's marine territory has become a big challenge for the Government of Indonesia to manage it. Nowadays, Indonesian marine has lot of regulation in the sea. But it's cannot prevent the basic interest of all people that earnings life from there. A lot of migrant has been smuggled in and by Indonesian's marine territory. The main concerns that arouse are: how should government give an equation for Indonesian migrant workers that are smuggled and how should the government put migrant workers protection to supply the equation for them. These questions will solve by a normative juridical study on the protection of natural resources and the resources of Indonesian fisherman. The study uses normative legal research which elaborated with conceptual approach from numbers of regulations that apply in marine labor law and employment law. This research is also complemented by a literature</i>

*approach in the form of Indonesian legal literature and marine journals to address the issues raised in this paper. The findings in practice prove that the government should give more attention for the fisherman's welfare and protection related to fish catching. The objective protection for Indonesian marine resources is from regulated all the regulation to develop Indonesia economic from Maritime sector. It is all needed to make a new system in legal protection for Fisherman and Marine Resources in Indonesia.*

*Keywords: Equation, Migrant Workers, Smuggled, Prevention, Protection.*

## **A. INTRODUCTION**

The sea, especially the territorial ocean has special characteristics in each of its layers for humans. As for as the law of the sea; law of the sea were a series of regulations that accommodating the behavior of people as members of the community. This law aims to establish order among parties of the community. The sea is a vast expanse of water between various continents and islands in the world. Because Indonesia's territory consists of 60% of the territorial waters/ or oceans, the Writer Team also explained the condition of the Indonesian archipelago. Behind all of this resources, there a lot of problems; include about migrant worker.

People or workers who work abroad to get a number of benefits in the form of a salary or wages through a work agreement are known as migrant workers. These migrant workers work with a large number of risks with the lure of large wages. The flow of Indonesian labor migration abroad is getting bigger and bigger every day. This is due to an unsolved domestic labor problem. The crisis, which has not yet been resolved, has also accelerated migration. According to the Indonesian Association for Sovereign Migrant Workers (2013), it is estimated that the number of Indonesian migrant workers abroad is 4.5 million people. Most of these migrant workers are women (around 70%) who work in the domestic and manufacturing sectors. The rest, about 30% are men, working as laborers in plantation, construction, transportation and services.

During their time of employment, most of the migrant workers worked in sectors that were full of risk (3D: Dark, Dirty, Dangerous) but lacked protection. In the Middle East (especially Saudi Arabia), Indonesian migrant workers who are often becoming victims of rape and employer violence number in the thousands. In Malaysia, Indonesian migrant workers are treated as 'persona non grata'. The Malaysian government's anti-migrant policy represses undocumented Indonesian migrant workers in Malaysia. In order to expel undocumented Indonesian migrant workers, the Malaysian government even issued an Immigration Act 1154 of 2002.

There are many conventions for each country to protect workers or migrant workers who work across jurisdictions between countries. If a convention or national law of a state party is violated, it will result in criminalization that is classified as transnational

crimes. Transnational crimes involving labor or labor are generally carried out by cross-border smuggling syndicates from one country to another. The group works in a neat, serious and covert organization. The network of this group in its work involves several countries, such as countries of origin / smugglers, countries of transit and countries of final destination. Regarding the methods and modes of organized crime perpetrators and their victims, migrant workers across state jurisdictions, it is understood that they are serious crimes committed by organized criminal groups. Based on these things, the writing team is interested in discussing issues around protection aimed at preventing the smuggling of migrant workers.

## **B. METHOD**

The rapidly developing global market and economy has a direct impact on the socio-cultural changes of society. Communities in wealthier countries need more cheap labor to replace domestic, manufacturing, and other hard work roles. This situation requires the role of legal force to regulate it. The power of law arises because of the hierarchical order. The legal strength of statutory regulations in accordance with the principle of hierarchy means that the division of each type of statutory regulation is based on the principle that the lower statutory regulations must not conflict with higher statutory regulations.

From January to August 2017, the National Agency for the Placement and Protection of Indonesian Workers (BNP2TKI) has succeeded in placing as many as 148,285 TKI to a number of destination countries for placement. These procedural workers are spread across the Asia Pacific region, America, the Middle East and Europe. However, the rampant sending of female workers has not been matched by the maximum protection from the government. Whole human development means the development of a whole Indonesian society to create a just and prosperous society that is evenly distributed, both materially and spiritually based on Pancasila and the 1945 Constitution. The implementation of national development also involves labor. Labor has a very important role and position as actors and goals of development. In accordance with the role and position of the workforce, it is necessary to develop manpower to improve the quality of the workforce and their participation in development and to protect workers and their families according to human dignity .

The 1945 Constitution of the Republic of Indonesia Article 27 paragraph (2) states the right of every citizen to work and a decent living for humanity. Article 28 D paragraph (1) the right of everyone to recognition, protection and legal certainty that is just and equal treatment before the law paragraph (2) the right to work and to receive fair and proper treatment in working relations. Article 28 E paragraph (1) the right to religion, choose education and teaching, choose a job, choose citizenship, choose a place to live in the territory of the country and leave and return, paragraph (2) the right to believe in beliefs, express thoughts and attitudes according to one's conscience and Article 29 the obligation of the state to guarantee religion.

Act no. 13 of 2003 concerning Manpower Article 31 states the right of every worker to choose, get, or change jobs and earn a decent income at home or abroad. Employment placement is carried out based on the principles of being open, free,

objective, and just and equal without discrimination (Article 32). As Article 33 of Law no. 13 of 2003 manpower placements consist of domestic and overseas. Meanwhile, provisions regarding the placement of workers abroad are regulated by Act no. 39 of 2004, namely the state is obliged to guarantee and protect the human rights of its citizens who work both at home and abroad based on the principles of equal rights, democracy, social justice, gender equality and justice, anti-discrimination, anti-human trafficking. The placement of Indonesian workers abroad is an effort to realize equal rights and opportunities for workers to obtain decent work and income, which is carried out with due regard for dignity, human rights and legal protection as well as equal employment opportunities and provision. Work force in accordance with national law.

One of the objectives of the International Labor Organization (ILO), as stated in its Constitution. The Constitution is protect the interests of workers when they are employed in countries that are not their own, taking into account the expertise and experience of the organization in matters of relevance. Workers and their family members are guaranteed. The principles and standards set out in the ILO framework, in particular the Convention on Migration for Work (No.97), the Convention on Migration in Persecuted Conditions and the Promotion of Equal Opportunity and Treatment for Migrant Workers (No. 143), Recommendations on Migration for Work (No. 86), Recommendation on Migrant Workers (No.151), Convention on Forced or Forced Labor (No. 159), and Convention on the Abolition of Forced Labor (No. 105).

## **C. RESULT AND DISCUSSION**

### **The Migrant Workes, High Risk Between Needs and Hope**

As mentioned above, there are many expectations regarding the occupational risks of Indonesian migrant workers. The root of the problem includes Law Number 39 of 2004 as the highest regulation in dealing with the problem of migrant workers, which does not include a definition of undocumented migrant workers. This law also does not have a protection perspective. In fact, undocumented and documented related to the development of the global crisis which is increasingly acute has prompted several receiving countries, such as the Hong Kong government to implement policies that encourage migrant workers not to have documents, for example the two-week rule.

In addition, the economic crisis has prompted recipient countries to increase the need for undocumented Indonesian migrant workers (BMI) (so that they do not have the right to do anything and to get cheap labor). In sending countries such as Indonesia, choosing to become undocumented migrant workers is because of the compulsion not to be burdened with expensive fees from the process of departure when they become migrant workers.

As stated by M.Fayyad, the problems that befall Indonesian migrant workers occur from their departure from Indonesia to their arrival abroad. There are four main problems with Indonesian migrant workers abroad:

1. The pattern of working relations (labor - employer). The work pattern between migrant workers and their employers is still developed unilaterally by the employer without paying attention to workers' rights and voices. Efforts are

- needed to strengthen the position of workers so that they have the same power in the work contract / agreement.
2. The right to organize. Migrant workers do not exercise their rights to join labor unions in the local country, so that if at any time there is a problem there is no support from others.
  3. Minimum standard of wages. Migrant workers on average have not followed the local state wage standards and have not received the same rights as workers / workers in that country.
  4. Conflict. When there is a conflict with an employer, on average, migrant workers do not yet have the power to resolve it legally through courts or third party mediation.

The main problem of Indonesian migrant workers who seek work abroad is that the pattern of work relations between migrant workers and their employers is still developed unilaterally by the employer without paying attention to the rights and voices of workers, migrant workers do not exercise their rights.

Indonesia as one of the largest labor-sending countries abroad has ratified the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (hereinafter referred to as the Migrant Workers Convention). However, the destination countries for the placement of Indonesian migrant workers have not yet ratified the convention, such as Malaysia and Saudi Arabia. The ratification of this Convention is very important because it can show the international community about the commitment of a country in protecting its workers who work abroad. On the other hand, ratifying the Convention means that the Government is obliged to provide equal opportunities and opportunities for foreign workers or migrant workers and their family members who work in Indonesia, including if they are laid off and are obliged to provide unemployment benefits.

### **The Law Of Labor In Indonesia Concerning About Migrant Worker**

Act no. 13 of 2013 Article 35 paragraph (2) states that the implementer of the placement of workers, namely government agencies responsible for manpower affairs and private institutions with legal status are obliged to provide protection from recruitment to placement of workers. Meanwhile, Law no. 39 of 2004 states that the protection of migrant workers is all efforts to protect the interests of prospective migrant workers / migrant workers in realizing guaranteed fulfillment of their rights in accordance with statutory regulations, both before, during, and after work.

The working relationship between users and migrant workers is stated in Law no. 39 of 2004 Article 55 is as follows:

1. After the work agreement is agreed upon and signed by the parties,
2. Every TKI is obliged to sign a work agreement before the TKI concerned is sent abroad.
3. A work agreement is signed in the presence of an official of the agency responsible for manpower affairs
4. The work agreement as referred to in paragraph (2) shall be prepared by the implementer of the placement of private TKI

5. The work agreement as referred to in paragraph (2) and paragraph (3), at least contains:
  - a. Username and address of the user;
  - b. The name and address of the TKI;
  - c. The position and type of work of the TKI;
  - d. The rights and obligations of the parties;
  - e. Working conditions and conditions including working hours, wages, and payment methods, both leave and rest periods, facilities and social security;
  - f. Term of employment extension

Regulations related to the rights of migrant workers in the Indonesian migrant worker protection law have several inconsistencies, especially with regard to the protection of women migrant worker. The relation of the constitution and conventions to the rights of migrant workers and their family members will prevent the right for each migrant worker. For example, in Article 6, Indonesian migrant workers who work abroad at a legal entity employer, if there is an employment risk experienced by Indonesian migrant workers themselves become their personal responsibility. In addition, Article 63 is also contrary to the Convention on the Rights of Migrant Workers and Members. Their families Article 16 paragraph (2) states that migrant workers and members of their families must have the right to effective protection from the state against acts of violence, physical injury, threats, intimidation by government officials or by individuals, groups or institutions.

The law on the protection of Indonesian migrant workers is basically a form of Indonesia's commitment as a follow-up to the ratification of the Convention on the Rights of Migrant Workers and Members of Their Families. The protection of Indonesian migrant workers, especially in this law, appears to neglect efforts to prevent the smuggling of migrant workers.

### **Prevention on Migrant Workers Smuggling**

Indonesia as one of the largest labor-sending countries abroad that has ratified the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; has an obligations to law enforcement. Even though the destination countries for the placement of Indonesian migrant workers have not yet ratified the convention; Indonesian government should still enforcing the convention. As an obligation as, the enforcement of ratification is very important. It can show the international community about the commitment of Indonesian government to protecting its workers who work abroad. On the other hand, ratifying the Convention means that the Government is obliged to provide equal opportunities and opportunities for foreign workers or migrant workers and their family members who work in Indonesia, including if they are laid off and are obliged to provide unemployment benefits.

On the other hand, as one of the of the International Labor Organization (ILO) task, Indonesian government should state in its Constitution. The Constitution is protecting the interests of workers when the employee in countries that are not their own, taking into account the expertise and experience of the organization in matters of

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relevance. Workers and their family members are guaranteed. So by that, there are some ways to promoting the protection for Indonesians' migrant workers. There are:

1. Promote and realize the basic principles and rights of migrant workers at work;
2. Create greater opportunities for female and male migrant workers to find decent work;
3. Increase the coverage and effectiveness of social protection for all;

Although migrant workers make an important contribution to local economic development, attention for workers abroad is still inadequate. The guarantee and acceleration of the objectives of the safe placement and protection of Indonesian migrant workers abroad requires integrated services and responsibilities, in this case the National Agency for Placement and Protection of Indonesian Migrant Workers (BNP2TKI) is formed. International law enforcement to prevent smuggling of migrants in the labor sector is a form of necessity. The International Criminal Justice Institute needs to be given new powers by the United Nations to deal with transnational crimes if the state is unable or unwilling to deal with them. The ICC is expected to be able to prosecute and punish the perpetrators of crimes such as the transnational crime of migrant smuggling.

#### **D. PENUTUP**

The conclusion that we can afford from text above is the protection for Indonesia migrant workers, especially in terming prevention is a must. And the preventions that has been mention before are : Promote and realize the basic principles and rights of migrant workers at work; Create greater opportunities for female and male migrant workers to find decent work; Increase the coverage and effectiveness of social protection for all.

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