IS THE STATE OF INDONESIA IN CHARGE TO PROVIDE LAW PROTECTION TO THE INDONESIAN MIGRANT WORKERS?

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Abstract. Right to work is assured in the regulation of 1945 Constitution (amendment) Article 28 D Clause (2) mandating that every person deserves to work and in return they get wages, fair and proper treatment in the relation of employment. Working as migrant worker is accessible job opportunity, especially to people who have low education and skill with promising income. Many cases faced the migrant worker. It is necessary to analyze how the state's position in providing protection to its citizens experiencing problems overseas. Country has the right to protect its citizens overseas and to intervene diplomatically. It cannot provide direct protection because if there is a criminal act committed by Migrant Worker of Indonesia, then the applicable law is the law of country where the Migrant Worker works. The actual protection is to make bilateral agreements with the destination country. Law No 39 Year 2004, Article 77 regulates the right to obtain protection from pre-placement, placement period to post-placement. Employment or the right to work is one of human rights that is the right to social freedom, namely the right to meet the basic needs. Regarding the legal protection for women migrant workers, the relevant human rights theory used is the natural rights theory because the right to work in this case is the right that every human being possesses

1. Introduction

In order to fulfill their needs and purpose, human is gifted by certain ability through interaction, one of them are related to employment. Employment to human being is related to the nature God gives; by working human in their position as employee gets wages that are used to meet the needs of their life. Moreover, working is a part of human rights. This right is regulated in the United Nation Universal Declaration of Human Right, Year 1948 Article No 23 that generally states “every person deserves to get a job” [1]. While the basic right for every human to migrate is recorded in the Article 13 Chapter 1 stating that “Everyone has the right to freedom of movement and residence within the borders of each state.

In the regulation of national law of Indonesia, right to work is assured in the regulation of 1945 Constitution (amendment) Article 28 D Clause (2) mandating that every person deserves to work and in return they get wages, fair and proper treatment in the relation of employment. Employment rights assurance in 1945 Constitution carries certain consequences for the state to provide law protection to every citizen to obtain their rights. Furthermore, the regulation of Article 28 Clause (4) states that protection, progress, enforcement, and fulfillment of human rights are the responsibility of the state especially the government.
Working as Migrant Worker of Indonesia who works overseas is accessible job opportunity, especially to people who have low education and skill with promising income. Even though the Migrant Worker gives foreign exchange to state and regional government as well as gives solution to the problem of employment opportunity within the country, Migrant Worker still obtains limited law protection [2]. This condition is proved by the existence of so many cases of violation especially for the right of Women Migrant Worker every year.

The birth of Regulation No 39 Year 2004 is meant to create effective placement mechanism based on the Human Rights Regulation especially to Migrant Worker of Indonesia, aiming to prevent or at least minimize the problems faced by the Migrant Worker of Indonesia. Even though the existence of cases faced by the Migrant Worker, many people are still willing to work in this field, since the number are increasing every year despite of the problem. The Ministry of Labor and Transmigration identifies 110,171 cases in regard with the placement of Migrant Worker of Indonesia [3].

Related to the problem of employment, the protection of Migrant Worker rights have been regulated in the conventions and recommendations of International Labor of Organization /ILO [4]. The existence of ILO convention can legalize the same standard of protection. ILO convention is binding where every member of ILO is bound to implement the convention since its position as a member of ILO is not based on the ratification [5]. This obligation at Declaration of Fundamental Rights and Principles at Work has been adopted in the ILO Convention No 86 in June 1998 [6].

In this context the question of whether the state is responsible for protecting labor migrants is subject for debate. It is necessary to analyze how the state's position in providing protection to its citizens experiencing problems overseas because the reality of the migrant workers of Indonesia problem occurs overseas in the context of universal provisions and the provisions of state of Indonesia.

2. The State Responsibility

To explain about the concept of state responsibility and legal protection to Migrant Worker as a whole needs to be done at national and international level. This is because procedural process of placement of Migrant Worker consists of pre-placement, in-work and post-placement. At the national level, the instruments of protection are directed to the phase before the migrant workers go abroad and after returning to the state of origin. While instruments protection at the international level starts when workers leave Indonesia and are at work until the time he or she returns to Indonesia.

Related to the concept of protection at the time Migrant Worker in overseas, it is related to the jurisdiction of the destination country. Jurisdiction is an attribute of state sovereignty in which the jurisdiction of a certain state refers to the competence of the state to govern people and property with its domestic law (criminal and civil) [7]. This principle is generally granted by international law to all countries that want to enforce it. This principle relates to a state which is not obliged to surrender its citizens who have committed crime overseas [8].

A country can ask responsibility for losses to other countries for reasons such as breach of treaties, breach of contractual obligations, and the existence losses, related to the citizens of other countries and so on [7]. Such breach of obligation can be an act and omission. The state’s responsibility to its citizens cannot be separated from the issue of claims, since a country has the right to protect its citizens overseas and to intervene diplomatically or to claim for a satisfactory settlement. The analogy of this cases that the claimant states is deemed to have been harmed through its people or claimed its right according to international law. In the case of labor law in particular, it cannot provide direct protection because if there is a criminal act committed by Migrant Worker of Indonesia, then the applicable law is the law of country where the Migrant Worker works.

3. The State’s responsibility toward legal protection for Migrant Worker

A further understanding is the protection of the law which implies giving protection of human rights that are harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law. Law is an inseparable part of human life whereas legal protection is a
form of consequence of a state of law, in which ‘the state of Indonesia is based on law (rechtstaat) not based on mere power (machtstaat).” The government based on the constitution is not absolute [9]. The law is living within society and on the contrary, in society there is always a legal system, therefore there is a famous term “ubi societas, ibi ius” [10].

Related to the case of legal protection for workers, Suliati Rahmat argues that the Republic of Indonesia is obliged to protect the entire nation of Indonesia [11]. The phrase “the entire nation of Indonesia” also includes workers which mean Migrant Workers. Furthermore, it is said that the protection of labor law, whether with or without the assistance of workers’ organizations, through regulations, actions aimed at protecting the weak, places the workers in a proper position as human beings.

The protection of the law is the protection of the pride and dignity as well as the recognition of human rights owned by legal subjects within a country based on the legal protection of arbitrariness. There are two kinds of legal protection for people, namely: preventive law protection and repressive legal protection. M Hadjon’s opinion facilitates an analysis of legal protection [12]. In the concept of legal protection for people, at least there are two relating parties, where the protection of the law is focused on one party, with its actions, dealing with the people who are subjected to such acts of government. The concept of legal protection for the people is very relevant to use in assessing the legal protection for Migrant Worker because the worker, in this case Migrant Worker, is in a weaker position than the company. Furthermore, the actual protection is to make bilateral agreements with the destination country, the protection that is given to all Indonesian citizens, whether the workers are sent legally or illegally due to cheating of brokers and they must be protected in the making of the agreement.

The protection scope of the law is wider, by raising the issue of protection of all Indonesian citizens overseas from the side of the penal code. Therefore, another scope of law protection, the state needs to enter into extradition treaties as well as mutual assistance in criminal matters (Mutual Assistance in Criminal Matters) and the diplomatic lobbies. If the provisions of the ILO cannot be a mediator between the national provisions of each country, it can be minimized through the creation of bilateral agreements or contracts that can accommodate the interests of each party [5].

Basically, the contract law has a very important principle to be described, especially to analyze the contracts made by Indonesian workers working overseas with their employers. In signing this standard contract, there is the impression as if there are parties who do not participate in making or formulating the articles. In the arrangement and theory, there are basically two groups of opinions: the first is a group that says for the side who did not participate in making; signing a standard contract, when they are violated their freedom, guaranteed by the principles of freedom of contract. Nevertheless, the other groups argue that the parties who do not participate formulate the articles in the contract still have the freedoms to sign or not sign. Only when he signs, then he or she is no longer free to determine his or her will that should be listed in the contract.

With the principle of freedom of contract, the parties have the right to decide what they want and are also allowed to determine what they do not want to put into their agreement, and what the agreement will be binding on the parties signing the agreement (Article 1338 the Book of Civil Code). In the principle of the existing opinion of the standard contract, it can be traced also by examining the legal relationship between the parties making the agreement in terms of its position, form and nature.

To formulate clauses that contain legal protection requires discussion of the legal principles related to the issue of the legal relationship between the workforce with the employer and the company provider of workforce. The principle is the logical ratio of the regulation that indicates the existence of ethical demands. The legal principles of the legal relationship between the workforce, employers and company provider of workforce are the principles of national law and there are also the principles of international law. Since there are parties who make agreements has different citizenship from the Indonesian workers; namely the company that mediates in the receiving country, as well as the employers who employ them.
The concept of protection of Migrant Workers of Indonesia is contained in Article 1, clause 4 of Law No 39 Year 2004. It states that the Protection of Migrant Worker of Indonesia is all efforts to protect the interests of candidate of Migrant Worker of Indonesia or Migrant Worker of Indonesia in realizing the guarantee of the fulfillment of their rights, in accordance with the rules and regulations in term of before, during, and after working.

Article 77 regulates the right to obtain protection from pre-placement, placement period to post-placement. During the placement, article 78 is stipulated that overseas Representatives of the Republic of Indonesia given the duty to protect migrant workers. This protection is certainly in accordance with the laws and regulations as well as international customs. The protection in this context includes the provision of legal assistance, in accordance with the laws and regulations in the destination country as well as applicable international laws and customs. In addition, the representative of the Republic of Indonesia in the destination country is also obliged the duty of defending the fulfillment of rights in accordance with the employment agreement and or the laws and regulations exist in the destination country.

In article 20 of the Foreign Relations Act, Representatives of the Republic of Indonesia “must” settle disputes among fellow citizens by deliberation or in accordance with applicable law. Consequently, if the Representative of the Republic of Indonesia does not carry out its duties and obligations, then they have violated those articles, or in other words, the forms of violation are not obeying the law. Meanwhile the offender is the Representative of the Republic of Indonesia and Company Provider of Migrant Worker.

In relation to article 79, it can be seen that the obligations of the Embassy of the Republic of Indonesia or the Consulate General of the Republic of Indonesia not only protecting the Migrant Worker of Indonesia, but also including the guidance and supervision of private Company Provider of Migrant Worker of Indonesia representatives in the destination country; namely in this regulation referred to as Business Partners.

While article 25 and article 24 state that in the framework of the protection of migrant workers, the Embassy of the Republic of Indonesia or Consulate General of the Republic of Indonesia may conduct supervision on Business Partners by making a list of troubled Business Partners and further provisions shall be stipulated in a Government Regulation. In this case, the Consulate does not have the authority to revoke the business license of the troubled Partners because it relates to the principle of territorial jurisdiction, as it is well known that the Business Partner is established under the laws and regulations of the country concerned. Then the protection given by the Embassy of the Republic of Indonesia or Consulate General of the Republic of Indonesia against the Migrant Worker of Indonesia in the framework of the control of the Business Partners is to appeal and foster the troubled Business Partners to provide protection. Although the Overseas Company Provider of Migrant Worker of Indonesia Act states that, the Representative of the Republic of Indonesia, in this case the Embassy or Consulate can ‘make’ a list of problematic agents.

This indicates that the Government of Indonesia determines the role of Business Partners in the placement of Overseas Workers, so that the establishment of Business Partners is based on the laws of the destination country, but the Indonesian government may determine the working agreement clause between Private Company Provider of Migrant Worker of Indonesia and Business Partners.

4. Construction of Human Rights in Protecting Labor Migrants

One form of legal protections is the existence of human rights assurances. According to Abdullah Rozali, human rights are [13] the basic rights that human beings have since birth is the grace of God Almighty. It is necessary to understand that human rights are not sourced from the state and the law, but merely derived from God as the creator of the universe and its contents, so that human rights cannot be minimalize (non-derogable right). Therefore, what is required of the state and the law is an acknowledgment and assurance of the protection of the human rights.

According to Miriam Budiardjo [14], the rights formulated in the seventeenth and eighteenth centuries were strongly influenced by the notion of natural law as defined by John Locke (1632-1714)
and Jacques Rousseau (1712-1778) and are limited to political rights only, such as equal rights, the right to liberty, and the right to vote. In the twentieth century, however, these political rights were perceived as less than perfect, and began to add several other rights which were broader in scope. Conversion of human rights concerning the nature of human being to legal rights and socioeconomic rights is the main characteristic of human rights nowadays. The classical theory of human rights based on the theories of natural law, the thoughts relating to human rights include [15]: human rights are owned by everyone naturally in accordance with the assumption that a person is born as a free person, valid universally to everyone regardless of geographical location, do not require actions or programs from others whether they are individuals, groups or governments.

From the understanding of human rights, it can be stated that employment or the right to work is one of human rights that is the right to social freedom, namely the right to meet the basic needs. Regarding the legal protection for women migrant workers, the relevant human rights theory used is the natural rights theory because the right to work in this case is the right that every human being possesses. Furthermore, the right to work or to meet their needs must be contained in the real law, namely as a right assured in the state constitution.

Indonesia as part of the world community and a member of the ILO has a moral obligation to implement international provisions in industrial relations practice in Indonesia [16]. In the Convention which has been ratified into Regulation No 6 Year 2012 concerning the Ratification of the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families, may be found in article 10 of the Migrant Convention that “No migrant worker or member of his or her family shall be subjected to torture or inhuman or degrading treatment or punishment”(International Convention on the Protection of the Rights Of All Migrant Workers and Members Of Their Families).

From this article, it can be seen that Indonesia fully supports what has become an agreement on the Migrant Workers Convention. Therefore, it has been ratified and made a law. The content is concerning of the Migrant Workers Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As mentioned earlier, the legal protection of migrant workers is closely linked to the fulfillment of human rights, including in the protection of employment, protection of equality before the law with fellow citizens of the destination country of work, protection in remuneration, and so on.

5.Conclusion

Related to the concept of protection at the time Migrant Worker in overseas, it is related to the jurisdiction of the destination country. The state’s responsibility to its citizens cannot be separated from the issue of claims, since a country has the right to protect its citizens overseas and to intervene diplomatically or to claim for a satisfactory settlement. In the case of labor law in particular, it cannot provide direct protection because if there is a criminal act committed by Migrant Worker of Indonesia, then the applicable law is the law of country where the Migrant Worker works. Goverment is obliged to protect the entire nation of Indonesia. The phrase “the entire nation of Indonesia” also includes workers which mean Migrant Workers. The concept of legal protection for the people is very relevant to use in assessing the legal protection for Migrant Worker because the worker, in this case Migrant Worker, is in a weaker position than the company. The actual protection is to make bilateral agreements with the destination country, the protection that is given to all Indonesian citizens, whether the workers are sent legally or illegally due to cheating of brokers and they must be protected in the making of the agreement.

The concept of protection of Migrant Workers of Indonesia is contained in Law No 39 Year 2004. Article 77 regulates the right to obtain protection from pre-placement, placement period to post-placement. In relation to article 79, it can be seen that the obligations of the Embassy of the Republic of Indonesia or the Consulate General of the Republic of Indonesia not only protecting the Migrant Worker of Indonesia, but also including the guidance and supervision of private Company Provider.
Employment or the right to work is one of human rights that is the right to social freedom, namely the right to meet the basic needs. Regarding the legal protection for women migrant workers, the relevant human rights theory used is the natural rights theory because the right to work in this case is the right that every human being possesses. Furthermore, the right to work or to meet their needs must be contained in the real law, namely as a right assured in the state constitution.

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