

# Politics And Legal Philosophy Of Indonesian Migrant Worker Protection: Case Study In Malaysia

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# Politics And Legal Philosophy Of Indonesian Migrant Worker Protection: Case Study In Malaysia

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**Abstract:** This study was conducted on how the State attempts to maximize legal protection against the rights of migrant workers and their family members, especially in Malaysia and how Indonesian state law protects the rights of Indonesian migrant workers and their family members. This study uses a legal pluralism approach, which seeks to operationalize the constructivism paradigm to obtain empirical and non-empirical material data. The social legal approach is also used to reveal empirical data as material for analysis to be submitted to the Legal Entity (State). The results of the study indicate that legally, Indonesia's efforts to maximize legal protection against the rights of migrant workers and family members are through Law No. 18 of 2017. Specifically with Malaysia, Indonesia and Perkese, BPJS Ketenagakerjaan, or SOCSO signed a Memorandum of Understanding (MoU) on March 4, 2019. Politically, Indonesian state politics to protect Indonesian migrant workers and family members, among others, by ratifying ICRMW and establishing laws No. 18 of 2017 which adopted ICRMW as a whole although not all aspects of migration. This effort is needed, considering philosophically, Indonesian migrant workers need to be involved in the policy-making process so that safe migration for TKIs is realized. Pancasila is used as a tool or touchstone to test Law No. 18 of 2017 because these principles can provide a normative basis for the law to prioritize human values and act fairly and civilized.

**Keywords :** legal protection, migrant workers, rights, legal philosophy

## 1. INTRODUCTION

THE Indonesian state must fulfill the rights of every citizen to be able to work in a healthy environment and good working conditions, which are based on Pancasila, especially the principles of 'Fair and Civilized Humanity'. Article 27 (2) The 1945 Constitution of the Republic of Indonesia stipulates that every citizen has the right to work and a decent life for humanity. The right to work is a human right and becomes an inseparable part of human dignity. Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government (Article 28 I (4) of the 1945 Constitution of the Republic of Indonesia). Therefore the State is obliged to protect the rights of workers who work both domestically and those who work abroad (Indonesian migrant worker or Tenaga Kerja Indonesia/abbreviate: TKI)).

Protection of TKI is all efforts to protect the interests of TKI and/or TKI candidates and their family members in realizing the fulfillment of their rights in all activities before work, during work and after working in legal, economic and social aspects (Article 1 (5) Law No. 18 2017 concerning the Protection of Indonesian Migrant Workers (PTKI Act) .The aim of this protection is to ensure the fulfillment and enforcement of human rights as citizens and TKI, and to guarantee the legal, economic and social protection of TKI and their families. The PTKI Act that every TKI family has the right to obtain information about the conditions, problems and return of TKI, receive all TKI property that dies abroad, obtain copies of TKI and/or TKI candidate documents and work agreements, and gain access to communication.

Placement of TKI is an effort to realize equal rights and opportunities for workers to obtain decent jobs and income

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(Mafruhah et al., 2019). The placement is carried out while taking into account the dignity, dignity, human rights and legal protection as well as the equal distribution of employment opportunities and the provision of labor in accordance with human needs. The placement data of TKI from the National Agency for Placement and Protection of Indonesian Workers (BNP2TKI) noted that the number of TKI placements in 2016 was 234,451 people, in 2017 it rose to 262,899 people and in 2018 there was another increase to 264,092 people. Whereas the majority of TKI placements are still dominated by Malaysia, namely in 2016 there were 87,623 people, in 2017 it rose to 88,991 people and in 2018 it rose again to 90,671 people (Center for Development and Information Research BNP2TKI, 2019). However, migration often results in serious problems for TKI and also family members. Based on data from BNP2TKI that the number of complaints of problems throughout 2016 was 4,761 cases, in 2017 amounted to 4,349 cases and in 2018 there was an increase to 4,678 cases. Cases involving termination of employment before the employment agreement expires, salary is not paid, salary deductions exceed provisions, communication breakups, migrant workers want to be repatriated, overstayed and undocumented migrant workers always occupy the largest 10 (ten) complaints. Complaints of the biggest problem occur in Malaysia, namely in 2016 there were 1,535 cases, in 2017 there were 1,704 cases and in 2018 it rose again to 3,120 cases (Center for Development and Information Research BNP2TKI, 2019).

## 2 METHOD

This study uses a legal pluralism approach, which seeks to operationalize the constructivism paradigm to obtain empirical and non-empirical material data. The legal socio approach is also used to disclose empirical data as material for analysis to be submitted to the State entity. Documentation data is used as the main material for extracting research data. This research prioritizes qualitative research about TKIs to express exclusively by participating fully in exploring the problems experienced by TKIs. Data validation is also done qualitatively by conducting norm studies as a beginning to find out how the

concept of legal protection against TKI rights and family members in Malaysia.

## 2.1 Legal Protection of TKI Rights and Family Members In Malaysia

Most TKI placements are found in Malaysia. The highest number of complaints of problems experienced by TKI occurred in Malaysia, namely in 2016, there were 1,535 cases, in 2017 there were 1,704 cases and in 2018 there was a significant increase to 3,120 cases (Center for Development and Information Research BNP2TKI, 2019). The problems experienced by TKI are related to unpaid salaries, violations of employment contracts, inability of companies to provide employment and inability of prospective workers. The social problems are unregistered marriage, children out of wedlock and relations with foreign nationals. While the problems experienced by domestic workers include unpaid salaries, persecution, confinement, not strong employment and fraud. Social problems are related to culture and mental disorders. Based on the interview on 26 March 2019 at the Consulate General in Johor Bahru Malaysia, another problem is the enactment of the online maid system (SMO), which is an unfair employment contract, exploitation, insurance payment problems, immigration issues, and the difficulties of the Indonesian Representative in protecting PLRT considering that the law used is Malaysian law. One of the efforts made by Indonesia to protect the rights of TKI and its family members is by signing UN General Assembly Resolution 45/158 dated 18 December 1990 concerning the International Convention on the Rights of All Migrant Workers and Members of Their Families (ICRMW), on September 24, 2004 (Pudjiastuti, 2010). Indonesia only ratified it on April 12, 2012 through Law No. 6 of 2012 concerning ICRMW approval. Previously, Indonesia also ratified several conventions from the International Labor Organization (ILO) that supported decent work for migrant workers. The ILO Conventions include: Convention No. 29 of 1930 concerning Forced or Compulsory Labor, Convention No. 98 of 1949 concerning the Application of the Principles of Right to Organize and to Bargain Collectively, Convention No. 100 of 1951 concerning the Equal Remuneration for Men and Women Workers for Work of Equal Value, Convention No. 87 of 1948 concerning the Freedom of Association and Protection of Right to Organize, Convention No. 105 of 1957 concerning The Abolition of Forced Labor, Convention No. 138 of 1973 concerning Minimum Age for Admission to Employment, Convention No. 111 of 1958 concerning Discrimination in Respect of Employment and Occupation and Convention No. 182 of 1999 concerning The Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor. Based on Article 7 (2) Law No. 39 of 1999 concerning Human Rights that international agreements relating to human rights which have been ratified by Indonesia will become positive law. Thus ICRMW becomes Indonesia's positive law. Therefore Indonesia has an obligation to implement it within the framework of protecting the rights of TKI and its family members. Thus the State has strong legitimacy to guarantee the protection and fulfillment of TKI's rights and family members by reducing the role of the private sector in the placement and protection of TKI. Other efforts by the Indonesian state to maximize legal protection against the rights of TKI and their family members through the PTKI Act promulgated on 22 November 2017. The PTKI Law cannot be implemented maximally if there are no implementing

regulations. Pursuant to Article 90 of the PTKI Law that the regulations for implementing this law must be stipulated no later than two years from the date this law was promulgated. Implementation Regulations that need to be stipulated include Government Regulations, Presidential Regulations, Ministerial Regulations and Head of Agency Regulations. At present the Implementation Rules that have been set are the Minister of Manpower Regulation of the Republic of Indonesia No. 18 of 2018 concerning Social Security for Indonesian Migrant Workers. The implementation of Social Security is managed by the Social Security Organizing Agency (BPJS) (Article 29 of the PTKI Law). The protection of migrant workers should be carried out in two directions, both by sending countries (Indonesia) and recipient countries (Malaysia). On March 4, 2019 in Kuala Lumpur a Memorandum of Collaboration (MoC) was signed between BPJS Employment and Social Security Organizers in Malaysia, Pertubuhan Sosial Keselamatan (Perkeso) or SOCSO. This MoC was conducted to welcome the latest Malaysian Government regulation on social security protection for all Migrant Workers in Malaysia. Starting in 2019 a new Protection Act for Migrant Workers in Malaysia applies, from previously managed by the commercial industry through the Workmen's Compensation (WC) scheme to the Government through a state protection scheme managed by SOCSO. With this new regulation, since January 2019 all Migrant Workers have the same rights and receive equal treatment in terms of social security protection, exactly what has been obtained by local Malaysian citizens, without discrimination." TKIs in Malaysia will get protection from two institutions, namely from SOCSO and BPJS Employment. The signing of the MoC is a new round of protection for TKI in Malaysia, SOCSO support will be able to increase the benefits and coverage of TKI in Malaysia. The scope of MoC with SOCSO includes sharing data on participation, socialization and joint education, cross-country service delivery and law enforcement. The initial step in implementing the MoC is TKI data sharing that registers in Indonesia and then submitted to SOCSO, and vice versa TKI who has settled in Malaysia and registered at SOCSO will be given a report on their participation in the BPJS Employment. Now SOCSO already has a Labor Inspection Officer who specifically enforces the law for Foreign Workers in Malaysia. This law enforcement officer will greatly assist TKIs who have already worked in Malaysia without documents, to immediately report on their employment status so that they can be recognized by the Malaysian Government and register themselves in social security protection both organized by BPJS Employment and those held by SOCSO. Thus the benefits to be provided by SOCSO and BPJS Employment will complement each other. If TKI must be treated in Malaysia then it will be handled by the SOCSO and later when returning to Indonesia and need to continue treatment will be handled by BPJS Employment, until fully recovered and ready to work again. Through this SOCSO protection scheme, TKI will now also be entitled to periodic Pension benefits if there is a work accident that has an impact on disability.

## 2.2 Philosophical Foundation For Legal Politics of TKI Protection

Pancasila is a source of identity, personality, morality and direction of safety for the Indonesian people (Latif, 2012). Pancasila is the basis of the Indonesian state (grundnorm) and the ideals of Indonesian state law (rechtsidee) as a normative

and constitutive belief framework. In the next stage, Pancasila became the fundamental principle of the state's fundamental norm by being included in the Opening of the 1945 Hidayat & Nagara, 2012). Based on the aspirations of the society to be achieved which are crystallized in the state's goals, state basis and legal ideals, what is needed is a national legal system that can be used as a platform or political framework and national law (Moh Mahfud, 2006). Pancasila is used as a tool or test stone to test legislation relating to the protection of TKI's human rights. Indonesia has a high respect for human rights. Pancasila guarantees a philosophical foundation for the right to work. This is reflected in the second Pancasila article of just and civilized humanity. The right to get a job is also the fifth manifestation of "Social justice for all the people of Indonesia". The state must provide guarantees for decent work for every citizen. The principles of the Pancasila provide a normative basis for Indonesian law to prioritize human values on the one hand and the demand for fair and civilized actions on the other. These human values function to direct the law in its essential nature, namely to advance the good of mankind, because human goodness cannot be realized if the law is separated from human values (Tanya et al., 2015). The policy of Indonesian state law to protect TKI and its family members, among others, by ratifying ICRMW through Law No. 6 of 2012 concerning ICRMW approval. In addition, the government has also stipulated Law No. 18 of 2017 concerning PTKI. Overall the substance of the PTKI Law has adopted ICRMW even though not all aspects of migration. The PTKI Act authorizes three institutions to conduct placements, namely the Agency, TKI Placement Company (Penempatan dan Perlindungan Tenaga Kerja Indonesia/PPTKI) and the Company that places TKI for its own corporate interests (Article 49). Placement carried out by the Agency is carried out based on a written agreement between the government and the government of the employer country of TKI or a legal entity employer in the destination country (Article 50). The PTKI Act does not explicitly mention the placement of TKIs in employers other than legal entities, but from the article concerning placement by the Agency, it can be seen that the placement of TKIs in employers who are not legal entities (individuals) is carried out by PPTKI. The weakness of the TKI arrangement that works for an individual employer is that it has not mentioned the types of work included in the category. Usually this sector is dominated by women who work in the domestic sector. The PTKI Law again failed to see the specific problems and needs of groups of women working in the domestic sector, because they continued to hand over their placement responsibilities to PPTKI, which is a private party. Therefore it is necessary to strengthen the PTKI Law. Policy regarding categorization of TKI types of work Individuals need to be created immediately by ensuring TKI Individuals get the same services as other TKIs based on human rights principles. TKI as the subject of policy needs to be involved not only in its implementation but also in the policy-making process so that safe migration for TKI is truly realized. As stated in one of the principles of the Sustainable Development Goals (SDGs) that "no one should be left behind."

### 3 CONCLUSION

The efforts of the Indonesian state to maximize legal protection against TKI's rights and family members through the PTKI Law. Therefore, the implementing regulations must be

immediately stipulated to reduce the problems experienced by TKI and their family members both before, during and after work. At present the Implementation Rules that have been set are the Minister of Manpower Regulation of the Republic of Indonesia No. 18 of 2018 concerning Social Security for Indonesian Migrant Workers. BPJS Employment Indonesia and Perkeso or SOCSO signed a Memorandum of Collaboration (MoC) on March 4, 2019 in Kuala Lumpur. The politics of Indonesian state law to protect TKI and family members, among others, by ratifying ICRMW through Law No. 6 of 2012. In addition, the government has also stipulated Law No. 18 of 2017 concerning PTKI. Overall the substance of the PTKI Law has adopted ICRMW even though not all aspects of migration. TKI as the subject of policy needs to be involved in the policy-making process so that safe migration for TKI is truly realized. Pancasila is used as a tool or test stone to test the PTKI Law because the principles of Pancasila will provide a normative basis for Indonesian law to promote human values and act fairly and civilized.

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