

## **Legal Instruments for the Protection of Migrant Workers by ASEAN and Indonesia National Law**

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### **Abstract**

The existence of ASEAN as an international organization with legal personality was referring to the birth of the ASEAN Charter, 2007. The Charter became effective on December 15, 2008 that Indonesia has ratified by Law No. 38 Year 2008. The Charter emphasizes the commitment of regional cooperation within the framework of the ASEAN Community based on three pillars: political security, economic and socio-cultural. The three pillars are interrelated for the purpose of peace, stability and prosperity in the ASEAN. One area that was agreed by ASEAN is legal protection for migrant workers. Legal protection for migrant workers is important because of some cases of abuse and torture by the employer, as in the case of Siti Hajar 2009. For the Indonesian legal protection for migrant workers is urgent because the number of migrants is increasing every year and it is the Government's obligation to protect its citizens wherever existence. ASEAN, in the regional level already has legal instruments for the protection of migrant workers namely the ASEAN Declaration of the Protection and the Promotion of the Rights of Migrant Workers. While at the national level, Indonesia has a number of legal instruments related, that is Law No. 13 Year 2003 and Law No. 39 Year 2004 on the Placement and Protection of Indonesian Workers Abroad. Based on the above, this paper will examine first, the protection of the rights of migrant workers within the framework of the ASEAN agreement and the second will examine the comparison between the protections of the rights of migrant workers in ASEAN level with Indonesia national law. The goal is to determine the harmonization and synchronization of the legal protection of migrant workers in ASEAN perspective and the perspective of Indonesian national law.

**Key words:** Legal instrument, protection, migrant workers, Indonesia.

### **Introduction**

ASEAN Charter reflects the commitment of its member to make regional cooperation more based on law within the framework. This cooperation was based on the ASEAN Community by 2015 that which consists of three pillars: political and security pillar, economic pillar and socio-cultural pillars. For Indonesia, the ASEAN Charter was ratified by Law No. 38 Year 2008 on the Ratification of the Charter of Association of Southeast Asian Nations. (Secretariat Director General of Cooperation for ASEAN, 2012). One of the important agreements in ASEAN is the protection for migrant workers contained in the ASEAN Declaration of the Protection and the Promotion of the Rights of Migrant Workers. The issue of protection of migrant workers is important for Indonesia because Indonesia has the largest migrant workers in ASEAN. The large number of migrant workers of Indonesia has raises a lot of problems as well, such as wrong treatment and abusive employers, for example in the case of Siti Hajar that occurred in 2009, the threat of the death penalty for migrant workers in 2015 amounted to as many as 281 persons, 59 of them have been executed. Therefore normative studies are needed to determine the legal protection of national and regional laws of ASEAN for migrant workers.

### **Research Method**

This article uses the method of normative law to examine norms that applicable contained in national legislation and in international agreements. Normative Study conducted from the legal protection of migrant workers in the national and regional level and then looks at the legal implications of both.

## **Results and Discussion**

### ***The Protection of Migrant Workers' Rights in ASEAN Framework***

The issue of migrant workers is different from the issue of skilled workers within the framework of the ASEAN Community by 2015. Migrant workers were include in two pillars, the pillars of the ASEAN Political Security Community (APSC) and the pillars of the ASEAN Socio-Cultural Community (ASCC), while skilled workers were on the pillars of the ASEAN Economic Community (AEC).

In the context of the political pillars of security, protection of the rights of migrant workers, among others, posted on the ASEAN Human Rights Declaration. The general principle of the ASEAN Human Rights Declaration states that: "The rights of women, children, the elderly, persons with disabilities, migrant workers and vulnerable and marginalized groups are part of human rights and fundamental freedoms are inherent, integrated and inseparable". On October 9, 2013 adopted the ASEAN Declaration on Strengthening Social Protection which contains the principle that all people, especially the poor, are at risk, the disabled, the elderly, drop out of school age, children, migrants and other vulnerable groups, are entitled to have equitable access to social protection where it is a basic human right (Taufik, 2014).

In the context of socio-cultural pillar, the protection of migrant workers are in the ASEAN Socio-Cultural Community (ASCC) Blueprint. Furthermore, the protection and promotion of migrant workers are described in the core element included in Item C2 on "Protection and Promotion of the Rights of Migrant Workers". Point 28 of Item C2 above stressed that the protection of the rights of migrant workers must be based on two things: first in accordance with the laws, regulations and national policies of ASEAN member countries, both in accordance with the Declaration on the Protection and Promotion of the Rights of migrant workers (ASEAN Declaration on the protection and Promotion of the Rights of migrant workers) in 2007. the 2007 Declaration is the basis of the ASEAN agreement for the protection of migrant workers.

ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers in 2007 contains a number of rights for migrant workers such as:

1. The fundamental rights and dignity of migrant workers and their families without violating the laws, regulations and policies in the recipient country.
2. Welfare right.
3. The right to access information, training and education, access to justice, social security services that are carried out in accordance with national law, bilateral and multilateral agreements.
4. The right for wages payment and sufficient access to jobs and decent living conditions
5. Migrant workers who are victims of discrimination, abuse, exploitation, violation, have adequate access to the legal system and the courts of the receiving country.
6. The right to obtain legal assistance when migrant workers were arrested or jailed by using diplomatic channels between the sending and receiving countries.

Given the above declaration is a form of international treaties that contain an agreement between the member states, it can be seen the obligation of the host country and the obligations of the sending country. Rights for migrant workers are: access opportunities to have jobs and livelihoods; the right to be facilitated from recruitment, preparation for deployment overseas, and the protection of migrant workers when abroad and repatriation and reintegration into their countries of origin;

ASEAN Foreign Ministers in 2007 has established the ASEAN Committee on Migrant Workers (ACMW) which has the duty to carry out the above-mentioned Declaration. ACMW dividing the work into four: improving the protection and promotion of the rights of migrant workers to exploitation and ill-treatment, strengthen the protection and promotion of the rights of migrant workers by improving government work migration in ASEAN countries, regional cooperation to combat trafficking in ASEAN, develop "ASEAN Instrument" on the Protection and Promotion of the Rights of Migrant Workers. ACMW make a report on the Senior Labor Officials Meeting (SLOM) (<http://humanrightsinasean.info/asean-committee-migrant-workers/about.html>).

Some legal issues related to the implementation of the 2007 Declaration of the above are:

1. The political declaration by the heads of state or government will require operational mechanism, therefore the next ASEAN leaders mandated the ASEAN Instrument as a follow up to the Declaration, but unfortunately there are different interpretations of what is meant by "instruments" outlined in the Declaration Cebu 2007. Indonesia and some ASEAN countries that send their employees (Indonesia, the Philippines, Cambodia, Laos, Vietnam and Myanmar) interprets the "instrument" above as an agreement that is legally binding, but instead for some other ASEAN countries that are state receiver (Malaysia, Singapore, Brunei Darussalam and Thailand), "instrument" is nothing more

than just some guidelines that are not legally binding. (<http://www.thejakartapost.com/news/2012/05/03/an-asean-way-protecting-indonesian-migrant-workers.html>)

2. ASEAN countries that send their employees (sending states) insisted that the scope of application of the instrument should include undocumented migrant worker (migrant workers are undocumented) in view of the migrant workers are human and have human rights so that all ASEAN states are obliged to respect the human rights of the as stipulated in the ASEAN Human Rights Declaration. Contrary to the views above, receiving states (recipient countries) argued that the issue of human rights for undocumented migrant workers was more to the legal issues in the national level. (<http://thediplomat.com/2015/01/the-need-for-an-asean-treaty-on-migrant-workers/>).
3. Sending countries argued that "instruments" should include family members of migrant workers, while the host country refused to approve the scope of family members.
4. The sending State found ASEAN regional instruments should include the issue of human rights as contained in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as well as the ASEAN Human Rights Declarations, otherwise the group receiving countries tend to narrow the scope of the human rights of migrant workers far from what is stipulated in the above two international instruments.

### **Protection of the Rights of Migrant Workers According to the Indonesia National Legislation**

The rights of migrant workers in an atmosphere of national law can be seen in a variety of laws and regulations in force, from the Constitution (UUD 1945) and the various legislations, as can be seen below.

1. The 1945 Constitution of the Republic of Indonesia  
Article 28 regulates the rights to earn a living, the right to health, right to information and the right to social security. Article 27 paragraph 2 also ensures that everyone has the right to obtain decent and humane work.
2. Law No. 39 Year 2004 regarding the Placement and Protection of Indonesian Workers Abroad, has establishes a number of rights for migrant workers: the right to work abroad; the right to obtain correct information about the job market overseas and procedures placement of migrant workers abroad; the right to receive services and equal treatment in the placement abroad; the right to obtain the freedom of religious belief and conviction as well as the opportunity to run a religion and worship in accordance with her faith; the right to earn wages in accordance with prevailing wage standards in the country of destination; acquired the rights, opportunities and equal treatment of foreign workers earned more in accordance with the regulations and legislation in the country of destination; obtain legal protection in accordance with the legislation on measures that can lower a status and dignity as well as the violation of the rights that have been established in accordance with the legislation during the placement abroad; obtain protection guarantee the safety and security upon return to place of origin; and obtaining the agreement of the original work. Law No. 39 Year 2004 also set of some obligations for migrant workers namely: comply with the legislation either in the country or country of destination; comply with and carry out its work in accordance with the employment agreement; pay a service charge placement of workers abroad; and notify or report the arrival, presence and returning to the Indonesian Representative in the country of destination.  
Law No. 39 Year 2004 has shortcomings, among others because it is more focused on the issue of the placement so that aspect of protection and legal assistance be excluded (Krustiyati, 2013), therefore it is up to now the Commission IX of the House of Representatives continues to do a revision of the law. ([http://nasional.kompas.com/read/2015/09/30/02145991/Komisi.IX.DPR.Jamin.Revisi.UU.Berikan\\_Perlindungan\\_terhadap.TKI](http://nasional.kompas.com/read/2015/09/30/02145991/Komisi.IX.DPR.Jamin.Revisi.UU.Berikan_Perlindungan_terhadap.TKI)).
3. Law No. 21 of 2007 on the Eradication of Trafficking in Persons also regulates the protection of migrant workers.
4. Law Number 13 Year 2003 on Manpower does not regulate comprehensively on the protection and rights of foreign laborers working in Indonesia, the protection and rights of foreign workers the same labor Indonesian citizens. Such rights are: the right to work and rest periods (Article 77-85), the right to the protection of health and safety as well as moral and morality (Article 86), equality of treatment in accordance with human dignity and religious values , the right to earn that meet a decent livelihood for humanity (Article 88), the right to social security (Article 99), the right to form and join trade unions / labor unions (Article 104), the right to practice their religion required by religion (Article 80) and the right to obtain work safety protection (Article 87). However, Indonesia imposes restrictions for foreign workers in Indonesia.
5. Some areas in Indonesia have local regulations (regulations) that deal with migrant workers, unfortunately, one study found that most of the regulations that deal with migrant workers (an

estimated 80% or more) they are 'extractive' rather than protect, because they actually charge additional fees (Farbenblum *et al.*, 2013).

In addition to the legislation above, the law that comes from ratification also part of the Government's efforts to protect the rights of migrant workers, such as Law No. 6 of 2012 on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

### **Migrant Workers Rights in ASEAN and Indonesian National Legal Perspective**

Normatively legal protection for migrant workers have a base ranging from the national level, regional (ASEAN) to multinational (ILO conventions). Some fundamental rights for workers / migrant workers such as the right to work and a decent living, the right to information, right to welfare and others can be found in all three levels above.

ASEAN itself through the 2007 Declaration on the Protection and Promotion of the Rights of Migrant Workers has guaranteed protection by taking into account and respect the laws and national policies of its members. Indonesia, for example through Law No. 13 Year 2003 on Manpower (Chapter VIII Article 42) has restrictions for foreign workers (migrant) in Indonesia. Restrictions by the Indonesian national law of course must be respected by the others of member countries of ASEAN and its migrant workers. Instead the Government and Indonesian migrant workers must also respect the national laws and policies of member countries of ASEAN, especially of the recipient country. In fact in the position of the sending country, the Government of Indonesia would have to be more preoccupied with national laws and policies recipient countries. Malaysia and Singapore, for example as a receiver for migrant workers still do not agree that "ASEAN instrument" made legally binding on the grounds that they had to have its own policy in his country related to the setting of migrant workers. Besides Malaysia cannot accept that the protection of migrant workers are also given to the families (<http://www.voaindonesia.com/a/negara-asean-belum-sepakat-soal-perlindungan-buruh-migran/2842676.html>), whereas if it referred to international law and standards that exist so that protection should also include the families of migrant workers.

### **Conclusions**

Protection of migrant workers within the framework of ASEAN are in two pillars include the pillars of politics and security and socio-cultural pillars. Then there is the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers in 2007.

A thing that must be resolved is the difference in perception between sending countries and receiving countries of migrant workers. The impact of that difference is the absence of a legally binding agreement for the protection of migrant workers in ASEAN. Indonesia in its capacity as the sending country should take an active role in negotiating the importance of such legal instruments referred to above.

As for the national scope, it is important to make the revision of Law No.39 of 2004 so that there is better protection for Indonesian migrant workers who work in other ASEAN countries. Another thing that is important is the provision of legal aid. If migrant workers from Indonesia decided to escape because they could not receive harsh treatment from the employer then he will be arrested because, according to the contract of employment if they are out of the house they are considered illegal. Last but not least important is the Indonesian government should give attention to human trafficking and the threat of the death penalty for Indonesian migrant workers

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