

## PROTECTING MIGRANT WORKERS, AN INDONESIAN EXPERIENCES

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### ABSTRACT

*Indonesian had placed a lot of migrant workers in overseas as well as in ASEAN countries. There had two sides effect of migrant workers working in abroad, such as positive effects and negative effects. Positive side, their existence of migrant workers in abroad could anticipated the problem of unemployment in the country, while negative effects was they often to be as victims of cruel and inhuman treatment from her employers. Indonesia recently had ratified the International Convention On Migrant Workers and Their Families 1990 (ICMW). By doing so hopely the other fellow member of ASEAN countries doing the same except the Philippine. The main purpose to ratify, is in order the Indonesian migrant workers which exist in ASEAN countries be able to get optimum protections as enshrined in the ICMW respectively.*

Key words : Protecting, Migrant Workers, Indonesian Experiences, ICMW

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### Introduction

In this era of globalization, the migration of people a cross the world were most increasingly. Migration is the right of person to move to other countries which guarantee by the international law of human rights as enshrined in the International Bill of Rights. The purpose of this basic rights is to improve development of economic, social and cultural life of those persons (Stephen James; 2007 : 195). By the end of twentieth century's, the moral truth of human rights clearly recognized by the international community and often said that rest on a sympathetic identification of deep conscience of human being (Robert Meister; 2011 : 20). Thus, the rights to gain job in other countries through migration mechanism may be deemed as a rights of persons to improve their economic life, actually can be said as universal human rights, since it is part of the "right to life". (Paulina Tambakaki; 2010 : 8).

In conjunction with person of migrant workers, those basic rights further has been formulated in details by the United Nations in 1990. The 1990 UN Convention concerning, the protection of the rights of all migrant worker and members of their families (ICMW) entry into force on 2003, 13 years after its passing (Jennifer Yau, 2005). Due to the elaborate of its formulation L Rao Penna called the ICMW as modern Magna Charta of migrant workers (L Penna Rao; 1993 : 179)

The ICMW consist of 9 parts and 93 articles. Most of the provisions of ICMW, derived from the substance of several main international instruments of human rights such as; Universal Declaration of Human Rights; International Covenant of Economic, Social and Cultural Rights; International Covenant of Civil and Political Rights; International Convention of the Elimination of All Forms of Racial Discrimination; Convention on the Eliminations of Discrimination Against Women; Convention of the Rights of the Child; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment; as well as the substance of some ILO conventions as long as any retaliation with migrant workers and their families. Those all were stated in the preamble of ICMW.

The main parts of the ICMW are Part III, Part IV and Part V. Part III contain provisions applicable to all migrant workers and members of their families irrespective provisions applicable to migrant worker and members of their families which possessing legal status. While Part V regarding the rights of particular categories of migrant workers.

Part III of ICMW consist of 28 articles, from article 8 to article 35, embodying rights of undocumented and documented migrant workers and their families such as among other; rights to freedom movement to and from their countries of origin; right to life; to free from slavery; freedom of thought, expression, conscience and religion; right to privacy and property; rights in connection with all aspects of due process; right of equal treatment with national dealing with remuneration etc; right same treatment as national regarding social security etc; right to emergency medical care; rights in retaliation with children; right to preserve a cultural identity; right to transfer earning and saving; rights to information by state of origin, state of employment and state of transit especially concerning the right arising from the ICMW.

The validity of Part III, or the ambit of article 8 to article 35 can be traced upon the pivotal provision of article 7 of the ICMW, which stated that :

"States parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present convention"..... (Addition underline).

The phrase with underline saying : “within their territory” and not saying “by license to permit” to their territory, it mean that who ever foreigner exist in the territory irrespective of their license to permit or irrespective of their legal or illegal status, are entitle to gain their rights enshrines in the ICMW.

Meanwhile, Part IV of ICMW consist of article 57, contain rights only applicable to documented migrant worker and their families such as, among others : right to temporarily absent; right to freedom of movement in the territory of employment; rights to from association and trade union; right to equality with national in respect of protection against dismissal; rights to address his or her case to local authorities in the state of employment dealing with violation of work contract by their employer; right to participate in public affairs of the state of origin; political right in the state of origin; and the rights to information.

On the other side, Part V which consist of 7 articles as from article 57 to article 63 applicable to migrant workers and their families which have particular categories. Such categories are : frontier workers, seasonal workers, itinerant workers, project-tied workers, specified – employment workers and self – employed workers. In general, all of them also have the rights in accordance with Part IV.

Due to the strategic values of the substances of ICMW in protecting migrant workers, of course it can be said as a break through of the UN effort in realizing the principle of “dignity of human kind” belong to migrant workers and their families. In such away the character of ICMW was gained a character of “law – making treaty”, since its adopted by general assembly which need further consent of states for it binding force (J.G. Starke; 1967 : 41-42). International law doctrine recognized two kinds of consent : tacit consent and express consent. Tacit consent mean that a state tacitly absorbed some points of principles or norms of the treaty, then formulated it on national regulation, and this way of course did not generating and international obligation emerge from the treaty concern. While, express consent mean, states express their consent by several ways such as, by signature, exchange of instrument, ratification and accession (Malcolm N Shaw; 2008 : 909 – 910).

In connection with the ASEAN atmosphere to day, and on behalf of the “spirit of cooperation” among its member countries, it is time for them to pay more attention to pivotal values of ICMW in handling their regional issues of migrant workers and their families. Concrete action will be seen in their conduct in implementing the ICMW, wether by tacit consent or by express consent.

### **I. Indonesian experience on migrant workers**

Until right now on 2013, Indonesian population estimated around 250 millions, and around 28.07 millions among them were in category of poor inhabitant (<http://www.bps.go.id/news=1203>; 6-8-2013). This circumstances presumably as a factor to encourage and effort of the poor increasing their level of economic life by seeking job in abroad as migrant worker. They migrated to countries all over the world, among others to the ASEAN countries such as : Brunei, Malaysia and Singapore. Most of them were consist of maids or household servant which often facing sadness treatment from their employer as well as torture and sexual humiliation which degrading their dignity as human being.

Some secondary facts demonstrated those outrage and inhuman treatment such as :

- (1) Reported on 31 May 2012, that Hartati a maid from Central Java getting paralyzed and permanent disable due to often tortures by her cruel employer by way of soldering electrical tool to her body. Then, she thrown away and abandoned in Penang, Malaysia. (<http://www.merdeka.com/peristiwa/tkw-asal-tegal-dijebloskan-ke-penjara-dan-dibuang>; 1-8-2013).
- (2) Reported on 12 November 2012; Violence against Indonesian maid occurred again in Malaysia. On this occasion the culprits was 3 individual Malaysia polices. Some commentator in Indonesia said, this was actually a conduct which degrading women dignity and hopely never done again in the future. Due to the good relationship principle among neighboring countries, especially in the frame work of establishing ASEAN community harmonically. (<http://luar-negeri-kompasiana.com/2012/11/12/ki-wanita-kembali-menjadi-korban-kekerasan-di-malaysia-507687.html>; 4-8-2013).
- (3) Reported on 28 November 2012, the sources said that a maid from Deli Serdang, North Sumatera falling down from fourth store of an apartment in Penang, Malaysia and then she died. She escaped from her employer using a string and soon the string became broken off. (<http://www.merdeka.com/peristiwa/jatuh-dari-lantai-4-tkw-meninggal-di-malaysia.html>; 1-8-2013).
- (4) Sources said on November 2012, fugitive incident occurred again in Selayor Malaysia. A maid from Kalumpang, West Sulawesi, Sukini escaped from her cruel employer and the was feld irresistible from several conducts of her employer. Her employer often tutored, giving abusive words and prohibit her to communicate with others person including with her family. She some occasions wrote some massages on a tissue and send to her friend, hopely her friend could take effort to save her from her employer. Should her friend fail to help, she will escapes by jumping from ninth floors of the condonium, due to irresistible feeling. Her friend which has equal profession as a maid has not any power to save her, and finally she take serious risk jump from ninth floors and found died. (<http://www.merdeka.com/peristiwa/hindari-siksaan-tki-di-malaysia-tewas-saat-melarikan-diri.html>; 1-8-2013).
- (5) Another story from Singapore, reported on 21 February 2012. A Singaporean man 44 years old had conducted an outrage action by rape and torture to Indonesian maid. The maid who was cleaning electrical box beyond her boss room, suddenly being embraced by him from behind and forced her to do sexual intercourse in his room. After finishing his immoral conduct, he thrown down the maid from second

floor and then the police found the maid with seriously wounded. In Singapore, source said, in 2012 maids often suffering from abuse manner as it was reported by Indonesian mass-media. (<http://www.merdeka.com/dunia/aniaya-penjara-seumur-hidup.html>; 1-8-2013).

- (6) Sad story also reported on 28 February 2013. A sexual harassment happened over Indonesian maid in Singapore. Ibrahim Mohamad 51 years old humiliates an household servant by torturing, embracing, kissing and caressing her breast and buttocks. The maid was hired by his daughter in law to work in his house. After several hearing in the court, finally Ibrahim found guilty and sentenced in jail for 2 months. (<http://www.merdeka.com/dunia-ki-pria-singapura-di-penjara-22-bulan.html>; 1-8-2013).

The cases mentioned above just a few of salients cases which happened at the member of ASEAN countries e.g. Malaysia and Singapore. Actually many other cases was occurred in Malaysia and Singapore every year since presumable five years later, but not all reported here in this writing. Beyond ASEAN countries for instance in Saudi Arabia and Jordan also often reported such equal sad stories.

In Arab Saudi as reported on 17 November 2010 had already happened an incident with take great concern of human conscience. Employer as mother and daughter had conducted an outrage action to cut her maid's mouth with scissors, skin of mouth and skin of head of the maid being peeled off, her legs being struck until paralyzed. She also often suffered from illness due to her employers without a pity to ironed her skin cruelly. (<http://news.detik.com/read/2010/11/17/0395525/1495985/10/pemerintah-harus-jamin-keamanan-ki>; 1-8-2013).

In Jordan as reported on 17 April 2013 two Indonesia sibling maids get tortured from their employer during their work to make bread with unclear reason. Sadly, their salaries never paid during years they work. Their recruitment agent did not care about this and escape from responsibility, whereas the placement of those maid were unofficially procedures. Soon after they came back home to Sukabumi (west Java) both of them suffering mental break down and then tied by chains. Their rights to gain payment from their employer in Jordan then handled by the Local Union of Migrant workers in Sukabumi in Coordination with National Agency on Placement and Protection of Indonesian Migrant Workers or BNP2TKI. (<http://www.merdeka.com/peristiwa/disiksa-gaji-tak-dibayarkan-ki-ini-pulang-ke-rumah-jadi-gila.html>; 1-8-2013).

The question is, why did generally migrant workers especially those which categories as maid or household servant often treated inhuman, tortured, raped, and others degrading actions from their employers? There are many factors may be caused that problems such as: (1). Maids as migrant workers are particularly a vulnerable groups due to their very low standard of economic life; (2). They face serious obstacles in term of access to information services; (3). They seldom have the equal degree of access of protection as citizens; (4). Local populations did not always appreciate or understand the impact and value of migrant workers on economics and societies. (Vernand de Varennes; 2003 : 7).

However, from legal perspective apparently should be envisaged the lack of legal instrument wether bilateral, regional or international level dealing with protection of migrant workers, especially in a country which does not ratify the ICMW yet.

## II. Main obstacles

The main obstacle for Indonesian in protecting its migrant workers in abroad is that the of the host state does not ratify the ICMW yet. According to the basic principle of international law; a state does not ratify an international convention, there is no international legal obligation and responsibility emerged from that convention. In other words, that a breach of convention by a state party, entails its international responsibility over the other state parties, that is to say as internationally wrongful act. An internationally wrongful act of a state may consist of one or more action or omission or combination of both. (James Crawford; 2005 : 77). In last analysis; should a state does not ratifies the ICMW its never has legal obligation to obey all of ICMW provisions, since the ICMW has not legal binding to that state concern.

From Indonesian side, Indonesia had already signed the ICMW on 22 September 2004 and ratified on 31 May 2012. This ratify was based on the Law No. 6 / 2012, concerning ratification of International Convention of Migrant Workers and Their Families, 1990.

How is the positions of ASEAN members countries relating to status of ICMW? The status as seen on 16 July 2013 was: Cambodia had signed on 27 September 2004, but did not ratify yet; Indonesia as mentioned above, signed on 22 September 2004, ratified on 31 May 2012, Philippine signed on 15 November 1993 and ratified on 5 July 1995. Those were all consist of the full member countries of ASEAN, while the candidate of member country such as Timor Leste had ratified on 30 January 2004. (<http://treaties.un.org/pages/viewdetails.aspx?src;27-7-2013>). That phenomenon shwon, most of the full members of ASEAN countries seen reluctantly to ratify the ICMW. Above all, Malaysia and Singapore as founding fathers of ASEAN which Indonesia had placed in great number of migrant workers in both countries also did not ratify ICMW yet. This is the real obstacle of Indonesia in giving protection to its migrant workers in overseas especially in countries as fellow member of ASEAN. Indonesia as founding father ASEAN ought to urge the fellow members to ratify the ICMW at least absorb them to its national legislation based on universal moral rights as was enshrined in Universal Declaration of Human Rights (David Reidy; 2012 : 43). Besides, as pointed out by Antonio Cassese, the dignity of human being is a basic value that every state should try to protect (Antonio Cassese; 2005 : 397).

What did the general reasons, why countries reluctantly to ratify the ICMW? There were at least five reasons for doing so, such as: (1). Its incompatibility with the national legislations; (2). Domestic challenges in matters of administration to implement

those ambitious texts of ICMW; (3). Lack of awareness and knowledge of the ICMW; (4). The absence of adequate promotional activity; (5). And most saliently, lack of political will (Ryszard Choleinsky; 2005).

Lack of political will also caused lack of optimum function of diplomatic protection since the diplomatic protection is an elementary protection according to international law (Carmen Triburcio; 2001, 37).

Indeed, lack of political will was the main factor caused countries reluctantly to ratify the ICMW. Many countries try to overcome their reluctance by making reservation or declaration in ratifying the ICMW. On the ground of complication between ICMW and their national legislation for instance, Chile made reservation to article 22 paragraph (5) concerning compensation of migrant worker in case of facing deporting; Columbia puts reservation in the implementation of articles 15, 14 and 47 dealing with the right to compensations, the right to free import-export text, the right to transfer assets, which stated that all of those right are perform according to Columbian legislation; Srilangka imposed reservation to article 8 (2), 29, 49, 54 each concerning the right to enter and remain in Srilangka, the qualifications a child to be citizen when they born in the territory of Srilangka, kinds of job which need certain qualifications, protection against dismissal; also Turkey puts declaration to article 40, 45, and 46; each regarding Turkish law allows only Turkish citizen to form trade union in Turkey, integration and language education for children of migrant workers, and right to freely from import – export text. On the other hand, reservation or declaration often made on the ground of abilities to perform; for instance : Turkey made declaration to articles 76 and 77 stating that Turkey will recognize the competence of committee on the protection of the rights of all migrant workers and member of their families at a later time; mean while Uganda puts reservation to article 18 which said that the Republic of Uganda cannot guarantee at all times to provide free legal assistance in accordance with the privations of article 18 paragraph 3 (d). (<http://treaties.un.org/pages/viewdetail.aspx?src;27-7-2013>).

### III. Next steps

In anticipating the obstacles, Indonesia in the next future ought to make every effort such as :

- (1) To encourage the fellow of ASEAN members to pay more attention to ICMW, although it is with full of difficulties exhausted and patients. For the countries which reluctantly to ratify, they could absorb some points and principles of ICMW in to their national legislation.
- (2) In the legislation, should they have any political will, in long run urge the ASEAN members wish to ratify the ICMW, they can put any reservations or declarations as others countries beyond ASEAN members had done. Again it needs political will of ASEAN member countries which did not ratify the ICMW yet.
- (3) Indonesia has already umbrella law in protecting its migrant workers in overseas, it is Law No. 39/2004 concerning placement and protection of Indonesian Migrant workers in abroad, apparently this law was unbalance in regulating between the matters of placement and the matter of protection. Too much number of provisions to regulate the matter of placement which consist of 67 provisions e.g. from article 10 until article 76 (Part IV and V), on the other hand provision concerning protection just consist of 7 articles e.g. from article 77 until article 84 (Part VI). Many suggestions arise from viewers, NGOs, migrant workers, they affirmed this law soon be improved, provided for the need of more detail and more concrete protection of migrant worker in abroad. It seen now the process of improvement is on going. Parliaments should give priority deliberation, in order shortly the improvement of this law could be finished.
- (4) In connection with protection of migrant workers which had categories as a maid or house-hold servant, the government of Indonesia must uphold the implementation of article 102 strictly and tightly. This article imposing criminal sanction to some one or to unlicensed agent which placed migrant workers in abroad with minimum 2 years in jail and maximum 10 years. Due to maid are vulnerable group of life and poverty, lack of knowledge and information, they often become victims of their employer.
- (5) For the more effective protection of Indonesia migrant workers in abroad, several main provisions of law no. 39/2004 must be considered. Article 6 stating that government responsible for increasing protection of migrant workers in abroad. Article 7 (d) said that for the optimal protection, government has to conduct diplomatic efforts in receiving state. Regarding control to migrant workers in abroad article 92 (2) gives power to the office of Indonesian embassy or consular. The very important provision is article 27 stating that the placement of Indonesian migrant workers only in the country which had already a written agreement with Indonesia. For this purpose article 78 (2) said the government may set up an office of attaché of man power in those certain Indonesian embassy.

Considering the wording of article 27, it is relevant to perform in ASEAN countries which did not ratify the ICMW yet. For Indonesia, such bilateral agreement is solely legal ground for regulated their rights and obligations in a very detail norms on those existing bilateral agreement. Including for instance the rights of the sending state to do random visit as directly protection to the address of the maid or address of her employer, as well as the maid reports regularly to the office of embassy or consular, regarding her real existence. This must be allowed by the receiving state since according to general principle of international law, any sovereign state can not perform their sovereignty in another sovereign state (*par imparem non habet imperium*). Also for instance, the receiving state agree to provided a call center in local authority to which the maid could immediately call for help if any emergency situation occurred to herself. It considered also importance in bilateral agreement imposing the obligation of the employers to report regularly concerning the existence of their maid to local official of the receiving state, hence through the local official then submit the report to embassy or consoler of the sending state.

Since such bilateral agreement need to regulate a real and detail obligation, it legal status many increased to higher status to be a bilateral treaty by reason : (a) Parliament of receiving state must recognized and give consent, especially in connection with the state budget due to wide obligation of government added in the agreement; (b) a treaty which made in bilateral character is actually a law making treaty both of them and have strong legal basic for addressing their bilateral problems; (c). for those countries which did not ratify the ICMW, within the bilateral treaty they can absorb the relevant principles of ICMW and others UN Human Rights Instrument.

### Conclusion

Indonesia has a great number of migrant workers in abroad among others in ASEAN fellow member countries. Most of those migrant workers are consist of maids or house hold servants whether they sent by legal procedures or illegal procedures. They often suffering from treatment of cruel, inhuman, and degrading their dignity as human being. This was occurred in many countries including in ASEAN countries, due to their vulnerable condition.

As democratic state, Indonesia had ratified the International Convention on Migrant Workers and Their Families (ICMW). By doing so, Indonesia wish to express its respect for human rights of migrant workers which sent to Indonesia. Nevertheless, it is regrettable, most of ASEAN countries did not ratify the ICMW yet, except Philippine, as well as Combodia just had signed it. Indonesia as one of the founding father of ASEAN, ought to have strong effort and without exhausted, urges the fellow ASEAN members wish to ratify ICMW based on spirit of ASEAN cooperation.

Should the member countries failed to ratify, it urge in short term, be sufficienly to absorb ICMW into its national legislation as further become the legal basic in establishing bilateral or multilateral treaty or agreement concerning protection of migrant workers within ASEAN countries.

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