

State Responsibility in Fulfilling the Rights of Indonesian Migrant Workers During Pandemic Era

Devi Rahayu*
Faculty of Law
Trunojoyo University Of Madura
 Bangkalan, Indonesia
 rahayudevi78@yahoo.com

Nunuk Nuswardani
Faculty of Law
Trunojoyo University Of Madura
 Bangkalan, Indonesi

Abstract— When countries implement lockdown policies, the impact in the industrial world was the occurrence of layoffs. This also happens to Indonesian migrant workers who cause them to return to Indonesia. The context of legal protection in the provisions of law No. 18 of 2017 concerning the Protection of Indonesian Migrant Workers, states that the protection process is carried out during the pre, during and post placement process. So far, IMWs have contributed to the country's foreign exchange, so the State also responsible for fulfilling the rights of migrant workers. This study focused on how the state's responsibility to fulfill the rights of Indonesian migrant workers during pandemic. This study used the juridical method. Work was one of the basic rights of citizens, so the State was responsible for providing jobs and decent living. It was also the right of migrant workers to be eased and facilitated their interests by the State. In administrative law, the concept of State control makes it possible for the people to participate in government. This can also be based on migrant workers to play role in determining government policies regarding assistance during pandemic. In addition, the context of protection for migrant workers was carried out during pre, during and after departure. When migrant workers were returned to their respective areas, the country was responsible for problems that occur in the workplace and includes the IMW in concept of workers affected by the pandemic to access pre-employment cards and other assistance.

Keywords: *Migrant Workers, Responsibility, Pandemic Era*

I. INTRODUCTION

The outbreak of the new corona virus covid 19 in almost all continents, 213 countries and has infected 5,213,767 people and 334,996 died in the world. This has led all countries to take measures to deal with and prevent the virus spread by stopping all economic activities, except health and food supply. The termination of economic activities, which lasts for 2-3 months, certainly has impact on work relations. Many workers are finally sent home, laid off and ultimately sent back to their respective countries for foreign workers. This also happens to Indonesian migrant workers who work abroad.

Data on the placement of Indonesian Migrant Workers .There are several policies taken in the labor sector, namely productive labor intensive and labor intensive infrastructure. In addition, there is also a pre-employment card policy. This was in the form of assistance in the form of training worth 1

million and money of 600,000 for four months. The problem is whether the repatriated IMWS can access the pre-work card, then the presence of more IMWS in villages which of course is far from access to information whether they know and can access it. In the scheme, there is pre-employment card assistance (Labor Ministry), then there is cash assistance and non-cash food assistance (Social Ministry), finally social assistance from the Province and the Region. [1]The placement of migrant workers is done by utilizing the international worker market through improving the quality of workforce competency.[2]

The data released by the Ministry of Foreign Affairs has 15,000 IMWs who returned home until March, then it is predicted that 34,000 IMW will return home and most of them come from East Java. Some of the IMWs returned home who had their contracts expired, but most of them were sent home temporarily and were laid off. This emergency situation made the return of IMWs also left problems in the destination country, such as unilateral layoffs, unpaid wages and layoffs without severance pay. Not to mention that there are many IMWs who cannot return home such as IMWs who enter Malaysia non-procedurally, they prefer to stay in Malaysia.

In addition to problems in IMWs destination countries, problems that occur in Indonesia, especially in areas that accept citizens who have lost their jobs, have increased the number of unemployed. Data from the Ministry of Manpower, in May that 1.7 million people were laid off, it is estimated that the impact of this pandemic will be 3 million people who will be laid off, this has not been added to the IMWs who are repatriated.

There are several policies taken in the labor sector, namely productive labor intensive and infrastructure labor intensive. In addition, there is also a pre-employment card policy. This was in the form of assistance in the form of training worth 1 million and money of 600,000 for four months. The problem is whether the repatriated IMWs can access the pre-employment cards, then the presence of more IMWs in villages which of course is far from access to information whether they know and can access it. In the scheme, there is pre-employment card assistance (Labor Ministry), then there is cash assistance and non-cash food assistance (Social Ministry), finally social assistance from the Province and the Region.

Article 27 paragraph 2 of the 1945 Constitution regulates the rights of citizens to work and decent living. However, because the available employment opportunities in the country are not sufficient for all the demands of community work, some choose to work abroad, for this reason Law Number 18 of 2017 concerning the Protection of Indonesian Migrant Workers in article 7 provides protection for migrant workers starting from before working, protection during work, and protection after work. In this context, the State has the obligation to provide employment for its citizens, while related to IMWs, the State is also responsible for providing protection when IMWs work abroad and after placement.

With this context, during pandemic, where many IMWs experience problems and are in working countries or IMWs who have been sent home due to layoffs, the State should also be responsible for fulfilling the rights of migrant workers. The focus in this paper is: how the state's responsibility to fulfill the rights of Indonesian migrant workers during pandemic.

II. RESEARCH METHOD

The research type used is doctrinal research. The approach taken is the statute approach and the conceptual approach.[3] The statuted approach used for analyze the positive law governing the process of placement and protection of Indonesian migrant workers that had been carried out and the conceptual approach used to analyze the concept of state responsibility and the migrant workers rights. Legal material is obtained by studying literature. Analysis is done by content analyze.

III. RESULT AND DISCUSSION

State Responsibility for Indonesian Migrant Workers

Responsibility comes from the word responsible, which means that the condition is obliged to bear everything (if anything happens, it can be sued, blamed, sued, etc. According to Suwoto, the definition of responsibility contains 2 (two) aspects, namely internal and external aspects. [4]

Accountability comes from the word responsibility, which means that the condition is obliged to bear everything (if anything happens, it can be sued, blamed, sued, etc. According to Suwoto, the definition of responsibility contains 2 (two) aspects, namely internal and external aspects. In *Black's Law Dictionary*, [5] stated: "*Liability is the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment (liability for injures caused by negligence)-also termed legal liability.*

The idea of state responsibility in legal protection departs from legal state study based on *rechstaat* and study of the rule of law, which requires the need for human rights regulation. Human rights guarantees in this case also specifically regulate guarantees for workers. The existence of guarantee of human rights is form of legal protection.

The construction of state responsibility towards citizens is based on the transfer of citizens' rights to the state by means of community agreement or social contract.

According to Hobbes, human rights are a way out to overcome the condition of 'homo homini lupus bellum omnium contra omnes' in which humans behave like animals.[3] Rousseau wants democracy in which sovereignty rests in the hands of the people and is handed over to the People's Representative Council. During this period France established human and citizen rights. The transfer of citizens' rights in social contract theory is reciprocal with the state's obligation to fulfill them. This is in accordance with the goal of state where every citizen is entitled to the demands of fulfilling state responsibilities.

One of the law functions is to provide legal protection for the community, especially legal protection for the weak (workers), especially against workers from strong powers (employers). The imbalance legal position in the work relationship requires legal protection to protect the normative rights of workers. The function of legal protection is to provide protection to every citizen or society, especially for the working community

Regarding legal protection for workers in industrial relations, Suliati Rachmat said: "The Republic of Indonesia has the obligation to protect the entire Indonesian nation".[6] This shows that the state has the obligation to protect all Indonesian citizens. Legal protection for workers is carried out either with or without the help of trade union organizations / labor unions through regulations and actions aimed at protecting weak parties and placing workers in a decent position as human beings with dignity.

In analyzing legal protection for the people in Indonesia Philipus M. Hadjon said: "There are 2 (two) types of legal protection for the people, namely: preventive legal protection and repressive legal protection.[7] Likewise with the labor law to protect the work and power of employers. With regard to legal protection, according to Philipus M. Hadjon there are 2 (two) powers which are always the main concern, namely government power and economic power. The construction of economic protection is protection against the weak against the strong.

In relation to the rights that workers have as human beings by nature, legal protection is needed. Based on this, John Locke argues that humans in a free state or state of nature in natural law are free and equal, while still having natural rights that cannot be submitted to other groups of people except through community agreements.

Legal protection for workers in industrial relations is necessary for the fulfillment of their rights as well as recognition of human rights and guarantees of security from the state. The notion of human rights (Fundamental Rights) is rights that are fundamental (grounded) and inherent with a universal human identity. Therefore, studying human rights, according to Todung Mulya Lubis, is actually examining the totality of life; the extent to which our lives give humanity a natural place.[8]

The right to work as part of human rights will be inherent in every person and the state is obliged to respect, protect and fulfill human rights.[9] The obligation to respect means that the state guarantees that its policies do not violate the human rights of its citizens, protecting it can be done by

preventing any violations committed by third parties and carrying out investigations and punishments for those who violate it, while fulfilling means creating conditions that allow every individual to enjoy the right to work.

In our national law, the right to work is guaranteed in the provisions of the 1945 Constitution (amendment) article 28 D paragraph (2) which states "everyone has the right to work and to receive fair and decent compensation and treatment in a work relationship". The guarantee of the right to work in the 1945 Constitution certainly has consequences for the state to provide legal protection to each of its citizens to obtain their rights. In addition, in the provisions of Article 28 1 paragraph (4) states "that the protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government".

This understanding has two dual meanings, namely to guarantee basic rights to citizens in the form of the provision of decent work and livelihoods and to impose burden on the state to fulfill these rights. However, in reality, it cannot be denied that until now the state has not been able to fulfill the obligation to provide decent work and livelihoods. This is due to various problems faced by the government in the manpower sector

A crucial issue of protection for migrant workers is the issue of guaranteeing migrant workers' rights. Starting from the conception of human rights, it is basic right or basic right brought by humans from birth as gift from God Almighty. This human right forms the basis of other rights and obligations. As is well known, in addition to human rights, there are human obligations, which in social life we should first receive attention in its implementation. We must fulfill our obligations first, then demand rights. In individualistic society, there is tendency for excessive demands for the implementation of human rights. In fact, human rights cannot be enforced absolutely because the absolute implementation of human rights means violating the same human rights of others.

Legal protection for workers according to the rules consists of social protection, economic protection and technical protection.[10] In the IMWP Law, the substance that regulates the provision of protection as above is the rights and obligations in Article 8 regulating protection before work which consists of administrative protection and technical protection. Protection during work which is regulated in article 21 paragraph (1) of the IMWP Law which consists of: data collection, monitoring, fulfillment of rights, settlement of labor cases, consular services, guidance for advocacy and legal assistance and repatriation.

The problems in the country of work that occurred during the IMW impact of this pandemic were layoffs without the fulfillment of rights and unpaid wages. Due to abnormal conditions, the workers return to Indonesia without taking care of their rights as workers that have not been fulfilled. Here, if it is based on the provisions of Article 21, the State represented by the local Indonesian Embassy must strive to fulfill these rights. In addition, there are also non-procedural migrant workers, who of course cannot return to Indonesia because of documentary problems and are forced to stay in that country. In this situation, the State is obliged to facilitate IMW by providing options in the form of repatriation or providing assistance for living expenses during the pandemic period.

Meanwhile, protection after working for Indonesian migrant workers according to article 24 paragraph (1) of the IMWP Law which covers:[11] facilities for returning to their place of origin, settlement of Indonesian migrant workers' rights that have not been fulfilled, facilities for managing Indonesian migrant workers who are sick and who die, social rehabilitation and social reintegration and empowerment of Indonesian migrant workers and their families.

Based on these provisions regarding social rehabilitation and reintegration, in this pandemic condition the State has an obligation to IMW to carry out reintegration and empowerment efforts. This is of course adjusted to the labor policy set by the government. The pre-employment card policy provided by the central government can be difficult to access for IMW, most of whom are in villages with minimal information. Not to mention that the number of pre-employment cards is not proportional to the number of workers who are dismissed victims, including IMW.

For this reason, local governments can take part in making policies that can specifically provide assistance to IMW. This policy is of course in accordance with the needs of IMW. If it is based on the IMW Law, regions do have an obligation to provide protection. Facilitating problems that exist in countries of work and facilitating the needs of IMW in the reintegration process are local government priorities to fulfill the rights of migrant workers

Policies in Form of Regulations and Decisions

In order to coordinate in democratic country and remove sectoral ego barriers in autonomous regions, the 'presence' of the government, in this case c.q. Local government is needed. The meaning of government is present here is in the form of regulation, so that things that have not been regulated can be arranged so that the rights and obligations of the community can be fully implemented.

According to Article 1 number 2 Law no. 12 of 2011 concerning the Formation of Legislative Regulations: Legislation is written regulation that contains legally binding norms and is established or stipulated by state institution or authorized official through the procedure stipulated in the Legislation.

Therefore, according to Jimly (page 10), there are three forms of decision-making activities that can be distinguished by the use of the terms "regulation", "decisions / decree" and "stipulations", according to Jimly these terms should only be used for:

1. The term "regulation" is used to describe the results of regulatory activities that produce regulations (*regels*).
2. The term "decision" or "decree" is used to describe the results of an administrative decision or decision-making activity (*beschikkings*).
3. The term "stipulation" is used to describe the judgment or trial that results in a decision (*vonnis*).

However, on page 11 of his book, as explained by Jimly, in practice there is no uniformity in the use of these terms, for example in referring to "stipulation" using the term "judge's decision".

From Jimly's explanation above, we can conclude that the term "decision" can be interpreted broadly and narrowly. In the broad definition of the term "decision", it also

contains the meaning of "regulations / regels", "decisions / beschikkings" and "stipulations / vonnis". Meanwhile, in the term "decision" in narrow sense, means result of administrative decision making or decision making activities (beschikkings). Regarding the difference between decision beschikking and regulations (regeling), it is stated that decisions (beschikking) are always individual and concrete (individual and concrete), while regulations (regeling) are always general and abstract (general and abstract). that is, its enforcement is addressed to anyone who is subject to the formulation of general principles. [12] Furthermore, on page 28, Jimly states that the product of the decision is used through the state administrative court, while the product of the regulation is tested (judicial review) directly to the Supreme Court or if it is for a law it is tested at the Constitutional Court. In addition, there is an opinion that looks from a different side, according to Maria Farida Indrati S, which states that decision (beschikking) is once-completed (enmahlig), while regulations (regeling) always apply continuously (dauerhaftig). [13]

Philipus M. Hadjon in his book "Introduction to Indonesian Administrative Law" states that local policies can take the form of two forms of action, namely local policies in the form of Local Regulation Making and local policies in the form of Local Head Decision Making. Decisions in question are actions of the competent authorities which give rise to legal provisions. Decisions from the competent authorities take the form of "regulations" and "decisions". It is called regulation (regeling), if the content of the decision is intended to regulate plural / abstract matters which are generally the same. Called decision (beschikking) if the content of the decision is intended to settle the law or establish the law on certain concrete things.

Thus, the format that can accommodate generally accepted policies in abstract form regarding matters that need to be regulated is a Regulation, in the context of this research is a Local Regulation. This is because higher regulations already exist and follow-up of existing regulations is required

The granting of autonomy to regions and authority in establishing local regulations is intended as effort to provide flexibility to regions in accordance with their local conditions. In addition, it is also intended to close the distance between local regulation makers (local officials) and the people in their area so that an intensive and harmonious communication atmosphere is built between the two. This means that the existence of the people in the regions as the main supporting subjects for democracy has place and channel to participate in various local regulations issued / produced by local government.

According to Meutia Hatta, national policies have encouraged the implementation of a wider decentralization of local governments through Law no. 22 of 1999 and currently has been revised by Law no. 32 of 2004 concerning the role of local governments in improving the quality of human resources capable of managing potential resources for the welfare of society. The most recent was updated by Law No. 23/2014 on Local Government.

So far, in several areas there have been regulations on the protection of Indonesian workers or what is often referred to as Migrant Workers. The existence of this local regulation is encouraged. First, because there are so many cases of violations of the rights of migrant workers. Second, these cases are caused by the absence of protection of migrant workers' rights. Protection in the form of a local regulation as well as its implementation. Third, the regency government needs to play role in protecting its people, especially those who become migrant workers.

In this pandemic time where most of the IMWs are sent home, local policies are needed to respond to legal protection after employment which is the mandate of Law No. 18 of 2017. This local policy is derived from the condition of migrant workers and their needs during the pandemic. In the provisions of Article 41 of the IMWP Law, it regulates the responsibility of local / city governments in protecting migrant workers by conducting: disseminating information, creating IMW database, reporting the results of periodic evaluations of Indonesian migrant worker placement companies to the provincial government, managing IMW returns, providing protection of Indonesian migrant workers before working and after work, providing job education and training, providing guidance and supervision of educational and job training institutions, carrying out social and economic reintegration, regulating and supervising the implementation of IMW placements and establishing one-stop integrated services.

State Responsibility in Protecting Citizens Abroad

Regarding the existence of Indonesian citizens who work abroad, the concept of state responsibility in providing protection rights must still be guaranteed by the state. Because citizens, in this case IMW, are abroad to work. In the case of the state providing guarantees to citizens to get job and decent living for humanity. In general, Indonesian citizens who are outside the territory of the Republic of Indonesia receive protection rights from the state, especially IMW who are in position as workers. The need for legal protection for IMW because 84% are informal workers and 60% are IMW who work in domestic sectors that are vulnerable to becoming victims. So that the state must give protection rights in the concept of distributive justice to IMW who work in other countries. The applicable law is the law of the country where IMW works. The form of protection is in the form of assistance and of course advocacy to IMW who are experiencing cases. In addition, the government proactively monitors the whereabouts / conditions of IMW while working in the country and conducts socialization regarding workers' rights.

To explain the concept of the state role in legal protection for IMW as a whole, it needs to be done at the national and international levels, because procedurally the IMW placement process consists of pre-placement, during working and post-placement. At the national level, the protection instrument is directed at the phase before TKIW leaves the country and after returning to the homeland. Meanwhile, at the international level, the instrument of protection is when a worker starts to leave Indonesia and is in the workplace until the time he returns to Indonesia. Regarding the concept of protection when the IMW is abroad, it relates to the country jurisdiction. Jurisdiction is

attribute of state sovereignty, where the jurisdiction of a country refers to the competence of the country to regulate people and assets with its national laws (criminal and civil). [14]

In the case of labor law in particular, it cannot provide direct protection. Because in the event of criminal act committed by IMW, the law of the country where IMW works will apply. It's just that legal protection can be provided by including an arrangement that labor advisory company is required to open legal aid institution in countries where many migrant workers work. Another effort is to take diplomatic approach to cases that have occurred or to enter into bilateral agreements to contract standards and legal protection for both parties (workers and employers).

When viewed from the perspective of the work contract between the employer and the IMW, it shows the legal relationship between two people from different countries, so that they enter the realm of International Civil Law (ICL). This happens because ICL talks about legal relations that show foreign elements in the case material, not the legal source, the source of law from ICL is the national law in each country. As said by Meijers [15] that, "Het Internationaal Privaatrecht is het privaatrecht voor de internationale gevallen", namely events that are international, but the source is not international.

Knowing the rights and guarantees of legal protection can prevent the occurrence of discriminatory treatment of citizens in the destination country of work, violence both sexual and physical, and labor protection. The following will describe the principles of territorial jurisdiction and the principles of state treatment standards, as benchmarks for TKIW in obtaining legal rights and guarantees, based on international legal principles that apply to each individual while in the receiving country. (*host state*).

In principle, according to the principles of international law, foreigners while in the receiving country are subject to the laws of that country, except for matters relating to their personal status, the arrangements are still subject to the national laws of the foreigners concerned. So in relation to this, the legal status of IMW when in the country where it works is subject to the laws of that country. Thus, when IMW is in the country of work, the national law (Indonesia) which regulates the protection of IMW cannot be automatically used because it involves jurisdiction outside the country's territory. [16]

From Brownlie's opinion, it can be said that based on the principles of the Standard of State Treatment, IMW when in the country of work has the same rights as local citizens before the law, including regarding rights and guarantees of the same legal protection in labor regulations. So it is clear by using this principle, the equal position between local citizens and foreign nationals who are immigrants in the country.

IV. CONCLUSION

The The conclusions that can be drawn from this research are work was one of the basic rights of citizens, state was responsible for providing. It was also the right of migrant workers to be eased and facilitated their interests by the State. The concept of State control makes it possible for the people to participate in government. This can also be based

on migrant workers to play role in determining government policies regarding assistance during pandemic. The government is obliged to resolve problems that occur to migrant workers in receiving country. When migrant workers were returned to their respective areas, the country was responsible for problems that occur in the workplace and includes the IMW in concept of workers affected by the pandemic to access pre-employment cards and other assistance.

REFERENCES

- [1] BNP2TKI, "Laporan Pengolahan Data BNP2TKI 2019(2)," [https://bp2mi.go.id/uploads/statistik/images/data_19-02020_Laporan_Pengolahan_Data_BNP2TKI____2019\(2\).pdf](https://bp2mi.go.id/uploads/statistik/images/data_19-02020_Laporan_Pengolahan_Data_BNP2TKI____2019(2).pdf), 2019. [Online]. Available: [https://bp2mi.go.id/uploads/statistik/images/data_19-02020_Laporan_Pengolahan_Data_BNP2TKI____2019\(2\).pdf](https://bp2mi.go.id/uploads/statistik/images/data_19-02020_Laporan_Pengolahan_Data_BNP2TKI____2019(2).pdf). [Accessed: 25-May-2020].
- [2] R. Devi, "Does The Placement Termination Policy of Migrant Workers Able To Provide Protection?," in *Advanced in Social Science, Education and Humanities Research, vl 226, 1st International Conference on Social Science (ICSS 2018)*, 2018.
- [3] A. Jimly, *Introduction to Constitutional Law*. Jakarta: Raja Grafindo Persada, 2014.
- [4] S. M. Soedarmo, "Powers and Responsibilities of the President of the Republic of Indonesia," Airlangga University, 1990.
- [5] C. Henry, *Black's Law Dictionary*. Paul Minnesota: West Publishing, Co.St, 1990.
- [6] R. Suliati, "Efforts to Improve Legal Protection of Women Workers in Private Industrial Companies," University of Indonesia, 1996.
- [7] H. Philipus, M, *Legal Protection for the People in Indonesia*. Surabaya: Bina Ilmu, 2009.
- [8] L. Todung, Mulya, *Legal Aid and Structural Poverty*. Jakarta: LPES, 1984.
- [9] R. Sri, Lestari, "Protection of Migrant Workers' Human Rights: Normative Study of Indonesian Obligations Based on Principles and Norms of International Law," *Justisia Law J.*, vol. Edition 85.
- [10] L. Husni, "Law of Placement and Protection of TKI," Brawijaya University, 2010.
- [11] S. G. of the R. of Indonesia, *Law Number 18 Year 2017 Concerning Protection of Indonesian Migrant Workers*. Indonesia, 2017.
- [12] J. Asshiddiqie, *Procedure of Law Testing*. Jakarta, 2015.
- [13] Maria Indrati, *Legislative Science (Types of Content Function)*. .
- [14] W. Rebecca, MM, *Introductory International Law for Students*. Semarang: IKIP Semarang Press, 1995.
- [15] E. . Meijers, in *Het Vraagstuk der Herverwijzing (WNPR 1938 no. 3555- 3558); also in VPO II (1955: 366)*. Malang: hand-out of course material for International Civil Law, Faculty of Law, Brawijaya University Malang; 2005, 2005.
- [16] I. Brownlie, *Principles of Public International Law fourth edition*, Fourth edi. Oxford: Clarendon Press, 1990.