RESPONSIBILITY OF PROTECTION INDONESIAN FEMALE MIGRANT WORKERS

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ABSTRACT

State guarantees the basic rights of the citizens in the form of provision of jobs and a decent living and provide for the burden to the state to meet these rights. The state’s obligation to work to make the responsibility of the state in fulfilling the rights of working citizens. The nature of the provision of legal protection against Indonesian female migrant workers is a protection against the guarantee of the security of all forms of violence whether physical or psychological, abuse, rape, torture, persecution, murder, expulsion, or in other words to provide protection against acts of arbitrariness of the persons, groups and in order to attain a state of justice and law enforcement. This article explain the responsibility of the government in the context of the migrant workers protection in the perspective of Indonesian law and the law in the recipient country as well as the International legal framework. The responsibility by the Indonesian Manpower Supplier as the private parties can also be requested for criminal responsibility as corporations. The international law also regulates the state responsibility in providing equal treatment for foreigners, yet each country has different implementation toward the law. This paper will analyze the destination country in term of protection that focuses in Malaysia and Netherlands. Malaysia has Employment Act provision that some chapters regulating the foreign worker. Moreover, Indonesia and Malaysia have also made Memorandum of Understanding as the efforts to provide protection that in line with ASEAN context in Protection and Promoting the declaration of the rights of migrant workers. Legal protection for migrant workers in the Netherlands is different, since the rule is based on international law, the provisions of Europe Union and national law. The protection does not distinguish between undocumented and documented, since there is an existence of the real problem in Au pairs.

Keywords : responsibility, legal protection, female migrant workers

1. Introduction

Working is one of human rights1, this is in accordance with the provisions of Article 23 of the Universal Declaration of Human Rights (UNDR) 1948 which generally states that everyone has the right to get a job2. While the cornerstone of the right of every human being to do the migration is regulated in Article 13 (1)"Everyone has the right to freedom of movement and residence within the borders of each state".3 Guarantees of fundamental rights is an assurance given by the United States, and it is universal and international.

Labor mobility, which is cross-nation, is a form of the right to work and freedom of movement guaranteed by the state and cross-nation context for the worker remains the responsibility of the state. State responsibility in international law refers to accountability, i.e. disobedience to fulfill the obligations between one to another countries that is prescribed by the international legal system4. Any violation of the rights toward other countries makes the state face the responsibility5. The responsibility of the state towards its citizens cannot be separated from the demand of the claims, since a country has the right to protect its citizens overseas, the country is entitled to intervene diplomatically or make a claim for a satisfactory settlement.6 The importance of giving legal protection to female migrant worker/TKIW7 is a guarantee of security protection against all forms of physical or psychological violence, such as harassment, rape, torture, persecution, murder and expulsion. This protection aims to avoid the arbitrariness of actions of individuals or groups and countries. Legal protection means there are two related parties, where there are

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2 Article 23 Declaration of Human Rights (UNDR) 1948, (1) everyone has the right to work, to free choice of employment, to just and favorable condition of work and to protection against unemployment, (2) everyone, without any discrimination, has the right to equal pay for equal work, Walter Laqueur, The Human Right Rider, New American Library, New York, 1979, p.200.
7 Henceforth in this article use the term TKIW to refer to female migrant workers and the term TKI to refer to migrant worker.
people who should be protected from arbitrary action and the parties who must provide protection. Legal protection is the protection of the inherent dignity and acknowledgment of the human rights to every person in certain country to avoid arbitrariness. Indonesia has never used the term of migrant workers, but instead uses “tenaga kerja Indonesia (TKI) di luar negeri” (Overseas Manpower of Indonesia). In fact, female migrant worker who worked as PNLRT (house servant) is psychological violence, victims of economic and sexual exploitation, and often experience discrimination in the workplace because of the job status that is synonymous with jobs that do not require special skills (unskilled labor). In addition, the location of the workplace that is in the household and family (hidden view) makes it difficult for supervision and this triggers the risk of violence.

This problem is aggravated by the fact that the Employment Act in some destination countries does not guarantee the adequate rights of domestic workers. Therefore, the female migrant workers/TKIW has low bargaining position in asserting their rights. Those problems become a spirit of the creation of Act No. 13/2003 on Labor that employment is a field of peoples’ life that must be guaranteed and protected by the state, as the rights attached to a person as it is mandated by the constitution.

Act No. 39/2004 concerning the Placement and Protection of migrant worker/TKI, here in after refers to as the PPTKILN Act. The existence of PPTKILN Act is intended for the creation of an effective mechanism for placement of TKI, which the orientation is the protection of Human Rights in order to prevent problems that appear in the future. As mentioned in the preamble of PPTKILN Act, migrant worker often become the object of human trafficking, including slavery and forced labor, violence victim, abuse, crime against human dignity, as well as other treatment that violates human rights.

Procedures of overseas employment as a whole consist of the pre-placement, during working in overseas and after working. Under the provisions of Article 1 paragraph (4) of the PPTKILN Act states that the protection of migrant workers is all efforts to protect the interests of the candidate migrant workers in the implementation of ensuring the fulfillment of their rights in accordance with the legislation either before, during, and after working. Protection in the phase of before and after working is still in the jurisdiction of PPTKILN Act. However, migrant worker issues are not only at national scope or sending country alone, the real problems of migrant worker essentially is also a matter to the receiving (recipient) country, as the embodiment of human rights protection. Indonesia is the sending country while the destination country of migrant worker is the receiving country (recipient country). Related cross-nation and inter-state relations, it is included in the realm of international law. The process is characterized by liberalization in trade, services, investment, but also includes the movement of people to improve their lives and employment opportunities.

Each state has different laws, as well as its employment law. However, there is international standardization in the field of employment settings, one of which is the provision in the International Labor Organization conventions (ILO). It is primarily related to employment issues regarding the protection of the rights of migrant workers and it has been seriously regulated in the rules and recommendations of the ILO. The existence of minimum standards regarding the protection of the rights of migrant workers is also set in the provisions of the ILO. ILO Convention is binding in which each member (country) is bound to implement it because of their membership and they are not allowed to ratify the convention. 

The existence of the ASEAN Declaration on the Protection and Promoting of the Rights of Migrant Workers, and it can not effectively provide protection for migrant workers.

Based on PPTKILN act protection is responsibility of government and the private sector. It is neccessary to study responsibility in the context of government action and company to determine whether they has to protect female migrant workers. Review the policy of other countries has to know whether they have regulation for protecting female migrant workers. The court ruling about government's responsibility and company responsibility to determine whether the decision has been given protection for TKIW. Protection for female migrant worker is important because many case happen by the of their position.

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8 Philippus Hadjon, Legal Protection for People in Indonesia, Bina Ilmu, Surabaya, 2007, p.32
9 See Article 1 paragraph (1) of Act No. 39/2004. Tenaga Kerja Indonesia (Manpower of Indonesia) or TKIs the citizens of Indonesia who work overseas in the employment relationship for a particular period and they receives wages.
10 The total of Indonesian migrant workers are 2,536,429, and 67 % of them are women. More than 90% of TKIWs working in the informal sector and most of the them are working on the domestic sector. Tatang Budi U.Razak, Directorate Protection of Ministry of Foreign Affairs for citizen of Indonesia and Legal Aid, Management Issues of TKI in the Perspective of citizen Protection Overseas, Focus Group Discussion,Surabaya, September 27, 2012, in Koesrianti, The State Responsibility of Indonesian Female Domestic Migrant Workers, p.3.
12 See Preamble point (c) of the PPTKILN Act.
migrant worker is important because many case happen by the of their position. The central issue in this paper is the needs for countries (sending and receiving country) to make an effort to Protect Migrant Workers as an embodiment of human rights protection. In order to study the entire central issues, the legal issue in this paper is does the state has to provide protection for Indonesia female migrant worker/TKIW. The purpose of this paper is to analyze the state responsibility to provide protection for Indonesia female migrant worker.

2. The responsibility of the State to protect migrant workers
Legal protection against TKIW is a protection against the guarantee of the security of all forms of violence whether physical or psychological, abuse, rape, torture, persecution, murder, expulsion, or in other words to provide protection against acts of arbitrariness of the persons, groups and in order to attain a state of justice and law enforcement.

The concept of state responsibility in the legal protection to Indonesian Female Migrant Workers, needs good cooperation between national and international scale, since the procedure of placement process of TKIW consists of pre-placement, during working and after the placement. When the TKIW are working overseas, the concept of protection is related to the jurisdiction of recipient country. Jurisdiction is an attribute of sovereignty, where the jurisdiction of a country refers to a competence of the state to organize its citizen and wealth with its national law (civil and criminal). Jurisdiction to individual gives authority to the states to a run jurisdiction because such person is within state power and the judicial process can be carried out against him or her. Related to the presence of migrant workers, it is known as active nationality principle; according to this principle the state can carry out jurisdiction over its citizens. This principle is generally provided by international law to all countries that want to enforce this kind of jurisdiction. This principle is related to the state, not to obligate to submit its citizens who have committed a criminal offense overseas.

Each country has sovereignty, but sovereignty does not make the country free from responsibility; it means according to the principle, within sovereignty, there is an obligation not to abuse it. This reason becomes a background emergence of state responsibility in international law that there is no country can enjoy their rights without respecting the rights of the other country. Where the breach of that obligation can be an act and omission. The country has responsibility towards its citizens and it cannot be separated from claims, because it has a right to protect its citizens overseas, the country is entitled to intervene diplomatically or to make a claim for satisfied settlement. In this case, the recipient country deems to have harmed through its people or to demand their rights which is related to international law.

According to the principles of international law, foreigners while in the recipient country the is subject to the laws of the country, except for issues relating to personal status, the arrangements still use the national law of each foreigners. Therefore, the legal status of TKIW when they work in the recipient country is subject to the laws of that country. Thus, when TKIW is working in the recipient country, the national laws (Indonesia), which regulates the protection of TKIW, cannot be immediately used because it involves international (other country) jurisdiction. Brownlie states that:

"...alien can only expect to the equality of treatment under the local law because he submit to the local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality."

From this statement, we can draw a conclusion that the standard of treatment based on the Standard Principle of the State, when TKIW is working in the recipient country, have the same rights as local citizens before the law, including the rights and constitutional guarantees protection in the labor regulation. Therefore, it is clear by using this principle, the status between nationals’ citizen and foreigners who became immigrants in the country are equal.

In term of state responsibility, the legal system of human rights is usually divided in three forms: (1) Respect, It is demanding the state and its agency not to do anything that could violate the basic rights and freedoms of the individual; (2) Protection, It requires the state to take necessary measures to protect the rights and freedoms of citizens in its territory; (3) Fulfilment, It ensures the fulfillment of the basic needs of its citizens. Indonesian government has responsibility to protect TKI who work overseas with the standart of treatment. The recipient country must gave TKI the same rights as local citizens.

3. Accountability Department (Ministry of Manpower and Transmigration) in the Protection of TKI
The government has an obligation to take responsibility for unlawful acts, directed at the return on its original condition as before the occurrence of unlawful act. However, efforts to restore the original state cannot be done, since the government is burdened with the obligation to provide compensation, as a consequence of claim responsibility.

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15 Rebbeca, see note 4.
20 Indroharto, Effort to Understand the Law on State Administrative Court, Book 1, Pustaka Sinar Harapan, Jakarta, p.1993.
Officials, in this case is the minister of manpower and transmigration has two legal position, that is as representative of legal entities and representatives of officials. In relation to responsibility and claim responsibility, these two government positions have different legal consequences. There are two difference of responsibility namely responsibility and claim responsibility in the public and in the civil, which appeared as a consequence of government action is contrary to the norms of public law and private law. While in the other hand the responsibility and claim responsibility can also appear despite government action is lawful. If the government action cause harm to citizens, they can prosecute government through the different courts.

In Indonesia, the Supreme Court organizes lawsuit against the government in form of legislation through judicial review. According to article 20 (2) b of Act No. 48 (2009), regarding to Judicial Power, it is mentioned that the Supreme Court has the authority to examine the legislation under the law against the law. The Supreme Court is verified local government legislation, this process is carried out after the completion process by central and local governments to accept the decision of revocation from the central government, this rule is defined in article 145 of Act No. 32/2004 on Regional Government Affair. In the civil law, the government also bears claim responsibility if they act against the law and cause losses for citizens, namely on the basis of article 1365 BW. It can be consulted on jurisprudence related to a lawsuit against the government acts that cause harm to citizens as mentioned by M.A.

The following are the example of the related cases that have been settled by the Supreme Court as an effort to give better protection of TKI, the workers in this case is individual or legal entities against the Minister of Manpower and Transmigration:

Decision No 98/G/28, Jakarta Administrative Court, the petitioner is consortium of insurance protection of TKI, the respondent was Minister of Manpower and Transmigration. The petitioner suffered a great loss due to the publication of Ministerial Decree No. KEP 104/MEN/V/2008 (termination of the insurance protection of TKI). The petitioner loss of insurance sales and disbursement of funds of IDR 350 million per day, and those fund had to be deposited in cash to the police. The issue of the decree is regarded as an arbitrary action. The petitioner sued under article 53, paragraph (1) of Act No 9 of 2004 on State Administrative Court: (a) the petitioners have a legal relationship, capacity and interest in the matter as the a quo (b) the legal consequences of legal act in a state administrative body is an act of law or officers in State Administrative Body, which comes on a legal provision of State Administrative Body, that could affect rights and obligations to other people. Moreover, the petitioner also stated about the basic principle of good governance (AAUPB), prudent principle. The judgment of Supreme Court of Indonesia cancelled the Ministerial Decree No. KEP 104/MEN/V/2008 and re-enactment of Decree which sued by the petitioner No. KEP 435/MEN/XI/2006.

In this case, the responsibility and claim responsibility for the actions of officials of the minister of labor and transmigration is referred to the agency or state administrative official who perform a variety of actions in order to run his or her job as the government affairs. On one hand, he or she acts as government representatives who act on behalf of officials. While on the other hand, he or she (officials minister) is a human who may perform various actions when they make mistakes; an error in governance will be associated with responsibility. In this matter, Goftipus M. Hadjon argues:

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21 As a representative of public legal entity such as state, province, district or city, the government can do civil actions such as the sale and purchase, lease, make treaties, and so on. Some representatives of government positions make certain action for the public such as making regulations, decision, issuing permits, and so on.

22 According to Ten Berge: ..... a particular government decision which is contrary to the principles of good governance means contrary to the rule of law. Although the principle is a vague statement, but its bind power is not totally vague, this principles have binding power to the public. Ridwan, the Law of State Administration, Raja Grafindo, Jakarta, 2011, p.236.

23 According to the Koenjoro P and SF Marbun, stated general principles of state administration, Ibid, p.244).
"...personal responsibility is related to functionalist approach or behavioral approach in administrative law. Personal responsibility with respect to maladministration has correlation to authority and public service. Differentiation of responsibility between position and individual for government acts brings consequences related to criminal responsibility, civil liability, and liability of the state administration. Criminal responsibility is personal, in line with the government acts; personal responsibility is associated with the office of maladministration..."  

An official, who acts for and on behalf of the department, has personal immunity, meaning that if their actions cause harm to others, the burden of the losses is charged to the department. In the government organization, there is two basic norms namely, government norms and behavior of governing apparatus norms. Behavior norms that must be obeyed as officers are discipline, codes of ethics as officials and officers, oath of officers, and treaty of integration. Besides, there are various legal law that contain of norms, such as regulated in Article 34, Act No. 5 (2009) about public service. Terms of above article is applied as preventive norms of behavior, that regard as a step to prevent and protect the organization of behoorlijk public services; therefore, violation of those norms will be considered an act of maladministration.

Agency or official or state administrations who are involved in civil activities or using civil instrument in the government organization or in state administration body is similar to a body of civil law; consequently, a government action will be considered aberrant if it is contrary to the norms of civil law. Civil liability can become position liability, if it is related with unlawful acts by the authorities. Civil liability becomes personal liability when there are elements of maladministration and for criminal liability becomes personal responsibility.

3. Criminal Responsibility of PJTKI (TKI Supplier Company)

The status of legal entity or corporation as the subject of the criminal law has been organized on Supreme Court of Indonesia, dated March 1 1969, No. 136/Kr/1966 in the case of PT K and PT SS, which states, “A legal entity cannot be confiscated.” The interpretation of Supreme Court of Indonesia to that case was right, because something, which can be confiscated, is a thing or object, whereas PT SS and PT K were not a thing, yet it is a “legal subject.” Thus, the Supreme Court decision’s confirmed, that the legal entity or corporation is a legal subject in criminal law.

Meanwhile, several Supreme Court of Indonesia decisions, regarding human trafficking in the process of TKI placement, the main suspect is individual, and in this case, it can be a broker, sponsor, or branches. In the case of human trafficking, it is one of the organized crime involving an organized network. If we look at the content of Act No 39/2004, a party which can organize the process of placement of TKI overseas is company; the form of the company is limited company (PT) (individuals are prohibited to conduct the placement of TKI). However, there is no criminal verdict related to human trafficking case, which is imposed on certain company, there is only an administrative verdict related to the negligence of the company in providing protection to TKI based on Act No. 39/2004.

The imposition of criminal sanctions to company is very important because the process of sending TKI overseas, the main subject is human. If there is a company, which perform actions that can harm human dignity and even loss of life; consequently, the company deserves to be responsible to its action because they cannot able to provide protection to TKI. In addition, the imposition of sanctions on the company will also provide a deterrent effect on other companies.

In the criminal law, there is a reference in term of responsibility; there shall no law penalties if there are no errors. In strafbaar feit, relationship between criminal acts and offenses is specified by the relationship between the nature of unlawful act and fault. It means impossible to someone to be accounted for (punished) if he does not commit any criminal act. But even someone commits a criminal act, he or she cannot be always punished.

The setting of corporate or legal entity (Limited Company/ TKI Supplier Company) as legal subjects in the provisions of Act No. 21/2007 and Act No 39/2004, gives certain consequences; criminal responsibility can be imposed on the corporate. Beside those responsibility, there is something more important to find out about the detail of actions and the part of the company which can make fault and can be requested for criminal responsibility. Criminal responsibility of corporations can be charged to: (1) those

25 Government norms is meant to run the governance in line with legislation and law (wet en rechmatigheid). While the behavior norms organizes the government officials and government employees to have good, honest, and tested behavior in running the governance.
26 Government Regulation No. 53/2010, concerning the Discipline of Civil Servant.
27 See Regulation No. 42/2004 on Constructing Corps and the Code of Civil Servants.
28 the importance of official oath can be referred to article 27 of Act No. 8/1974 and Act No. 43/1999 on the Amendment of Act No. 8/1974 on the Fundamentals of Civil. Article 3 No (2) Government Regulation No 53/2010 on the discipline of civil servants. For the oath of regional office heads, it is administered in article 110 of Act No. 32/2004 on Regional Government.
29 The ministers must sign integration pact, soon after his or her inauguration. Officials and employees of the respective ministries are also required to sign a pact of integration. Minister of State for Administrative Reform issued Official Letter no. SE0/M.PAN/04/2006 on the Implementation of Integrity Pact; the letter is intended to all central and local officers.
30 Article 34 of Act No. 5/2009 on Public Service
31 Chidir Ali, Jurisprudence of Indonesia on Economic Criminal Law, Binacipta, Bandung, 1982, p 68
who act for and or on behalf of the corporation, or (2) for the benefit of the corporation, which can be done (1) based on the employment relationship, (2) or other relationship. As well as, acting in a corporate environment; whether it is (1) individual or (2) together. The criminal responsibility is briefly stated in Article 13 of Act No 21/2007.

Criminal responsibility in this case may be imposed against the corporate management or corporation. Some people, acting for and or on behalf of the corporation or for the benefit of the corporation, commit corporate crime. In this case, the broker or sponsor or tekong and branches can be regarded as persons acting on behalf and for the benefit of the corporation. They recruit the candidate of migrant worker directly by offering them to work overseas. For each candidate, submitted to the Supplier Company, they get a reward around IDR 2-4 million for each candidate.

Regulation of criminal responsibility normatively is already structured in Act No. 21/2007, but when it is viewed from one of decision of Supreme Court of Indonesia No. 10/ Pid.B/2013/PNBlt, in a verdict against the Yoyok Yurianto. This verdict is based on the provisions of Article 2 (1) of Act No. 21/2007 and the sentence was three years imprisonment and a fine of IDR 120,000,000. Something which is important in this case is the, Which should be observed in this case is that the defendant, Yoyok is Branch Manager of PT Prayogo Prajogo in Blitar (the office is in Surabaya) and Head of service, counseling and registration unit of Indonesian migrant workers candidate (UP3CTKI), Prayogo Prajogo, Ltd. In the recruitment and placement activities in Blitar, Yoyok always manages it with Irwan Prayogo (Director of Prayogo Prajogo, Ltd).

In this case, there is no sanction that imposed on Prayogo Prajogo, Ltd as a Supplier Company or on its Director. Although the judge justified coordination between the defendant and the Director; if it refers to Article 13 and Article 14 of Act No 21/2007, there will be prosecution against the management director and PP, Ltd (as corporation), besides it may also be charged with criminal responsibility for acts of human trafficking. The imposition of criminal sanctions should be imposed on the corporation because it will provide a deterrent effect on the corporation and the corporation will be more careful in the placement of TKI.

From the previous example, the Supplier Company or the manager of the company can be prosecuted criminal responsibility for human trafficking in the process of TKI placement. The sanctions that can be imposed on the Supplier Company under Article 15 of Act No. 21 of 2007 are: (1) hefty fines punishment, which is three times higher as it is mentioned in Article 2, Article 3, Article 4, Article 5 and Article 6 (2). Moreover, there are some additional penalties; such as’ of revocation of business licenses, confiscation of property which obtained from criminal activity, disposition of legal entity, managerial dismissal, and prohibition to the manager to set up the same type corporation.

Sanctions on Supplier Company based on Act No. 39/2004, Article 102 is shall be punished with imprisonment of at least 1 year and not later than 5 years and or a fine of at least IDR 1,000,000,000 and at most IDR 5,000,000,000. Every person who, as stated in paragraph (c) conducts recruitment to the candidate of TKI that does not comply with the requirements, referred to Article 35 and also under section 103: shall be punished with imprisonment, minimum one month and maximum 1 year and or a fine is at least IDR 100 million and at most IDR 1,000,000,000,000, for every person who: paragraph (1) placing TKI is not through business partners as required by article 24.

4. The Responsibility of migrant worker protection in Malaysia

Many of Malaysia people have already been unwilling to do any kind of job that includes into 3D category (dirty, difficult and dangerous). Indonesia migrant workers were acknowledged as the preffered workers to fill the GAP. Cultural, religious and linguistic similarities between the two countries. Subsequently thousands arrived in Malaysia to take up jobs in the plantation, construction and domestic work sectors. According to the data in PUSLITFO BNP2TKI, the number of Indonesia migrant workers sent to Malaysia up to October 2014 is 113,952 (PUSLITFO BNP2TKI). It means Malaysia is the main destination for Indonesian migrant worker. However, the number of cases occurred Malaysia reported to BNP2TKI up to October 2014 is 688 cases, while the number of Indonesia migrant workers deported through Nunukan up to September 2014 has reached 2773 persons. Legal documents, wages and inappropriate jobs, rude employers, as well as violence are the other problems faced by Indonesian migrant workers in Malaysia.

Malaysian labor laws exclude migrant domestic workers from key protections, such as a weekly day of rest, annual leave, and limits on working hours. Immigration laws tie a domestic worker’s residency to her employer, so the employer can terminate a domestic worker’s contract at will and refuse permission to transfer jobs. These policies restrict domestic workers’ ability to seek redress and to change employers, even in cases of abuse.

The deployment and management of foreign labour is regulated through three major legislative, the Immigration Act, the Employment of Foreign Worker’s Act (under subsumed The employment Agencies Act) and the Penal Code. In fact, the regulation regulating domestic servant, which becomes the main job for female migrant worker, has been mentioned in Employment Act 1955 (part 11 Domestic Servant) as well as the amendment of Employment Act 2012.

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33 In this case, Yoyok as the Branch Manager of PP, Ltd., in Blitar recruited the candidate of TKI to be employed in Hong Kong.
34 Philip, Migrant Worker in Malaysia, Fair labour Association, 2008, p 1
37 Kaur, see note 51
The government of Malaysia classifies migrant workers into documented and undocumented migrants. Some say regular migrants and irregular migrants. Some use the term ‘illegal migrants’ when they refer to the undocumented migrants, but the term is derogatory as no person and no human being should ever be called illegal. The preferred term would be documented and undocumented migrants. Documented migrant worker is a worker that has the necessary documents such as work permit/paspor/visa that the law requires before the migrant worker can work. The term undocumented workers are used also to those did once have valid documents, but now their document has expired or retained by the employer. It also refers to those who never did have any documents from the very beginning that allows them to work.

Equality and Equal Treatment Under The Law Article 8 of the Federal Constitution of Malaysia provides that “All Persons are equal before the law and is entitled to equal protection of the law” and by the use of term “person” as opposed to ‘citizen’, it is most clear that this guarantee of rights extends to all persons, including migrant workers, be they documented or undocumented. It must be pointed out that 6 of the 13 Articles under Part II of the Federal guarantee of rights extends to all persons, including migrant workers, be they documented or undocumented. It must be pointed out that 6 of the 13 Articles under Part II of the Federal Constitution entitled ‘Fundamental Liberties’ uses the word “persons” as opposed to word “citizens”, and as such usage of the word ‘persons’ in Article 8 clearly is not conscious but also important. But in reality many of Indonesia migrant worker were deported by Malaysia government. Malaysia police conducts a routine check on the migrant workers. When the workers cannot show their document, they will be arrested and brought into court without any counseling and right to defense. Then they will be imprisoned for 3 to 6 months. Malaysia government, then contacts Indonesia embassy to carry out the deportation. This practice is surely against the principles of equality and equal treatment, even not having legal document is considered a crime. The punishment can be in the form of fine, imprisonment, and physical punishment.

The equality is also reflected in the Employment Act 1955 which applies to all workers, irrespective of whether the person is a local worker or a foreign worker (migrant worker). In section 2 of the Employment Act, being the interpretation section, the term employee is defined as : any person included in any category in the First Schedule to the extent specified there in whom the Minister makes an Order and Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such persons wages do not exceed one thousand five hundred ringgit a month

In 2012 Malaysia conducted an amendment on Employment Act 1955. Some aspects amended related to migrant workers include the salary payment via bank (section 25A). The salary of migrant workers can be given not via bank as long as there is an agreement from the worker and a notification to the Director General. Regulation for salary payment to migrant workers was issued due to the fact that there are many cases related to unpaid salary by the employers. Section 37 Amendment Employment Act 1955 provides a guarantee of right for female migrant labor; that is female maternity right – a right to an eligible period in respect of confinement and receive from the employer a maternity allowance. In section 57, employers who employ foreign domestic servant shall inform to Director General within 30 days. This regulation is issued in order that the government can both record the location of the migrant employees and monitor how the employers treat their employees.

Difference regarding the worker also arranged on the Immigration Act 1959/60. There are 3 kinds of passes, and visas that is mentioned; permits foreign nationals entering Malaysia to work that are the Employment Pass (Regulation 9), Visit Pass (Temporary Employment) (Regulation 11 (1)(ii)) and the Work Pass for Sabah (Regulation16). If we categories there are two types of employment approval permits or work visa, namely an employment pass for expatriates and temporary work permit or visit pass for low skilled worker, including domestic workers. Expatriates worker are high educated, have high salary and permitted their family accompany them. Low skilled, recruit under the work permit/visit pass on one year work permits renewable up to five years), have age restriction and they can not their family with them. This condition is related to migrant worker.

Malaysian state diversiﬁed recruiting policy based on racialised hierarchy and a preference for certain nationals. For example, Indonesia migrant worker have lower wagen than Philipina workers. This make one labour exporter against another.

Malaysia governance structure have resulted in marginalisation and vulnerability of low skilled migrant worker. Migrant workers likely lose their freedom of movement and also their legal status that restricted by the country. Other to recruiting the worker especially unskilled worker could do by private agent or by outsourcing system. It certainly could not be avoided if the agent are more concerned with proﬁt than provide protection for worker. Other, employer had retain their worker pasport that make migrant worker more vulnerability and can make them became undocumented if there were escape from the employer.

In 2004, Indonesia and Malaysia concluded an MOU on migrants that excluded migrant domestic worker. In 2006, they created an MOU speciﬁcally for migrant domestic worker that provide the first policies on this unregulated workforce. The outcome was incredibly weak and reinforced the vulnerability of workers to abuse. For example: the MOU allowed for employers to keep domestic worker passports and failed to provide such basic standard for weekly day off.

In 2012, Indonesia and Malaysia have an amendment MoU 2006. This MoU revised the previous MoU in the aspects of (1) the passport - it can be kept either by the migrant workers themselves or by the employer for the sake of safety, with the agreement

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38 Dato M, see note 52
39 Dato M, see note 52
40 Kaur, see note 52
41 Kaur, see note 52, p 392
42 Marrion P, 2011, p 411
of the worker, and it can be given at anytime requested; (2) right for vacant day weekly – worker has a right to get one day off weekly; whenever the worker agree to work on the vacant day, he/she must be paid proportionally; (3) cost structure – cost paid by employers and domestic workers are as much as RM 2711 and RM 1800 respectively; (4) the formation of joint task force between government of Indonesia and of Malaysia responsible to supervise the realization of the amendment of the MoU; (5) salary - it is between RM 600 and RM 800; (6) the salary payment – it must be via bank. The amendment substantially has indicated positive response from the two countries to provide protection for workers. However, when we study the amendment more thoroughly, there are some aspects that has not been regulated in the MoU, they are: Payment for the vacant day. Working hour, the length of working hour is not specifically mentioned and Variation.

Indonesia and Malaysia are the members of ASEAN (Southeast Asian Nations). In December 1997, the ASEAN vision was adopted concert of southeast Asian Nations. ASEAN community shall be established comprising three pillars, namely, ASEAN security community (ASC), ASEAN economic community(AEC) and ASEAN Socio cultural community (ASCC). The ASEAN member states have agreed to accelerate the establishment of an ASEAN community by 2015.45

The Declaration mandates ASEAN countries to promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers. As a follow-up to the Declaration, an ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) convened its first meeting in September 2008. The Committee was established as a follow-up to the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. The Committee’s work focuses on four main thrusts as follows: (1) Step up protection and promotion of the rights of migrant workers against exploitation and mistreatment, (2) Strengthen protection and promotion of the rights of migrant workers by enhancing labour migration governance in ASEAN Member States, (3) Regional cooperation to fight human trafficking in ASEAN, in collaboration with the Senior Officials Meeting on Transnational Crime, (4) Development of an ASEAN instrument on the protection and promotion of the rights of migrant workers. 44

The ASEAN Declaration on the Protection and Promoting the Rights of Migrant Workers only setting basic policies and legal principles of protection, does not have operational policy to protect migrant workers by imposing obligation on sending states and receiving state. This does not have a direct legal binding effect, there is no formal machinery to control the implementation and no sanction for violating country.45

6. The Responsibility of migrant worker protection in Nederlands
Netherlands is not the main destination for Indonesia migrant workers. Some Indonesia migrant workers are unskilled, and thus they work in the sectors which do not need skill. One of the Dutch government’s policies to open job opportunities is for skilled or well-educated workers. In 2002 Dutch government issued many work permits in the sectors of agriculture, services, culture and education. Most of Indonesia migrant workers work in the sectors of agriculture, reconstruction, domestic work, as well as restaurant. There is no exact number how many Indonesia migrant works work in Netherland inasmuch as Netherland is not their main destination. Hence, Indonesia citizens only come to Indonesia embassy in Netherlands to report their visit. Whenever a country becomes the main destination of Indonesia migrant workers, there should be a labor attaché, Job Order (JO) and a regulation that any people who come to the country to work must report their status as worker to Indonesia embassy. Data in BNP2TKI shows that up to October 2014 the number of Indonesia migrant workers in Netherlands is 664 persons, (653 males and 11 females).

The purpose of EU was to creation a common market in which barriers to trade between member state, be able to market goods and services in any member state.Worker has right to move freely from one member state to another.46 Free movement for TCNs (people from no EU countries) has much less to say about immigration although EU law has a lot to say about freedom of movement for workers. The EU has ashared a competence on immigration set out in article 79 TFEU. 47 Basis on foreign labour act (wet Arbeid Vreemdelingen), employer need a work permit for engaging foreign worker from non EU country that issued by CWI and has to be requested by employer. Basis EU law, no work permit can be requested from EU citizen. There are alsways the language barriers, housing shortage and similliar social problems. In recent years, a increasing number of British, Irish and German comea to Nederlands require technical skill48 Since 1998 the law excluded illegal immigrant from public social service. They are entitle protected by labour law, but seldom able to enforce it.

Policy for irregular migrant is the obligation to carry proof of identity support by the Aliens Act 2000 and the implementation of EU Directive 2001/51/EC and some measures that establish by Ministry of Justice, Policy Documentoon Return of Allies 2003.49

46 For example they may want to be able to travelwith their familiesor to put downroots in the host state.ACL. Davies, EU Labour Law,Edward Elgar Publishing Limited, UK, 2012, p 69.
Directive 2009/52/EG, the Wet Arbeid Vreemdelingen has been revised. In addition to the (existing) obligation to pay third-country nationals in Article 23(1), the employer is liable to pay any back payments to the illegally employed third-country national as well. The agreed level of remuneration and duration shall be presumed to be in accordance with established practice in the relevant occupational branches. An employee may bring a claim against his or her employer or, if such a claim fails, against the next higher employer.\(^{50}\)

Indonesia migrant workers work in Netherlands through some ways, i.e. through an agent (company which provides labor or worker for other countries) or by personal employer, through illegal night market, or becoming a legal worker at first, but then they leave their employers because of some inconvenience and become an illegal worker or undocumented worker. Cases occurring on Indonesia migrant workers are related to unpaid wage, wages below the minimum wage, exploitation, human trafficking, health, immigration procedure, detention, and AU PAIR problems. Indonesia migrant workers belong to the qualification of TCNs countries who can access as seasonal worker and whose rights are guaranteed in Fundamental Rights. Entering workers who work in the sectors of agriculture, domestic, and services as seasonal worker is an attempt to combat illegal immigration and would protect vulnerable migrant against exploitation. This action is also an attempt to give opportunities to the entering unskilful migrants.

People who do not have a residence permit can not work. If the people decide to keep workers working then gained his rights under CAO (collective arbeidsovereenkomst). The rules set a minimum wage, holiday entitlements, rights when fired, working hours. Related to the employment contract, for documented migrant workers the contract will be made written, which mentions the basic right of the migrant workers; while for undocumented workers who do not have both residence permit and work permit the contract is made either written or unwritten. In addition, when written contract is not made, the workers may use salary slip as well as their friend’s recommendation as the proof. Furthermore, if the worker has worked every week for three months or at least 20 hours per month at the same employer may be assumed to have no fixed agreement.

In the 1969 Council of Europe Agreement on Au Pair Placement is the only international legal instrument that specifically addresses Europe’s au pair policies. Under this agreement the au pairs are entitled to board and lodging (where possible a separate room), adequate time to attend language courses for cultural and professional improvement, one free day per week and a certain sum of money as pocket money. The agreement neither specifies the minimum allowance, the conditions of the room nor the amount of free time. It merely stipulates that a contract must be formulated to address these concerns.\(^{51}\) The Dutch Immigration and Naturalization Service (IND) is mandated to develop the rules which apply to au pairs. An important change in policy is enacted by the Dutch Modern Migration Policy Act law by designating au pair agencies as the sole sponsor of an au pair instead of the host family.\(^{52}\)

There is a reality of Au Pair by Indonesian in Netherlands. It is a program which is designed for graduates of bachelor degree from Indonesia. Au pair is a cultural exchange program. In Europe the rules regarding Au pairs already in existence since 1969. In the Netherlands the definition of Au pairs have a double meaning. Referred to in the national guidelines for Au pairs for work organization, Au pairs are mild household work for 8 hours a day or 30 hours per week and two days off each week. Au pairs get allowance of 300-340 euro. Some host family apply rules which exploit the Au pairs, such as should not be out of the house during working hours, hours of work in excess of the contract as well as additional jobs that are outside the contract. Au pairs from Indonesia could be known for friendly, humble and couldn’t say no on the host family. So the Au pairs are regarded as domestic workers (PRT) and paid for with allowance which is lower than the salaries of housekeepers. Many Au pairs who fled from the host family as a victim of abuse and exploitation. They eventually became domestic workers without documents.

Indonesia government, represented by Indonesia embassy, has an obligation to provide protection for Indonesian citizen who live or stay in another country. The Indonesia embassy is also responsible to give protection for all Indonesia citizens who are in trouble and ask for protection. Indonesia embassy in Netherlands stated that the number of labor cases handled by the Indonesia embassy is very small; every year there is only one case. The case was not brought to the court since the worker did not have document. So, the employer was only reported to police for doing a fraud.\(^{53}\) The country, represented by the embassy, has carried out their responsibility. The Indonesia embassy has also been cooperated with other parties both government and non government organization (NGO). Cases that have ever been handled are health cases, immigration, salary payment which is not as standardized and human trafficking. Moreover Indonesia worker deportation data through IOM Nederlands in 2013 there are 118 persons, to september 2014 there are 75 persons.

7. Conclusion

State must provide protection for Indonesian female migrant worker because the state must provide protection to migrant workers that guarantee to provide jobs to residents in to citizens, including those who work abroad. The protection for migrant workers can provide from the concept of international law. There are limits to the jurisdiction of the state to provide protection to its citizens. Indonesian government has responsibility to protect TKI who work overseas with the standart of treatment. The recipient country must gave TKI the same rights as local citizens.

Others to provide protection can be seen the responsibility of the State in the context of related officials constitutional in this regard was the Minister of manpower and transmigration. It has two legal positions as the representative body of law and Deputy

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50 TJM Jacob, see note 57, p 60-61.
51 CMA, Phillipine Migration and Au pairs in Europe, 2014, p 10, accessed on 1 December 2014
52 Ibid, p 15.
officials. The lawsuit related to government action that is poured in the form of State Administrative Decisions (KTUN) which is the administrative efforts or PTUN. Under article 53, paragraph (1) of law No. 9 of 2004 about The State of the Judiciary. The responsibility by the corporate in ruling the application of legal protection against TKIW in the judgment: has been implemented but not maximized. PPTKIS not only subject to administrative sanctions only, but can be subject to heavy fines. Corporate have responsibility with many cases of TKI, so government must give them the heavy fines.

Last the protection do by the Indonesian embassy in Malaysia and Netherlans. Malaysia has Employment Act provision that some chapters regulating the foreign worker moreover, Indonesia and Malaysia have also made Memorandum of Understanding as efforts to provide protection that it is in line with ASEAN context in Protection and Promoting the declaration of the rights of migrant workers. Legal protection for migrant workers in the Netherlands is different since the rule is based on international law, the provisions of Europe Union and national law. The protection does not distinguish between undocumented and documented, since there is an existence of the real problem between Au pairs and workers who do not possess documents.

Court decision of the government and PPTKIS regarding the actions of the government and PPTKIS can be said that has not seen their responsibilities of the protection of women migrant workers. Protection responsibilities should be embodied in the judgment not only normative. From the discussions two policies recipient countries of migrant workers, the Indonesian government could consider countries that can provide legal protection for women migrant workers, as not all countries regulate in detail. Lessons for other countries, can make a comparison to the improvement of policies for migrant workers in the country as well as consideration for sending migrant workers. This article can be used for policy makers to improve the policy of migrant workers that able to provide protection for female migrant workers

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