

# Legal Protection on Indonesian Domestic Workers in Malaysia: From Actors' View

Malahayati

School of Law, Universitas Malikussaleh, Kampus Bukit Indah Jl. Jawa No. 1 Lhokseumawe, Aceh, Indonesia

*The research is financed by Ministry of Education and Culture Republic of Indonesia No. 35/UN45.7/PL/III/2015*

## Abstract

This article provides an overview of actors' perspective on legal protection under Memorandum of Understanding (MoU) between the Government of the Republic of Indonesia and the Government of Malaysia on the Recruitment and Placement of Indonesian Domestic Workers 2006 and Its Protocol 2011 after the moratorium (2009-2011). After taking up a discussion on whether the moratorium was useful or not for the workers, the different perceptions on legal protection by various actors constitutes the subject of this article. The article then analyses empirical evidence concerning the perspective of the actors, both formal and informal actors, on Indonesian domestic workers' legal protection under the MoU 2006 and its Protocol 2011. It is argued that the implementation of these laws does not make significant improvement to domestic workers' protection. The article describes the perspective of the actors on domestic workers' protection, followed by some cases and violations on domestic workers after the moratorium.

## Keywords:

Legal Protection, Indonesian Domestic Workers, Malaysia, Actors' Perspective, MoU 2006 and Protocol 2011

## 1. Introduction

Domestic work is one job that is still very large in Indonesia. This work is one of the oldest job in Indonesia, which has relevant peculiarity patterns, relationships, scope and type of work. Domestic worker is an invisible force that allows the passage of economic life, government, public services and other sectors. They are the backbone of public employment through domestic institutions, namely the family. Those who take care of the employers' household who have to work in various public sector. Domestic workers is a job that gives economic contributions to the family, both employers' and employees' family. The majority of domestic workers are women (90 per cent). This job has a high risk. The number of domestic workers in Indonesia exceed 2 million people and 12 per cent of them are children under the age of 18 years. Placement of Indonesian workers per year per country from the year 2006 to 2012 amounted to 3,998,592 people, of which Malaysia is the second-largest placement country after Saudi Arabia. In 2014, the number of registered workers working abroad reached 6.5 million, and most of it is from the domestic sector. This figure continues to increase in accordance with the needs and lifestyle, particularly in advanced countries.

ILO defines domestic workers as a "wage earner working in a private household under whatever method and period of remuneration, who may be employed by one or several employers, and who receives pecuniary gain from this works".<sup>1</sup> Galloti's 2009 paper outlined that the domestic worker's job has a very wide field and varied of work. This work is often considered not require any particular skill or low skilled, so that the public often sees this work is less important, both economically and socially. Therefore, this work often involves highly unequal power relations between workers and employers. They are usually underestimated as women who used to do daily activities.<sup>2</sup>

Law of the Republic of Indonesia Number 13 of 2003 on Labour does not recognize the protection of domestic workers. It does not fulfill the rights and obligations of workers employed in the domestic sector, similar to the Law of the Republic of Indonesia Number 39 Year 2004 concerning the Placement and Protection of Indonesian

<sup>1</sup> ILO, the Status and Conditions of Employment of Domestic Workers. Meeting of Experts, Geneva, 2-6 July 1951, Report 3, Document MDW/8.

<sup>2</sup> Gallotti, M, the Gender Dimension of Domestic Work in Western Europe, International Migration Papers, No. 96, ILO, Geneva, p. 2-3.

Workers Abroad (PPTKILN Act), which specifically regulates labors who work abroad. Domestic workers is not considered the same as ordinary labor, who have skills or special expertise. To accommodate the placement of domestic workers abroad, Indonesia adopted a policy through bilateral agreements with receiving countries.

For that reason, agreement on workers "who do not have the skills" needed to be made separately.<sup>1</sup> So then Indonesia and Malaysia formed the protection of the fundamental rights of Indonesian domestic workers in Malaysia, as stipulated in the Memorandum of Understanding on the Recruitment and Placement of Indonesian domestic workers, which passed in Bali on May 13, 2006 (MoU 2006).<sup>2</sup> However, this MoU is considerably inadequate to provide protection for Indonesian domestic workers. Based on Migrant Care's data of 2004 to 2010, the rate of violence against migrant workers in Malaysia came to the second rank after Saudi Arabia and even as the highest in 2009.

Increased rates of violence against Indonesian domestic workers in Malaysia, causing the Indonesian government decided to impose a moratorium on the informal sector in June 2009. During the moratorium, Winfaidah, an Indonesian domestic worker in Malaysia, experienced the case of abused and raped violence. There were some other violations and abuses during moratorium, which showed that the existing protection policies have not been able to assure the protection of Indonesian domestic workers in Malaysia.<sup>3</sup> On the other hand, the moratorium has an impact on the increasing number of illegal migration in the sector PLRT working without official documents up to 5000 people.<sup>4</sup> However, the Minister of Manpower and Transmigration officially revoke the moratorium of domestic workers' placement to Malaysia, starting on December 1, 2011. Lifting of the moratorium is done after Indonesia and Malaysia agreed to sign the Protocol Amending the MoU on Recruitment and Placement of Indonesian Domestic Workers, dated May 30, 2011 (hereinafter referred to as Protocol 2011).<sup>5</sup> In fact, after all the way in which both States dealt with, cases of human rights violations against domestic workers keep going. The policies that are conducted by the government of Indonesia and Malaysia through MoU as well as the moratorium has yet showed significant progress towards Indonesia domestic workers' protection, especially women, in Malaysia.

Several studies have addressed the issues related to non-fulfillment of the rights of migrant domestic workers. These studies examine from various fields, such as the problem of non-recognition of domestic work as a decent job, even legislation prefers to use the word 'helper' rather than 'worker' or dependency problems against employer.<sup>6</sup>

In this article, I will demonstrate that the MoU of 2006 and its Protocol 2011 have not provide any significant change to the protection of Indonesian domestic workers in Malaysia. The enactment of the MoU of 2006 and Protocol 2011 has not been based on the needs of domestic workers and the real conditions in the field. The MoU and its Protocol were limited to the legality of the cooperation in the field of domestic employment in order to maintain good diplomatic relations between the two countries. In fact, the role of the directly involved actors in formulating regulations related to the protection of Indonesian domestic workers in Malaysia is still insignificant. Actors must be more familiar with conditions on the ground, so that policies can be enact to minimize the violations against domestic workers.

First, this article will present a formal actor perspective to the concept of legal protection on domestic workers in the process of formation and implementation of the MoU 2006 and its Protocol 2011. Then it will be followed by an informal actor's perspective. In the next section will explain the various cases that continue to occur during the moratorium and after the enactment of the Protocol 2011. The results showed that almost all actors have the same perspective that the MoU 2006 and Protocol 2011 have not provide optimal protection against domestic workers. Crucially, I suggest that formal and informal actors perspective to the concept of protection of domestic

<sup>1</sup> Fong Chan Onn, Minister of Human Resources, released this statement in responding a question by *Human Rights Watch*, Kuala Lumpur, Malaysia, February 16th, 2004. See, *Human Rights Watch* VOL 16, NO 9(C) 2004.

<sup>2</sup> According to BNP2TKI's Data, the placement of informal workers was more than formal workers. Malaysia even received the largest number in informal sectors from 2006-2012 as many as 1,870,580 workers. See, <http://www.bnptki.go.id/statistik-mainmenu-86/penempatan/6756-penempatan-per-tahun-pernegara-2006-2012.html>.

<sup>3</sup> Ana Sabhahana Azmy (2011) p 8.

<sup>4</sup> Anis Hidayah, *Buruh Migran: Membangun Hubungan Republik Indonesia-Malaysia Berbasis HAM*, Migrant CARE, <http://www.tabloiddiplomasi.org/current-issue/101-diplomasi-oktober-2010/955--buruh-migran-membangun-hubungan-ri-malaysia-berbasis-ham.html>.

<sup>5</sup> The Statement of Minister of Labor, [http://menteri.depnakertrans.go.id/?show=news&news\\_id=771\\_1](http://menteri.depnakertrans.go.id/?show=news&news_id=771_1) Desember 2011.

<sup>6</sup> See, Respect Network: Acting Together for the Protection of the Rights of Migrant Domestic Workers, Migrant Domestic Workers in Europe, Amsterdam, September 2009; CES-ETUC, out of the Shadows – Organising and protecting domestic workers in Europe: the Role Trade Unions, Brussels, April 2005; Caritas Internationalis: Migrant Domestic workers—General considerations and examples from selected countries, October 2009.

workers should be the main basis in formulating government policies of both countries. I propose that protection of domestic workers' rights should be the main focus in formulating policies by both countries.

## 2. Actors' Perspective on the Concept of Legal Protection on Domestic Workers

### 2.1. Formal Actors' Perspective

Nurhasanah Sihombing and Fais Maulana said that there are two things in terms of the contents of MoU 2006:<sup>1</sup> First, the clauses in the MoU 2006 mainly set about the placements of the workers rather than the protection of the workers; Second, It also has no clear purposes and objectives. Yet to be seen is the purpose of the establishment of MoU 2006 was due to the high unemployment rate in the country. This is one reason why many Indonesians working in Malaysia as domestic workers. The MoU was limited to the cooperation legality in the field of employment and meant to maintain good diplomatic relations between the two countries. Actually, domestic workers' protection is subject to the contract between the workers and their employers. This is relevant to a theory that says if the law does not guarantee legal protection for the parties; the employment contract is the only instrument that can be used as a legal protection for the parties.

Indonesian Ministry of Social Affairs believes there are several things in the draft of MoU 2006 that actually require further discussion with the Malaysian government, among others:<sup>2</sup>

"Regarding the direct recruitment by employers, workers' job displacement, expense that has to be financed by migrant workers and their children's education problems in Malaysia. Actually, according to the agreement reached between the two heads of government in Bukit Tinggi, the Government of Indonesia pursued the possibility of such children can enjoy education. In addition, the constraints of local regulatory, the children were scattered and dispersed... become another obstacle factor."

Head of Public Relations Manpower RI, Suhartono, explained that there were changes agreement in Protocol 2011 include issues related to:<sup>3</sup>

- (a) Salary should be according to market conditions;
- (b) The right to one day off a week, if it still works it will be replaced with a 'one day' salary;
- (c) The Rights of workers to hold their own passports; and
- (d) Minimum salary provision was not mentioned in the Protocol 2011.

Meanwhile, Director of the Placement of Abroad Employment, Roostiwati added that regarding 'method of salary payment through a bank, gain access to special communication for surveillance, the two countries agreed to form a Joint Task Force (JTF) to oversee the implementation of the Protocol 2011'.<sup>4</sup> JTF was comprised of Manpower Ministry, Ministry of Health, National Body of Indonesian Workers' Placement and Protection (BNP2TKI) and Malaysian Representative in Indonesia. "Their task is to perform surveillance if MoU violated," said Secretary General of Manpower, Muchtar.<sup>5</sup>

Muchtar explained in the MoU with Malaysia agreed that the workers would acquire such assurance that the formal labors get, which are one day off a week, social protection and administrative rights. "Even the holidays should be considered overtime so there must be re-calculation on the salary; or passport should be held by the workers. The employers may hold the passport but the workers can take it back anytime. Therefore, they can be free and unfettered. All of these clauses should be addressed in the employment contract," he said.

Director of Foreign Cooperation in Asia-Pacific and America of BNP2TKI, also served as a member of JTF Indonesia, Anjar Prihantoro said that the JTF is technically aimed to provide appropriate assistance for the settlement of problems on the field. Structurally, the JTF was under the Joint Working Group (JWG). To prepare for the placement of domestic workers in Malaysia, JTF Indonesia has met three times with the results of the term of reference's draft, regarding the mechanism of action, duties and functions, and membership of JTF

<sup>1</sup> Fais Maulana, Interview recorded in Jakarta, May 23rd, 2014; Nurhasanah Sihombing, Interview via cell phone, May 28<sup>th</sup> 2014. Both are the Staf of Ministry of Foreign Affairs of Republic of Indonesia.

<sup>2</sup> Ministry of Social Affairs, *MoU PLRT di Malaysia dan Masalah Pendidikan Anak PLRT*, URL:<http://www.kemsos.go.id/modules.php?name=News&file=article&sid=453>, September 16, 2014.

<sup>3</sup> Suhartono, *Berhasil Membuat MoU dengan Malaysia, Apa kata Malaysia?*, <http://dumalana.com/2011/06/08/berhasil-membuat-mou-dengan-malaysia-apa-kata-malaysia>.

<sup>4</sup> Anis Hidayah, *MoU Indonesia-Malaysia Belum Cukup Lindungi TKI*, <http://oseafas.wordpress.com/2011/07/02/hubungan-indonesia-malaysia-di-bidang-kebudayaan/>, May 16<sup>th</sup> 2015.

<sup>5</sup> <http://www.detik.com>. Monday, February 27<sup>th</sup>, 2012.

Indonesia. As mandated by the Protocol 2011, the JTF should carry the tasks of coaching, supervision and facilitation of migrant worker issues.<sup>1</sup>

In contrast to the above opinions, member of Commission IX of House of Representatives of Republic of Indonesia, Rieke Diah Pitaloka said that there are two very fundamental things as the weakness of the Protocol 2011. *First*, there is no law enforcement mechanisms or strict sanctions for employers or agencies of both countries if it violates the law or the provisions of the Protocol of 2011. *Second*, the supervision mechanism is not clear. Article 13 of the Protocol said that the Parties should approve the JTF establishment and its functions included in the terms of reference. However, it is afraid that the role of JTF could not be optimal in defending migrant workers problems.<sup>2</sup>

Regarding the moratorium on sending domestic workers to Malaysia, Irfan, Head of Apprenticeship, Placement and Employment Permit of Aceh, stated that the Government of Aceh had been already banned the delivery domestic workers abroad, and only allowed placement of workers based on competency. However, the problem is workers who work illegally. The role of Aceh Provincial Agency of Manpower is very small in the placement of workers abroad; the Central Services on Placement and Protection of Indonesian Workers (BP3TKI) has been more involved in that regard. However, when a problem arises in Malaysia, then they would ask the Manpower Agency to take care of it. Meanwhile, all workers' private documents were managed by BP3TKI.<sup>3</sup>

The Head of East Java Provincial Agency of Manpower, the East Java Government welcomed the lifting of moratorium on domestic migrant workers to Malaysia and has adopted a policy of, among others, the compulsory of introduction training for prospective workers, which is a 200 hour training. The Malaysian labor agency also agreed that structural cost or placement fees are not charged to the prospective domestic workers. In addition, starting in 2012, East Java does not place any informal workers, but only assign domestic workers based on competency, in the field of housekeeping, caregiver, laundry, cook and baby sitter. They hope that this policy will reduce brokers and leave through other places outside East Java embarkation. It is supposed to increase remittance.<sup>4</sup>

## 2.2. Informal Actors' Perspective

Executive Director of the Migrant CARE Indonesia, Anis Hidayah explained that in term of domestic workers, legal protection is one of the most important things to deal with. Until now, both Indonesia and Malaysia do not have laws that regulate domestic workers. Yet, eleven points of change in Protocol 2011 also have not guaranteed legal protection for domestic workers. The Protocol does not standardize the JTF mechanism in order to ensure the fulfilment of workers' rights. It is also important to address the minimum wage. Recently, the policy of salary in Malaysia correlated with the placement quota. When Malaysia sets certain amount of salary to one country, then it affects on the quota that will be given to that country. Based on the Protocol, if there is still unregulated wage, Indonesian workers can be easily targeted for cheap labor.<sup>5</sup>

The Chairman of JALA PRT (the NGO), Lita Anggraini adds that 'Both MoU 2006 as well as Protocol 2011 are ineligible in protection and decent work situation for domestic workers. In examples, there is no minimum wage standards; Malaysia has not signed the ILO Convention 189 on decent work of domestic workers and Convention on the Protection of the Rights of All Migrant Workers and their Families (CMW); the agreed employment contracts still do not meet the minimum standards of decent work contract.'<sup>6</sup>

Director of Migrant Care Malaysia, Alex Ong Kian, with the Chairman Society of Javanese People's Solidarity (Pasomaja) Machrodji Maghfur and the Chairman of Bocahe Dewe, Ambar, in Kuala Lumpur, said that:

'Passports held by employers is actually an insult and surrender the sovereignty of the government of Indonesia to Malaysian employers, because a passport is a document that states should be held by its own citizens. The Government of Indonesian should seriously fight for this because this condition is the government's policy of pledging its sovereignty, which is contained in the MoU 2006. Then they use the term of *illegal* domestic

<sup>1</sup> Anjar Prihanto, <http://www.bnp2tki.go.id/beritamainmenu231/5406-penempatan-tki-ke-malaysia-dibuka-lagi-28-september-2011.html>, May 16th 2015.

<sup>2</sup> Rieke Diah Pitaloka, *MoU Indonesia-Malaysia: Harus Berdasar pada Hubungan Setara Demi Harga Diri Bangsa Indonesia*, <http://www.riekediahpitaloka.com/release/201206/mou-indonesia-%E2%80%93malaysia-harus-berdasar-pada-hubungan-setara-demi-harga-diri-bangsa-indonesia>.

<sup>3</sup> Irfan, Interview recorded in Banda Aceh on September 20<sup>th</sup> 2014.

<sup>4</sup> <http://disnakertransduk.jatimprov.go.id/ketnagakerjaan/574-kebijakan-pemerintah-pasca-moratorium-tki-ke-malaysia>, October 20<sup>th</sup> 2014.

<sup>5</sup> Anis Hidayah, Interview recorded in Jakarta, March 24<sup>th</sup> 2014.

<sup>6</sup> Lita Anggraini, Interview recorded in Jakarta, March 2<sup>nd</sup>, 2014.

workers, while there is no such term in the concept of human rights. We also demand that the Malaysian government about to change labor laws which should focus on the protection of workers, not employers.’<sup>1</sup>

Senior researcher for Human Rights Watch, Nisha Varia said that Amended Protocol in 2011 provides several benefits for Indonesian domestic workers, but fails to provide some degree of protection related to low wages and high cost of recruitment. Singapore is limiting the cut off salary as the equivalent of two months' salary for workers at the beginning of this year, lower than agreed in the Indonesia-Malaysia agreement. Cutting a few months salary of Indonesian workers to pay recruitment fees contributes to gross violations, including forced labor, trafficking, and conditions akin to slavery. Malaysia should follow a number of countries in the Middle East, which prohibits deductions at all.<sup>2</sup>

Hikmahanto Juwono recommends to the governments of Indonesia and Malaysia, ‘if each party does not want to ratify CMW, then the contents of the Protocol 2011 should at least be in accordance with the contents of the CMW, which guarantees legal protection and the rights of Indonesian domestic workers.’<sup>3</sup>

Based on the explanation above, it shows that two pieces of legislation, namely the MoU 2006 and its Protocol 2011 do not guarantee the protection of Indonesian domestic workers' rights in Malaysia. Relevant to this, Brenda Cossman said ‘the law is informed by men aimed to strengthen the patriarchal social relations (norms, experience, man power) and it is indifferent to the experiences of women (and the poor, the marginalized, the minority) so the resulting law is unfair and has deviant impact’.<sup>4</sup>

In the context of international law, migrant workers activists consider that the MoU is not necessary at this time, since the MoU is the weakest legal instrument and unenforceable (sub law). The legal instrument should be in the form of bilateral agreement, which is assumed to have stronger legal enforcement. The activists assume that the form of MoU was more directed to the concept of the non-legally binding, where MoU only contains political and moral commitment. Indonesia is not able to enforce the MoU through an international court or other commonly alternative ways to carry out an international agreement.

Meanwhile, from the side of national law, particularly in countries that adhere ‘common law’ legal system such as Malaysia, the notion of non-legally binding MoU implies that MoU 2006 and its Protocol 2011 can not be used as a means of proof as well as in-enforce by court. However, in the practice of Indonesia diplomacy today, yet there is no tendency to direct the settlement of disputes of an international agreement through the international courts.

Seeing the diversity of the issues described above, other things that also need attention is the bargaining power of Indonesia in bilateral talks was very weak. It might be observable from the MoU 2006 and the Protocol 2011, which accommodate more Malaysian interests relating to the recruitment and placement rather than Indonesian domestic workers' interest.

MoU 2006 does not accommodate the protection of domestic workers' rights, due to the deviant state paradigm, which considers domestic workers only seen as a 'commodity' that is beneficial to both countries, rather than a human that has right to get an appropriate job. In addition, they work in Malaysia because the Government of Indonesia is unable to create jobs, while none of Malaysian citizen wants to work with very low incomes such as domestic workers. Moreover, there is a legal inconsistency between the MoU 2006 in Art 5 (1) and the Article 24 paragraph (1) and (2) of the PPTKILN Act. There was an authority conflict between private institution and JTF. It means that this issue indicates the weakness of the Indonesian government in the presence of Malaysia. In addition, the weakness of Indonesian bargaining power causes the existing laws not be able as a legal standing for domestic workers who work abroad. Meanwhile, migrant labor activists called on the government to immediately revise PPTKILN Act and soon draft a bill of domestic workers regulation. During this time, the Indonesian government has ratified all of the fundamental ILO conventions and it is enough to recognize the rights of workers, while the Malaysian Government only has ratified some of them.

Eventhough Protocol 2011 has been progress than before, however each clause in the Protocol 2011 is still not clarify the scope of workers' protection. In addition, the mechanisms of law enforcement is also still not firm and clear, and lack of clarity in the mechanisms of JTF control. Supposedly, in legislating of Protocol 2011,

<sup>1</sup> The United of Malaysia's NGO, *LSM Malaysia Dukung PLRT Pegawai Paspor*, <http://www.bnptki.go.id/berita-mainmenu-231/651-lsm-malaysia-dukung-tki-pegawai-paspor.html>.

<sup>2</sup> Nisha Varia, *Perjanjian Baru Indonesia-Malaysia Menipu Pekerja Rumah Tangga*, <http://www.hrw.org/id/news/2011/05/31/perjanjian-baru-indonesia-malaysia-menipu-pekerja-rumahtangga>, March 23th, 2014.

<sup>3</sup> Hikmahanto Juwana (2009) p 4.

<sup>4</sup> Sulistyowati Irianto, et al (2009) p 354.

Indonesian government attempted so that each clause in the Protocol accommodate the protection of domestic workers' rights in accordance with CMW.

### 3. Cases and Problems After Moratorium

Some of the problems that continue to occur after the moratorium can be categorised in the form of:

#### 3.1. *Illegal Recruitment*

Domestic workers' recruitment process conducted by Private Agency for Implementation of Placement of Indonesian Migrant Workers (hereinafter referred to PPTKIS). As mentioned in Article 1 (5) of the PPTKILN Act, "PPTKIS is a legal entity that has obtained written permission from the government to organize placement services for workers abroad. This is in line with Art 1 MoU 2006 "Indonesian Recruitment Agency" (IRA) means an Indonesian recruitment agency approved by the Indonesian Government for the purpose of recruiting Indonesian Domestic Workers."

PPTKIS may establish branch offices in areas outside of the head office from the domicile address (Article 21 of the PPTKILN Act). The weakness of this Article is explicitly does not require the presence of a branch office in the area, so this opens ambiguities for many brokers or sponsors. It certainly adversely affect the workers because the government has legitimized PPTKIS a great authority to recruit, without elaborated supervision of local government. This is the forerunner of many illegal recruitment.

Irregular migration could arise in a variety of points in the migration cycle as at the stage of recruitment, departures, transit (stopover), resign and return. These things might be categorised of human trafficking and people smuggling. In addition, irregularity can also be done by migrants, for example smuggling or staying longer than the deadline in the visa.

The risks for Indonesian domestic workers in Malaysia, often occurs in stages of recruitment and pre-departure in migration, especially for those who do not have access to reliable information and the right time. This problem usually referred to as illegal recruitment. Illegal recruitment refers to the form of the search, procurement, contract bonding or workers' transportation to get jobs abroad. It usually were carried out by the institution/agency that does not have permission or conducted directly by an employer who does not comply with national laws and regulations. The workers were illegally recruited and highly vulnerable to the risks and dangers of exploitation or victimized by hidden organizations or by dishonest employers. Illegal recruitment is also associated with various forms of the entry, residence or the workings of a person without a permit in the country of destination.<sup>1</sup>

#### 3.2. *Exploitation of Children*

According to Teganita, eventhough MoU 2006 has upgraded workers' minimum age from 21 to 25 years, 10 percent of 100 cases within the past half year involve 15-year-old children, which were employed by Malaysian employers.<sup>2</sup> Based on the results of an investigation discovered that the PPTKIS is the most responsible agency in terms of age falsification. Teganita is pessimistic seeing Indonesia because it does not have a system of registration of births and deaths, so it would be difficult at verification stage.<sup>3</sup>

Other supporting research by Human Rights Watch in 2004 says that 'A large number of women interviewed by Human Rights Watch stated that passports and other travel documents have been altered to change their age, name and address. Due to the widespread practice of altering passports and other traveling documents, government and NGOs find difficult to estimate the number of Indonesian domestic workers in Malaysia those are still children.'<sup>4</sup>

As for the statement of the victims of counterfeiting, Suwati Syaripah, who was 18 years, she said that 'there was a lot of young girls, the youngest was 15 years old, they (PPTKIS) changed my age to 26 years, but my age is actually 16 years old.'<sup>5</sup> Similar to Alin, 19-year-old domestic worker, admitted to have falsified her age and she often get abuse from her employer in Malaysia.<sup>6</sup> The confession of former domestic worker from Cianjur, who

<sup>1</sup> International Labour Office Jakarta (2012) pp 8-9.

<sup>2</sup> Teganita Malaysia, *Tenaganita kritik dari Nota Kesepahaman tentang Pekerja Rumah Tangga ditandatangani oleh Pemerintah Malaysia & Indonesia pada tanggal 13 Mei 2006*, [http://www.caramasia.org/index.php?Itemid=346&id=182&option=com\\_content&task=view](http://www.caramasia.org/index.php?Itemid=346&id=182&option=com_content&task=view).

<sup>3</sup> See Teganita Malaysia.

<sup>4</sup> Human Rights Watch Report (2004) p 32.

<sup>5</sup> Suwati Syaripah, Interview recorded in Kuala Lumpur, Malaysia, Feb 17, 2004. See, Human Rights Watch Report (2004) p 33.

<sup>6</sup> Alin, Interview recorded in Embassy of Republic of Indonesia Kuala Lumpur, Malaysia, April 2008. See. Researchers Team of the Institute for Ecosoc Rights. p 110.

claimed that her age had been falsified before she left for Malaysia. *'I was 16 years when I left for the first time. Yes... indeed I was not 18 years old yet. So, at that time... they forged my age but not the address. It was my real address... My parents just did not know initially if I want to work abroad.'*<sup>1</sup>

Based on the statement of several workers above, it appears that there are two defilement occurred; *first*, PPTKIS had falsified ages; *second*, PPTKIS did not require a parents' permit in the case of approval, whereas Article 10 Ministry of Labor's Regulation No. 18 of 2007 states that Parents' approval is part of the requirements.

The latest data in 2011, the Chairman of the Indonesian National Commission on Children, Arist Merdeka Sirait said:

*'Throughout 2010, 316 children were sent abroad as migrant workers, and 92 children were unaccounted for. It was difficult to detect a child as a migrant worker. It was known only after the children were becoming victims of violation such as sexual harassment, violations of psychic and so forth. Presence of children as workers are also caused by several things including their place of origin that usually came from remote villages, they do not have birth certificates, thus easily to manipulate datas.'*<sup>2</sup>

Meanwhile, according to Anis Hidayah, the government has identified the manipulation of workers' data because this kind of falsification has been for a long time, but there is no serious legal enforcement.<sup>3</sup>

### *3.3. The Workers Did Not Get Adequate Education and Training Pre-Departure*

Situation and working conditions can be determined by knowing the host country's laws, culture, and social practices. Among these three very basic things, legal education is supposed to be able to protect an individual or group workers, typically is national law as well as bilateral agreement agreed by both countries (sending and receiving countries). Understanding the laws in destination country such as Malaysia is rather difficult for Indonesian domestic workers. *First*, both countries have different legal systems. Indonesia impose the Dutch legal system or civil law, while the Malaysian legal system uses comon law from the British system. Malaysia is based on the common law, rather than textual law. *Second*, domestic workers typically have low education, most graduates of elementary or junior high school. However, it can be resolved by providing intensive education, both in sending country and receiving country.

Moreover, cultural education and social practices also affect Indonesian workers' protection in Malaysia. Indeed, Malaysians' cuture and social practices are not much different from Indonesia because Indonesia and Malaysia are still one family, namely Malay. In fact, domestic workers who will go to Malaysia did not get a legal education, or culture and social practices from local government or PPTKIS. As the report of one former worker in Malaysia, Emi says:<sup>4</sup>

In the shelter, we were about 90 people, none of us were getting legal education, cultural training, social practices and even job specifications. We were not given any kind of education and training by PPTKIS or local government, we just spent our time, dozing, stories, and so on.

Meanwhile, Ita said:

*"Yes, we were not given education and training, many turns in the shelter and they can not work as housemaid, such as cooking, washing, ironing, and so on. Even they come from the village, you know... Sure, most of the young girls can not work."*<sup>5</sup>

The Author found other violations when conducting interviews with three former workers, and the results of the three said that they were not notified the terms and conditions of the employment contract, so that they certainly did not know the real conditions related to their rights and obligations during the work, as ware stated in their contract.

*'Yes, I just told to sign... about the contents of the contract, I did not know... they (PPTKIS) said it's just the same, you have the same rights and obligations as servants in general, essentially you must obey the employer commands, so he's saying...'*<sup>6</sup>

Similar to Ita, the former domestic worker, which says:

<sup>1</sup> See, Ana Sabhana Azmy (2011) p 99.

<sup>2</sup> <http://www.migrantcare.net/mod.php?mod=publisher&op=viewarticle&cid=5&artid=1019>.

<sup>3</sup> <http://www.migrantcare.net/mod.php?mod=publisher&op=viewarticle&cid=5&artid=1019>.

<sup>4</sup> Emi Sartika, Interview recorded in Medan, April 3<sup>rd</sup> 2014.

<sup>5</sup> Ita, Interview recorded in Medan, October 1<sup>st</sup> 2014.

<sup>6</sup> Emi Sartika, interview recorded in Medan, April 3<sup>rd</sup> 2014.

'I just got suddenly from my friend the information to be a domestic worker in Malaysia, so not a lot of information I get how it would fit me if I would be already working. There was no employment contract explanations from the brokers, he said... later... if you've been in the employer's home.'<sup>1</sup>

Long, expensive, and complex requirements of recruitment through legal procedures resulted in the bribery and increased illegal activities. Competition and unethical practices among PPTKIS, branches and brokers/sponsor of labor create a situation that undermines the effectiveness of some regulations, weaken the rights of the prospective workers.

Over the past two years, there are some PPTKIS known to falsifying competency test certificates for prospective workers. Studies conducted by international organizations of Human Rights Watch said 'PPTKIS's staff in Jakarta told about the bribes and unofficial fees he has to pay to avoid delays in processing workers and other interference with his business. He said that without such payments, the obstacles he would encounter would put them at a disadvantage compared with other PPTKIS.'<sup>2</sup>

The structure of labor recruitment in Indonesia increases the freedom and encouragement to the brokers/sponsor to ask the high cost of the prospective Indonesian workers. In many cases, the brokers/sponsors ask the commission for several different agencies and do not receive a regular salary. PPTKIS located in Jakarta said,

'We do not give (the agents of branches) salary from Jakarta. They earn money from migrant workers and the brokers. I do not know how much they got the money .... I ask them not to take too much of the prospective workers.'

Misleading information and rumors about the long bureaucratic and migration process to prospective workers cause they believe in brokers/sponsors to take care of everything rather than through official channels established by the government. This makes it easier for them to deceive the prospective workers about the amount of money they have to pay in advance.

Based on a study, Monitor Directorate of Corruption Eradication Commission (KPK) reports that on the system of migrant workers in 2007 had found a lot of corruption in the placement of migrant workers. Bribes routinely occur in the processing of documents received by BP3TKI officials. For a monthly bribe, Jakarta Ciracas region reached 2.5 billion Rupiahs or 30.60 billion Rupiahs per year. The details, among others, bribes for service of documents approximately 1.489 billion Rupiahs and periodically bribery about 1.060 billion Rupiahs. The bribes were carried out by prospective workers with BP3TKI officers to expedite the process of workers placement and departure abroad. There are also unofficial costs imposed on the public service under the control of Directorate General of the Placement Services of Migrant Workers (PPTKLN), namely the issuance of Mobilization Permit with unofficial costs 50- 100 thousand Rupiahs/sheet.<sup>3</sup>

Denny Indrayana assess:

The government should resolve system of corruption in Indonesia because it is one of the factors that rise the problems of migrant workers, both at home and abroad. The problems will continue because there is no clear and decisive action by the government. Indonesia may be mad at Malaysia, he continued, but in fact the Indonesian people themselves that cause problems. Corruption involving public officials with migrant workers who suck the blood of the starving poor people. The KPK should continue to take enforcement action and the head of BNP2TKI, Jumhur Hidayat, should be responsible directly to resolve this issue.<sup>4</sup>

In 2009, related to the examination of the placement and protection of migrant workers abroad, the Supreme Audit Agency (BPK) concluded that the effectiveness of the placement and protection of migrant workers is not reached because it is not fully supported by intact, comprehensive, and transparent policy, especially to protect the basic rights of migrant workers. This creates the possibility of deviation from the recruitment process until the deportations back to the country.<sup>5</sup>

Meanwhile, the KPK also monitors the re-implementation of the report, which was submitted in 2007, the KPK considers illegal charges are still happening turned out. This time the KPK assesses the insurance problems of migrant workers who are particularly problematic. The KPK stated that the issue has impacts on migrant worker because even they have had pay insurance premiums up to 400 thousand Rupiahs, they still obtain no right

<sup>1</sup> Ita, interview recorded in Medan, October 1<sup>st</sup> 2014.

<sup>2</sup> See, Human Right Watch Report, p 33.

<sup>3</sup> <http://m.inilah.com/read/detail/227971/buruh-migran-desak-kpk-usut-korupsi-bp2tki>.

<sup>4</sup> <http://m.inilah.com/read/detail/227971/buruh-migran-desak-kpk-usut-korupsi-bp2tki>.

<sup>5</sup> <http://www.suarakarya-online.com/news.html?id=276161>.



because the insurance companies do not provide the services. And again, the government does not make any legal enforcement on these cases.

According to Muhammad Fadhli, there are two things that most basic of weakness of MoU 2006 and Its Protocol 2011, namely: *first*, there is no clear law enforcement mechanisms or sanctions provided especially for employers and brokers if it violates the rights of domestic workers in the process of recruitment and placement. *Second*, the implementation of control mechanisms is also not clear, in Article 13 paragraph (1) states ‘...will set up a Joint Task Force (JTF) or a joint unit either in Jakarta or in Kuala Lumpur’. Later in Paragraph (5) states ‘...the scope of duty of JTF will be included in the terms of reference agreed upon by the parties.’ This role of JTF was feared not effectively deal with the problems of domestic workers.<sup>1</sup>

The MoU also does not accommodate the proposal of Indonesian Government as to set a minimum wage, but only give it to the market mechanism and the balance of domestic workers and employer.<sup>2</sup> Human Rights Watch said that the point of minimum wage should be included, because Malaysia has no national minimum wage, but only provide for private sector workers. Malaysian Trade Union Congress supports the minimum wage of 900 Ringgits (300 US Dollars), and the Malaysian government assesses revenues of less than 750 Ringgits (250 US Dollars) and below are included in the national poverty line.<sup>3</sup>

Another problem is the recruitment costs that are so expensive and must be borne by the workers (previously paid upfront by the employer) is not offset by the deadline for workers to pay it off, but only mentioned in Article 6 paragraph (6) ‘...every month, domestic workers’ basic salary cut by 50% to pay off the debt...’ It thus presumably employers would prolong the process of wage cuts, so that they still work in that place. It is also usually the mode used by the employer.

The result of a sudden inspection conducted by the minister of Labor of Indonesia, Muhaimin Iskandar, in the BP3TKI in 2011 said ‘convoluted service, lengthy bureaucratic and prone to extortion be un-inseparable on the issue of migrant workers.’<sup>4</sup>

Assuming that the MoU of 2006 and 2011 Amended Protocol MoU can reduce human rights violations against Indonesian domestic workers in Malaysia, but it turns out that it was the wrong assumptions and proved ineffective on a practical level. Relevant to this, according to the theory of progressive law, the legislation of MoU 2006 and Its Protocol 2011 actually should be based on the philosophy of law for humankind, because the man is the decisive and orientation point of law. Therefore, the law is not an institution that is separated from the human interest. Quality of law is determined by its ability to serve human welfare.<sup>5</sup>

According to the Executive Director of the NGO Migrant Care, Anis Hidayah, the recurrence of similar cases in Malaysia indicate a weakness in law enforcement on cases of Indonesian migrant workers. For example, a series of cases of abuse against Indonesian workers was not resolved through legal ways, such as the case of Ceriyati, Kunarsih, Modesta Rangka Kaka, Winfaidah, Fitria, Sumarsih and many other cases. Unresolved settlement of the problem is also due to the weakness of the Indonesian government's diplomacy against Malaysia. The Indonesian Government had only reactive to cases that arise, government protection of migrant workers such as seasonal only. The government does not consider the complexity of migrant workers seriously.<sup>6</sup>

During this time, the government preventive measures still tend to use formal diplomatic approaches, such as meetings, and negotiations. It is certainly a very minimal impact on the protection of domestic workers. The government does not see to the real context. The government should use more social approach, which is usually perceived by domestic workers. For example, utilization of Indonesian society groups in Malaysia could be a potential social diplomacy, such as academics, Indonesian researchers, professional groups, and community organizations in Malaysia. As for repressive diplomacy taken by the government, the diplomatic note and moratorium, have failed, because this policy only run unilaterally by Indonesia, while Malaysia did not heed this policy.

#### 4. Conclusion

The objective of this article has been to prove that the implementation of MoU 2006 and Its Protocol 2011 does not make significant improvement to domestic workers’ protection. It also provided an overview of actors’

<sup>1</sup> Muhammad Fadhli (2013), pp 72-73

<sup>2</sup> See the explanation of Article 5 Number 5.1.

<sup>3</sup> Human Rights Watch Report, *Perjanjian Baru Indonesia-Malaysia Menipu Pekerja Rumah Tangga*, <http://www.hrw.org/node/109327>.

<sup>4</sup> <http://www.bpk.go.id/web/?p=10107>.

<sup>5</sup> Satjipto Rahardjo (2010), p 23.

<sup>6</sup> Anis Hidayah, *Migrant CARE Kutuk Aksi Perkosaan 3 Polisi Malaysia terhadap TKI*, <http://www.migrantcare.net>.

perspective on legal protection under Memorandum of Understanding (MoU) between the Government of the Republic of Indonesia and the Government of Malaysia on the Recruitment and Placement of Indonesian Domestic Workers 2006 and Its Protocol 2011 after the moratorium (2009-2011). The different perceptions on legal protection by various actors was the subject of this article. This time, the government of Indonesia did not see to the real condition of domestic workers' problems. It also suggest that the government should use social approaches to deal with legal protection to Indonesian domestic workers in Malaysia. This approach would examine problems, which are usually perceived and experienced by domestic workers.

To conclude, it is worth briefly outlining some important legal problems that this research may have for our understanding of the legal protection on Indonesian domestic workers in Malaysia. The legislation of the legal instruments should consider the perspective of actors, who have more comprehensive understanding about the issues. Some cases showed that the Protocol 2011 does not make important progress for the sake of domestic workers' protection because its substance does not accommodate the needs of workers, but only the interest of the government. Moreover, the MoU 2006 and Its Protocol 2011 remain seen as political tools rather than legal protection.

## References

- Ana Sabhahana Azmy, (2011), *Negara dan Buruh Migran: Kebijakan Perlindungan Buruh Migran Perempuan Indonesia Masa Pemerintahan Susilo Bambang Yudhoyono 2004-2010 (Studi Terhadap Perlindungan Buruh Migran Perempuan Indonesia di Malaysia)*, Tesis, Jurusan Ilmu Politik Universitas Indonesia, Jakarta
- Anis Hidayah, *Buruh Migran: Membangun Hubungan Republik Indonesia-Malaysia Berbasis HAM*, Migrant CARE, <http://www.tabloiddiplomasi.org/current-issue/101-diplomasi-oktober-2010/955--buruh-migran-membangun-hubungan-ri-malaysia-berbasis-ham.html>, October 16<sup>th</sup>, 2014.
- , *Migrant CARE Kutuk Aksi Perkosaan 3 Polisi Malaysia terhadap TKI*, <http://www.migrantcare.net>.
- , *MoU Indonesia-Malaysia Belum Cukup Lindungi TKI*, <http://oseafas.wordpress.com/2011/07/02/hubungan-indonesia-malaysia-di-bidang-kebudayaan/>, May 16<sup>th</sup>, 2015.
- Anjar Prihanto, <http://www.bnptki.go.id/beritamainmenu231/5406-penempatan-tki-ke-malaysia-dibuka-lagi-28-september-2011.html>
- Gallotti, M, the Gender Dimension of Domestic Work in Western Europe, International Migration Papers, No. 96, ILO, Geneva
- Hikmanto Juwana, *Perlindungan Hukum bagi TKI*, Republika, Saturday, June 27<sup>th</sup>, 2009.
- Human Rights Watch Report* VOL 16, NO 9(C) 2004
- Human Rights Watch, *Perjanjian Baru Indonesia-Malaysia Menipu Pekerja Rumah Tangga*, <http://www.hrw.org/node/109327>.
- ILO, *the Status and Conditions of Employment of Domestic Workers*. Meeting of Experts, Geneva, 2-6 July 1951, Report 3, Document MDW/8.
- International Labour Office Jakarta (2012) *Perlindungan dan Pencegahan Untuk Pekerja Migran Indonesia*, the Guidance Book.
- Ministry of Social Affairs, *MoU PLRT di Malaysia dan Masalah Pendidikan Anak PLRT*, <http://www.kemosos.go.id/modules.php?name=News&file=article&sid=453>.
- Muhammad Fadhli, *Implementasi MoU tentang Perekrutan dan Penempatan Pekerja Domestik dalam Melindungi Penata Laksana Rumah Tangga Indonesia di Malaysia*, 2013, Faculty of Law University of Malikussaleh, Lhokseumawe
- Nisha Varia, *Perjanjian Baru Indonesia-Malaysia Menipu Pekerja Rumah Tangga*, <http://www.hrw.org/id/news/2011/05/31/perjanjian-baru-indonesia-malaysia-menipu-pekerja-rumah-tangga>.
- Respect Network: Acting Together for the Protection of the Rights of Migrant Domestic Workers, Migrant Domestic Workers in Europe, Amsterdam, September 2009; CES-ETUC, out of the Shadows – Organising and protecting domestic workers in Europe: the Role Trade Unions, Brussels, April 2005; Caritas Internationalis: Migrant Domestic workers—General considerations and examples from selected countries, October 2009.

Rieke Diah Pitaloka, *MoU Indonesia-Malaysia: Harus Berdasar pada Hubungan Setara Demi Harga Diri Bangsa Indonesia*, <http://www.riekediahpitaloka.com/release/201206/mou-indonesia-%E2%80%93malaysia-harus-berdasar-pada-hubungan-setara-demi-harga-diri-bangsa-indonesia>.

Satjipto Rahardjo, *Penegakan Hukum Progresif*, Kompas Media Nusantara, Jakarta, 2010.

Suhartono, *Berhasil Membuat MoU dengan Malaysia, Apa kata Malaysia?*, <http://dumalana.com/2011/06/08/berhasil-membuat-mou-dengan-malaysia-apa-kata-malaysia/>, October 16<sup>th</sup>, 2014.

Sulistyowati Irianto & Lim Sing Meij, dalam Sulistyowati Irianto & Sidharta (Editor), *Metode Penelitian Hukum, Konstelasi dan Refleksi*, Yayasan Obor Indonesia, Jakarta, 2009.

Tenaganita Malaysia, *Tenaganita kritik dari Nota Kesepahaman tentang Pekerja Rumah Tangga ditandatangani oleh Pemerintah Malaysia dan Indonesia pada tanggal 13 Mei 2006*, [http://www.caramasia.org/index.php?Itemid=346&id=182&option=com\\_content&task=view](http://www.caramasia.org/index.php?Itemid=346&id=182&option=com_content&task=view).

The United of Malaysia's NGO, *LSM Malaysia Dukung PLRT Pegang Paspor*, <http://www.bnp2tki.go.id/berita-mainmenu-231/651-lsm-malaysia-dukung-tki-pegang-paspor.html>.