

CHAPTER TWO

LITERATURE REVIEW

A. Legal Protection

Legal protection is to protect human rights that are harmed by other people, and the protection is given to the society so that they can enjoy all the rights given by law that shall be given by respective officers to provide protection, both mental and physical disturbances and various threats from any party.¹⁵

Legal protection is protection of morality, as well as recognition of rights possessed by human based on law or provision of arbitrariness or as a collection of legal rules that will protect something from other things. Regarding consumers, it means that the law protects the rights of customers from something that results in not fulfilling these rights.¹⁶

The protection provided by law is also related to the existence of rights and obligations, in this case, the rights owned by people and their environment. As the subject of law, people have the rights and obligation to carry out legal action.¹⁷

Setiono said that legal protection is an act or an attempt to protect the public from arbitrary actions by the authorities that do not comply with the

¹⁵ Rizky Dian Bareta and Budi Ispriyarso, "Legal Politics Protection of Indonesian Migrant Workers in Full-Phase of Work," *Kanun Jurnal Ilmu Hukum* Vol. 20, No.1, 2018, p. 170

¹⁶ Philipus M. Hadjon. *Perlindungan Hukum Bagi Rakyat Indonesia*. Surabaya. Bina Ilmu. 1987. p. 25

¹⁷ CST Kansil. *Pengantar Ilmu Hukum dan Tata Hukum Indonesia*. Jakarta. Balai Pustaka. 1989. p. 102

rule of law, to bring order and peace to enable people to enjoy dignity as human beings.¹⁸ Muchsin states that legal protection is an action to protect legal entity by arranging the relationship of rules which is manifested into the attitude and actions in creating their social order in social life among the humans.¹⁹

Protection is regulated in Article 1 paragraph 6 of the Law No. 13 of 2006 regarding the Protection of Witness and Victim which determines that protection is all efforts to the right fulfilment and provide assistance and sense of security to Witnesses and/or Victims that must be performed by the Victim and Witness Protection Agency or other institutions in accordance with the provisions of this Law.²⁰ In law and justice, enforcement uses the proper line of thinking with the pieces of evidences for realizing justice or legal content must be determined by ethical convictions, whether or not a case is fair. Legal issues become apparent if the legal tools perform well and the legal officer can keep the rules that have been standardized so that no misuse of rules and laws that have been done systematically, meaning that it uses codification and unification of the law to achieve legal certainty and legal justice.²¹

¹⁸ Setiono. *Rule of Law (Supremasi Hukum)*. Surakarta. Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret. 2004. p. 3

¹⁹ Muchsin, *Perlindungan dan Kepastian Hukum bagi Investor di Indonesia*. Surakarta. Universitas Sebelas Maret. 2003. p. 14

²⁰ Article 1 Paragraph 6 the Law No.13 of 2006 on Protection of Witness and Victim

²¹ Ishaq. *Dasar-dasar Ilmu Hukum*. Jakarta. Sinar Grafika. 2009. p. 44

B. Indonesian Workers

Workers are working age people in a society. According to Article 1 paragraph (2), the Law No. 13 of 2003 manpower is every individual or person who can work in order to produce goods and/or services either to fulfil his or her own needs or to fulfil the needs of the society.²² Basically, the society of the country is divided into two groups, namely workers and non workers. The range of working age in Indonesia is 15-64 years old but other opinions say that the productive age is over 17 years or above 20 years, while others mentioned more than 7 years because the children who live on the streets are classified as worker.²³

Hamzah stated that work force includes worker that work inside and outside the working relationship both physically and mentally energy. He also said that the workers are the product that is already or looking for work and who are carrying out other work.²⁴

The definition of worker or employment is every matter relating to labour at the time before, during, and after the work period.²⁵ The limitation of employment in Indonesia is not comparable to many societies who are looking for work, so most of them seek employment opportunities in another country which requires worker.²⁶

²² Article 1 paragraph 2 the Law No. 13 of 2003 on Manpower

²³ Hardjan Rusli, *Hukum Ketenagakerjaan*, (Bogor: Ghalia Indonesia, 2011), p. 4

²⁴ Andi Hamzah. *Pokok-pokok Hukum Ketenagakerjaan*. Jakarta: Rineka Cipta. 1990. P. 8

²⁵ Article 1 paragraph 1 the Law No. 13 of 2003 on Manpower

²⁶ Tri Listiani, dkk, "Kendala Perlindungan Hukum terhadap Buruh Migran di Kabupaten Cilacap", *Jurnal Dinamika* Vol. 12 No.2 Mei, 2012, p. 313.

According to the Law No. 18 of 2017 concerning Protection of Indonesian Migrant Workers, Indonesian Migrant Worker is an Indonesian worker who will fulfill the criteria as a job seeker and work abroad and is registered in regency or municipal government institution manpower.²⁷

Indonesian Worker is a name given to Indonesian Citizens who work abroad such as Malaysia, Middle East, Australia, Taiwan and several other countries in employment relations for a certain period receiving wages. However, the term is often related to unskilled workers. These workers have significant contribution to their families and Indonesian economy as a whole.

C. Indonesian Illegal Workers

Undocumented workers are groups of immigrants who work illegally abroad. Usually, these immigrants have expired residence permit, used tourist visas, and entered through the process of human trafficking.²⁸

Indonesian illegal workers are Indonesian workers who work overseas without procedures and do not compliance with the provision that has been regulated. There are three categories of illegal or undocumented workers, such as:

1. Migrant workers without permit, who enter Malaysia on traveler visas or social visit passes and continue staying and working in the Malaysia although their visas have been terminated.

²⁷ Article 1 paragraph 1 the Law No. 18 of 2017 on Protection of Indonesian Migrant Workers

²⁸ FIDH-SUARAM, "Undocumented Migrants and Refugees in Malaysia: Raids, Detention and Discrimination", <https://www.fidh.org/IMG/pdf/MalaisieCONJ489eng.pdf>, Accessed on 14th of April 2019 at 11.13 p.m

2. Escaped migrant workers, who have fled their employers and then are employed by new employers. This is because every working condition is terrible, such as unpaid wages and meager wages, very long working hours, physical or sexual abuse, or rape. Most of them are domestic workers who have fled their employers to seek help. Some of them were victims of trafficking: sold by their recruiters and forced them to be prostitutes in Malaysia. When migrant workers run away, automatically, they will become undocumented or illegal. This is because their original passports are held by their previous employers. Besides, according to regulations, foreign workers must work for employers whose names are indicated on their work permits (visas) and are not permitted to move to other employment contracts.

3. Over-Stay migrant workers, is migrant worker who continue to work and stay in Malaysia even though their working contracts as temporary employment, have been expired. There are so many employers like to work without any documents to gain profit while many migrant workers compliance to the permit so when the permit expired, they quickly go back to their origin state. Several Indonesian migrant workers said that they had to pay at least Rp.9 million (the US \$ 900.00) or more, to recruitment agencies in Indonesia and they have to wait several months before departure for Malaysia.²⁹

²⁹ Sri Wahyono, "The Problems of Indonesian Migrant Worker's Rights Protection in Malaysia", *Jurnal Kependudukan Indonesia* Vol. II, No. 1, 2017, p. 32

D. The Obstacles of the Government of Indonesia to Protect Illegal Workers

Illegal workers are one of the main challenges faced by the Government of Indonesia in terms of managing migration. The current policy on migration management, recruitment system, and protection of Indonesian workers has led to a large number of people leave Indonesia without following formal procedures and becoming workers in destination countries. Reviews of these workers can be found in almost all destination countries of Indonesian workers, although Malaysia hosts reviewed most significant number of Indonesian illegal worker. Illegal workers result from labor migration policies in both countries of origin and destination, which create labor migration processes that are slow, complicated, and costly for the migrant.³⁰

Illegal Indonesia workers are the result of several factors. First, high number of recruitment agencies and brokers that are not registered and lack of knowledge about migration procedures and human rights of migrants. Second, the effort of government is not enough in providing information and protection for migrant workers. The third one is weak law enforcement. Fourth, the failure to prosecute those involved in the practice of hiring illegal workers.³¹

Due to the low degree of mindfulness among planned workers in Indonesia, an expansive legitimate system spotlights the implementation of the privileges of workers and averts unlawful enrollment, as a creating nation

³⁰ Anonymous, 2010, Labour Migration from Indonesia 'An Overview of Indonesian to Selected Destinations in Asia and Middle East.

³¹ Castles, S. and M. J. Miller, 2009, *The Age of Migration: International Population Movements in the Modern World*, Palgrave Macmillan 4th edition.

with levels of destitution, joblessness, and underemployment. Indonesia utilizes its Human Resources as an approach to acquire outside trade through settlements from laborers. Although the number of workers who consistently high left Indonesia during the last two decades, the legal framework which facilitates the recruitment and placement of workers is still weak.³²

The Law No. 18 of 2017, which is the primary law administering Indonesian workers, does not confine the unexpected expenses borne by workers, nor does it accord sufficient assurance for workers, lapsing much power and obligation to private recruitment. Article 82 in the Law No. 18 of 2017 stated that a legal recruitment agencies shall be responsible for migrant workers by giving protection with the work agreement, while Articles 7 affirm the that government's has the obligation to provide and improve protection for Indonesian workers since pre-departure, during their placement and until post-placement. With two different articles, it is unavoidable that there will be a weak system in observe the welfare of Indonesian migrant workers and the compliance of recruitment agencies, as well as effective law enforcement, criminalize agencies that do not comply with the laws and regulations.

The lack of transparency by the government and the weakness of the community in defending the interests of workers have negative implications for workers.³³ However, many Indonesian workers, particularly domestic workers, experience problems obtaining a new contract or passport. Such

³² Shah, N.M., and I. Menon 1997 "Violence against women migrant workers: issues, data and partial solutions", *Asian and Pacific Migration Journal*, Vol. 6, No. 1: 5-30.

³³ Esim, S., and M. Smith 2004 *Gender & Migration in Arab States: the case of domestic workers*, International Labour Organization (ILO).

articles cannot protect Indonesian workers, overseas and lack clarity on what action should be taken by Indonesian government representatives.

E. Previous Study

Research on the protection of migrant workers had been conducted by Riri Anggriani with the title "Protection of Indonesian Irregular Migrant Workers in the Southeast Asia Region (In the Perspective of International Human Rights Law)". In her writing, Riri discussed the protection of migrant workers in an international human rights perspective. What distinguishes this writing from her writing is that it uses the perspective of national law to protect the migrant workers, especially illegal, not only in terms of human rights but also protection in all aspects. For this reason Riri's writing can be a comparison and source in this paper.