

CHAPTER II

LITERATURE REVIEW

A. The Review of Migration, Migrant Worker, Domestic Worker and Indonesian Migrant Workers (TKI)

1. Migration

Glossary on Migration defines the meaning of migration as the movement of a person or a group of persons, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes which includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification.⁸

Today, there are at least 200 million people living outside their countries of birth or nationality.⁹ In a world characterized by uneven economic, social and political development and increased global interconnectedness most countries are affected by migration. The regional and global social and economic disparities are the main drivers of migration today. Although economics and wage differentials

⁸ Richard Perruchoud, *Glossary on Migration 2nd Edition*, (Switzerland: 2011), pg. 62.

⁹ IOM, *Labour Migration from Indonesia, An Overview of Indonesian Migration to Selected Destinations in Asia and the Middle East*, https://www.iom.int/jahia/webdav/shared/shared/mainsite/published_docs/Final-LM-Report.pdf, Retrieved on July 7, 2015.

play an important role, demographics play a major role too, as the more developed countries tend to have aging populations and lower fertility rates while less developed countries tend to have higher fertility rates and larger populations of working age. These economic and demographic trends are long-term developments and, while policies may change rapidly, these trends help shape current patterns of migration. They are likely to keep doing so, thus we can expect existing migration trends to continue for the foreseeable future with the exception of movements caused by natural catastrophes and wars, which cannot be predicted.

2. Migrant Worker

The United Nations Convention on Protection of the Rights of All Migrant Workers and Members of Their Families defines migrant workers as a person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.¹⁰

According to the International Labor Organization, as of 2014 there were an estimated 232 million international migrants in the world (defined as persons outside their country of origin for 12 months

¹⁰ Wikipedia, *Migrant Worker*, https://en.wikipedia.org/wiki/Migrant_worker#United_Nations.27_definition, Retrieved on July 5, 2015.

or more) and approximately half of them were estimated to be economically active (i.e. being employed or seeking employment).¹¹

This cross-border movement of migrant workers for the purpose of employment in a foreign country is called as labor migration. Through legal or irregular means, facilitated or otherwise, labor migrants contribute to the economy of both the origin and the destination country. Migrants help expand the labor force in destination countries and through remittances they can contribute to development in their country of origin. In November 2009, the World Bank reported that official remittance flows to developing countries reached USD 338 billion in 2008, thus accounting for a significant part of all foreign investments.¹² Remittance flows to South Asia, East Asia and the South Pacific grew strongly in 2008 despite the Global Financial Crisis, but there are now risks that remittance flows may slow down in a delayed response to a weak global economy.¹³

Most countries in the world are today affected by labor migration, either as countries of origin, destination or transit, and some countries are experiencing all three phenomena simultaneously. There

¹¹ ILO, *Mainstreaming of Migration in Development Policy and Integrating Migration in the Post-2015 UN Development Agenda*, www.ilo.org, Retrieved on July 5, 2015.

¹² World Bank, *Migration and Remittance Trends 2009*, <http://sitesources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/MigrationAndDevelopmentBriefI.pdf>, Retrieved on July 7, 2015.

¹³ *Ibid.*

is a growing trend amongst migrant workers in Asia from countries such as Indonesia, India, Pakistan, Philippines, Sri Lanka, Bangladesh, Cambodia, the Lao People's Democratic Republic, and Vietnam to seek work in other Asian countries. Japan, Republic of Korea, Malaysia, Singapore, Thailand, Brunei Darussalam, Hong Kong SAR, and Taiwan Province of China have become the main destinations for migrant workers. Two decades ago the majority of Asian labour migrants travelled to countries in the Middle East for employment. Of the 25 million labor migrants in Asia, most are working in neighbor countries.¹⁴

Figure 2.1 Estimated Numbers of Labour Migrants by Country Origin and Country of Destination

Country of Origin	Number of Labour Migrants	Destination Countries	Year
Myanmar	1,840,000	Thailand	2006
Thailand	340,000	Saudi Arabia, People's Republic of China, Taiwan Province of China, Myanmar, Singapore, Brunei Darussalam, Malaysia	2002
Lao People's Democratic Republic	173,000	Thailand	2004
Cambodia	183,541	Thailand	2006
Vietnam	400,000	Republic of Korea, Japan, Malaysia, Taiwan Province of China	2005
Philippines	8,233,172	Middle East, Malaysia, Japan	2006
Malaysia	250,000	Japan, Taiwan Province of China	1995
Singapore	150,000	-	2002
Indonesia	2,700,000	Malaysia, Saudi Arabia, Taiwan Province of China, Singapore, Republic of Korea, United Arab Emirates	2007
People's Republic of China	530,000	Middle East, Asia and Pacific, Africa	2004
Total	14,799,713		

Source: Hugo 2009

¹⁴ ILO, *International Labour Standards on Migrant Workers' Rights: Guide for Policymakers and Practitioners in Asia and the Pacific*, <http://www.ilo.org/public.english/region/asro/bangkok/library/download/pub07-10.pdf>, Retrieved on July 7, 2015.

Labor migration in Asia is predominantly temporary in nature, with the majority of labor migrants working on one or two year contracts. In addition, labor migration in Asia is dominated by lower skilled and semi-skilled workers, mainly employed in construction, domestic work, agriculture, manufacturing and the service sector. For most migrants the rationale for working abroad is to be able to earn a higher income to support themselves and their dependants in their home country. While working overseas, many labor migrants send money home to pay for their families' daily needs, children's education or to service debts. In 2008, ASEAN countries received an estimated USD 36 billion in remittances from migrant workers within and outside the region.¹⁵

3. Domestic Worker

Domestic workers comprise a significant part of the global workforce in informal employment and are among the most vulnerable groups of workers. They work for private households, often without clear terms of employment, unregistered in any book, and excluded from the scope of labor legislation. Currently there are at least 53 million domestic workers worldwide, not including child domestic

¹⁵ World Bank, *International Remittance Estimates*, [http://www.sitesources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/RemittancesData_Nov09\(Public\).xls](http://www.sitesources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/RemittancesData_Nov09(Public).xls), Retrieved on July 7, 2015.

workers and this number is increasing steadily in developed and developing countries. Even though a substantial number of men work in the sector – often as gardeners, drivers or butlers – it remains a highly feminized sector: 83 per cent of all domestic workers are women.¹⁶

Their work may include tasks such as cleaning the house, cooking, washing and ironing clothes, taking care of children, or elderly or sick members of a family, gardening, guarding the house, driving for the family, and even taking care of household pets.

A domestic worker may work on full-time or part-time basis; may be employed by a single household or by multiple employers; may be residing in the household of the employer (live-in worker) or may be living in his or her own residence (live-out). A domestic worker may be working in a country of which she/he is not a national, thus referred to as a migrant domestic worker.

In some cases, the contribution and skill of servants whose work encompassed complex management tasks in large households have been highly valued. However, for the most part, domestic work, while necessary is demanding and undervalued. Although legislation protecting domestic workers is in place in many countries, it is often

¹⁶ International Labour Organization, *Who are Domestic Workers?*, http://www.ilo.org/global/topics/domestic-workers/WCMS_209773/lang--en/index.htm, Retrieved on July 6, 2015.

extensively enforced. In many jurisdictions, domestic work is poorly regulated and domestic workers are subject to serious abuses, including slavery.¹⁷

At present, domestic workers often face very low wages, excessively long hours, have no guaranteed weekly day of rest and at times are vulnerable to physical, mental and sexual abuse or restrictions on freedom of movement. Exploitation of domestic workers can partly be attributed to gaps in national labor and employment legislation, and often reflects discrimination along the lines of sex, race and caste.

4. Indonesian Migrant Worker (hereinafter called as TKI)

Indonesian migrant worker or *Tenaga Kerja Indonesia* (TKI) is Indonesian citizen that works in foreign countries outside of Indonesia. The large population of Indonesia as the world's 4th largest, has contributed to the surplus of workforces in Indonesia. This large workforce, combined with scarcity and unavailability of jobs at home, has led numbers of Indonesians to seek job abroad, to earn money to improve their economy. However, this Indonesian migrant workers are mostly low-skilled and works in domestic sector.

¹⁷ Anti Slavery International, *Domestic Work and Slavery*, www.anti-slavery.org, Retrieved on July 6, 2015.

It is estimated around 4.5 million Indonesians work abroad. Most of them (around 70%) are women, most are employed in domestic sector as maid or domestic helper and manufacture sector. Most of them aged in productive age margin, between 18 to 35 years old.

Indonesian migrant worker is known as the foreign-exchange heroes because they can generate around 8 million US Dollar or equals to around 100 billion Rupiah profit for foreign exchange in a year (2014).¹⁸ Encouraging their female workers to migrate abroad for domestic work is one of country strategy upon development, offsetting unemployment problems and growing the economy through accumulating foreign-exchange reserves.¹⁹

B. The Placement of Indonesian Migrant Workers (TKI)

The Indonesian labor export policy began in the Soeharto era from the late 1960s to the mid-1990s, with the intention of generating economic growth from workers' remittances. The implementation of this policy was given to the Department of Manpower, Transmigration and Cooperative Units (Departemen Tenaga Kerja, Transmigrasi dan Koperasi), which was

¹⁸ Pikiran Rakyat Online, *Devisa TKI sebesar Rp 100 Triliun*, <http://www.pikiran-rakyat.com/ekonomi/2015/05/07/326426/devisa-tki-sebesar-rp-100-triliun>, Retrieved on July 25, 2015.

¹⁹ Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, (North Carolina Law Review: 2009-2010), pg. 1627-1656.

established in 1970. This department issued Ministerial Regulation No. 4/1970 which prohibits recruitment without permit and imposes conditions upon recruitment.²⁰ The regulation explains general ways in managing domestic and international migration through the Intra-region Cooperation Program (AKAD) and the Intra-nation Cooperation Program (AKAN). It also paved the way for the involvement of the private sector in workers' recruitment and placement. As a ruling dictator, Soeharto gave no room for civil society to criticize his handling of migrant workers. Consequently, the regulation of migrant workers was not monitored and mishandling of workers often occurred.

In the post-Soeharto period starting from 1998, the government increased its efforts to protect Indonesian migrant workers through the introduction of several regulations and policies. The Ministry of Manpower and Transmigration passed the Ministerial Decree No. 104A/2002 which set the platform for the early recognition of 'vulnerable workers', which refers to those who work in the domestic sector without contracts.²¹ In addition, the government established a national agency for workers, the BNP2TKI and enacted Law No. 39/2004 that regulates the placement and protection of

²⁰ National Agency for the Placement and Protection of Indonesian Migrant Workers (BNP2TKI), *Sejarah Penempatan TKI*, www.bnp2tki.go.id/berita-mainmenu-231/berita-foto-mainmenu-31/4054-sejarah-penempatan-tki-hingga-bnp2tki-.html, Retrieved on July 16, 2015.

²¹ International Organization for Migration (IOM), *Labor migration from Indonesia, An overview of Indonesian migration to selected destinations in Asia and the Middle East*, (Jakarta, Indonesia: 2012), pg. 13.

migrant workers. Yudhoyono's administration further elevated the regulation framework by issuing a Presidential Instruction No.6/2006 on Reforming the System and Placement and Protection of Indonesian Migrant Workers. This Instruction sets up guidelines, i.e. for the advocacy of workers, service at embarkations under the 'one roof' system (a system where immigration at airports provides special counters for overseas workers), the improvement of the quality and quantity of workers, and eradication of illegal recruiters, which are mainly responsible for recruitment that leads to physical and psychological damages. In response, the Ministry of Foreign Affairs issued Regulation No. 4/2008 which was designed to assist Indonesian nationals abroad through close cooperation between consulate offices in host countries and the BNP2TKI.

C. International Human Rights Law

1. Definition of International Human Rights Law

International human rights law refers to that body of international law created to promote and protect human rights at the international, regional, and domestic levels. They are mainly obligations which states are bound to obey. It is primarily made up of treaties, agreements between states and customary international law. Declarations, guidelines, and principles adopted at the international level contribute to the understanding, implementation, and development of the international law.

Enforcement of international human rights law can occur on domestic, regional or international level.²²

In 1948, the United Nations' New Commission set out to draft the document that became the Universal Declaration of Human Rights. Eleanor Roosevelt, the chairman of the commission credited with its inspiration, referred to the Declaration as the "international Magna Carta for all mankind." It was adopted by the United Nations on December 10, 1948.

2. History of International Humanitarian Law

The idea of human rights emerged stronger after World War II. The extermination by Nazi Germany of over six million Jews, Sinti and Romani (gypsies), homosexuals, and persons with disabilities horrified the world. Trials were held in Nuremberg and Tokyo after World War II, and officials from the defeated countries were punished for committing war crimes, "crimes against peace," and "crimes against humanity."²³

Governments then committed themselves to establishing the United Nations, with the primary goal of bolstering international peace and preventing conflict. People wanted to ensure that never again would

²² US Legal, *International Human Rights Law and Legal Definitions*, <http://definitions.uslegal.com/i/international-human-rights-law/>, Retrieved on July 13, 2015.

²³ David Shiman, *Teaching Human Rights*, (Denver: Center for Teaching International Relations Publications, U of Denver, 1993), pg 6.

anyone be unjustly denied life, freedom, food, shelter, and nationality. The essence of these emerging human rights principles was captured in President Franklin Delano Roosevelt's 1941 State of the Union Address when he spoke of a world founded on four essential freedoms: freedom of speech and religion and freedom from want and fear. The calls came from across the globe for human rights standards to protect citizens from abuses by their governments, standards against which nations could be held accountable for the treatment of those living within their borders. These voices played a critical role in the San Francisco meeting that drafted the *United Nations Charter* in 1945.

a. The Universal Declaration of Human Rights

Member states of the United Nations pledged to promote respect for the human rights of all. To advance this goal, the UN established a *Commission on Human Rights* and charged it with the task of drafting a document spelling out the meaning of the fundamental rights and freedoms proclaimed in the Charter. The Commission, guided by Eleanor Roosevelt's forceful leadership, captured the world's attention.

On December 10, 1948, the *Universal Declaration of Human Rights (UDHR)* was adopted by the 56 members of the United

Nations. The vote was unanimous, although eight nations chose to abstain.

The UDHR, commonly referred to as the international Magna Carta, extended the revolution in international law ushered in by the United Nations Charter – namely, that how a government treats its own citizens is now a matter of legitimate international concern, and not simply a domestic issue. It claims that all rights are *interdependent* and *indivisible*. Its Preamble eloquently asserts that:

[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.

The influence of the UDHR has been substantial. Its principles have been incorporated into the constitutions of most of the more than 185 nations now in the UN. Although a *declaration* is not a legally binding document, the Universal Declaration has achieved the status of *customary international law* because people regard it "as a common standard of achievement for all people and all nations."

b. The Human Rights Covenants

With the goal of establishing mechanisms for enforcing the UDHR, the UN Commission on Human Rights proceeded to draft

two *treaties*: the International Covenant on Civil and Political Rights (ICCPR) and its optional *Protocol* and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together with the Universal Declaration, they are commonly referred to as the ***International Bill of Human Rights***. The ICCPR focuses on such issues as the right to life, freedom of speech, religion, and voting. The ICESCR focuses on such issues as food, education, health, and shelter. Both *covenants* trumpet the extension of rights to all persons and prohibit discrimination.

As of 1997, over 130 nations have *ratified* these covenants. The United States, however, has ratified only the ICCPR, and even that with many reservations, or formal exceptions, to its full compliance.

c. Subsequent Human Rights Documents

In addition to the covenants in the International Bill of Human Rights, the United Nations has adopted more than 20 principal treaties further elaborating human rights. These include conventions to prevent and prohibit specific abuses like torture and *genocide* and to protect especially vulnerable populations, such as refugees (Convention Relating to the Status of Refugees, 1951), women (*Convention on the*

Elimination of All Forms of Discrimination against Women, 1979), and children (*Convention on the Rights of the Child*, 1989).

In Europe, the Americas, and Africa, regional documents for the protection and promotion of human rights extend the International Bill of Human Rights. For example, African states have created their own Charter of Human and People's Rights (1981), and Muslim states have created the Cairo Declaration on Human Rights in Islam (1990). The dramatic changes in Eastern Europe, Africa, and Latin America since 1989 have powerfully demonstrated a surge in demand for respect of human rights. Popular movements in China, Korea, and other Asian nations reveal a similar commitment to these principles.

d. The Role of Nongovernmental Organizations

Globally the champions of human rights have most often been citizens, not government officials. In particular, **nongovernmental organizations (NGOs)** have played a cardinal role in focusing the international community on human rights issues. For example, NGO activities surrounding the 1995 United Nations Fourth World Conference on Women in Beijing, China, drew unprecedented attention to serious violations of the human rights of women. NGOs such as Amnesty International, the Antislavery Society, the

International Commission of Jurists, the International Working Group on Indigenous Affairs, Human Rights Watch, Minnesota Advocates for Human Rights, and Survivors International monitor the actions of governments and pressure them to act according to human rights principles.

Government officials who understand the human rights framework can also affect far reaching change for freedom. Many United States Presidents such as Abraham Lincoln, Franklin Roosevelt, Lyndon B. Johnson, and Jimmy Carter have taken strong stands for human rights. In other countries leaders like Nelson Mandela and Václav Havel have brought about great changes under the banner of human rights.

D. Country Profile

1. Indonesia

Indonesia, officially the Republic of Indonesia, is a sovereign state in Southeast Asia.

Indonesia is an archipelago comprising thousands of islands.²⁴ With an estimated total population of over 252 million people, Indonesia is the world's fourth-most-populous country. Indonesia's republican form of government comprises an elected legislature and president. It encompasses 34 provinces, of which five have Special Administrative status. The nation's capital city is Jakarta. The country shares land borders with Papua New Guinea, East Timor, and Malaysia. Other neighbor countries include Singapore, the Philippines, Australia, Palau, and the Indian territory of the Andaman and Nicobar Islands. Indonesia is a founding member of ASEAN and a member of the G-20 major economies.

Across its many islands, Indonesia consists of hundreds of distinct native ethnic and linguistic groups. The largest—and politically dominant—ethnic group are the Javanese. A shared identity has developed, defined by a national language, ethnic diversity, religious pluralism within a majority Muslim population, and a history of colonialism and rebellion against it. Indonesia's national motto, "Bhinneka Tunggal Ika" ("Unity in Diversity" literally, "many, yet one"), articulates the diversity that shapes the

²⁴ United Nations Economic and Social Council, *Tenth United Nations Conference on the Standardization of Geographical Names*, (New York: 31 July – 9 August 2012).

country. Despite its large population and densely populated regions, Indonesia has vast areas of wilderness that support the world's second highest level of biodiversity. The country has abundant natural resources, yet poverty remains widespread.

Indonesia is a republic with a presidential system. As a unitary state, power is concentrated in the central government. Following the resignation of President Suharto in 1998, Indonesian political and governmental structures have undergone major reforms. Four amendments to the 1945 Constitution of Indonesia have revamped the executive, judicial, and legislative branches. The president of Indonesia is the head of state, commander-in-chief of the Indonesian National Armed Forces, and the director of domestic governance, policy-making, and foreign affairs. The president appoints a council of ministers, who are not required to be elected members of the legislature. The 2004 presidential election was the first in which the people directly elected the president and vice president. The president may serve a maximum of two consecutive five-year terms.

The highest representative body at national level is the People's Consultative Assembly (MPR). Its main functions are supporting and amending the constitution, inaugurating the president, and

formalizing broad outlines of state policy. It has the power to impeach the president. The MPR comprises two houses; the People's Representative Council (DPR), with 560 members, and the Regional Representative Council (DPD), with 132 members.

The DPR passes legislation and monitors the executive branch; party-aligned members are elected for five-year terms by proportional representation. Reforms since 1998 have markedly increased the DPR's role in national governance. The DPD is a new chamber for matters of regional management.

Most civil disputes appear before a State Court (Pengadilan Negeri); appeals are heard before the High Court (Pengadilan Tinggi). The Supreme Court (Mahkamah Agung) is the country's highest court, and hears final cessation appeals and conducts case reviews. Other courts include the Commercial Court, which handles bankruptcy and insolvency; a State Administrative Court (Pengadilan Tata Negara) to hear administrative law cases against the government; a Constitutional Court (Mahkamah Konstitusi) to hear disputes concerning legality of law, general elections, dissolution of political parties, and the scope of authority of state institutions; and a Religious Court (Pengadilan Agama) to deal with codified Sharia Law cases.

2. Hong Kong SAR

Hong Kong, officially known as Hong Kong Special Administrative Region of the People's Republic of China, is an autonomous territory on the southern coast of China at the Pearl River Estuary and the South China Sea.²⁵ It has an area of 1,104 km² (426 sq mi) and shares its northern border with the Canton Province of Mainland China. Home to around 7,200,000 Hongkongers and other nationalities, Hong Kong is one of the world's most densely populated regions.

After the First Opium War (1839–42), Hong Kong became a British colony with the perpetual cession of Hong Kong Island, followed by Kowloon Peninsula in 1860 and a 99-year lease of the New Territories in 1898. After it was occupied by Japan in the Second World War (1941–45), the British resumed control until 30 June 1997. As a result of negotiations between China and Britain, Hong Kong was transferred to the People's Republic of China under the 1984 Sino-British Joint Declaration. The territory became China's first provincial-level special administrative

²⁵ Census and Statistics Department, *Geography and Climate, Hong Kong (PDF)*, Hong Kong Government, Retrieved on July 13, 2015.

region with a high degree of autonomy²⁶ on 1 July 1997 under the principle of one country, two systems.²⁷

In the late 1970s, Hong Kong became a major entrepôt in Asia-Pacific. The territory has developed into a major global trade hub and financial centre, and is regarded as a world city. Hong Kong is a member of APEC, ADB, IMF, BIS, WTO, FIFA, and International Olympic Committee, as Hong Kong Basic Law authorizes the territory to develop relations with foreign states on its own in appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.²⁸

Hong Kong enjoys a high degree of autonomy, as its political and judicial systems operate independently from those of mainland China. In accordance with the Sino-British Joint Declaration, and the underlying principle of one country, two systems, Hong Kong has a "high degree of autonomy as a special administrative region in all areas except defense and foreign

²⁶ Department of Justice, HKSAR, *Basic Law Bulletin Issue No.2 (PDF)*.

²⁷ Peter H Russell, David M. O'Brien, *Judicial Independence in the Age of Democracy: Critical Perspective from Around the World*, pg. 306.

²⁸ Hong Kong Basic Law, Article 151.

affairs”. The declaration stipulates that the region maintain its capitalist economic system and guarantees the rights and freedoms of its people for at least 50 years after the 1997 handover. The guarantees over the territory's autonomy and the individual rights and freedoms are enshrined in the Hong Kong Basic Law, the territory's constitutional document, which outlines the system of governance of the Hong Kong Special Administrative Region, but which is subject to the interpretation of the Standing Committee of the National People's Congress (NPCSC).²⁹

The primary pillars of government are the Executive Council, the civil service, the Legislative Council, and the Judiciary. The Executive Council is headed by the Chief Executive who is elected by the Election Committee and then appointed by the Central People's Government.³⁰

The civil service is a politically neutral body that implements policies and provides government services, where public servants are appointed based on meritocracy.³¹ The Legislative Council has 70 members, 40 seats are directly elected

²⁹ Wenmin Chen, *Hong Kong's Constitutional Debate: Conflict Over Interpretation*, pg. 235-236.

³⁰ Civil Service, Information Service Department, (Hong Kong Government, June 2009).

³¹ John P. Bums, *Government Capacity and the Hong Kong Civil Service*, (Oxford University Press: 2004), pg. 114.

by universal suffrage by permanent residents of Hong

Kong according to five geographical constituencies and a District Council functional constituency. 30 seats from functional constituencies are directly elected by a smaller electorate, which

consists of corporate bodies and persons from various stipulated functional sectors. The entire council is headed by the President of the Legislative Council who serves as the speaker.