

**Summary of
DOCTORAL DISSERTATION**



Title of Dissertation

**Strengthening Indonesia's Migrant Worker Legislation:
Reality And Necessity**

by

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Introduction

Indonesian migrant workers contribute significantly to the well-being of their remaining families in Indonesia and the Indonesian economy. Remittances from Indonesian migrant labourers are critical in reducing poverty. Even for their remittance services, the Indonesian government recognizes migrant laborers as remittance heroes. However, this recognition of remittance champions was not accompanied by adequate protection for their human rights, as their work is informal and unskilled. Since migrant laborers in informal jobs are frequently stigmatized as "coolies," a term coined by the colonial government to denote the low honor and dishonorable nature of their work.

Remittance interest without adequate protection of migrant workers' human rights was typical of the Indonesian government's postcolonial policy of dispatching migrant workers abroad, especially during the Suharto regime (1967-1998). Consequently, the contributions of migrant laborers to the economic development of the nation are not matched by adequate legal protection for their fundamental rights. Numerous reports and studies document various cases of abuse suffered by migrant workers, particularly those employed in the informal sector, such as domestic workers or unskilled labourers in various industries. These migrant workers endure many cases of abuse of their fundamental rights, including a lack of health insurance, an unsafe and pleasant working environment, adequate rest time, security guarantees, and acceptable wages.

Migrant worker migration management requires formulating and implementing a well-considered, comprehensive, and methodical immigration policy through quality Indonesian migrant worker legislation, both in terms of substance and the legal and political process through which it is established. Considering this, the substance and procedure of drafting legislation define its quality. Given this notion of quality legislation, the Indonesian legislation on migrant workers contains certain flaws, including placing a premium on the placement of Migrant Workers over their protection, the predominance of the private sector in the management of migrant workers, and the absence of a ban on sending migrant workers to countries that do not protect migrant workers.

The efficacy of a country's protection of migrant laborers is contingent on the quality of its legislation. How closely goods and services adhere to requirements or standards determines the quality of legislation. Consequently, legislative quality refers to conforming legislative instruments and procedures with statutory requirements. Considering

this idea, migrant workers legislation is deemed adequate if the protection of migrant workers is well-defined throughout their migratory phases in terms of their rights and responsibilities, as well as for all the involved parties, including government agencies and private actors.

This dissertation is predicated on the premise that the low quality of Indonesian migrant worker legislation, both in terms of substance and process of lawmaking, contributes to the poor governance of the country's migrant workers. According to the premise of this thesis, this topic's primary concern is *'Why is Indonesian migrant worker legislation insufficient to safeguard the rights of migrant workers?'* This central issue will be expanded to include the following legal issues, which will help us identify the most effective way to improve the quality of Indonesian migrant worker legislation. These legal questions are:

1. Is the feature of colonial migrant worker legislation influencing the character of the substance of post-independence Indonesian migrant worker legislation? This question will be discussed in Chapters 2 and 3.
2. How does existing Indonesian legislation on migrant workers fall short of protecting the human rights of migrant workers? This question will be discussed in Chapter 4.
3. How might incorporating various foreign migrant worker legislation contribute to increasing the quality of Indonesian migrant worker legislation? This question will be answer in the Chapter 5.

The subsequent chapters provide a comprehensive response to the dissertation's research query. The first chapter lays out the rationale for this thesis, which investigates Indonesia's inadequate migrant worker legislation and its implications for the development of migrant worker basic rights violations. The second chapter examines migrant labor patterns in the context of Indonesian legal and political institutions during the colonial period. A historical examination of the origins of migrant workers during the colonial era can be of great assistance in comprehending the post-colonial migrant workers in Indonesia. It is necessary to determine whether colonial migrant worker legislation influenced post-colonial migrant worker legislation to comprehend the scope of migrant worker legislation during that period.

The third chapter examines the evolution of government legislation governing migrant laborers, with an emphasis on their fundamental rights. Because these two regimes

were the most like the colonial era, aspects of migrant workers' legislation in their era are examined to evaluate their relationship with colonialism and their impact on the preservation of migrant workers' rights in these two regimes. The fourth chapter analyzes the two migrant worker statutes (2004 and 2017) enacted after the amendment to the Indonesian Constitution, which prioritized human rights issues, including migrant worker rights, by incorporating democratic principles. The fifth chapter examines the legislation governing migrant laborers at the international, regional, and select national levels. This dissertation concludes with a conclusion that summarizes its main findings.

Research Method

This study employed doctrinal research, defined as "research that provides a systematic exposition of the rules governing migrant worker legislation, analyzes the relationship between rules, explains areas of difficulty, and possibly predicts future developments." Given the subject of this study, a systematic legal approach is the most appropriate method for conducting research. This approach entails the application of convergent approaches within the frameworks of International Labor Migration Law, Regional Labor Migration Law, and National Law. However, when considering the subjects of observation, namely comprehending the laws and regulations of the selected regions, only a comparative legal approach can result in purposeful knowledge. The outcomes of such an approach would provide valuable input for debating each pertinent issue and, ultimately, for concluding each one. Nonetheless, the comparative process and analysis of currently enacted laws and regulations should be empirically based.

Migrant Workers' Politics and Legislation Frameworks: A Colonial-Structural Approach Revisited

If the Dutch colonized Indonesia for more than 3,5 centuries, and then Japan continued the colonization, it undoubtedly influenced the post-colonial Indonesian labour legislative pattern. J.J. van Klaveren (1983) stated, *'we live in an era in which colonial systems are being phased out or disguised. However, the mould created by former colonial governments cannot be quickly abolished. It will never be wholly eradicated from the course of history - partly a chain of causes and effects - that leads up to the present'*. Taking

Klaveren's assertion into account, this chapter will look at the origins of colonial 'migrant workers' legislation, which will lead us to a better understanding of post-colonial migrant workers legislation and its implications for migrant workers' human rights. During colonial times, however, the term "migrant workers" was not in use. They employed laborers for those working in all colonial enterprises domestically and abroad.

In the colonial times, Dutch employed migrant workers to assist the government's economic development, particularly in agriculture industries on their lands occupied both in the East Indies and outside the country, or to meet the labour needs of investors' agricultural companies that obtained an investment license from the Dutch government. Indigenous people in the East Indies who worked for the Dutch or investor companies were referred to as '*coolies*,' a term derived from 1881 Ordinance concerning the mobility of labour that imposed criminal penalties on violators. In practice, the police were decisive in charge, with complete authority to enforce the coolie law against Labourers.

Meanwhile, Japan, which gained control of Indonesia following its triumphant conquest of the Dutch in 1942–1945, increased its reliance on Indonesian migrant labour to build transportation infrastructure in the countries it invaded. Additionally, during Japan's colonial era, the exploitation of Indonesian migrant labourers was dubbed '*romusha*,' or forced labour without worker rights. Both colonial empires used similar migrant labour legislation to govern the indigenous people, which amounted to indentured labour in which their rights were not respected fairly. They were required to carry out their responsibilities under contract law or face a fine.

The forced labour statute was implemented in both colonialism regimes to supplement the enslavement system used by the two colonialists to gain political and economic control over the Indonesian people. As a result of the worst period of labour practice in history, international communities may consider that such 'slavery' labour law should not exist in any form in the future of the global labour legal system. Consequently, fundamental workers' human rights must be recognized, protected, and upheld regardless of their employment status, particularly if the government receives economic benefits, such as remittances from migrant workers, and aids in poverty reduction.

Therefore, when the Indonesian legislator drafts any similar legal policy regulating labour management, the characteristics of slavery and support for indenture work in the colonial coolie ordinance or *romusha* should be fully understood. Simply put, it is critical to

study legal history to improve the quality of legislation, particularly when it comes to labour in general and migrant labour.

Indonesian Post-Colonial Migrant Worker Legislation: A Recurring Historical-Structural Approach

The historical-structural approach will be used to examine how and to what extent migrant worker legislation was established over the regime's three decades, from Sukarno's Old Order (1945–1967) to Suharto's New Order (1967–1998) to the Reform Era's early years (1998–2004). Sukarno's regime opposed migrant worker policies to advance his revolution agenda of eradicating all Western influence on the new Indonesian state, most notably colonial legacies. As a result, Sukarno took no action to regulate migrant workers. In comparison to Sukarno, Suharto made extensive use of "technical laws" governing the management of migrant workers, with the dual goal of increasing migrant remittances and alleviating poverty. As a result, the post-colonial Indonesian politics and policy have maintained a consistent posture on migrant labor throughout the country's history in an approach reminiscent of the colonial "coolie" migration sequence. This strategy is characterized by mass labour recruitment to support the Dutch government's agribusiness goals or the Japanese government's infrastructure interests. In the meantime, from 1945 to the present, Indonesian politics has been separated into two primary agendas regarding migrant workers: migrant worker remittances and poverty alleviation.

Suharto's New Order era successfully replicated this strategy for obtaining state remittances and alleviating poverty. Additionally, as a defining feature of contemporary Indonesian migrant worker political legislation, the state's political interest in migrant workers persists. The state's intention to increase remittances and alleviate poverty through exporting migrant workers was an essential component of the migrant workers' policy. As a result, migrant labourers were hailed as currency heroes (*'Pahlawan devisa'*). Suharto's government lauded migrant labourers as the remittance's hero, emphasizing how critical migrant workers are to Indonesia's economic development in the modern day.

Regrettably, the state's attitude toward migrant workers has remained unchanged during Indonesia's democratic post-Suharto era. The economic well-being of migrant workers remains paramount, with two primary objectives: remittances and poverty eradication in the home country. The post-Suharto governments made a token effort to

safeguard migrant workers' fundamental rights by enacting ad hoc legislation such as restructuring migrant workers and placement management. Specific regimes, such as President Wahid's, have carried out this policy by establishing a migrant labour protection system under the aegis of the foreign ministry's office. Meanwhile, other governments, including President Habibie, Megawati, and Yudhoyono, have emphasized the importance of migrant worker placement in the destination country in their migrant worker programs. Considering the status quo approach to migrant worker legislation, migrant workers, migrant worker NGOs such as Indonesian Migrant Care, and academics push for a fundamental change in migrant worker legislation incorporating a human rights perspective. As a result, in 2017, a new Act Protecting Migrant Workers was enacted. However, while the Act 2017 does not guarantee comprehensive protection for Indonesian migrant employees, it helps improve the management quality of migrant workers. Consequently, the effectiveness of the Act of 2017 to strengthen the protection of migrant workers' human rights has not changed significantly, as evidenced by the continuity of the government's approach to migrant workers' human rights issues at work.

The National Legal Arrangements for the Protection of Migrant Workers' Rights: Institutional Structure and Inadequate Protective Mechanisms

Political migrant worker legislation throughout Indonesian migration history was primarily concerned with state interests and provided only rudimentary protection for migrant workers' rights. Law No. 18 of 2017 on the Protection of Indonesian Migrant Workers is a more democratically enacted law than Law No. 39 of 2004 on the Placement and Protection of Indonesian Migrant Workers. This law is considered more democratic because it involves a broad range of stakeholders, including academics, non-governmental organizations, and the public, via various consultation forums. However, current migrant worker legislation falls short of adequately protecting migrant workers' rights. The primary evidence for this argument is the absence of provisions in existing legislation addressing these three crucial issues that substantially impact the protection of migrant workers' rights. *First*, the government's migrant worker placement strategy did not consider the destination nations' lack of protection for migrant workers' rights. *Second*, the Indonesian government uses a Memorandum of Understanding (MoU) as the agreement instrument with its foreign

counterpart, which is not strictly binding on the foreign party. *Third*, the government sends migrant workers to countries without diplomatic ties to Indonesia. As a result, migrant labourers in these four destination countries face a greater risk of human rights violations and lack of protection under Indonesia's migrant labour law system.

Additionally, Act No. 18 of 2017 paid less attention to female domestic workers and seafarers. Although, both groups of migrants require substantial government protection due to the highest incidence of human rights violations at their places of employment compared to other occupations. In terms of numbers, an increasing number of migrants from these two groups are seeking work abroad, particularly women, due to the scarcity of jobs available to male migrant workers during the pandemic. In addition, women's engagement in meeting home demands has increased in recent years because of the rise in their household expenses, which includes the cost of their children's education.

Enhancing the Quality of Indonesia's Migrant Worker Legislation

The changing pattern of migrant workers is undoubtedly influenced by the migrant legislation imposed by the entire Indonesian government's migrant regime thus far. For more than half a century of Indonesian migrant worker legislation, migrant labourers have been substituted as government remittance targets. In contrast, breaches of the human rights of migrant workers are more severe in their home countries and abroad. The government finally changed its migrant labour legislation fundamentally in 2017 by eliminating all 'coolie features' that disregard migrant workers' 'status' as workers, allowing them and their families to be more respected. This 'reform' of migrant workers' legislation approach results from legal academics' involvement and migrant NGOs that provided valuable insight during the 2009–2017 drafting of migrant worker legislation.

Even though the Migrant Worker Act 2017 still has some shortcomings, it represents a significant step toward creating more modern migrant labour legislation and management that adheres to international migrant labour standards. Stephen Castles and Mark J. Miller (2003) have drowned some contemporary migrant worker patterns, such as the globalization of migration, which has resulted in the diversification of migrants' countries of origin across a broad spectrum of economic, social, and cultural factors. Additionally, the differentiation of migration is another characteristic of current and possibly future migration, as it results

in receiving countries having not just one type of immigration, such as labour migration, refugees, or permanent settlement, but a variety of them simultaneously.

On the other hand, globalization continues to shrink state borders, aided by information technology machines, resulting in a future world economy growing faster than ever recorded. As a result of this rapidly changing environment, labour law must be adaptable from an inward-focused to a global perspective. To address these challenges, it is vital to improve the quality of Indonesian migrant worker legislation by combining international labour law and learning from more vital migrant worker legislation in foreign countries. Additionally, the migrant labour regulation's legislative process should be more transparent by allowing a broad range of public participation and insight.

The objective (efficacy) of the Indonesian legislation on migrant workers is to safeguard the migrant workers' rights during the entire migration process. To accomplish this objective, Indonesia enacted the migrant worker Act in 2004 and subsequently modified it in 2018. The continual violation of the human rights of the country's migrant workers while they are working abroad and, in some instances, when they are returning home demonstrates that the most recent legislation has certain faults. Nonetheless, the substance of the existing law (Act of 2018) is strengthened, as indicated by the government's involvement in migration governance, which was previously dominated by private entities.

In general, however, the government's involvement in migration governance occurred mostly during the initial stages of migration in the origin country. In contrast, the government's engagement in protecting migrant workers overseas has remained unchanged until the present day. In this regard, the 2018 Act does not regulate the government's role to ensure that migrant workers' rights are adequately protected. Hence, the international norm of migrant worker legislation supplied by the ILO was insufficiently elaborated in the current rule. In contrast, the legislation controlling migrant workers in Nepal, Pakistan, and the Philippines governs migration in all its stages, including the institution in charge, the well-being fund, and legal assistance for migrant employees. Thus, adoption of some provisions of these nations' migrant workers legislation as well as regional agreements such as EU and ASEAN are critical to enhancing the substance quality of Indonesian migrant workers. Relevant to use are the technical approaches of legal development, such as legal transplant and vernacular.

In the meantime, the ratification of ILO conventions should be continued, particularly regarding the technical conventions whose ratification rate is still low. In

addition to improving the quality of the legislation's substance by incorporating foreign legislation, the lawmaking process is essential for improving the quality of the legislation, particularly as it pertains to migrant workers, and of the legislation in general. Important to examine in this context is the public's participation. Legislation in a democratic nation should involve public engagement in a natural, rather than formal, manner. Because of this, the acceptance or rejection of the resulting legislation by those impacted by the legislation will be influenced.

Strengthening Indonesia's Migrant Worker Laws: Concluding Remarks

This concluding chapter provides a general summary of some legal issues that were previously explored in greater depth. It will answer the fundamental research question: *'Why is Indonesian migrant worker legislation insufficient to safeguard the rights of migrant workers?'* Through this main question, the primary objective of this study has been attained. The objective is to propose more robust legislation on Indonesia's migrant workers based on multiple international, regional, and country-specific migrant worker legislation that is more robust in protecting the migrant worker.

The exhaustive analysis of the colonial and post-colonial origins of Indonesia's legislation regarding migrant workers reveals that the preservation of migrant workers' rights was not the major objective. In contrast, the major issue mentioned in migrant worker legislation is the government's aim in expelling migrant workers. In the colonial period, two bonded laws known as "coolie law" under the Dutch colonial government and "romusha law" under the Japanese emperor had a significant impact on the present Indonesian migrant worker legislation. Both 'migrant workers legislation' viewed migrant workers as a strategic tool to further state interests in the plantation industry, railway construction, and military services, primarily in the Dutch and Japanese colonialists' occupied territories. Coolie and romusha were ascribed to the indigenous people of East Indies (now Indonesia) and were viewed as employees who were hired for unskilled or dirty labour without regard for their rights or appropriate working conditions. As a result, they were viewed as slaves whose rights were contingent on the favour of their master.

In the post-colonial era, coolie was utilised as a method to establish economic dominance, particularly by the administration of Suharto. During his administration, the law

governing migrant workers was never enacted in the form of a statute, but rather through technical policies such as the President Regulation or President Instruction, as well as ministerial rules. The objective of these instrument policies was to accomplish the government's objective, which was systematically managed utilising the five-year development plan (*'Rencana Pembangunan Lima Tahun-Repelita'*). State remittances and poverty reduction were two of the government's primary objectives in mobilising the vast Indonesian migrant labour force in the Middle East. Suharto, who inherited the debt and severe economic problems from Sukarno, considered sending migrant workers abroad to earn remittances as a major economic potential for the country's income. In addition, this remittance aids in alleviating poverty throughout the country's villages. Consequently, the legal term used to manage migrant workers was "migrant worker mobilisation" (*'pengerahan tenaga kerja Indonesia'*), which literally translates to "mass deployment of migrant labourers." In addition, to recognise the remittance services provided by migrant workers, the government refers to them as foreign exchange heroes (*'Pahlawan devisa'*).

After Suharto's ouster in 1998, however, subsequent presidents adopted his stance on migrant workers. NGOs and academics encouraged the government to enact legislation to protect the human rights of migrant workers in response to the harsh conditions migrant workers face in other countries. In 2004, in response to their demand, the Indonesian Parliament enacted the first Migrant Worker Act, which was later revised in 2017.

In overall, Act No. 18 of 2017 on the Protection of Indonesian Migrant Workers is vastly superior to the prior Act of 2004. In addition, it was evolved democratically through participation of the public in academic study, legal drafting, and hearings. Substantively, the 2017 Act signified a sea change in the management of migrant workers by placing government agencies at the forefront of aiding migrant workers' interests throughout the migration process, from pre-departure to placement in destination countries' and return to Indonesia. In addition, the Act of 2017 protects the family members of migrant workers, based on the Migrant Worker Convention (MWC) that Indonesia adopted in 2012. Nonetheless, this dissertation covered some faults in Act 2017's provisions that are essential for judging whether the law's execution was effective or unsuccessful. The key evidence for this thesis is the absence of provisions in present legislation that address these crucial issues that have a substantial influence on the protection of the rights of migrant workers. First, the government's policy for migrant worker placement did not take destination countries into account, principally due to a lack of protection for the rights of migrant workers. The criteria

for receiving nations are established in a discretionary standard, which encourages candidates for migrant worker visas to select a country designated in the 2017 Act. Ideally, the country destination criterion would be enshrined in law, and the government would be prevented from sending migrant workers to nations that do not meet Act 2017's requirements.

Second, the Indonesian government uses a Memorandum of Understanding (MoU) as an agreement instrument with its international counterpart, which is not legally binding on the foreign party. Consequently, countries that accept migrant labour cannot be held accountable for violations of the MoU. Thirdly, the government continues to send migrant workers to nations with no diplomatic ties to Indonesia. Consequently, the protection of migrant workers is much more difficult to achieve; on the other hand, the potential for violations of migrant workers' human rights on the job is much greater than for migrant workers in countries with diplomatic relations with Indonesia. As a result, migrant workers in these two countries face a significantly higher risk of human rights violations and a lack of protection under Indonesia's migrant labour laws.

A further problem of the Act of 2017 is that it provides insufficient protection for sailors, putting their human rights at danger, particularly on the lawless high seas. In addition, there is no mention of gender in the affirmative provisions of the Act of 2017, which largely assist women in domestic employment. In this instance, the Act of 2017 is less compatible with other pertinent legislation, such as the Act of 2007 Concerning the Prevention of Human Trafficking and the ILO Domestic Workers Convention of 2011. The government and legislature's dedication to domestic worker protection legislation is likewise waning, as indicated by the fact that the issue's legislative agenda has been unresolved since 2004.

Based on a review of comparative migrant worker legislation in international, regional, and selected individual countries, several pertinent substance laws that would improve the quality of the Indonesian migrant worker legislation are likely to be incorporated into future Indonesian legislation. These include deployment, institutions in charge, social security, legal aid, migrant welfare fund, oversights, and domestic workers. In addition, one of the most important provisions is that the legal agreement covering the deployment of migrant workers with the receiving country must be changed from a memorandum of understanding to a legally enforceable statute.