

ASEAN's Role in Protecting Migrant Workers' Rights During the Covid-19 Pandemic

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Abstract

This paper focuses on ASEAN's efforts as a regional organization to protect the rights of migrant workers in the Covid-19 pandemic situation. The protection of the rights of migrant workers is part of the protection of human rights regulated in various international legal instruments as well as within the ASEAN framework, especially in the ASEAN Consensus on the Promotion and Protection of the Rights of Migrant Workers (ACPPRMW). Although responding quickly to the impact of the Covid-19 pandemic on the economic and health sectors, ASEAN's response and efforts in protecting the rights of migrant workers during the Covid-19 pandemic were late and ineffective. This is also an illustration of the ineffective implementation of the system and mechanism for the protection of migrant workers in ASEAN as well as the implementation of other ASEAN human rights legal instruments, due to the main principle that is firmly held by ASEAN, namely the non-interference principle.

A. Background

The rapid development of the global situation in the last few decades requires ASEAN to be able to react to the new global situation and consolidate itself to realize its regional aspirations. One of the things that must be faced by ASEAN is cooperation in handling the problem of migrant workers.

As an international organization that has an important role, ASEAN is obliged to pay attention to all phenomena that occur and involve its member countries. Regarding the issue of migrant workers, almost all ASEAN countries face problems, especially illegal migrant workers, both in positions as sending and receiving countries. The presence of illegal migrant workers causes various problems, one of which is security issues. In terms of security, illegal foreign workers are associated with criminal matters, such as smuggling and

human trafficking involving transnational crime syndicates and labor exploitation.¹ The existence of illegal migrant workers also raises relationship problems between countries, such as the raid on illegal migrant workers conducted by the Malaysian government in 2017 that has caused a bit of tension with Indonesia due to the emergence of issues related to the inappropriate treatment of illegal migrant workers from Indonesia.

Most of the problems concerning illegal migrant workers are sought to be resolved bilaterally. ASEAN itself can be said to have only responded to the issue of migrant workers since the Cebu Declaration in 2007 after previously only highlighting issues related to human trafficking. The ASEAN Dec-

¹ Joudo Larsen, "Migration and People Trafficking in Southeast Asia", <https://www.aic.gov.au/sites/default/files/2020-05/tandi401.pdf>. (accessed on 7 September 2021).

laration on the Promotion and Protection of the Rights of Migrant Workers (Cebu Declaration) produced at the 12th ASEAN Summit on January 13, 2007, in Cebu, Philippines is a response to the agreed Vientiane Action Program (VAP) at the 10th ASEAN Summit on November 29, 2004. In Annex 1 of the VAP, one of the programs launched was the "elaboration of an ASEAN instrument for the protection and promotion of the rights of migrant workers."

The Cebu Declaration is a statement that is not legally binding. However, to implement this declaration, ASEAN formed the ASEAN Committee the implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). Still, in its journey, ASEAN countries have different points of view regarding the arrangements for handling migrant workers, especially between sending and receiving countries.² Receiving countries such as Malaysia and Singapore argued that they had their national policies regarding the regulation of migrant workers. That makes consensus on legal instruments regarding the protection of migrant workers hard and can only be realized in the ASEAN Consensus on the Promotion and Protection of the Rights of Migrant Workers (ACPPRMW) which was agreed upon ten years after the Cebu Declaration.

With the emergence of the Covid-19 pandemic which has limited mobility from one place to another, especially between countries, the issue of protecting the rights of migrant workers has become much more complex than before.³ This situation has also raised the risk of large-scale layoffs for migrant workers in ASEAN.⁴ Meanwhile, even

without the Covid-19 pandemic, ASEAN still has a lot of "homework" related to the protection of migrant workers.⁵

This situation requires more intensive cooperation by ASEAN countries than before. However, ASEAN countries prioritize tightening social activities within their respective countries, which has the potential to violate the rights of migrant workers.

The protection of the rights of migrant workers is part of the protection of human rights regulated in various international legal instruments. Within the framework of the United Nations, these rights relate to the right to an adequate life as regulated in the Universal Declaration of Human Rights (UDHR) in 1948. The rights of migrant workers are also related to the right to freedom and personal security and freedom from torture as regulated in The International Covenant on Civil and Political Rights (ICCPR) is also the economic, social, and cultural rights regulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

More specifically, the International Labor Organization (ILO) has established two conventions for the protection of migrant workers, namely the Migration Convention No. 97 of 1946 and the Migrant Workers Convention No. 143 of 1975. Then in 1990, the United Nations established the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW) which comprehensively contains the protection of the rights of all migrant workers and members of their families, both documented and or not.⁶

As a regional organization built into a community, one of the goals of which is to promote and protect human rights and freedoms as well as improve the welfare and decent living for its people, ASEAN should

2 Hardani dan Rahayu, "Politik Hukum Perlindungan Non-Derogable Rights Pekerja Migran Indonesia Tidak Berdokumen", *Refleksi Hukum*, 3 No. 2 (2019): 115-128. <https://doi.org/10.24246/jrh.2019.v3.i2.p115-128>

3 Yazid dan Jovita, "Dampak Pandemi Terhadap Mobilitas Manusia di Asia Tenggara". *Jurnal Ilmiah Hubungan Internasional*. Edisi Khusus (2020): 75-83. <https://doi.org/10.26593/jihi.v0i0.3862.75-83>

4 Saragih, (et. al.), "4 Tahun Setelah Komunitas Ekonomi ASEAN: Meninjau Kembali Pergerakan Bebas Kebijakan Tenaga Kerja" *Jurnal Inovasi*. 17 No. 2 (2021): 320-331.

5 Putri, "ASEAN Consensus on The Protection and Promotion of the Rights of Migrant Workers sebagai Rezim Perlindungan Pekerja Migran Berketerampilan Rendah di ASEAN", *Padjadjaran Journal of Internasional Relations (PADJIR)*, 3 No. 2 (2021): 242-264. doi: 10.24198/padjir.v3i2.31172.33497

6 Kusniati. "Perlindungan Hukum Dalam Upaya Pemenuhan HAM Buruh Migran". *Jurnal Penelitian Universitas Jambi Seri Humaniora*. 11 No. 1 (2009): 47-56.

play a role in protecting the rights of migrant workers in the Covid-19 pandemic situation.

In this regard, this article will review ASEAN's efforts to protect the rights of migrant workers in the Covid-19 pandemic situation. The systematics of this paper begins with an introduction and continues with a discussion containing an explanation of ASEAN's efforts in handling the Covid-19 pandemic and its impact on the fulfillment of the rights of migrant workers, before finally closing with a conclusion.

B. Method

Following the substance of the legal issues to be studied in this research, this research is designed as non-doctrinal legal research. In non-doctrinal legal research, the law is conceptualized sociologically as an empirical phenomenon that can be observed in life.⁷

The research steps include the following activities: identifying legal facts and eliminating irrelevant facts to determine the legal issues to be resolved; collecting legal materials, and also if deemed relevant, non-legal materials; conducting a study of the proposed legal issues based on the materials that have been collected; conclude in the form of arguments that answer legal issues, and give prescriptions based on the arguments that have been built in the conclusions.⁸

C. Results and Discussion

As a regional organization, ASEAN has taken several strategic and policy steps to stop the spread of Covid-19 and anticipate its impact with a significant response carried out at the national level. The governments of ASEAN member countries have implemented national-scale strategic and natural policy measures to deal with the Covid-19 pandemic under their respective national interests with the main objective of maintaining security and political stability, affecting the country's economy.

The policy of ASEAN member countries to close the borders of their countries has made the ASEAN motto "One Vision, One Identity, One Community" look like a utopia because it shows that ASEAN countries are once again putting forward their sovereignty rather than having a collective vision. The principle of non-interference has also prevented ASEAN member countries from relying on the actions of other countries that first experienced the spread of the Covid-19 virus.⁹

This does not mean that ASEAN and its member countries do not respond globally and regionally. This is evidenced by the rapid response and information sharing among ASEAN health officials, strong collaboration between ASEAN and WHO, and engagement with external partners, such as ASEAN Plus Three (APT), the European Union, and the United States, including through the exchange of appropriate data and information. time on prevention, detection, control, and response actions. Indonesia had played an important initiative even before the WHO declared pandemic status by proposing the establishment of an ASEAN-China Joint Ad-Hoc Task Force for Health Ministers in a special meeting between ASEAN and China Foreign Ministers on February 20, 2020. This joint task force is expected to focus on the exchange of information and data, especially in handling the Covid-19 outbreak, holding expert team meetings, and encouraging joint research and production for virus detection and vaccines.¹⁰

In the economic field, countries in the region are asked to jointly commit to keeping markets open, ensuring normal trade flows and supply chain connectivity, especially for essential products, and working together to reduce the socioeconomic impact of Covid-19.

On April 14, 2020, a Special ASEAN Summit on Covid-19 was held which was attended by virtually all heads of government of ASEAN countries. In this meeting, it was agreed that seven important points were stated in the Declaration of the Special

7 Wignjosuebrotu, *Hukum: Paradigma, Teori dan Masalah*, (Jakarta: ELSAM dan HUMA, 2002), 183.

8 Marzuki. *Penelitian Hukum*. (Jakarta: Pranata Media, 2005), 171.

9 Djalante, (et. al.), "Covid-19 and ASEAN Responses: Comparative Policy Analysis", *Progress in Disaster Science*, 8 (2020): 1-12. <https://doi.org/10.1016/j.pdisas.2020.100129>.

10 Djalante, (et. al.), *op. cit.*

ASEAN Summit on Coronavirus Disease 2019 (Covid-19), namely:

1. Strengthening cooperation against Covid-19, including exchange of information, best practices, research development, development of epidemiology, and others;
2. Protect ASEAN citizens amid the coronavirus or Covid-19 pandemic;
3. Strengthening public communication and the importance of efforts to combat stigmatization and discrimination;
4. Take collective action and coordinated policies to mitigate economic and social impacts;
5. Take a comprehensive approach that involves multi-stakeholders and multi-sectors;
6. Assigning the economic ministers of ASEAN countries to ensure the continuity of supply chain connectivity so that trade can continue;
7. Support the reallocation of the ASEAN Trust Fund to tackle the Covid-19 virus outbreak.

Efforts to spread and transfer Covid-19 countermeasures between governments of ASEAN member countries are carried out while still adhering to the principle of non-interference and respect for national values and culture.¹¹

Before the Covid-19 pandemic hit, ASEAN and its three East Asian partner countries (China, Japan, and South Korea) who were members of the APT had a regional disease surveillance mechanism, namely the Protocol for Communication and Information Sharing on Emerging Infectious Diseases. Through this protocol, countries that are members of the APT are encouraged to report cases of diseases categorized as Public Health Emergency of International Concern (PHEIC). The cooperation developed under this protocol mechanism includes disaster safety health facilities and field epidemiology training networks as well as a regional public health laboratory network through the Global Health Security Agenda platform. However, it is not clear how the network contributes to effective policy-making for the Covid-19

¹¹ *Ibid.*

pandemic.¹²

Since the emergence of the Covid-19 pandemic, ASEAN has indeed activated several health mitigation cooperation mechanisms in handling Covid-19, including:¹³

1. ASEAN Emergency Operation Center Network for Public Health Emergencies, which provides daily developments regarding the situation and technical changes of Covid-19 to each ASEAN country;
2. ASEAN BioDiaspora Virtual Center, which produces risk assessments and reports on the Covid-19 virus using "big data";
3. Regional Public Health Laboratories Network, which enables each ASEAN member country to access laboratory readiness, technical and material support, as well as laboratory experience and supervision;
4. ASEAN Risk Assessment Center, which conducts investigations on fake news and hoaxes related to Covid-19 and provides credible and timely information effectively.

In addition, ASEAN is also seeking cooperation and exchanging information regarding the handling of Covid-19 in the health sector with partner countries such as the United States, China, and the European Union.

In addition to cooperation in the health sector, ASEAN also carries out a strategy in the economic sector to prevent the negative impact of the Covid-19 pandemic on the economic sector of its member countries with trade policies that ensure that markets remain open. To ensure this, several agreements have been made, including:¹⁴

1. Joint statement by ASEAN economic ministers on strengthening ASEAN economic resilience in response to the Covid-19 pandemic on March 10, 2020;

2. Declaration of the Special ASEAN

¹² *Ibid.*

¹³ Purwanto, "Strategi ASEAN Merespon Dampak Covid-19", <https://kompaspedia.kompas.id/baca/paparan-topik/strategi-asean-merespons-dampak-covid-19>, (accessed on 21 August 2021)

¹⁴ *Ibid.*

Summit on Coronavirus Disease 2019 issued by the leaders of ASEAN countries on April 14, 2020, which in addition to declaring a commitment to keep the market open for trade and investment;

3. Joint statement by ASEAN agriculture and forestry ministers on minimizing food supply chain disruptions in the ASEAN region and ensuring markets remain open by 15 April 2020;
4. Hanoi Plan of Action agreed upon by the economic ministers of ASEAN countries on June 4, 2020. The work plan, in addition to being agreed on strengthening economic cooperation and supply chain connectivity, also includes steps for facilitating trade in essential goods such as food, medicine, and medical equipment. This work plan also contains an agreement on the facilitation of production and access to Covid-19 medicines and vaccines.

Regarding the protection of the rights of migrant workers, ASEAN has a mechanism that is fundamentally built from the ASEAN Charter itself. Although it is not clearly stated, the recognition of the existence of migrant workers cannot be separated from the goals of ASEAN, especially in Article 1 point 5 of the ASEAN Charter which reads: "Creating a single market and production base that is stable, prosperous, highly competitive, and economically integrated through effective facilitation for trade and investment, in which there is a free flow of goods, services, and investment; facilitating the movement of business actors, professional workers, talented workers and laborers; and a freer flow of capital." Although migrant workers are not explicitly stated, migrant workers in this context can be interpreted as one of the subjects of in-service traffic. Article 1 point 5 of the United Nations Charter can also be interpreted as aiming to facilitate the mobility of migrant workers widely because, in essence, migrant workers are not only migrant workers or informal workers, but also include professional and trained workers. In addition, it is in line with the objectives contained in Article 1

point 13 of the ASEAN Charter that ASEAN is people-oriented in which all levels of society are encouraged to participate in, and benefit from, the process of integration and development of the ASEAN community.

Within the framework of the ASEAN Political-Security Community (APSC), an ASEAN Declaration of Human Rights (ADHR) was agreed upon at the 21st ASEAN Summit in Phnom Penh, Cambodia on 18 November 2012. This ADHR is not legally binding but is a very important basic instrument for the enforcement and protection of human rights in the Southeast Asia region.¹⁵ In the ADHR General Principles, it is stated that: "The rights of women, children, the elderly, persons with disabilities, migrant workers, as well as vulnerable and marginalized groups are part of human rights and basic freedoms that are inherent, integrated and inseparable."

In addition to the ADHR, ASEAN also has "The Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN" which was made in Bandar Seri Begawan, Brunei Darussalam on October 9, 2013. women and children, including women migrant workers and children of migrant workers. At the same time, ASEAN has issued the "ASEAN Declaration on Strengthening Social Protection" which contains the principle of equitable access to social protection as a guarantee of basic human rights, one of which is for migrant workers. In addition to these instruments, of course, the protection of the rights of migrant workers in ASEAN is specifically regulated in the Cebu Declaration and ACPPRMW as a consensus on its implementation.

The availability of this mechanism does not mean that the protection of the rights of migrant workers in ASEAN or specifically in member countries has been running optimally. As with the implementation of other ASEAN legal instruments, the biggest challenge will come from the main principle that is firmly held by ASEAN, namely the non-

15 Bangun, "Perbandingan Sistem dan Mekanisme HAM Negara-Negara Anggota ASEAN: Tinjauan Konstitusi dan Kelembagaan" *Jurnal HAM*. 10 No. 1 (2019): 99-113. <http://dx.doi.org/10.30641/ham.2019.10.99-113>.

interference principle which was born from the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC). effectiveness of legal systems and mechanisms, including human rights law in ASEAN.¹⁶

The response of ASEAN member countries as reflected in their policies and strategies in dealing with the Covid-19 pandemic has significantly affected the fulfillment of the rights of migrant workers. In fact, according to studies by various world bodies, migrant workers themselves are one of the most vulnerable and at-risk groups during the Covid-19 pandemic. The busyness of member countries in dealing with the spread of Covid-19 in their domestic environment has caused ASEAN to slightly ignore the protection of migrant workers during the Covid-19 pandemic. Even when ASEAN then decided to take joint steps in handling the Covid-19 pandemic as in the Special ASEAN Summit on Covid-19 on April 14, 2020, it did not directly mention matters related to the conditions of migrant workers during the Covid-19 pandemic.

ASEAN's concrete steps in responding to the importance of protecting the rights of migrant workers during the new Covid-19 pandemic were seen through The 13th ASEAN Forum on Migrant Labor (AFML) which was held in Hanoi, Vietnam, and virtually on 10 and 12 November 2020 with the theme "Supporting Migrant Workers during the Pandemic for a Cohesive and Responsive ASEAN Community". The 13th AFML produced 12 (twelve) recommendations that were used as guidelines for ASEAN member countries to implement ACPPRMW, especially during the Covid-19 pandemic, namely:

1. Ensure access of all migrant workers in all sectors to health care, including Covid-19 testing and treatment, emergency assistance, measures, income support, social protection, and assistance for those who have lost their jobs, both from receiving countries and/or sender.
2. Improve safety and health standards in workplaces and employer-provided housing for migrant workers including hygiene, sanitary living conditions, and Personal Protective Equipment (PPE) as preventive measures to reduce migrant workers' exposure to Covid-19 infection.
3. Ensure decent wages for migrant workers and protect their wages during the pandemic through effective complaint mechanisms and support services. Accordingly, complaints about wages, demands, and labor disputes from migrant workers who have lost their jobs due to the pandemic should be investigated and dealt with as soon as possible.
4. Consider that costs associated with recruitment and transfer, including additional costs for Covid-19 testing, quarantine, and health insurance, should not be borne by migrant workers under general ILO principles and operational guidelines for proper recruitment. Migrant workers who have paid recruitment fees but have not been placed in the receiving country must receive a refund of the fees paid. For this reason, the regulation and supervision of migrant worker recruitment agencies must be strengthened.
5. Providing access for migrant workers, especially domestic migrant workers and dismissed migrant workers, to mental health support and services. Stigmatization, xenophobia, and discrimination against migrant workers, especially those infected with Covid-19, must be overcome, including through public campaigns.
6. Information on Covid-19 related to migration, employment, health, and safety policies should be accessible to migrant workers in a language understood by them and if possible electronically. The response to Covid-19 and other potential pandemics in the future should be included in occupational safety and

16 Bangun, "Pengaruh dari Kedaulatan Negara Terhadap Pelaksanaan Mekanisme Kerjasama ASEAN dalam Pemberantasan Terorisme" *Pandecta*. 14 No. 1 (2019): 1-12. <http://dx.doi.org/10.15294/pandecta.v14i1.1777>.

health policies in the workplace to ensure better protection for all workers including migrant workers.

7. Strengthen the repatriation and reintegration program of migrant workers with adequate resources. In doing so, special attention should be paid to migrant workers displaced and repatriated during the pandemic as well as to migrant workers in transit countries and points of entry during placement and return. If detention facilities are used as a last resort, safety and health standards must be ensured.
8. Integrate gender and rights-based responsive protection of migrant workers and their families into emergency preparedness plans.
9. Maximizing digital technology in the process of immigration documents and work documents from migrant workers and ensuring the accessibility of migrant workers to the process to reduce physical contact.
10. Improve the capacity of migrant workers who have lost their jobs due to the pandemic by increasing their access to available re-skilling and up-skilling programs, including digital literacy, public employment programs, job placement, and skills certification, taking into account the real needs of women migrant workers.
11. Supporting the restoration of the flow of labor migration in the new normal by strengthening and sharing available disaggregated data, while maintaining the confidentiality of personal information.
12. Improve cross-sectoral referral and collaboration mechanisms to strengthen the national policy framework for the protection of migrant workers during the pandemic. The protection of women migrant workers and victims of gender-based violence during the pandemic and their coordinated access to essential services must be strengthened. The increased risks of forced labor and human trafficking during the pandemic

and post-pandemic recovery must be addressed urgently.

The protection of the rights of migrant workers during the Covid-19 pandemic has also become a concern for the ASEAN Parliamentarians for Human Rights (APHR) cooperation forum for members of parliament from ASEAN member countries for human rights. In July 2021, when Covid-19 cases increased sharply in the Southeast Asia region, including migrant worker receiving countries such as Thailand and Malaysia, APHR urged the governments of these countries to take more inclusive measures to protect all people without discrimination, regardless of their migration status. APHR member from Indonesia, Mercy Barends said that the Covid-19 pandemic will never be overcome if the governments of these countries do not provide care for everyone in their territory including migrant workers and therefore the government must ensure that these migrant workers have access to equal to direct assistance, testing, treatment, and vaccination.¹⁷ Meanwhile, the Interim Executive Director of the APHR, as well as a former Philippine legislator, Teddy Baguilat, strongly criticized the policies of the Thai and Malaysian governments which were considered to have contributed to the increasing stigma and negative sentiment towards migrant workers in their region as a result of anti-migrant rhetoric which is nothing but the pretext of the government's failure to prevent the spread of Covid-19 in their respective countries.¹⁸

The slow response of ASEAN in paying attention to the protection of the rights of migrant workers during the Covid-19 pandemic is an illustration of the ineffective implementation of the system and mechanism for the protection of migrant workers in ASEAN. The governments of ASEAN member countries, both sending and receiving countries, have only a limited focus on the rights of migrant workers. ASEAN member countries are also late in promoting the ratification and imple-

¹⁷ ASEAN Parliamentarians for Human Rights, "To Tackle COVID-19 Outbreaks, ASEAN MPs Call for More Inclusive Policy for Migrant Workers". <https://aseanmp.org/tag/migrant-workers/>. (accessed on 7 September 2021).

¹⁸ *Ibid.*

mentation of ILO measures on workers' rights for their members, let alone migrant workers. Despite the adoption of the ACPPRMW in 2017, the governments of ASEAN member countries are less capable of dealing with migrant workers, especially in times of crisis.

D. Conclusion

Although it has a fairly complete system and mechanism for the protection of migrant workers, ASEAN's efforts to protect the rights of migrant workers, especially in the Covid-19 pandemic situation, are a bit late and have not been effective. The slow pace of ASEAN's efforts to protect migrant workers in the Covid-19 pandemic situation can be seen from the response that ASEAN has given to the Covid-19 pandemic itself. ASEAN is quite fast in responding to health and economic aspects as shown in the Declaration of the Special ASEAN Summit on Coronavirus Disease 2019 (Covid-19) in April 2020 and several other agreements. However, ASEAN's concrete steps regarding the protection of the rights of migrant workers as one of the most vulnerable and at-risk groups during the Covid-19 pandemic were only seen in The 13th ASEAN Forum on Migrant Labor (AFML) in November 2020. This forum itself produced 12 (twelve) recommendations that are used as guidelines for ASEAN member countries to implement ACPPRMW, especially during the Covid-19 pandemic. The slow response of ASEAN in paying attention to the protection of the rights of migrant workers during the Covid-19 pandemic, is an illustration of the ineffective implementation of the system and mechanism for the protection of migrant workers in ASEAN as well as the implementation of other ASEAN human rights legal instruments, due to the main principles held by ASEAN. firmly by ASEAN, namely the principle of non-interference (non-interference principle).

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