

### Appendix 13

#### **The Question of Impunity in Issues of Migrant Worker Human Rights**

In 2011, after more than 30 years sending migrant workers abroad, Indonesia still has not made significant progress in improving the system of substantive protection for migrant workers. More than 40 countries receive Indonesian labour. Based on data from the National Agency for Placement and Protection of Migrant Workers (BNP2TKI), there are currently 4.31 million Indonesian workers living abroad. Throughout 2010, 533,425 migrant workers were placed; 128,084 (24 percent) in the formal sector with the remaining 405,431 (76 percent) working in the informal sector, the majority of whom are domestic workers. Data from Bank Indonesia reveals that their contribution via remittances reached USD 5.03 billion. The report stated that the available data was not segregated by gender.

Migrant domestic workers experience violence through their varied identities as women, women workers, migrant workers and domestic workers. The problem begins at their place of origin. Many of them have been victims of domestic violence and polygamy and/or single parents and heads of households for their immediate and extended families. Problems from pre-departure to placement include: fraud and document falsification that erase a person's history; threats of capital punishment for victims of fraud who have limited knowledge of the legal system of the country of destination; entrapment in illegal migration leading to a series of deportations leaving them vulnerable to trafficking; unfit working conditions that put health and life at risk; ill treatment due to domestic work patterns involving complex relations and communication problems; and sexual violence that places the victim in a culpable position both under the legal system and during reintegration into the community. Other crucial problems during repatriation include: the possibility of becoming victims of violence such as rape causing unwanted pregnancy; and mental disorders. Many such problems are left up to their families to handle.

BNP2TKI data for the first semester of 2010 (January-July) reported 33,518 cases experienced by migrant workers, including 898 cases of sexual violence, 3,568 cases of falling ill due to unfit working conditions and 1,097 cases of maltreatment. Of all destination countries, the highest number of cases is found in Saudi Arabia (5,563 cases). In the Middle East, 15 of the 23 Indonesian citizens on death row are women. The leading cause is murder carried out in self-defence or due to acute depression as a result of working conditions. The most serious problem in Malaysia is the deportation of undocumented migrant workers (irregular migrant workers) and the threat of capital punishment faced by 177 Indonesian citizens, 11 of whom are women accused of being drug couriers. This is another form of vulnerability: in many cases migrant workers are tricked into these situations by people through whom their survival mechanism exists. They may also put their lives at risk due to economic pressures. Throughout this year, BNP2TKI recorded 59,821 cases including 4,341 cases of abuse, 2,979 cases of sexual harassment, 4,380 cases of problematic employers and 2,821 cases of unpaid wages. Meanwhile, a release issued by the Indonesian embassy in Kuala Lumpur stated that in 2010 there were 1,382 cases handled and resolved by the embassy, the most extreme of which were 18,533 cases of deportation. The embassy in Singapore stated that there were 2,536 cases experienced by migrant workers in that country comprising 2,362 cases of pay cuts and an inability to adapt to the culture, language and work type, 100 legal and criminal cases and 61 cases in which the employment contract was breached.

The specific vulnerability of women as migrant workers can also be seen in the many cases where women are made to be drug couriers and subjected to heavy sentences in Malaysia. Data from the Ministry of Foreign Affairs states that in Malaysia there are 177 Indonesian citizens under threat of the death penalty: 142 people involved in drug offences and 35 people involved in non-drug related criminal cases such as murder and rape. A breakdown of the cases shows: 72 level I death penalty cases; 54 cases where the prisoner has been sentenced to death and which are now in the appeals process; and 5 cases which have been executed and appealed to the Federal Court. With regards to the 35 criminal cases, 33 are still in the court process and 2 defendants have had their sentences lightened or have since been released. Analysing these cases from a gender perspective, there are 10 women accused of drug offences and one woman accused of murder. It was

learnt that in the Puncak Borneo Prison in Sarawak there are 14 female prisoners, 9 of which are migrant workers from Indonesia. 8 of these were immigration cases and one was a migrant worker who was exploited by her lover to sell stolen goods until she was caught and prosecuted.

### Komnas Perempuan's Monitoring Results

The tendency for impunity for perpetrators of violence and violations of human rights against migrant workers continues to happen. These perpetrators whether they be state actors or non-state actors (private agencies) have yet to be charged and convicted despite provisions on the punishment of perpetrators being set out in Law 39 of 2004 regarding the Placement and Protection of Migrant Workers Abroad ("the Migrant Worker Act"). This Act contains criminal punishment provisions for perpetrators of violence and violations against migrant workers. Article 102 of the Act prescribes sentences of between 2 and 10 years imprisonment and a fine of between Rp. 2 billion and **Rp. 5 million** when the following violations are committed:

1. Placing Indonesian citizens abroad as individual workers
2. Placing Indonesian migrant workers abroad without official permission
3. Placing migrant worker candidates in positions and jobs that are contrary to human values and decency.

The elements of crimes against migrant workers as set out in article 102 of the Migrant Worker Act are still very general and not sufficiently detailed. As a result, cases of violations and violence against migrant workers are not usually taken to court. Apart from the weakness of these laws, the verbose, costly and unjust legal process itself is a reason that many migrant worker cases do not reach the courts. This is the reason that perpetrators of violence and offences against migrant workers are not justly punished. From the results of monitoring carried out by Komnas Perempuan in West Nusa Tenggara on the human rights of migrant workers and mechanisms for handling victims of these violations, throughout 2009 and 2010 the Mataram District Court delivered verdicts in 19 cases involving migrant worker issues. The lightest sentence imposed was 1 year jail under Law No. 39 of 2004 whereas the heaviest sentence was 8 years jail and a fine of Rp. 120 million in lieu of 6 months jail under Law No. 21 of 2007 on Human Trafficking. Throughout 2009 and 2010, the Pontianak District Court delivered verdicts on 5 cases involving migrant worker issues, all of which were cases of human trafficking. The heaviest sentence was 8 years jail and a fine of Rp. 120 million; the lightest sentence was 2 years jail and a fine of Rp. 100 million. These decisions mainly applied Law No. 21 of 2007 regarding Human Trafficking.

Punishment towards private agencies has been stipulated in article 103 of the Migrant Worker Act and its regulations being the Regulations of the Minister of Manpower and Transmigration Per-05/Men/III/2005 regarding the provision of administrative sanctions and sanction procedures in the implementation of the placement and protection of Indonesian migrant workers abroad. Nevertheless, there are weaknesses in the elements of offences on which such sanctions are based such as in article 5 regarding written warnings when a private agent violates certain provisions:

- a. failing to contribute to the cost of dispute settlement when the deposit is not sufficient in accordance with article 17 paragraph (1) of Law No. 39 of 2004;
- b. failing to establish an overseas representative office in accordance with the provisions of Article 20 of Law No. 39 of 2004;
- c. failing to seek approval from the government agency responsible for labour regarding recruitment information in accordance with Article 34 paragraph (3) of Law No. 39 of 2004;
- d. failing to report each migrant placement agreement to the government agency responsible for labour in each regency/city in accordance with Article 54 paragraph (1) of Law No. 39 of 2004;
- e. failing to organise consent to extensions of employment contracts with consular representatives of the Republic of Indonesia in accordance with the provisions of Article 58 paragraph (1) and (2) of Law No. 39 of 2004;

- f. failing to report the departure of each prospective migrant worker to consular representatives of the Republic of Indonesia in accordance with Article 67 paragraph (2) of Law No. 39 of 2004;
- g. failing to report the arrival of prospective migrant workers who will work with individual employers to consular representatives of the Republic of Indonesia in accordance with Article 71 paragraph (2) of Law No. 39 of 2004; or
- h. failing to report the return of migrant workers who worked with individual employers to consular representatives of the Republic of Indonesia in accordance with Article 74 paragraph (2) of Law No. 39 of 2004.

Private agencies face suspension for offences including:

- a. assigning or transferring a recruitment licence to another party pursuant to the provisions of Article 33 of Law No. 39 of 2004;
- b. failing to include prospective migrant workers in the PAP in accordance with Article 69 paragraph (1) of Law No. 39 of 2004;
- c. failing to place migrant workers in accordance with their employment contracts pursuant to Article 73 paragraph (2) of Law No. 39 of 2004;
- d. failing to make arrangements for migrant workers who die pursuant to Article 73 paragraph (2) of Law No. 39 of 2004;
- e. failure to provide protection in accordance with the placement agreement pursuant to the provisions of Article 82 of Law No. 39 of 2004.

Sanctions can be imposed in the form of revocation of recruitment and placement licences when private agencies:

- a. no longer fulfil the conditions of being a private agent pursuant to the provisions of Article 18 paragraph (1)(a) of Law No. 39 of 2004;
- b. place candidates in positions and workplaces that are contrary to humanitarian values and morals and laws and regulations both in Indonesia and the destination country or place candidates in destination countries declared closed to the placement of migrant workers in accordance with Article 30 of Law No. 39 of 2004;
- c. conduct recruiting without a licence pursuant to Article 32 paragraph (1) of Law No. 39 of 2004;
- d. fail to dispatch candidates overseas who have a complete set of legal documents in accordance with the placement agreement pursuant to Article 67 paragraph (1) of Law No. 39 of 2004;
- e. burden the candidate with a placement charge that exceeds the cost component in accordance with Article 76 paragraph (1) of Law No. 39 of 2004;
- f. dispatch candidates/workers who have not attended the development and protection program in accordance with the provisions of Article 83 of Law No. 39 of 2004.

Prior to handing down sanctions on placement agencies as set out in Article 25 of Law No. 39 of 2004 regarding Placement Agencies, the government has an obligation to review, assess and list all registered placement agencies every three months. In practice this does not happen regularly. The last official list of placement agencies circulated to the community was the results of the review released in 2010. Since the list released in 2007, publications regarding sanctions against placement agencies have been muddied by the release of ministerial statements in the media regarding issues such as the revocation of the licences of the following 22 placement agencies in 2011: PT Fim Anugerah, PT Tulus Widodo Putra, PT Putri Bersaudara, PT Nour Mansour Abadi, PT Ba-rokah Bersaudara, PT Zaya Abadi Ekasogi, PT Jasa Makmur Sejahtera, PT Maju Puta De-wangga, PT Irfan Jaya Saputra, PT Gabila Wadi Amed, dan PT Muara Mas Global, PT Assalam Karya Manunggal Putra, PT Bafa Anugerah Persada, PT Permata Gobel Sejahtera, PT Amrita Mahesa Prima, PT Multi Sukses Putranto, PT Dwi Insan Setia Utama, PT Bintang Lima, PT Prime Global Manpower, PT Bin Hamoud Safarindo, PT Asia Primadona Pratama and PT Assalam Bersaudara. These efforts have not been followed by the preparation of a more comprehensive list and wider dissemination of information to the public regarding placement agencies. As such, the public has no way of knowing whether a placement agency is official or not.

Another problem that allows impunity amongst placement agencies to persist is the fact that the violations that usually result in sanctions against placement agencies are often due to administrative violations such as failure to pay a Rp. 500,000,000 deposit to the government, violations regarding work training and housing. Violations such as physical, psychological and sexual violence are not major considerations when meting out sanctions against placement agents.

### The Sumiati Case

The Sumiati case was one of the most shocking cases of abuse experienced by a migrant worker. In 2010, 23-year old Sumiati binti Salan Mustapa, an Indonesian migrant worker from Bima in West Nusa Tenggara who was working in Saudi Arabia experienced violence, abuse and exploitation by her employer. As a result of the violence, abuse and exploitation, Sumiati suffered severe physical injuries on her face and body due to being cut, beaten and burnt. Her injuries included broken bones and a lung disorder.

The Indonesian government provided support and legal assistance to Sumiati during the trial process in Medina. During the initial trial, the judge sentenced her employer to 3 years in prison. The prosecution then filed an appeal. In statements released by the Ministry of Foreign Affairs, in the midst of civil and criminal proceedings, the lawyer of the defendant (Sumiati's employer) applied for bail which was granted by the local judge. The judge's reason for granting bail was because the judge was still awaiting the decision of the civil court before processing the criminal matter.

During the appeal, the Appeals Court in Mecca ordered that the Sumiati case be retried because it was held that there were problems in the investigation and inquiry procedure. During the new trial over Sumiati's torture by her employer in Medina on 11 April 2011, the judge freed the defendant. Sumiati's employer denied the torture, violence and exploitation against Sumiati. It was held that Sumiati could not demonstrate concrete proof of the torture. The defendant actually accused Sumiati of inflicting the injuries on her own body. As a result, Sumiati's employer is now free of all charges.

### Additional notes: Regarding the Draft Bill on Domestic Worker Protection

On 18 June 2011 during the 100<sup>th</sup> session of the International Labour Organization (ILO), Convention 189 on Decent Work for Domestic Workers was adopted as the minimal standard for the recognition and protection of domestic workers. Prior to adopting the convention, initiatives to advocate for policies for the recognition and protection of domestic workers already existed. In 2011, the Bill on Domestic Worker Protection was already included in the national legislation list of programs of the Indonesian parliament. This was an initiative of parliament supported by community organisations, NGOs and trade unions. Nevertheless, in its development, efforts to guarantee the recognition and protection of migrant workers through national laws still face many obstacles. Challenges include:

1. The cultural and social background of society that still considers domestic work as women's work which is not economically valuable and does not require special skills.
2. Consequently, there must be recognition that domestic work is work that requires skills and contributes to ongoing public life in terms of politics, services, and socio-cultural practices outside the home.
3. Due to the lack of recognition of domestic work, guaranteed normative rights such as wage standards, work hours, holidays and leave, freedom of association and other protections are not provided.