Indonesian Government Intervention in the Management of Indonesian Migrant Workers' Remittances: Is It Constitutionally Justified?

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The latest law on the protection of Indonesian Migrant Workers (IMWs), Law Number 18 of 2017 (Law 18/2017), obliges the Indonesian government to conduct economic protection through remittance management by involving certain institutions. Nonetheless, there is a lack of clarity about how this intervention would occur. The private nature of migrant workers' remittances leads to the question of constitutional justification essential for the government's authority to intervene – particularly in Indonesia as a constitutional state in the form of a welfare state – besides skepticism concerning the applicability of the norm. This paper emphasizes the constitutional silence with regard to state intervention in human resources allocation, as it makes the deployment of Indonesian workers abroad constitutionally groundless. Consequently, the discretion infiltrates the remittance, a component of national income that is essentially a private transfer in which the management should be fully controlled by the families. Through review of the scientific literature and legal document analysis, this research found that the inclusion of a state intervention provision on human resources into the 1945 Constitution is still required.

Keywords: Constitutional Justification; Government Intervention; Indonesia; Migrant Workers; Remittance Management

INTRODUCTION

In the Indonesian context, migrant workers who originated from the state have been labelled as 'the hero[s] of foreign exchange' (*pahlawan devisa)* for a long time. However, the demand for their protection has been – ironically – a tough and lengthy struggle (see Dewanto, 2020; Eddyono et al., 2020; Setyawati, 2013). Law No. 18 of 2017 on the Protection of Indonesian Migrant Workers (Law 18/2017) eventually emphasizes the protection aspect, after 47 years of frequent changes of statutory laws that mainly emphasized the placement aspect of

official Indonesian Migrant Workers (IMWs). This relatively significant shift deserves appreciation, but there is something perturbing about one of the protection forms introduced by the law.

This newest law imposes an obligation and gives authority for the central and local governments to conduct economic protection towards IMWs through remittance management by involving banks or non-bank financial institutions within the country and the placement country.[1] This measure is – by the article formulation – meant to be separated from financial and entrepreneurship education.[2] The accessible statutory laws show that the government intervention on IMWs' remittances has actually occurred since 1983 in capricious forms. Examples include the mandatory requirement for IMWs deployed to Saudi Arabia to set aside at least 50% of their income to send to their families through the government's bank;[3] the requirement to attach a savings book for remittance in order to obtain a migrant worker identity card;[4] the obligation to join a remittance program;[5] and remittance monitoring.[6] However, the exact measure of remittance management intervention according to Law 18/2017 remains questionable.

The inclusion of remittance management within the Law 18/2017 seems to show a disparate nuance – compared to the previous formulations of government intervention – as it is stated in the framework of economic protection, but there are several considerations in regards to the norm applicability. First, neither further regulation in another article nor any explanation in the elucidation is provided within this law.[7]

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1 Art. 35 of Law 18/2017

2 Art. 35 of Law 18/2017 reads: "The central and local governments, in accordance with their authorities, are obliged to conduct economic protection for Indonesian Migrant Workers and/or the Candidate through: a. remittance management by involving banks or non-bank financial institutions within the state and the placement state; b. financial education, so as IMWs and their families can manage their remittances result; and c. entrepreneurship education." By dividing this economic protection into three different points, the government intervention on IMWs' remittances is placed as a clearly distinctive measure separated from both financial and entrepreneurship education. This is also affirmed in Art. 28 para. (1) of the Government Regulation No. 59 of 2021 on the Implementation of Indonesian Migrant Workers Protection (Government Regulation 59/2021) that also separates remittance management from financial and entrepreneurship education.

3 Art. 7 para. (1) of the Ministry of Manpower Decree No. PER 149/MEN/1983 on the Procedures for Implementing the Deployment of Indonesian Workers to Saudi Arabia

4 Art. 50 para. (2) of the Ministry of Manpower and Transmigration Decree No. KEP-104A/MEN/2002 on Indonesian Workers Placement Abroad

5 Art. 33 of the Ministry of Manpower Decree No. PER-01/MEN/1991 on Inter-State Inter-Work, Art. 34 of the Ministry of Manpower Regulation No. PER-02/MEN/1994 on Workers Placement Inside and Outside the State and Art. 47 para. (1) of the Ministry of Manpower Decree No. KEP-44/MEN/1994 on the Implementation Guidelines of Workers Placement Inside and Outside the State

6 Art. 6 para. (4) *jo*. Art. 5 para. (1) point d of the Head of National Authority for the Placement and Protection of Indonesian Overseas Workers Regulation (*BNP2TKI*) No. 10 of 2016 on the Organization and Work Procedures of the Technical Implementation Unit for Indonesian Workers Placement and Protection assigns the Protection and Empowerment Section under the Agency for the Service, Placement and Protection of Indonesian Overseas Workers (*BP3TKI*) to monitor IMWs' remittances, while Art. 8 para. (4) *jo*. Art. 7 para. (1) point d assigns the Protection and Empowerment Officer under *LP3TKI* to do the monitoring.

7 In Indonesian statutory law design – according to the Attachment II of Law No. 12 of 2011 on the Statutory Laws Formation as amended by Law No. 15 of 2019 – elucidation functions as the statutory law-makers' official interpretation of certain norms, and is a means of clarifying the norms contained in the statutory laws' body.

Second, there are some problems with the implementing regulation. The Law 18/2017 has mandated further regulation on economic protection to government regulation, which ought to be stipulated at the latest two years after the promulgation of the law.[8] However, economic protection is not the first priority in the implementing regulation, as the very first government regulation established under this law solely focuses on placement procedure.[9] Now that there is finally a government regulation reaching the economic protection issue, the provision leads to inclusive financial policy – saving, transfer and access to capital – as an option, leaving a space for another measure that is possibly unpredictable.[10] Third, most authorities in the state of origin seem confident that migrant workers' remittances impact has been 100% positive, yet this actually depends on the specific circumstances under which such migration occurs, as well as the general political and economic conditions within the state (International Labour Office, 2010, pp. 7, 25, 42-43). Fourth, – and most importantly – government authorities over IMWs' remittances need to be clarified, as migrant workers' remittances are essentially a private household transfer (International Labour Office, 2010, p. 25). Thus, the state is just bypassed as a consequence of the fact that the remittance receivers are within the jurisdiction of the state.

The private nature of migrant workers' remittances appears to be the main reason behind the skepticism concerning such norm applicability – leading to the difficulty in formulating any implementation step – and there is a more basic issue involved when juxtaposed with Indonesia's character as a law state: *the constitutionality of such government intervention*. In the context of Indonesia as a law state with the type of welfare state, the state has a very large discretion in regulating the lives of its people. Nonetheless, this ought to be followed by the constitutionality of the measures taken. A strong constitutional justification is undoubtedly required as the government intervention on IMWs' remittances has shown that a private law matter is drawn into the public law arena.

This paper discusses the intervention of a welfare state government towards migrant workers' remittances, wherein the state acts as the migrant workers' state of origin in the context of international labor migration. It aims to introduce migrant workers' remittances as a particular object of discussion in constitutional and administrative laws, yet contribute to migrant workers' remittances studies by taking into account the perspective of constitutional and administrative laws, as academic

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8 Art. 36 in conjunction with Art. 90 of Law 18/2017.

9 Amidst various substances mandated to the government regulation – during- and after-work protection procedures; legal, social and economic protection; one-stop integrated services; central and local governments' duties and responsibilities; IMW placement procedures by the non-ministerial government institutions in charge as the integrated IMW protection and services policy executor; IMW Placement Company's duties and responsibilities; crew and fishery sailors' protection and placement; coaching to institutions related to IMW placement and protection; supervision to IMW placement and protection implementation – procedures of IMW placement by such non-ministerial government institutions are the only matter followed up through the stipulation of Government Regulation No. 10 of 2020 on the Placement Procedures of Indonesian Migrant Workers by Indonesian Migrant Workers Protection Agency, and this is also overdue.

10 Art. 28 para. (2) of Government Regulation 59/2021 reads: "The implementation of economic protection as in paragraph (1) may be conducted through inclusive financial policy in accordance with the statutory laws."

research on migrant workers' remittances mostly adopts economic development and sociological perspectives,[11] and when the focus is oriented towards policy, the orientation is directed towards maximizing the remittance utilization (see Carling, 2004; O'Neill, 2001). In the Indonesian context, existing research on IMWs' remittances management merely describes the remittance management from the experience of IMWs' families (Yuniarto, 2015, pp. 81-83).

This doctrinal legal research with a more interdisciplinary direction is a positive-law-oriented-research seeking for the justification of the Indonesian government's intervention in the management of IMWs' remittances. The law-in-context approach is used to understand the law. Research materials used in this study comprise of, first, normative resources mostly in the form of statutory laws relevant to IMWs' protection, fund transfer, state finance, and national economic and national development plans; second, authoritative sources in the form of scholarly legal writing, mostly concerning the role of government in a welfare state; third, additional resources consisting of some documents – such as the *Balance of Payments and International Investment Position Manual*, *Neraca Pembayaran Indonesia* (Indonesia's Balance of Payment, NPI), and so forth – as well as non-legal writings. These research materials were analyzed qualitatively.

The existence of law in regulating remittances is important because the remittance mechanism is quite complex and requires legal certainty. Fund transfers that are carried out require a different system and are difficult to track compared to simply transferring funds between domestic banks. It is the cross-border transfer of funds that is feared to become a loophole in the breach where this service can be misused, such as financing terrorism, money laundering, or crimes committed between countries ("A Draft Framework for", 2021; Engle, 2004, p. 39). In addition, based on the facts on the ground, migrant workers tend to look for the simplest and cheapest way of sending remittances; if their funds are not channeled by competent and appropriate institutions, the possibility of misuse of funds, as mentioned above, will be even greater. Therefore, Indonesian banking law, with its characteristics as administrative penal law, should accommodate a definite administrative mechanism for regulating remittances in order to prevent such cases.

The Indonesian government recognizes the importance of the existence of a law in the midst of complicated and crime-prone remittances. Therefore, the government issued several regulations related to the protection of migrant workers, especially regarding their remittances. Migrant workers, as the ones who receive work and wages outside the territory of Indonesia, should not necessarily lose their rights as Indonesian citizens. One of these is the right regulated in Art. 28D para. (2) of the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution), which regulates the right of everyone to work and to receive fair and proper compensation and treatment in work relations. However, the remuneration obtained by migrant

11 Much research from an economic development perspective can be found on a national scale (see Adams, 1991; Campbell, 2008; Garip, 2012; Gerber & Torosyan, 2013; Knowles & Anker, 1981; Oberai & Singh, 1980), but there are also studies with a broader scope (Barham & Boucher, 1998; Djajić, 1986; Taylor, 1999). From the sociological perspective, discussions are varied, ranging from the motivations to remit (Lucas & Stark, 1985) to the actors involved in the remittance (Dewi & Yazid, 2017), and to the remittance-use (Chandravarkar, 1980).

workers outside Indonesia who then enter the territory of Indonesia is known as remittances, as discussed above. The remittance itself does not have a clear position in the constitution, but the regulation is found in Law 18/2017 without any authentic definition. The existing law is one of the administrative penal laws that regulates several criminal provisions in it, but its main focus is not on eradicating criminal acts. That existing law focuses on administrative legal matters relating to the protection of migrant workers. Art. 35 *a quo* states that the central government and regional governments, in accordance with their respective authorities, have an obligation to provide economic protection for Prospective Indonesian Migrant Workers and/or Indonesian Migrant Workers, one of which is through the management of remittances by involving domestic banking institutions or non-bank financial institutions and the destination country of placement.

REMITTANCE AND THE REMITTANCES OF MIGRANT WORKERS: THE ABSENCE OF AUTHENTIC DEFINITION

There are distinctions in what refers to the definitions of migrant workers' remittances and remittance in general. Bouvier's Law Dictionary (n.d.) defines remittance as the money sent by one merchant to another, either in specie, bill of exchange, draft, or otherwise. Black's Law Dictionary provides a broader definition by defining remittance not only as (1) a sum of money sent to another as payment for goods or services, or (2) an instrument – such as a check – used for sending money, but also (3) the action or process of sending money to another person or place (Garner & Black, 2009, p. 1409). Meanwhile, Engle (2004, p. 38) defines migrant remittance specifically in terms of migrant workers, as money and goods generated during work abroad and sent home. Ratha (2020) perceives workers' or migrants' remittances similarly, as part of migrants' earnings in the form of either cash or goods to support their families. The International Monetary Fund (IMF) also implies that remittances assume the form of cash or credit transfers and transfers involving transfers of goods (Statistical Office of the European Communities & International Monetary Fund, 2009, p. 6). Remittances are, indeed, sent by the majority of migrants, wherein all types of migrants remit funds, and the best understood form of remittance is hence formal money transfer (Engle, 2004, pp. 38-40). However, remittance can also be transferred in the form of physical or social assets – items of health care and basic needs, consumer goods, jewelry, livestock, and items that can be used for marriage dowry. To summarize, (1) remittance does not pay attention to who sends the money, contrary to migrant workers' remittances wherein migrant workers are obviously the subject; and (2) remittance's object is money or the instrument used for sending money, while goods – besides money – can also be the object of migrant workers' remittances.

Amidst these distinctions, there is an absence of authentic definitions in the Indonesian context as no statutory laws define remittance and migrant workers' remittances. The central bank thus discerns remittance in terms of migrant workers as part of IMWs' earnings – either money or goods – sent to Indonesia and/or brought back home by the concerned IMWs (Yudanto et al., 2009, p. 3), while perceiving remittance as part of fund transfer that is generally conducted without underlying economic obligation fulfilment, having low value, and carried out between

individuals (Bank Indonesia, n.d.). Fund transfer itself is authentically defined as a series of activities beginning with the originator's order to transfer certain amounts of funds to the beneficiary mentioned in the fund transfer order and ending with the reception of such fund by the beneficiary.[12]

Consequently, Art. 35 point a of Law 18/2017 mentioning "banks or non-bank financial institutions" in the remittance management indicates a simplification of IMWs' remittances under the term remittance, wherein remittances are considered part of fund transfer. This is because banks and non-bank financial institutions obviously function to mobilize and to channel funds,[13] while fund refers to money, overdraft, or credit facility.[14] In other words, the simplification of migrant workers' remittances through a narrow, formal money transfer-oriented formulation has neglected the non-formal money transfer and transfer of goods as the other forms of migrant workers' remittances. The postal network – as one of the formal channels used by migrant workers to remit (Engle, 2004, pp. 38-39) – is not involved accordingly, as the services provided also cover the transfer of goods besides money transfers ("About UPU", n.d.; "Postal and Telecommunications Services Sector", n.d.). Meanwhile, the postal network is also a popular remittance channel used by IMWs (Dewi & Yazid, 2017, pp. 216-218).

MIGRANT WORKERS' REMITTANCES: A COMPONENT OF NATIONAL INCOME INFILTRATED BY THE GOVERNMENT

As a private transfer, migrant workers' remittances are a component of secondary income in the balance of payment[15] that can be included in the national income calculation (Ou, 1946, pp. 294-296). There are different ideas reflecting what is meant by national income (see Barna, 1942; Clark, 1948; Kuznets, 1940) as well as different methods of measurement, such as product, income, expenditure, and value-added methods. Neither national income nor other terminologies equal to it are available

12 This authentic definition is found in Art. 1 point 1 of Law No. 3 of 2011 on Fund Transfer (Law 3/2011) and Art. 1 point 1 of Bank Indonesia Regulation No. 14/23/PBI/2012 on Fund Transfer.

13 This is based on (1) the authentic definition of bank in Art. 1 point 1 of Law No. 7 of 1992 on Banking in which these functions are defined, although the authentic definition has been slightly changed by Law No. 10 of 1998 on the Amendment of Law No. 7 of 1992 on Banking; and on (2) some regulations referring non-bank financial institutions to – among others – insurance companies, pension funds, and financing institutions.

14 Art. 1 point 4 of Law 3/2011 – similarly to Art. 1 point 4 of Bank Indonesia Regulation No. 14/23/PBI/2012 on Fund Transfer – defines fund as (1) cash money turned over by Sender to the Receiving Provider; (2) money saved in Sender's Account on the Receiving Provider; (3) money saved in Receiving Provider's Account on another Receiving Provider; (4) money saved in Beneficiary's Account on the Final Receiving Provider; (5) money saved in Receiving Provider's Account allocated for the purposes of the Beneficiary who does not have Account on such Provider; and/or (6) overdraft or credit facility given by Provider to the Sender.

15 See International Monetary Fund, 2009, p. 210. A relatively minor change is made by the *Balance of Payments and International Investment Position Manual*, sixth edition (*BPM6*) – the current basis for Indonesian Balance of Payment arrangement – by replacing 'workers' remittances' known in the fifth edition of the *Balance of Payments Manual* (*BPM5*) with a broader terminology of 'personal transfer'. Nonetheless, the *BPM6* still acknowledges the definition of workers' remittances, and personal transfers – which includes workers' remittances – remain under the secondary income account.

in Indonesian statutory laws. In the 1945 Constitution, which consists of a specific chapter on national economic and social welfare besides financial matters, some aspects of state finance, including the state budget, tax and other levies, central-local governments' financial relations, and audit boards; currency; central bank; principles underlying national economics; state control over land, water, and natural resources as well as important sectors of production are encompassed.[16] Some terminologies – which might seem similar – existing in the statutory laws are state finance, state revenue, state income, and state ownership,[17] but none of them are comparable to national income since both terminologies count heavily on the state as the right holder and/or duty bearer.

By giving a space for the government in the remittance management, Law 18/2017 seems to attract migrant workers' remittances to an area in which the state has an active role, while such remittances are a private transfer in which the management is – logically – fully controlled by the families. The Indonesian government's obligation to give an economic protection towards IMWs through remittance management by involving banks or non-bank financial institutions within the state and the placement state – imposed by Law 18/2017 – triggers a question on whether such remittance management can really be conducted and how this will be conducted because neither further provisions nor explanations are provided in the law, while the implementing regulation is also problematic. Given the unprecise implementing regulation that makes the form of so-called 'economic protection' unclear, the following two sections will show that IMWs' remittance is an area infiltrated by the government beginning from a constitutionally groundless measure.

DEPLOYMENT OF INDONESIAN WORKERS ABROAD WITHIN THE ABSENCE OF A CONSTITUTIONAL BASIS FOR STATE INTERVENTION ON HUMAN RESOURCES ALLOCATION

Economic provisions in the 1945 Constitution have been criticized for being insufficient, including the state's intervention in economic resources allocation that merely covers natural resources and important sectors of production.[18] As the activity

16 See the Arts. 18A para. (2); 23 para. (1); 23A; 23B; 23D; 33; and the Chapter VIIIA specifically focused on the Audit Board. The principles underlying national economics are explicitly mentioned, and the production sectors necessary for the state as well as natural resources are explicitly stated as 'under the powers by state' (*dikuasai oleh negara*). The other matters might not be treated similarly, but those are mandated to legislation.

17 See Art. 1 points 1, 9 and 13 as well as Art. 2 of Law No. 17 of 2003 on State Finance; General Elucidation of Law No. 31 of 1999 on the Corruption Eradication; Ministry of Finance Decree No. KEP-225/MK/V/4/1971 on Implementing Guidelines for the Inventory of State-Owned Property/State Assets; Ministry of Finance Decree No. 01/KM.12/2001 on Guidelines for the Capitalization of State-Owned Property/State Assets in the Government Accounting System; and Law No. 15 of 2004 on the Examination of State Finance Management and Responsibility. See also "Beda Keuangan Negara" (2014).

18 As documented by the Mahkamah Konstitusi Indonesia (Constitutional Court of the Republic of Indonesia) (2010b, pp. 534-536), Bambang Soedibyo – in his capacity as the Expert Team member in the third amendment of the 1945 Constitution – criticized the economic provision within the 1945 Constitution for being insufficient as there are four areas of economic technocracy necessary to be regulated while the regulation is still very minimal. While fiscal matters – the management of state finance and assets – are only half provided with a constitutional basis, the monetary matters are not even regulated; market

producing IMWs' remittances, IMWs' deployment abroad is actually a form of government intervention in human resources – a component of economic resources clearly distinct from natural resources and irrelevant to the interpretation of important sectors of production[19] – lacking a constitutional basis.

However, in response to the high demand for manual and domestic workers in the Middle East in 1970, the Indonesian government declared that it "may agree on exporting Indonesian workers" and even promoted this as a national development program (Dewanto, 2020, p. 509). The number of workers to be deployed abroad was explicitly targeted in the *Rencana Pembangunan Lima Tahun* (Five-Year Development Plan, REPELITA) era, starting from 100,000 workers during the REPELITA III;[20] 225,000 workers during REPELITA IV;[21] 500,000 workers during REPELITA V;[22] and at least 1,250,000 workers during REPELITA VI.[23] Since REPELITA IV[24], a specific

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institution as well as state intervention on this are also unregulated, and market management and state intervention on economic resources allocation have no constitutional basis at all. These are still relevant, as the Chapter XIV – National Economy and Social Welfare's alterations brought by the fourth amendment of the constitution do not answer these criticisms. Soedibyo even argued that state intervention on economic resources allocation is totally constitutionally groundless (Mahkamah Konstitusi Republik Indonesia, 2010b, p. 536). However, some constitutional bases can actually be seen in Art. 33 para. (2) of the 1945 Constitution addressing state intervention in important sectors of production and in para. (3) addressing state intervention in natural resources.

19 There is still no clarity about what is meant by important sectors of production, but human resources are a production factor rather than a production sector. During the constitution amendment process, Hendi Tjaswadi, in his capacity as the spokesman of the Indonesian National Army faction in the second amendment of the 1945 Constitution, referred "the control by the state" to state companies, by mentioning the State Electricity Company and Telkom – the state-owned information and communications technology enterprise and telecommunications network in Indonesia – as an example (Mahkamah Konstitusi Republik Indonesia, 2010b, pp. 507-508). This was also the concern of the Constitutional Court in 2003 (Constitutional Court Decision No. 001-021-022/PUU-I/2003, p. 331), but this is also irrelevant to human resources, as the context was on whether electricity is a production sector important to the state and affecting the lives of many people.

20 See the Attachment to Presidential Decree No. 7 of 1979 on the Third Five-Year Development Plan (REPELITA lll) 1979/80-1983/84s (Presidential Decree 7/1979), Chapter V on the Expansion of Employment Opportunity, p. 292.

21 Attachment to Presidential Decree No. 21 of 1984 on the Fourth Five-year Development Plan (REPELITA IV) 1984/85-1988/89 (Presidential Decree 21/1984), pp. 341-345, gives more detail as 35.000 workers were planned to be deployed in 1984/1985; 40.000 in 1985/1986; 45.000 in 1986/1987; 50.000 in 1987/1988; and 55.000 in 1988/1989.

22 Attachment to Presidential Decree No. 13 of 1989 on the Fifth Five-Year Development Plan (REPELITA V) 1989/90-1993/94 (Presidential Decree 13/1989), pp. 397-398, details that 50.000 workers were planned to be deployed in 1989/1990; 75.000 in 1990/1991; 100.000 in 1991/1992; 125.000 in 1992/1993; and 150.000 in 1993/1994.

23 See the Attachment to Presidential Decree No. 17 of 1994 on the Sixth Five-Year Development Plan (REPELITA Vl) 1994/94-1998/99 (Presidential Decree 17/1994), Chapter X on Labor and the Expansion of Employment Opportunities, pp. 118, 130.

24 See the Attachment to Presidential Decree 21/1984 and the Attachment to Presidential Decree 13/1989. The amount recorded in REPELITA IV are USD 4 million in 1978/1979; USD 15 million in 1979/1980; USD 27 million in 1980/1981; USD 39 million in 1981/1982; USD 55 million in 1982/1983; and USD 48 million in 1983/1984, with an average growth rate of 64,4%. REPELITA V records migrant workers' remittances to the amount of USD 46 million in 1983/1984; USD 56 million in 1984/1985; USD 64 million in 1985/1986; USD 75 million in 1986/1987; USD 90 million in 1987/1988; and USD 110 million in 1988/1989, with an average growth rate of 19,0%.

chapter on the balance of payment records of migrant workers' remittance as a component of net factor income included workers deployment as a means to increase foreign exchange income sourced from remittance[25] and estimated the amount of foreign exchange income from IMWs.[26] The *Rencana Pembangunan Jangka Menengah Nasional* (National Medium Term Development Plan, RPJMN) still realizes the need of opportunities to work overseas due to the huge amount of unemployment within the state, but the number of IMWs to be deployed is no longer visible.[27] The number of IMWs' remittances is also no longer clearly stated as a balance of payment component, but its contribution to foreign exchange income is still acknowledged.[28]

LAW-BASED STATE, CONSTITUTIONAL SUPREMACY, AND SILENCE IN THE 1945 CONSTITUTION AS AN ECONOMIC CONSTITUTION

The dynamic of the 1945 Constitution unequivocally shows that Indonesia is a law-based state. The pre-amended version states that Indonesia is based on law by referring to *rechtsstaat* in opposite to *machtstaat*, but this statement is only placed in the elucidation. The desire to elevate this position has been around since the discussion of the first amendment of the 1945 Constitution (Mahkamah Konstitusi Republik Indonesia, 2010a, pp. 389-477), until the third amendment finally embraced it.[29] The position is now more assertive, but there is another concern as *rechtsstaat* is no longer mentioned. What the best formula would be was obviously the main object of discussion, as it revolved around a number of options, including the "law-based state" (*negara berdasar atas hukum*); "law state" (*negara hukum*); "law state upholding human rights" (*negara hukum yang menjunjung tinggi hak asasi manusia*); and "democratic law state" (*negara hukum yang demokratis*). To mention or not to mention the

25 See the attachments to Presidential Decree 21/1984, 235, 239; Presidential Decree 13/1989, 295; and Presidential Decree 17/1994, 392. REPELITA IV emphasizes the deployment to and remittance from the Middle East. REPELITA V still acknowledges the potency of Indonesian migrant workers' remittances as a source of foreign exchange income. REPELITA IV includes Indonesian migrant workers' remittance as a means to increase foreign exchange income from the services sector to control the deficit in the services sector.

26 REPELITA IV estimates that the remittance will reach USD 48 million in 1983/1984; USD 200 million in 1984/1985; USD 348 million in 1985/1986; USD 530 million in 1986/1987; USD 805 million in 1987/1988; and USD 1230 million in 1988/1999, with an average growth rate of 91,3%. REPELITA V estimates that the remittance will reach USD 110 million in 1988/1989; USD 126 million in 1989/1990; USD 143 million in 1990/1991; USD 157 million in 1991/1992; USD 181 million in 1992/1993; and USD 218 million in 1993/1994, with an average growth rate of 14,7%. REPELITA VI estimates that the remittances are increasing with an average of 26,8% per year from USD 291 million in 1993/1994 to USD 953 million in 1998/1999. REPELITA VI estimates that foreign exchange income from the deployment of Indonesian migrant workers is USD 3,0 billion.

27 See the Attachment to Presidential Regulation 7/2005, Part IV.23, p. 3; the Attachment to Presidential Regulation 5/2010, p. II.3.34.; and the Attachment to Presidential Regulation 2/2015, pp. 3-59.

28 See the Attachment to Presidential Regulation 7/2005, Part V.34, p. 7; the Attachment to Presidential Regulation 2/2015, pp. 3-60, 4-13; and the Attachment to Presidential Regulation 18/2020, pp. II.6-II.7.

29 Art. 1 para. (3) of the 1945 Constitution exactly reads, "The State of Indonesia is a law state" (*Negara Indonesia adalah negara hukum*). Mahkamah Konstitusi Republik Indonesia (2010a, pp. 389-477) has documented that the debate on what the best formulation would be was driven by, among others, a concern with the world's history, which shows that many states are law states and yet dominated by certain powers – including Indonesia's experience during the New Order regime. However, the notion behind this final formula is to elevate *rechtsstaat*.

word *rechtsstaat* was not specifically addressed. There is no trenchant clue in the discussion, but such a final formula seems to avoid a rigidly bound concept as the 'rule of law' or *rechtsstaat*.[30] Indeed, both *rechtsstaat* and the rule of law investigate what it means for a person to be governed by law as opposed to being subject to the dictates of the powerful, and the narrowest understanding of each concept will require discretionary powers accorded to officials constrained by law (Barber et al., 2003, pp. 444-445). In spite of the fact that these concepts are actually distinctive,[31] these similarities were presumably a matter of high concern during the discussion of the amendment, as the intention to elevate the idea of a law-based state was to explicitly ensure commitment to the supremacy of law.

Such an idea is closely related to constitutionalism that essentially focuses on the regulation and limitation of power, or commonly known as the limited government principle (Asshiddiqie, 2011, pp. 20-23). Constitutionalism is a legal device for the prevention of tyranny and the protection of the rights of man (Patterson, 1948, p. 427). It is defined (1) in a minimal sense, as the existence of norms not only creating legislative, executive, and judicial powers, but also imposing significant limits on these powers; and (2) in a richer sense, as an idea that government can/should be limited in its powers and that its authority depends on its observation of these limitations (Waluchow, 2018).

Both constitutionalism and the terms *rechtsstaat* and rule of law have a basic idea to limit the power and authority of the government, but constitutionalism is more specific as it requires the limitation to be placed in the constitution, in convenience with the ideal of constitutionalism expressed in the concept of constitutional supremacy (Andreescu & Andreescu, 2017, p. 19; Waluchow, 2018). One of the main purposes and functions of a constitution is to both authorize and create limits on the powers of political authorities (Gavison, 2002, p. 90), in which restraints imposed by the constitution to the government are a manifestation of constitutionalism (see "entrenchment" in Waluchow, 2018). Hence, it is very important to assesses whether certain government actions have a legal basis in the constitution.

In the Indonesian context, constitutional supremacy has also been explicitly committed by the 1945 Constitution through, among others, (1) the elucidation of the pre-amended version stating that the government is based on the constitutional system; (2) an article regulating that the president holds the power of government in accordance with the constitution;[32] (3) the third amendment establishing a

30 This can be seen from some opinions documented by Mahkamah Konstitusi Republik Indonesia (2010a, pp. 451, 447, 466). For example, (1) what is meant by "law state" (*negara hukum*) is "law-based state", also known as *rechsstaat* in German, or the "rule of law" in Anglo-Saxon, and essentially has the same meaning, although differently explained in the European (*rechtsstaat*) and the American traditions (rule of law); (2) rule of law – along with the constitutional system and human rights protection – is contained in the term law state (*negara hukum*); (3) the formula "Indonesia is a democratic law state" is related to *rechtsstaat* or the rule of law, emphasizing the urgency of the supremacy of law, and so forth.

31 For instance, Barber, et al. (2003) observe that (1) *rechtsstaat* rests on some sort of connection between the legal system and the state, while the rule of law is a quality of – or theory about – a legal order; and (2) *rechtsstaat* brings with such a connection an aspiration to harmony, in contrast to the rule of law that contains no implicit ambition to find a harmonious relationship between law and the state.

32 See Art. 4 para. (1) of the 1945 Constitution. The provision has been around since the creation of the 1945 Constitution and is consistently maintained to date.

Constitutional Court authorized to conduct the constitutional review;[33] and (4) the special procedures required for amending the constitution.[34] As government action is measured according to the 1945 Constitution that is still in force, the absence of provision with regard to state intervention in human resources allocation has rendered IMWs' deployment overseas by the government – that further extends to the government's intervention in IMWs' remittances – neither legitimate nor restricted.

Constitutional supremacy renders a constitution to be the source of all regulations – in political, economic, social, and legal areas – and its most important consequences are the conformity of the entire legal system with the constitutional norms as well as the fundamental obligation for state authorities to perform their attributions within the limit and in the spirit of the constitution (Andreescu & Andreescu, 2017, p. 49). According to developing perspectives concerning the Indonesian Constitution, the existence of economic articles within the 1945 Constitution prior and subsequent to amendments shows that it has been consistently an economic constitution since its emergence,[35] rather than merely a political one.[36] Nonetheless, inadequate economic provisions – even after being amended for the fourth time – should be of high concern. There are many substances commonly covered in an economic constitution (Asshiddiqie, 2013, pp. 19-20), and the absence of a constitutional basis for state intervention on human resources allocation, as an economic resource, should be fully scrutinized, as labor is one of the covered substances. The closest reason for this absence might be because this issue was not anticipated (Dixon, 2015, p. 821; Dixon & Ginsburg, 2011, p. 640), as "human resources" was vaguely mentioned during the discussion of the fourth amendment of the 1945 Constitution, and it seemed neglected afterwards.[37]

Silences in a constitution allow "time and experience" for improvement and completion, as a constitution is an evolutionary achievement (Loughlin, 2018, pp. 922-923). The long practice of IMWs' deployment abroad as constitutionally groundless has shown "time and experience", but the constitution on this particular issue has not been improved yet. This unfortunately hinders the 1945 Constitution to optimally safeguard the civic virtues of the citizens and to simultaneously impose limits on the abuse of political power and citizens' exploitation (Faria, 1999, p. 177). Yet, this is especially important for the specific issue of IMWs' deployment and remittances – wherein the interventions merely based on ministerial decrees until Law 25/1997

33 See Art. 24C para. (1) of the 1945 Constitution.

34 See Art. 37 of the 1945 Constitution.

35 See Asshiddiqie, 2013, pp. 8-10. Economic constitution refers to the highest law in the economic field, and a constitution is named as an economic constitution if it contains economic policy. This policy will be an umbrella and provides direction for the development of a country's economic activities.

36 Some economic articles – among others, concerning the principles underlying economic matters as well as state power over the important sectors of production and natural resources – have existed in the original version of the 1945 Constitution, and are maintained – with some additional articles – even after the last amendment.

37 See Mahkamah Konstitusi Republik Indonesia (2010b, pp. 604-718). There was an interesting opinion from A. M. Lutfi on behalf of the *Reformasi* fraction saying that Chapter XIV on the National Economic and Social Welfare would guide the nation in managing natural and human resources for the welfare of all its inhabitants. However, nothing in the further discussion responds to or addressed the management of human resources.

and Law 18/2017 appear as a strong justification after the policies have been carried out for decades – because placing economic provisions as constitutional norms will make them a standard of reference in all economic policies. Hence, the annulment of economic policies contradictory to the standard can be pursued through a judicial process.

INDONESIA IN THE INTERNATIONAL LABOR MIGRATION: A WELFARE STATE IN A GLOBALIZED WORLD

Remittance can be considered as the most tangible benefit of international labor migration for developing countries (International Labour Office, 2010, pp. 41-42), and various forms of government intervention on migrant workers' remittances do occur in many states (Puri & Ritzema, n.d., pp. 19-25). For instance, there are foreign currency denominated bonds in Pakistan, Bangladesh, and India; a non-repatriable investment scheme in Pakistan, advisory service on investment opportunities as well as supplementary loans for migrant-worker customers of Bangkok Bank in Thailand, training centers in high-migration regions in the Philippines, and so forth (Puri & Ritzema, n.d., pp. 20-21). Some governments – as in the Philippines, Thailand, Bangladesh, Indonesia, and the Republic of Korea – require certain percentages of remittances to be transferred through the domestic banking system of the migrant workers' country of origin, but this has worked effectively only in the Republic of Korea (Puri & Ritzema, n.d., pp. 19-20). Temporary migration programs tend to be advocated, based on the belief that temporary migrants would remit more money, resulting in more advantages for the development of the states of origin (de Haas, 2007, p. 9). However, remittances are actually found to have varied impacts in each region as these critically depend on the specific circumstances under which migration occurs (International Labour Office, 2010, pp. 42-43), and the discussion on remittance impact has essentially changed over time.

In the development and migration optimism before 1973, there was a general expectation that remittance flow – besides experiences, skills, and knowledge – would greatly help developing states' economic take-off (de Haas, 2007, pp. 3-4). In this period, developing countries' governments started to actively encourage emigration due to a consideration that this is a foremost instrument to promote national development (de Haas, 2007, p. 3). In the development and migration pessimism between 1973 and 1990, it was argued that remittances were mainly spent on conspicuous consumption and consumptive investment, yet rarely invested in productive enterprises (de Haas, 2007, pp. 4-5). Besides weakening local economies and increasing dependency, the increasing consumption and land purchases by migrants were then reported as the trigger of inflationary pressures and soaring land prices (de Haas, 2007, p. 5). The main "positive" effect of migration – that is migrants' and their families' welfare improvement – was considered to be artificial and dangerous, as remittances were assumed to be an unstable and temporary source of revenue (de Haas, 2007, p. 5). It was also argued that migration provokes the withdrawal of human capital – and the breakdown of traditional, stable village communities and their economies – leading to the development of passive, non-productive, and remittance-dependent communities (de Haas, 2007, pp. 4-5).

As a response to these contradictory perspectives, the New Economics of Labor Migration (NELM) emerged in the 1980s and 1990s by offering a more subtle view of migration and development by connecting migration causes and consequences – which remittance is part of – more explicitly instead of determining whether migration affects development positively or negatively (de Haas, 2007, p. 7). NELM opens up the possibility for both positive and negative development responses by questioning (1) why migration has contributed to development in some communities and much less – or even negatively – in others, and (2) what factors explain such different results (de Haas, 2007, p. 6). In essence, the impact of migrant workers' remittances on the development of their states of origin fundamentally depends on more general development conditions in the migrant-sending societies (de Haas, 2007, p. 25). It is rather naïve to expect that government intervention in migrant workers' remittances would be likely to succeed as long as the general political and economic conditions in the state of origin of the migrant workers concerned remain unfavorable (de Haas, 2007, p. 25).

The most plausible justification for the Indonesian government to intervene in the management of IMWs' remittances is that Indonesia aims to advance public welfare and underlies the principle of social justice.[38] An expansion of the government's functions, hence, emerges as a consequence of welfare service demands in the framework of a welfare state (Palguna, 2019, pp. 71-73), but government intervention – in relation to the concepts of democracy and constitutionalism – is only allowed if it is approved by the people, meaning that every attribution shall emerge at least at the legislation level. IMWs' deployment abroad, thus, did not meet this requirement until the Law 25/1997 – that includes the Indonesian government as one of the parties that may conduct workers' placement services both inside and outside Indonesian territory[39] – was enacted. Similarly, the Indonesian government's intervention in IMWs' remittances has also just been justified since 2017 through its inclusion in Law 18/2017. Although these laws appear to act as a justification, there are some points that need to be taken into account.

First, the absence of a provision on state intervention in human resources as an economic resource in the 1945 Constitution is still an obstacle (Ayuningtyas, 2020, p. 49). Human resources are, indeed, granted human rights in the constitution, but how state activities are interlocked with the market and family role in social provision – besides human rights entitlement – must be taken into account in a welfare state (Esping-Andersen, 1990, p. 21). The inclusion of a state intervention provision on human resources into the 1945 Constitution is, therefore, still required. Second, welfare states exist in a global political economy that is increasingly interdependent and yet divided into zones of sharply disparate conditions. Hence, national economies are structurally integrated into a larger system and engaged in systematic exchanges with it – but a welfare state is, by its nature, meant to be an exclusive system (Freeman, 1986, pp. 52-55). Welfare states' logic implies the existence of boundaries distinguishing those who are citizens and those who are not, and such boundaries are required, as welfare states establish a principle of distributive justice

38 See para. 4 of the 1945 Constitution's preamble.

39 Art. 144 of Law 25/1997 gave the same right and opportunity to every laborer to obtain labor placement services within and/or outside Indonesian territory, while Art. 145 mentioned that labor placement services can be executed by the government and/or the people.

that departs from the distributive principles of the free market (Freeman, 1986, pp. 52–53). Accordingly, international labor migration, as the activity producing migrant workers' remittances, intrudes and challenges the endogenous nature of the welfare state (Freeman, 1986, p. 52).

The welfare state as a closed system is essentially inward looking – seeking to take care of its own while its ability to do so is premised on its ability to construct a "safe house" to shelter its members from the outside world (Freeman, 1986, pp. 54-56). Hence, the implications for welfare states playing different roles in the international labor migration process are different. For a welfare state acting as the placement state, migration addresses problems caused by the welfare state's constraints on the flexibility of the labor market only if migrant workers are excluded from the exercise of welfare state rights (Freeman, 1986, pp. 54-56). For a welfare state acting as the state of origin – such as Indonesia in the context of IMWs – the demand to construct such a "safe house" should be translated into a real protection for IMWs as its members (Ayuningtyas, 2020, pp. 51-52).

CONCLUSION

It is difficult to conclude that the Indonesian government's intervention in the management of IMWs' remittances is constitutionally justified. Silence in the 1945 Constitution has been the main problem. By taking into account the constitutional supremacy and economic constitution applied in Indonesia, the absence of provisions on state intervention in human resources allocation obviously makes IMWs' deployment abroad practiced by the government constitutionally groundless. Most importantly, it imposes no restrictions, so that the intervention eventually infiltrates the financial output generated. It is hard to argue that welfare state's demand and endogenous nature are unconformable, particularly in the context of international labor migration. Meanwhile, Indonesia has to deal with international labor migration, as the lack of employment within the state has been a persistent problem. Legislations, hence, seem to emerge as an effort to give a justification to the government's actions, but they eventually create problematic rules as the most fundamental substruction remains vacant. This is exemplified by the considerable problems coming with the Indonesian government's obligation to conduct "economic protection" through remittance management, including the simplification of migrant workers' remittances' scope and channels as well as the legal vacuum on implementing the regulations.

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