

Presidential Regulation (PERPRES) No. 20 of 2018 on Foreign Workers in the Era of Free Trade

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Abstract—In Indonesia, this year President has issued a controversial regulation, Presidential Regulation (PERPRES) No. 20 of 2018 on Foreign Workers. The purpose of this paper is to analysis that regulation from the administrative law perspective. In fact, it is suspected as bad regulation for Indonesian workers. By doing a juridical review, using literature study as the research method, this paper would explain how it should be regulated; and how it should be implemented in free trade era to guarantee the prosperity as written in The Preamble of UUD NRI 1945. Based on this regulation, IMTA, that should be used by the government to prevent domination of foreign workers, has been shifted to RPTKA. But, RPTKA is not a license. It is only an optional requirement. PERPRES No. 20 of 2018 is contradictive with the principles and the purpose of UU No. 13 of 2003 on Labor Act, and Act No. 25 of 2007 on Investment Act itself. This kind of regulation could be potential to decrease the sovereignty of Indonesia on domestic workers in the era of free trade.

Keywords—*globalization; legal protection; national regulation; trade on services*

I. INTRODUCTION

This year, on March 29th - 2018, President of Indonesia, Mr. Joko Widodo has enacted a presidential regulation called Presidential Regulation No. 20 2018 about Foreign Workers (PERPRES 20/2018). The purpose of this regulation is to increase foreign investment in Indonesia through simple bureaucracy and procedure for foreign workers (TKA). The main topic of this paper is analyzing the existence of PERPRES 20/2018 in a free trade era from the administrative law perspectives.

PERPRES No. 20 of 2018 replaces the previous regulation: PERPRES No. 72 of 2014. Some articles in the new regulation have been revised to the simple administrative procedure for foreign workers. Thus, this presidential regulation then becomes controversial [1]. Some communities refuse this regulation and some accept it [2]. The contrasts argue that the new regulation is not a fair regulation. It shows that the President only accommodates the interests of foreign workers. The regulation is not for Indonesian workers. Some experts speak that PERPRES No. 20 of 2018 has the aim to facilitate and to legitimate foreign workers to work in Indonesia through a simple bureaucracy and procedures. This kind of regulation

has been concerned as a regulation that could decrease the work field of Indonesian workers [3].

In the other side, the pros believe that PERPRES No. 20 of 2018 is not an unfair regulation. It is just to accelerate and to simplify the administrative procedures in order to increase foreign investment in Indonesia [4]. Based on this new presidential regulation, the government has removed the license: Izin Menggunakan Tenaga Kerja Asing (IMTA) as the administrative procedure, and replace it with a document called Rencana Pengajuan Tenaga Kerja Asing (RPTKA).

From the perspective of administrative law, there is always a chance for people to question the policy of the government. Government shall produce a good regulation for society. But, on the other side, it has been acknowledged that there is no perfect policy [5]. PERPRES No. 20 of 2018 is imposed to increase foreign investment in Indonesia, but on the other side, it could decrease the opportunities of Indonesian workers. From this perspective, this regulation should be proportional. Proportionality is the concrete form of justice. Gustav Radbruch speaks that justice is understood as equality [6].

Based on this background, it is clear that PERPRES No. 20 of 2018 is a regulation with a big gap. As a regulation, PERPRES No. 20 of 2018 should be proportional in accommodating the interest of domestic and foreign workers (das sollen) in a free trade era. In fact, this regulation, through some of its articles, is taking priority over foreign workers (das sein). Noticing that gap, contained in that regulation, this paper is aimed to analyze about how it is regulated and how PERPRES No. 20 of 2018 should be implemented as a domestic policy of a state within free trade era, where International law should guarantee the free movement of foreign workers in participant countries.

II. RESEARCH METHOD

This paper is legal research. Legal research using a method of conceptual analysis. This research is conceptual research that is related to some abstract ideas, principles, or theories in administrative law. Two dominant forms of conceptual analysis are a) analysis of the existing conceptual framework of and about the law; b) construction of new conceptual frameworks with accompanying terminologies [7]. This research only focus on analyzing PERPRES No. 20 of 2018 and its conceptual

framework using the principles of good governance, and all legal concept related to free trade era: legal protection, the movement of a natural person, globalization, etc.

III. RESULTS AND DISCUSSION

A. *Globalization and Sovereignty*

The era of globalization brings a variety of stigma, especially about the reduction of the role of the state and sovereignty in the global order [8]. The improvement of the state's economy is related to several indications that arise along with the development of globalization itself [9]. Globalization that upholds the interaction of freedom and ease also makes this world more borderless. It causes the global world community to be free to interact with each other even though they are in a remote area and in a different country. Technological developments are also increasingly bringing this world into a prospect that is far narrower than before, where national borders and geographical constraints are increasingly not seen in this era of globalization. The reduction in the role of state sovereignty was also reported as a result of the increasing number of transnational companies that emerged and began to play an important role in the freedom of economic activity and capital in it. The existence of transnational companies is often regarded as a separate threat to the sustainability of sovereignty from countries in the world.

However, according to Kalvajit Singh, he argues that globalization does not automatically as the cause for reducing the role of the state and sovereignty in the international system. Singh disagrees that globalization will bring the world to the destruction of the nation-state system. He said that if the aim of globalization is indeed aimed at destroying the sovereignty of the nation-state, then globalization can be judged failed to do so because in two decades the number of sovereign countries has increased from previous eras [10]. At least there are five arguments, namely: (a) variations in the country's response to globalization; (b) in open economy, the balance sheet is getting higher; (c) reducing globalization to privatization does not reduce state intervention; (d) increasing repressive power of the state; (e) deregulation which is semantic interpreted as a re-regulation [10].

The next opinion that marked the reduction of the role of the state due to globalization was the argumentation of the economic liberals who stated that political interference and state regulations actually made economic globalization uneconomical, experienced setbacks and could cause conflict [11]. Regarding this statement, Singh gave a rebuttal that not all countries become powerless because of globalization (economics) especially for transnational companies that are the subject of it. This is because it turns out that the role of big countries as superpower actors is still behind the progress of these transnational companies. As with the provision of foreign direct investment, which is only dominated by large countries such as the United States, Japan, and other major countries [10].

Responding to this, the authors argue that from these facts it can be seen that the role of policies and national interests of the major countries is still clearly visible against the policies of

existing transnational companies, or it can be said that transnational companies are actually still bound by the existence of countries big behind it. So, it is very implausible to say that this transnational company which was later called has reduced the role of the state and sovereignty in it. This argument is also reinforced by Krasner's opinion which states that the role of a sovereign state is still important in economic globalization as a form of political organization that oversees and regulates these transnational corporations [12].

Singh stated that the existence of open economy practices did not reduce a country's financial account. Even the opposite is true increasing cross-border economic activities has a positive impact on a country's balance sheet which also has implications for the stronger position of a country in the international system [10]. The next argument is that even globalization demands privatization in all fields, this does not merely reduce the role of the state. The fact that it could increase the private sector, it has triggered the role of the state to tighten regulations and authority above it in an effort to minimize the negative impact of globalization. For example, there are state protection measures in the form of policies or quota restrictions as a permanent form of the existence of state sovereignty in the midst of globalization itself. Globalization cannot take place without getting support from countries that have power and have the authority to form and create a set of rules and laws related to trade liberalization, foreign investment, and industry policy. So, it is clear that the role of the states is still high in terms of ensuring sustainability and legal guarantees for globalization.

Here those who argue that globalization and the sovereignty of the state can go hand in hand believe that every state attitude taken in globalization is a determinant of whether the country's sovereignty can still survive or not. Implicitly as if revealing that globalization does not have a significant influence on the state, as long as the country is able to carry out good economic management. Large countries that are able to use the momentum of globalization to achieve their interests will actually be able to show the existence of their respective sovereignty. However, for a country that is not capable of being strategic in the midst of globalization, it will sink deeper into the flow of globalization. It is clear that what is a factor in the loss of sovereignty of a country is not caused by globalization but rather the result of the ineffectiveness of the state's own attitudes and policies. The deterioration of state sovereignty is precisely the result of an inappropriate response in facing globalization, as well as the complexity of external and internal problems within a country. Therefore, the prospect of authority and state sovereignty in globalization can still be said to remain as long as the country faces it wisely and strategically.

B. *The Movement of Natural Person (MNP) in a Free Trade Era*

Globalization is a reality that cannot be rejected by each country in its international relations. One aspect is Economic Globalization. It is a process of integrating the national economy into a global economic system [13]. One form of economic globalization is marked by increasing openness of a country's economy to international trade. Economic

globalization will create economic relations that affect each other between countries and the traffic of goods and services will form trade between countries. Government control is increasingly fading because the globalization process is driven by global market forces, not by the policy of a regulation issued by an individual government. International trade activities will affect the economic growth of a country because all countries compete in the international market [13].

According to Husynski and Buchanan, economic globalization results in a condition of rapid change [14]. Starting from the cyber revolution, trade liberalization, homogenization of goods and services throughout the world until growth-oriented exports are components of the phenomenon of globalization. Economic globalization will increase international trade. However, it often creates various strong influences on income patterns within a country. International trade is believed to bring out the beneficiaries and disadvantaged parties.

Globalization has positive and negative impacts. The positive impact of globalization increasing national income because it has a comparative advantage, the entrance to global capital, the spread of technology, the spread of human rights and increased employment opportunities to be able to improve the welfare of a country's people.

Globalization is a process for globalizing the spread of things throughout the world. Globalization brings a lot of influence, whether it is constructive or otherwise, that influence spreads in all sectors of life, culture, social, economy, education, technology and so on. The spread occurred through various media both directly and indirectly. The boundary between countries will be narrower, free areas will develop. The existence of globalization will bring changes to the concepts of space and time.

Here what we will discuss is economic globalization which is about the influence of globalization on the movement of factors of production, especially labor. In globalization, not only commodities are mobile, but also the factor of production. In the modern world, it can be said that every country imposes immigration restrictions. Therefore, work mobility is less common in reality compared to capital mobility. But labor mobility also remains important. Narrowing boundaries between countries have led to increasingly free forms of cooperation made by countries to increase efficiency. So, it is not strange if now there is a proliferation of free areas such as AFTA, MEE, MEA and so on. Among the member countries, they should have complied with the regulations that have been made. The forms of cooperation can be in the form of eliminating import tariffs or all other forms of protection. Also, with the more free labor from a country entering another country and can work in that country.

At present the export commodities of many countries such as Indonesia are not only in the form of goods but also labor, labor export, both educated and trained workers have enough influence for a country. It cannot be denied that a country's labor force sent to other countries also contributed to the increase in the country's foreign exchange reserves in addition to helping to reduce the unemployment rate in the country. It

can be said that labor mobility affects the economy of a country.

In an international level, The World Trade Organization (WTO) stated that the movement of natural persons is related to any regulations in Services. It is one of the four ways through which services can be supplied internationally. It regulates natural persons who are either service suppliers (such as independent professionals) or who work for a service supplier and who are present in another to supply a service. The Natural Movement on Natural Persons is based on the law of WTO. It is A General Agreement on Trade and Services (GATS).

It is stated in GATS Part I Article 1 Scope and Definition, 2. For the purposes of this Agreement, trade in services is defined as the supply of a service: "...(d) by a service supplier of one member, through a presence of natural persons of a Member in the territory of any other Member." Natural Persons refer to the national and permanent resident of WTO Members Countries.

Natural Person of another member means a natural person who resides in the territory of that other Member or any other Member; (i) is a national of that other Member; or (ii) has the right of permanent residence in that other Member, in the case of a Member which: 1. does not have nationals; or 2. Accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services.

In GATS there are For Modes of Supply [15]:

TABLE I. THE FOUR MODES OF SUPPLY IN GATS

Mode 1	<i>Cross-border supply</i>
Definition => services supplied from the territory of one WTO Member into the territory of any other Member.	
Mode 2	<i>Consumption of services abroad</i>
Definition => services supplied from the territory of one WTO Member to the service consumer of any other Member.	
Mode 3	<i>Commercial presence abroad</i>
Definition => services supplied by a service supplier of one WTO Member, through commercial presence, in the territory of any other Member.	
Model 4	<i>Movement of Natural Persons</i>
Definition => services supplied by a service supplier of one WTO Member, through the presence of natural persons of a Member in the territory of any other Member	

The elements of the movement of natural persons are [16]:

1) *Temporary movement*: Trade in services (TIS) excludes access to the employment market, and measures regarding citizenship, a residence of employment or permanent basis.

2) *Limited scope*: Applicable only in Free Trade Agreement (FTAs) categories of natural persons, and service sectors committed by individual WTO Member Countries.

According to the rule of GATS, mode 4, it does not determine what its persons. It covers a wide range of persons. It could be interpreted as workers from high-level engineers to unskilled workers, in the commitment of WTO to liberalization.

As we can see for example, in the ASEAN Agreement on The Movement of Natural Persons, at The Philippines' Schedule of Movement of Natural Persons Commitments, The Major categories of Natural Persons are:

a) *Business visitors (BVs)*: Seeking to enter or stay in the territory of another Member State Temporarily, whose remuneration and financial support for the duration of the visit is derived from outside of that other Member States;

b) *Intra-Corporate Transferee (ICT)*: Is an employee of a juridical person established in the territory of the Member States, who is transferred temporarily for the supply of a service through commercial presence;

c) *Contractual Service Supplier (CSS)*: Who is an employee of a juridical person established in the territory of a Member State temporarily in order to supply a service pursuant to a contract(s) between the employer and service consumer it has o commercial presence;

d) *Investors*: Engaged in the activities to invest in a business in the Philippines on behalf of a person or to manage a business in the Philippines on behalf of a person;

e) *Independent Professional (IP)*: Who is self-employed and who enters the territory of another Member states temporarily in order to perform services pursuant to a contract(s) between them and any service consumer located in the territory of the other Member State;

f) *Specialist*: Persons working within a juridical person possessing specialized knowledge essential to the enterprise's areas of activity, techniques or management;

g) *Installer and services*: Employee of a juridical person in the territory of other Member State for at least a who is assigned to install or service industrial machinery, equipment or both machinery and equipment, where such installation and/or servicing by the juridical person is part of the contract of purchase of the said machinery or equipment.

In the context of a free trade era, foreign workers could be defined either as Natural Person or Labor Migration. The different between MNP and Labor Migration are [17]:

TABLE II. THE MOVEMENT OF NATURAL PERSON AND LABOR MIGRATION IN COMPARISON

Natural Person	Labor Migration
Service suppliers only in sectors covered in the commitments of destination country or service consumer; employers of a Member's service suppliers moving to a service consumer in another Member State to provide the services; and they cannot access labor market in destination countries. Cannot apply for citizenship or residency.	Employees in any sector of the destination country; employees of any business in a destination (government, non-government, domestic or foreign); and the temporary contracts may lead to permanent employment and residency.

C. *The Presidential Regulation PERPRES No. 20 of 2018 on Foreign Workers*

This Presidential Regulation PERPRES No. 20 of 2018 on Foreign Workers enacted by President Joko Widodo on March 26th, 2018. To respond to the pros and contrast, this Presidential Regulation should be analyzed using other regulations related and the principles of good governance.

Related to a matter of foreign workers in Indonesia, there are numbers of regulations that should be considered. But in this paper, this Presidential Regulation PERPRES No. 20 of 2018 would be analysis using Undang-Undang Ketenagakerjaan No. 13 Tahun 2003 because this act is the main basis of that Presidential Regulation.

Here are the crucial articles of PERPRES No. 20 of 2018:

In article 10 verse (1) states that the employers of foreign workers are not required to have RPTKA (*Rencana Penggunaan Tenaga Kerja Asing*) or A Plan for Employing of Foreign Workers. According to this article, in RPTKA, there are three points that should be considered by an employer in hiring foreign workers. *First*, the shareholders who are a member of the board of directors or the board of commissioners at TKA; *second*, the diplomatic and consular employees; *third*, the foreign workers.

Furthermore, in article 10 verse (2), it is stated that the type of job needed by the government based on verse (1) c has to be determined by the minister.

The waivers of RPTKA given to employers are also regulated in article 13 verse (1) and (2) of this presidential regulation. This article states that in an emergency situation, employers could hire foreign workers by proposing the legislation to the Minister or the officials, not more than two days after the foreign worker start his work. And the legislation of RPTKA should be issued not more than one day work after the complete proposal accepted.

This presidential regulation regulates that RPTKA is optional. It is a contradiction with the regulation of Kepala Badan Koordinasi Penanaman Modal (BKPM) No. 12 of 2009. Article 56 verse (1) of this regulation states that companies and Kantor Perwakilan Perusahaan Asing (KPPA) that will hire foreign workers must obtain RPTKA and no exception. Thus, PERPRES No. 20 of 2018 has removed RPTKA for certain

positions to all companies that hire foreign workers. Those are board directors and members of the commissioner. RPTKA regulates in article 9 of PERPRES No. 20 of 2018. Through this article, RPTKA is the license to hire foreign workers (*Izin Menggunakan Tenaga Kerja Asing/IMTA*). So, implicitly, this regulation states that RPTKA is the license itself. The problem is, RPTKA is the license, but it is an optional and not mandatory requirement. This could be said that this regulation is not clear (ambiguity).

If RPTKA means to replace IMTA, then RPTKA, of course, is the license. The license is permission. By giving permission, the government allows a person certain action that is prohibited in the consent of public interest [18]. Through this license, the government could supervise that person and his activities. A license could be defined not as a prohibition while action, in general, is not prohibited as long as the action applied improperly with the regulation [19].

By implementing requirements within a licensing system, government as the regulator has purposes [18]:

- Controlling the activities;
- Preventing the negative impact caused by the activities;
- Protecting certain objects;
- Dividing those limited things;
- Directing activities by selecting the activities;

Regarding foreign workers in free trade of globalization era, PERPRES 20 of 2018 should be interpreted as a presidential regulation made by Presiden Joko Widodo to guarantee not only the interest of domestic interest but also the interest of free movement of a natural person in free trade era. In fact, Indonesia is a member of WTO. One of the consequences of being a member of WTO is, Indonesia has to apply the rule and the liberalization principles of WTO (GATS) about The Movement of Natural Person as national regulation. Indonesia has to open the chance to foreign workers. Nevertheless, PERPRES No. 20 of 2018 is also made to protect the interest of national workers. RPTKA is the key to balance international interest and national interest. But, RPTKA based on PERPRES No. 20 of 2018 could be interpreted as a regulation that made for the interest of foreign workers. Because the convenience based on this regulation of RPTKA could threaten the interest of national workers. By removing IMTA, it is difficult for the government to do surveillance on foreign workers.

The PERPRES No. 20 of 2018 are issued based on the authority of Presiden as the head of government (Article 4 of UUD NRI 1945) by considering Undang-Undang Pengawasan Perburuhan (The Labor Surveillance Act) No. 3 of 1951; Undang-Undang Ketenagakerjaan (The Labor Act) No.13 of 2003; Undang-Undang Penanaman Modal (The Act of Investment) No. 25 of 2007; Undang-Undang Keimigrasian (The Immigration Act) No. 6 of 2011; and PERPRES No. 91 of 2017 (PERPRES of The Acceleration of Business).

Normatively, PERPRES No. 20 of 2018 is formally legal. However, the substance of it should be criticized, especially the crucial articles mentioned above. The ambiguity of the

implementation of RPTKA could extinguish the rights of national workers. PERPRES No. 20 of 2018 that could be assumed as the regulation that is contradictory with the principles and the purpose of The Act of Labor and The Act of Investment.

Article 10 of PERPRES No. 20 of 2018 is contravened with Article 42 until Article 49 of The Act of Labor (the requirements of hiring foreign workers). Regarding this, PERPRES No. 20 of 2018 is not in line with the principles and the purpose of this Act. Article 4 of this Act states that the development in Indonesia aims to:

- Empower and utilize the workforce optimally and humanely;
- To embody the equitable opportunities and to provide labor that appropriates with national needs;
- To protect workers in achieving prosperity and to increase the welfare of workers and their families.

Regarding the ambiguity of the regulation of RPTKA, it is clear that PERPRES No. 20 of 2018 is also contravened with The Act of Investment. Article 3 verse (1) and verse (2) of this Act, states that the investment in Indonesia implemented based on these principles below:

- Legal certainty;
- Openness;
- Accountability;
- Equality and equity;
- Togetherness;
- Efficiency;
- Sustainable;
- Environmentally awareness;
- Independent;
- Balance in the unity of the national economy.

Article 3 verse (2) mentions that investment in Indonesia is enacted to achieve these goals:

- To increase the development of national economic;
- To provide employment;
- To increase sustainable economic development;
- To increase the ability to compete in national business;
- To increase the capacity and the ability of national technology;
- To support the development of social economic;
- To manage the potential economy to be the real economic power by using a national or international budget; and
- To increase social welfare.

Based on that juridical, knowing the consideration of the enactment of PERPRES No. 20 of 2018, it is clear that this presidential regulation issued to support the national economy and to extend the work field by increasing investment. So that, it is needed a re-adjustment on license in hiring foreign workers; the previous PERPRES No. 72 of 2014 about The Hiring of Foreign Workers, education and workshop of assistant, has to be adjusted with current needs.

Based on that consideration, PERPRES No. 20 of 2018 and its implementation should be balanced. As balancing is one of the principles of administrative law, then PERPRES No. 20 of 2018 is not issued only to focus on investment, but also to give preventive protection to national workers. In the globalization era, the movement of natural persons should be fair regulated.

Regarding that, the legal system should be created in a good way. It has to considerate the pros and contrast. While pros believe that free trade could increase economic growth, lower government spending, and possible for technology transfer; the contras believe that it increased job outsourcing, poor working conditions, and degradation of natural resources [20]. Furthermore, the government should face the fact that free trade in the globalization era has advantages and disadvantages. It should be observed to get possible solutions.

Here are the advantages and disadvantages of free trade agreement [20]:

TABLE III. THE IMPACT OF FREE TRADE AGREEMENT

Advantages	Disadvantages
Increase economic growth between participating countries;	Increase the outsourcing of jobs to other countries;
Less protection for business, which increases global competitiveness;	Theft of valuable intellectual property by developing countries with a little resource;
Re-allocation of government funds away from subsidies to other worthy causes;	Crowding out of local family farm business;
New incentives that attract foreign investors and increase in country development and growth;	Poor working conditions for outsources labor in countries without adequate labor protections;
Shared expertise that comes from companies doing business globally;	Depletion of natural resources due to lack of environmental protection in developing countries;
Latest technologies that become more available to other countries through interactions with multinational firms	Native cultures destroyed as they are uprooted and their resources become polluted;
----	Less income for smaller countries after paying fees and tariffs

Concerning the advantages and disadvantages, PERPRES No. 20 of 2018 has to apply RPTKA as the license. As the license, RPTKA could minimize the disadvantage caused by free trade or investment. RPTKA may replace IMTA but RPTKA is not optional. It is mandatory.

IV. CONCLUSIONS

It is not denied that in the globalization era, free trade is the needs of international society. Globalization could not eliminate sovereignty because in this free trade era there is always negotiable agreement among countries (bilateral, multilateral, and plurilateral). In fact, there are advantages and disadvantages of a free trade agreement. It is possible for those agreements to decrease sovereignty. It depends on how the government regulates the agreements to be implemented in its country as national regulation. The good national regulation on free trade agreement could prevent the disadvantages caused by those agreements. PERPRES No. 20/2018 on Foreign Workers, in this case, has to remove IMTA as the license for hiring foreign workers. It is removed by the government to increase investment in Indonesia. RPTKA is only an optional requirement. It is not clear whether RPTKA is the license or not. If it is mandatory then the license it should have sanctioned. IMTA supposed to be the instrument of government to do surveillance preventing the domination of foreign workers as one of the disadvantages of investment. And normatively, PERPRES No. 20 of 2018 is contradictive with the principles and the purpose of UU No. 13 of 2003 on Labor Act, and Act No, 25 of 2007 on Investment Act itself.

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