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Institutional dynamics of regulatory actors in the recruitment of migrant workers: The case of Indonesia¹

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Abstract

This paper examines how institutional dynamics among regulatory institutions affect the governance of the recruitment of Indonesian low-skilled migrant workers. Two institutional reforms have been made to create better governance for Indonesian migrant workers in the post-authoritarian era. One was the establishment of the National Agency for the Placement and Protection of Indonesian Migrant Workers (BNP2TKI) while the other was the granting of greater responsibility to local governments to supervise migrant worker recruitment. In spite of these institutional reforms, little progress has been made in the protection of Indonesian migrant workers. The paper reveals that the restrictive regulatory framework for the recruitment of migrant workers, which curbs private recruitment agencies, does not create better migrant worker governance since the newly established regulatory framework does not take into consideration the horizontal relationship between the old and new institutions and the vertical relationship between the central and sub-national governments. Horizontally, the bad institutional design of the new regulatory framework proposed to replace the old one has created institutional rivalry between the newly established regulatory actor and the old one. Vertically, the reluctance of central government to decentralise authorities to sub-national government has amputated the ability of sub-national governments to perform a supervisory role in the recruitment process. These two inter-related factors have hindered the effort to create a better recruitment process for Indonesian migrant workers.

Keywords: *Decentralization, Indonesian migrant workers, institutional dynamics, institutional rivalry, BNP2TKI*

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Introduction

The main challenge arising from the governance of Indonesian migrant workers is the persistence of chaotic recruitment process experiences by Indonesian migrant workers at home. In order to create a better recruitment process for Indonesian migrant workers, two main institutional reforms were carried out immediately after Indonesia underwent a process of democratic transition from Suharto's authoritarian rule (1966-1998) to a democratic environment. The first reform involved the establishment of the National Agency for the Placement and Protection of Indonesian Migrant Workers (commonly abbreviated as BNP2TKI) as a new institution to manage the recruitment process, as well as the protection of Indonesian migrant workers abroad. Since its inception in 2006, BNP2TKI has been expected to provide more coherent coordination among government institutions in the recruitment process, as well as overseas protection of Indonesia migrant workers. It also has a role in better supervising the private recruitment agencies, which are significant actors in the migrant worker recruitment process in Indonesia.

The second reform was the granting of greater responsibility to sub-national governments to supervise migrant worker recruitment. This is an implication of the decentralisation process that has been ongoing in Indonesia since 2001 after the collapse of the authoritarian regime (Hadiz, 2004). Prior to decentralisation, the governance of international migrant workers was characterised by a centralistic approach where the management of migrant worker recruitment was solely under central government authority. Since the decentralisation, sub-national governments have greater authority to manage and supervise the recruitment process (Bachtiar, 2011b). This arrangement is expected to curb many problems occurring at the early stage of the recruitment process, such as identity fraud and extortion, which happen on the local level (Basa *et al.*, 2009; Bachtiar, 2011a; Direktorat Pengkajian Bidang Internasional Lemhanas, 2013).

In spite of these institutional reforms in the governance of Indonesian migrant workers, little progress has been made. Indonesian migrant workers still encounter many problems at home even before they depart. Furthermore, issues faced by many Indonesian migrant workers abroad can be traced back to abuse in the recruitment process at home (Amnesty International, 2013; Farbenblum *et al.*, 2013). BNP2TKI, which aims to create better coordination among government institutions and manage the private recruitment agencies is still not able to facilitate the coordination among the government institutions that

deal with migrant worker issues (Tempo.co, 2012). Furthermore, it has failed to eradicate the prevalent bad practices of private recruitment agencies in handling Indonesian migrant workers (BPK, 2010).

Given this backdrop, this paper aims to answer the question of why the recruitment process for Indonesian low-skilled migrant workers has become more complex despite the Indonesian government's effort to make it more coordinated through the establishment of BNP2TKI. Furthermore, it attempts to discuss why the sub-national governments are unable to protect their migrant workers from exploitation during the recruitment process despite their greater role in supervising and managing the migrant worker recruitment process. This paper asserts that the establishment of new institutions does not necessarily create more coherent coordination among the government institutions dealing with migrant workers. On the contrary, the establishment of the new institution, BNP2TKI, has created unintended institutional rivalry with the previous institution responsible for the governance of migrant workers, the Ministry of Manpower. This institutional rivalry, characterised by the overlapping distribution of responsibility and the conflict over authority, has aggravated the management of migrant worker recruitment in Indonesia. Furthermore, the conditions of migrant worker recruitment in Indonesia are becoming more complex due to the defective decentralisation caused by the obscure legal framework and the limited authority given by the central government to sub-national governments. This condition has eventually been exploited by recruitment agencies for their own interests and has, thus, hindered efforts to create a better recruitment process for Indonesian migrant workers.

The paper employs meso-level institutional analysis to capture how internal conflict within the state, both at the central ministerial level and in the relation between central and sub-national governments are critical in understanding how migrant workers' recruitment works in practice. It utilises a qualitative methodology to understand the dynamics of the institutional arrangement of migrant worker recruitment in Indonesia. The data were collected in several ways, namely by conducting interviews with relevant actors, including central government officials, Members of Parliament, sub-national government officials, recruitment agencies, as well as migrant workers. Besides the interviews, the study also involved an analysis of official documents, regulations and reports pertaining to the migrant worker recruitment process.

This paper is organised as follows. The next section discusses the analytical framework on the institutional approach to the governance of migrant workers. In the third section, an overview of the evolution of governance of migrant workers in Indonesia is given. The fourth and fifth sections elaborate the causes and impact of the rivalry in the institutional arrangement of migrant workers in Indonesia. The sixth section analyses the dynamic interaction between sub-national government and central government in managing migrant worker recruitment. The paper concludes that the complexity of the regulatory actors' interaction facilitates the persistence of chaotic management of the migrant worker recruitment process in Indonesia.

The state institution and bureaucracy: Institutional approach on migrant workers governance

Much has been written about the governance of migrant workers at the national level (Kaur, 2010; Chin, 2003; Devasahayam, 2010; Rodriguez and Schwenken, 2013). The vast majority of this work is contextualised on the interaction between the state and the market under neoliberal logic in shaping the governance of migrant workers (Hugo, 2012; Battistella, 2012; Lindquist, 2010). Thus, many analyses on governance of migrant workers in developing countries focus on the private recruitment agencies and brokerage systems that have significant role in recruitment and placement process (Kaur, 2010; Xiang, 2012; McKeown, 2012; Rodriguez, 2008; Lindquist *et al.*, 2012). Furthermore, most of the literature on migrant workers to date concentrates on how the state interacts with private recruitment agencies in the recruitment process. For instance, in the case of the Philippines, Rodriguez (2010) argues that the labour brokerage is done primarily to serve the interests of the state. It works on the basis of sender countries offering “guarantees” of a “quality product” and involves sender countries taking on a lot of the work in the recruitment process of migrant workers usually via contracts with recruitment agencies. But, ultimately, it rests upon a view of the worker as a commodity. Therefore, from the beginning, it can be questioned whether the state has a genuine commitment to protecting migrant workers' rights.

In the light of a more regulated environment in which states try to create more regulations concerning the governance of migrant workers (Elias and Louth, 2016), few studies have tried to unpack the state that is mainly assumed to be a relatively homogeneous entity. The paper aims to fill a gap in the literature by examining how the intra-institution

interactions within the regulatory area in both the central and sub-national governments affect the persistence of chaotic management of migrant worker recruitment in Indonesia. Rather than solely focusing on the brokerage systems on the governance of migrant workers, this paper shifts the discussion to the practices of state institutions to understand international labour migration. For this reason, this paper contributes to the literature on the Indonesian state in post-authoritarian era through an empirical analysis of the management of the Indonesian migrant worker recruitment process.

In order to analyse the intra-institutional interactions within migrant worker governance, this paper incorporates the literature on public administration studies into the analysis of the recruitment process for Indonesian migrant workers. Given that democratisation and decentralisation are arguably two constitutive processes that define the Indonesian state in the post-authoritarian regime (Hadiz, 2010), this paper focuses on two general aspects of the intra-institutional interactions that capture the context of newly-democratised and decentralised states. The first is the horizontal interaction between the new emerging regulatory actor designed to create better governance and the old existing institution that represents the old governance in a newly-democratised polity. The second is the vertical interaction between the emergence of more authoritative sub-national government and the central government in a newly-decentralised environment.

In newly-democratised developing countries, there is usually a tendency to create a new institution to overcome the deep-rooted problems stemming from decades of institutionalised bad practice during the authoritarian regime (Pereira, 1999: 4). The creation of new institutions could also be the logical consequence of democratic consolidation. The newly-established institution can be seen as an institutional shortcut to quickly reform the long institutionalised bad governance, while at the same time not creating turbulence within the old-fashioned institution, which has strong informal and patrimonial relationships that may prolong the reform process (Andrews, 2014). In the case where the newly-designed regulatory actor emerges while the old one still exists, the co-existence of regulatory actors within the governance will come into play. There might be two possible outcomes of this interaction: it may be a complementary interaction where each actor operates at the same time and contributes to a common objective, or there may be rivalry where the newly-formed regulatory actor performs the same tasks and legal regulations as the existing one (Trubek and Trubek, 2007). While the former may result in better governance where the two

regulatory actors cooperate to enhance the reform within a specific regulatory arena, the latter creates complex dynamics that might lead to institutional rivalry, which, in turn, hinders the creation of better governance.

Borrowing the theoretical framework of Jordana and Sancho (2004), there are two critical dimensions that can be analysed in terms of these horizontal rivalry interactions, namely the overlapping distribution of responsibility and the power structure. In this institutional setting, the distribution of responsibility refers to “how responsibility for policy decisions is dispersed among the institutions involved” (Jordana and Sancho, 2004: 302). When a new regulatory actor comes into play in a new institutional setting, there might be a distribution of responsibility between the existing and the new regulatory actors. The responsibility might not be equally distributed among the regulatory actors. One actor might get greater responsibility as a regulator, while the other becomes the operator within particular governance. However, there might be a condition where the responsibility is not defined clearly, leading to an overlap in responsibility. This overlapping responsibility may be the result of inefficient institutional design or it may be intended by policy makers to create a grey area in order to appease the existing institutional actor and encourage them to agree with the creation of the new regulatory actor.

The other dimension besides the overlapping responsibility that needs to be analysed is the conflict arising from the change in the power structure within a particular governance area. In this context, the power structure is defined as the capacity to control final policy decisions in the implementation of policies within a particular governance area (Jordana and Sancho, 2004: 300). The new regulatory actor may change the power structure constellation by reducing the regulatory power of the existing institutional actor. In developing countries where corruption is rampant, this power structure can be exploited into a source of illegal wealth by bureaucrats through the abuse of their institutional power to regulate (Drugov, 2010; Kuncoro, 2006; Vial and Hanoteau, 2010). Consequently, when the new regulatory actor has less power than the existing institutional actor, political conflict between them is less likely to occur compared to the condition under which the new regulatory actor has more power structure to regulate.

While the process of creating a new institution as a result of democratic consolidation can lead to overlapping responsibilities among state entities in the central government, decentralisation might generate a convoluted interaction between central and sub-national

institutions. Decentralisation is one of the consequences of democratisation in post-authoritarian era Southeast Asia (Hadiz, 2010; Hadiz, 2004). In theory, decentralisation provides a greater access for local communities to a more adequate provision of services and more accountable sub-national government officials (Grindle, 2007). Yet, in the case of Indonesia, few sub-national governments have used their newly-acquired powers to promote reform (Rosser and Wilson, 2012: 609). Hence, decentralisation has created a mix result in which some sub-national governments are developed under the reform, while others are worse off (Firman, 2014). To address why some sub-national governments failed while others succeed in improving their capacity, much of the literature on the decentralisation in Indonesia focus on the analysis of how decentralisation has provided new rent-seeking opportunities for local predatory elites and thus undermined the effectiveness of decentralisation (Fitriani *et al.*, 2005; Choi, 2009; Hadiz, 2004). For instance, Hadiz (2010) argues that the rise of local predatory networks of patronage has become a part of the emergence of newly-decentralised system in the post-authoritarian regime. So far, little attention has been given to analyse how vertical interaction between central and sub-national government might hinder the promise of reform attained through the decentralisation process.

In a newly-decentralised state, the vertical interaction between the emergence of more authoritative sub-national government and central government is sometimes conflictual (Karim, 2015). As stated by McCarthy (2004: 1203), the decentralisation process in Indonesia was driven by the need of national policy makers to reassert the legitimacy of a national polity due to pressure generated by decades of central control. Despite the economic and political impetus for decentralisation, the bureaucracy in central government usually has no incentive to do so (Eaton *et al.*, 2011: 4). Generally, bureaucracy in central ministries may prevent the decentralisation of major authorities since it means that they will lose some *de jure* control, which under a weak institution can be translated into a source of material gain for bureaucrats (Cheema and Rondinelli, 2007: 9).

The fear of losing control might encourage the central government bureaucracy to resist the decentralisation process by creating an obscure legal framework, which leads to the fragmentation of the organisational structure of the state. Such an obscure legal framework may stem from the lack of clearly-defined responsibilities of the actors involved in the decentralisation process especially with regard to enacting regulations (Manor, 1999). As a result, rivalry between different levels of decision makers has been an unfortunate result of

decentralisation in Indonesia. This condition, coupled with the limited capacity of sub-national governments, as well as the limited authority given by central government to sub-national ones (Kim 2008), has created so-called defective decentralisation. Hence, rather than creating more responsive policies in dealing with particular issues that have a greater impact on the local level, decentralisation may turn out to be defective and eventually hinder the effectiveness of sub-national government's handling of local issues.

Having discussed the analytical framework to analyse the governance of Indonesia's migrant workers recruitment in the post-authoritarian era, the next section examines the changing of the governance of Indonesia's migrant workers from authoritarian regime characterised with a more market-oriented to the post-authoritarian regime characterised with a more state intervention.

From market-oriented to a more regulated environment

Currently, Indonesia is one of the largest senders of migrant workers in Southeast Asia. It is estimated that there are around 6.5 million Indonesian migrant workers working abroad (BNP2TKI, 2013). Each year, Indonesia sends around 600,000 migrant workers mainly to Southeast Asia, the Middle East and East Asia, which makes it the second largest sending country in Southeast Asia after the Philippines. Around 78% of the migrant workers from Indonesia work as domestic workers (ILO, 2013). Remittance brought by the migrant workers each year reaches around US\$ 7 billion (Bank Indonesia, 2014). Despite the magnitude and importance of Indonesian migrant workers, they remain relatively unprotected from abuse, especially during the recruitment process. For instance, many are tricked by private recruitment agencies to work abroad with the lure of good wages and conditions and the reality turns out to be the opposite of this. They are also charged extremely excessive recruitment fees that make them heavily indebted.

Many migrant workers activists would argue that the lack of protection of migrant workers in Indonesia is due to the prevalent market mechanism, which gives a greater role to private recruitment agencies in the migrant worker recruitment process. As a result, many blame the private recruitment agencies for the problems faced by Indonesian migrant workers. However, this is not entirely true in the post-authoritarian period, in which the government has greater involvement in the recruitment of migrant workers (Xiang and

Lindquist, 2014; Killias, 2010). Indeed, during authoritarian era under Soeharto (1966-1998), the governance of migrant workers was characterised by the heavy involvement of private agencies in the recruitment process, placement and return of migrant workers, while the role of the government was merely to give licence to the private agencies. In this era, Indonesian government policies towards migrant workers were motivated by an economic orientation in the placement of migrant workers abroad. The reason behind this was the high demand for labourers from the Middle East, especially Saudi Arabia and neighbouring countries, such as Malaysia in the early 1980s (Cremer, 1988). At the same time, Indonesia experienced economic stagnation due to the end of the oil boom era. Soeharto's authoritarian regime perceived the export of migrant workers to be the most effective way to decrease the unemployment rate, as well as to increase foreign exchange reserves (Palmer, 2014: 56).

One of the policies implemented by the Soeharto regime in order to increase the export of migrant workers was to open the door for the private sector to participate in the recruitment and placement of migrant workers. This policy was enforced through the issuance of Ministerial Regulation No. 01/1983, regarding procedures of placement of migrant workers for private agencies (Palmer, 2014: 62). This ministerial regulation also introduced the involvement of private recruitment agencies as significant actors in the recruitment and placement of migrant workers abroad. Through this regulation, the government gave authority to private recruitment agencies to conduct the majority of the recruitment process. In return, the Indonesian government encouraged the private agencies to promote Indonesian migrant workers by broadening the market for them abroad. By so doing, the government relied heavily on the private recruitment agencies to boost the number of migrant workers sent abroad and it neglected the protection aspect of Indonesian migrant workers (Azmy, 2011).

In the post-authoritarian era, due to the democratisation atmosphere, the civil society involved in the protection of migrant workers were increasingly putting pressure on the government to protect the Indonesian migrant workers. In particular, the urgent need to create a law that regulates the governance of recruitment, as well as the protection of migrant workers was caused by the mass deportation of Indonesian irregular migrant workers by the Malaysian government in 2002 (Azmy, 2011). The case of massive deportation of Indonesian illegal migrant workers showed how bad the legacy of Soeharto's authoritarian regime was

with regard to the recruitment of Indonesian migrant workers in Indonesia (Garcés-Mascareñas, 2012: 92).

In response to the mass deportation, the government took steps to regulate the practice of sending migrant workers abroad through a series of laws and institutional changes enacted from 2002 onwards. In 2004, at the end of her tenure, President Megawati issued Law No. 39/2004, which became the main foundation for the governance of Indonesian migrant workers including their recruitment and placement, as well as their protection. The law, known as the *Placement and Protection of Indonesian Migrant Workers Law* (Undang-Undang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri, abbreviated as UU PPTKILN), became one of the first legal products at the level of national legislation to address the Indonesian migrant workers. During Soeharto's authoritarian regime, laws governing the recruitment and protection of Indonesian migrant workers only existed at the level of government regulation and ministerial regulation. Hence, as argued by one Indonesian Member of Parliament, the enactment of Law No. 39/2004 showed that the central government has begun to pay a greater attention to the recruitment of Indonesian migrant workers, which was often overlooked by Soeharto's authoritarian regime (interview, Jakarta 2014).

The adoption of Law No. 39/2004 also showed a shifting approach by the government compared to the previous regime. While under Soeharto's authoritarian regime, migrant workers recruitment governance relied heavily on private recruitment agencies as the main actors in the recruitment process, with less government presence and intervention, the recent law means that the government plays an active role in the recruitment of Indonesian migrant workers. Through its intervention in the recruitment process, the government can, from the beginning, protect migrant workers from abuse by private recruitment agencies (Palmer, 2014: 101).

Despite its importance as a milestone in migrant worker governance in Indonesia, Law No. 39/2004 is also problematic. A careful reading of the Law indicates that it tends to define protection as a restriction in which the government tries to create a set of rules whereby the market mechanism does not control the process of exporting low-skilled migrant workers. Given that the process of exporting Indonesian migrant workers is highly dependent on agency-to-agency cooperation, rather than state-to-state cooperation or state to private company cooperation, the private recruitment agencies are becoming a focus of the law. Not

surprisingly, under this law, the government seems to focus on how to restrict and regulate private recruitment agencies, rather than other aspects of the protection of migrant workers before their departure, when they are abroad, and when they return.

However, the biggest problem caused by the enactment of this law is the confusion in the institutional design of the governance of Indonesian migrant workers. One of the fundamental changes in the governance of Indonesian migrant workers with the application of the law was the establishment of a new institution in the governance of Indonesian migrant workers called the National Agency for the Placement and Protection of Indonesia Migrant Workers (BNP2TKI). This institution, which is directly responsible to the President, manages the overall governance of Indonesian migrant workers from recruitment to placement and also post-placement (Article 94, Paragraphs 1 and 2).

Bad institutional design in Indonesian migrant workers governance

When Law No. 39/2004 was drafted, the majority of the political parties involved were aspired to excogitate a better recruitment service for the migrant workers both home and abroad. This aspiration stemmed from the loose protection of migrant workers that was predominant during Soeharto's authoritarian regime and that resulted in the abuse of migrant workers by private recruitment agencies, especially at the stage of the recruitment process. Hence, BNP2TKI aimed to create more regulated governance through an independent and integrated body under the President, which could create better governance of Indonesian migrant workers. In essence, this institution is the institutionalisation of an *ad hoc* institution previously created by President B. J. Habibie in the early 2000s, namely the Coordinating Agency for Placement of Indonesian migrant workers (BKPTKI). Due to its *ad hoc* nature, BKPTKI, whose membership consists of nine cross-sectoral agencies, does not have the power to issue binding coordinated policies relating to the governance of Indonesian migrant workers (Azmy, 2011). Ultimately, this institution did not have a significant function in improving the management of the migrant worker recruitment process. Given that the governance of Indonesian migrant workers involves various institutions, including the Ministry of Manpower, the police, sub-national government and the Foreign Ministry, there needs to be an institution that becomes the centre of coordination in order to efficiently manage the recruitment and placement and protection of migrant workers. For this reason,

President Megawati's administration included a clause on the importance of the establishment of institution to coordinate the governance of Indonesian migrant workers.

As a follow up to Law No. 39/2004, President Susilo Bambang Yudhoyono issued Presidential Regulation No. 81/2006 on the Formation of BNP2TKI. The regulation reinforced the responsibility of BNP2TKI as an institution to manage the recruitment and protection of Indonesian migrant workers. Through this Presidential Regulation, the Directorate General for Placement and Protection of Overseas Workers (PPTKLN) under the Ministry of Manpower was automatically disbanded because its function was switched to BNP2TKI. In March 2007, the BNP2TKI officially started to operate.

However, not all of the relevant institutions agreed with the idea of forming BNP2TKI. The Ministry of Manpower was the state institution that did not agree with the establishment of BNP2TKI. During Soeharto's authoritarian regime, the management of Indonesian migrant workers was entirely the responsibility of the Ministry of Manpower, which had great authority in regulating migrant workers governance. Under this new law, however, the authority of the Ministry of Manpower in managing Indonesian migrant workers is limited. In these circumstances, the bureaucrats at the Ministry of Manpower rejected the notion to establish a new organisation to handle Indonesian migrant workers from the outset (personal interview, 2014). The Ministry of Manpower preferred to carry out a reform within its bureaucratic system so that the management of the recruitment of Indonesian workers could be improved.

Nevertheless, bureaucrats at the Ministry of Manpower were forced to accept the formation of BNP2TKI. The mandate for the establishment of BNP2TKI was a sort of political accommodation made by the Megawati administration in dealing with the conflict between several private recruitment agencies and the Ministry of Manpower (personal interview, 2014). The conflict stemmed from the prevalent patron-client relationship between the private recruitment agencies and the bureaucrats at the Ministry of Manpower. As stated by Blunt *et al.* (2012), since the fall of Soeharto, patronage has remained a defining feature of the governance of the Indonesian state. In the post-authoritarian era, many of the former high-ranking bureaucrats at the Ministry of Manpower set up their own private recruitment agencies. Given the patron-client relations between the Ministry of Manpower and its former high-ranking bureaucrats, there was a high possibility of these types of private recruitment agencies, many of which were incorporated under the umbrella of the Association of

Indonesian Private Recruitment Agencies (APJATI), easily obtaining permission to operate compared with other companies that are not related to this association. Given this condition, many new companies that did not have a relationship with the bureaucrats at the Ministry of Manpower had difficulty in obtaining permits (personal interview with private recruitment agencies, 2014).

Therefore, in response to the Presidential Regulation on the Formation of BNP2TKI in 2006, the Ministry of Manpower issued a controversial ministerial regulation (Ministerial Regulation No. 5/2007) to authorise the formation of a new directorate within its internal organisational structure, which was, in part, in response to the changing administrative structure as an effect of the establishment of BNP2TKI. The Directorate for Placement and Protection of Overseas Workers is a reincarnation of the Directorate General of PPTKLN, which was disbanded a year earlier. By establishing the directorate, the Ministry of Manpower has been running a dualistic placement service along with BNP2TKI, which makes the governance of migrant workers more problematic. The Ministry of Manpower prudently drafted the regulation so as not to legally violate the preceding law (Presidential Regulation No. 81/2006) despite its contradictory revival of the overseas placement function. A conflict has officially started.

Overlapping responsibility and conflict over authority between Ministry of Manpower and BNP2TKI

Due to the lack of willingness on the part of the Ministry of Manpower from the outset to voluntarily give up authority to the newly-established institution, the potential for inter-institutional conflict is obvious. The conflict is increasingly unavoidable because the law does not clearly stipulate the relationship between these two institutions. In addition, this law does not clearly provide a specific distribution of responsibility between the two institutions in the implementation of the governance of Indonesian migrant workers. Furthermore, there is no straightforward article in the law that states the power structure and relations between the Ministry of Manpower and the newly-established BNP2TKI. Law No. 39/2004 only states that both shall coordinate in managing the governance of Indonesian migrant workers. As a result, since the founding of BNP2TKI in 2007, the Minister of Manpower, Erman Suparno, has insisted that the role of BNP2TKI is only as an executor of policies in the management of

migrant workers, while the regulations and policy making are still controlled by the Ministry of Manpower.

Even though BNP2TKI has a primary role as an executor of policies with regard to migrant workers' placement and protection, it has limited power to carry out this role since, in practice, there are no clear boundaries regarding what comprises "regulation making" and "policy operator". Thus, the distribution of responsibility is assigned on an informal arbitrary basis, rather than on a legal basis via formal enactment. The excessive function of the Minister of Manpower as both the regulation-making authority and the policy operator in migrant worker governance is a case in point for the unclear distribution of responsibility. As a regulator, the Ministry of Manpower is authorised to formulate policy design and evaluation, but at the same time, the Ministry also exercises overarching power over licensing, such as the issuance of private recruitment company licences (SIPPTKIS) and recruitment licences (SIP). This authority can also be characterised as a "service" that should have been given to the policy operator, in this case, BNP2TKI. This circumstance shows how the Ministry of Manpower is reluctant to hand over its executing authorities and challenges the primary purpose of BNP2TKI, which is to provide an integrative operational body for the management of migrant workers in Indonesia (Dewanto, 2014).

In order to further curb the power of BNP2TKI, the Ministry of Manpower issued Ministerial Regulation No. 22/2008 on the Implementation of the Placement and Protection of Overseas Workers, which had an impact on the reduction in the authority of BNP2TKI in overseeing the implementation of the placement of migrant workers abroad. This regulation has reduced BNP2TKI's authority in managing Indonesian migrant workers, which is part of the government-to-government cooperation and is limited to placement in countries such as South Korea and Japan. Hence, the management of Indonesian migrant workers outside Japan and South Korea, as well as those recruited by private recruitment agencies, was then under the authority of the Ministry of Manpower. Given that the majority of migrant workers work in Middle Eastern countries and East Asian countries, such as Malaysia, Taiwan and Hong Kong, and the majority are also channelled through private recruitment agencies, this Ministerial Regulation caused BNP2TKI to only manage 0.8% of all Indonesian migrant workers.

Not surprisingly, the ministerial regulation further infuriated the Chief of BNP2TKI, Moh. Jumhur Hidayat, a former labour activist and the leader of a widely-known workers

union, the Association of Indonesian Independent Worker Unions (Gaspermindu). Through his organisation, he indirectly proposed a judicial review regarding Ministerial Regulation No. 22/2008 by the Supreme Court. Indeed, it was not BNP2TKI as an institution that proposed the judicial review, but it is evident that the judicial review was intended to retrieve BNP2TKI's authority in managing migrant workers. This can be seen through the clauses reviewed, which coincidentally were related to BNP2TKI's authority. The judicial review was finally accepted and, thus, the Supreme Court invalidated Ministerial Regulation No. 22/2008.

In response to the Supreme Court's decision, the Minister of Manpower decided to cancel Ministerial Regulation No. 22/2008 by issuing three more technical Ministerial Regulations. In 2009, the Ministry of Manpower issued Ministerial Regulation No. 16/2009 on the procedures for the issuance of licences for the deployment of prospective workers abroad by private recruitment agencies, Ministerial Regulation No. 17/2009 on the procedures for the implementation of the final departure briefing for Indonesian migrant workers, as well as Ministerial Regulation No. 18/2009 on the procedures for obtaining overseas migrant worker cards. The issuance of these ministerial regulations has resulted in the transfer of a number of administrative services that were previously authorised by BNP2TKI to the Ministry of Manpower and also the provincial and district/city governments.

There are several strategic administrative services that, according to these ministerial regulations, are no longer authorised to BNP2TKI. First, the issuance of permits to conduct recruitment by private recruitment agencies was handed over to sub-national governments. Second, BNP2TKI is no longer authorised to carry out final departure briefing programmes (*Persiapan Akhir Pemberangkatan*) for Indonesian migrant workers, which again was handed over to the sub-national governments. Third, BNP2TKI is not authorised to issue overseas migrant worker cards (KTKLN), which every Indonesian migrant worker who wishes to go abroad must own. The issuance of the cards was handed over to the sub-national governments. Furthermore, recommendations for clinical health examinations for Indonesian migrant workers, the issuance of certificates of skills, which Indonesian migrant workers must have, insurance designation and the management of a special terminal for Indonesian migrant workers are also no longer authorised by BNP2TKI. However, BNP2TKI does not comply with these ministerial regulations and considers all strategic administrative services

are still under its authority. Consequently, the dualism in the management of migrant workers in Indonesia continues.

There are various kinds of problems arising from the institutional rivalry in the governance of migrant workers between the Ministry of Manpower and BNP2TKI. For instance, there is confusion pertaining to the issuance of recruitment licences (SIP). While the licences of private recruitment agencies (SIPPTKIS) are issued by the Ministry of Manpower, the licences for the agencies to start recruiting potential migrant workers can be issued by both the Ministry of Manpower and BNP2TKI. Ministerial Regulation No. 14/2007 stipulated that its Directorate for Placement and Protection of Overseas Workers can issue the SIP while, at the same time, BNP2TKI can also issue the SIP under the condition that it should give a periodical report to the Ministry of Manpower. The reason for the issuance of this confusing ministerial regulation was to appease the BNP2TKI and avoid another legal battle in the courts. As a result, this regulatory framework has made the distribution of responsibility unclear between the Ministry of Manpower and BNP2TKI and created confusion for private recruitment agencies.

In order to overcome this situation, usually, private recruitment agencies apply to both institutions for a recruitment licence to prevent unnecessary rejection by bureaucrats at either BNP2TKI or the Ministry of Manpower. However, this strategy is usually hard for private recruitment agencies to carry out since there is a tacit requirement to get a SIP, which is to provide a recommendation letter from two of the largest private recruitment agency associations, namely the Association of Indonesian Private Recruitment Agencies (APJATI) and the Private Recruiter Business Consortium (HIMSATAKI). It is an open secret among the private recruitment agencies that one needs to have a recommendation from HIMSATAKI to obtain a recruitment licence from BNP2TKI, while an APJATI recommendation is a requirement to secure a recruitment licence from the Ministry of Manpower. Thus, this unwritten requirement, as well as the involvement of the two biggest private recruitment agency associations, have further deepened the institutional rivalry between the Ministry of Manpower and BNP2TKI (Dewanto, 2014).

This condition, furthermore, has caused confusion with regard to the management of Indonesian migrant workers due to the administrative maze faced by private recruitment agencies. Some companies perform the administrative process through the Ministry of Manpower, while others use BNP2TKI. As stated by one of the private recruiters

interviewed, this condition means that the placement and protection of migrant workers cannot run smoothly, including the enforcement of laws and regulations when problems occur in the recruitment process (interview, Malang, 2014).

This rivalry also leads to ineffective control of private recruitment agencies. This condition gives space for private recruitment agencies to continue practices that are not in accordance with the rules, since the regulators cannot implement effective sanctions towards them. For instance, if a private recruitment agency is not served by the Ministry of Manpower, for some reason, then they will switch to BNP2TKI or *vice versa*. Likewise, if a private recruitment agency service, after its evaluation, is terminated or suspended by the Ministry of Manpower for a certain period of time, usually three months, then it will switch to BNP2TKI for permits and *vice versa*. This makes sanctions against malign private recruitment agencies ineffective (interview, migrant workers activist, Jakarta, 2014).

In 2010, the new Minister of Manpower, Muhaimin Iskandar, made a reconciliation with BNP2TKI. The reconciliation was reached after various attempts by the House of Representatives to mediate in the conflict between the two. Despite the reconciliation, each institution still offers its respective services with regard to both private recruitment agencies and migrant workers. Therefore, the institutional conflict has eased but not been solved.

This institutional conflict resurfaced again in December 2013 when the Ministry of Manpower suspended 213 private recruitment agencies from operating on the basis of their poor performance. This suspension caused many Indonesian migrant workers to be prevented from being sent abroad. When the problem was reported by one of the banned private recruitment agencies to BNP2TKI, this institution issued a permit for this private recruitment agency to send Indonesian migrant workers to the United Arab Emirates. The issuance of the permit by BNP2TKI evoked another problem because the Ministry of Manpower accused the private recruitment agency of carrying out illegal trafficking and reported it to the Police.

The discussion above shows that although BNP2TKI was designed as a new institution to address the bureaucratic red tape resulting from the previous governance, instead it has brought institutional rivalry due to its unclear distribution of responsibility with the Ministry of Manpower. Since it is positioned as the executor of policies made by the Ministry of Manpower, BNP2TKI has no authority to stipulate regulations that can be implemented by a wide range of institutions. Despite being directly responsible to the President, the institutional position of BNP2TKI is perceived by the officials within it as a

subordinate to the Ministry of Manpower. This has created a *status quo* where the Ministry of Manpower continues to hold regulatory superiority over BNP2TKI and, thus, the confusion over the governance of migrant workers in Indonesia continues. Even in the current debate regarding the revision of Law No. 39/2004, the Ministry continues to insist that the regulatory function should be theirs, while BNP2TKI serves as an operational institution (Dewanto, 2014).

Defective decentralisation in Indonesian migrant worker governance

Besides creating horizontal inter-institutional competition due to the lack of distribution of responsibility, Law No. 39/2004 has also created confusion in vertical inter-institutional relations between the central and sub-national government institutions. In line with the spirit of decentralisation experienced by Indonesia in the post-authoritarian era, Law No. 39/2004 stipulates that the sub-national governments, both provincial and municipality, have greater responsibility in managing migrant workers governance, especially in supervising the recruitment process in their specific territory. Theoretically speaking, the decentralisation process in which the sub-national governments have a greater role in managing mostly domestic issues (Teresa Balaguer-Coll *et al.*, 2010) including labour and employment may reduce the persistence of bad governance that affects the migrant workers (Bachtiar, 2011a). As suggested in the literature (Jorgensen, 2012), decentralisation may enable sub-national governments to come up with a specialised policy dealing with particular issues that concern them the most. In the case of Indonesia, decentralisation is expected to reduce the problems occurring in the early part of the recruitment process of migrant workers.

On the contrary, the decentralisation framework has provided a very limited solution in creating better governance in the recruitment process in Indonesia. In fact, the governance of migrant worker recruitment is becoming increasingly problematic. The reasons why decentralisation does not necessarily provide a greater role to sub-national government in managing the migrant worker recruitment process is the absence of a comprehensive legal foundation for sub-national governments to manage migrant worker recruitment in their respective areas, as well as the willingness of central government to give greater authority to sub-national governments (Karim, 2015). As argued by a local Member of Parliament, the decentralisation occurring in the post-authoritarian era has not provided a legal framework to operationalise the authority of sub-national governments both in the provincial and municipal

governments so that they have strong involvement and control over migrant worker recruitment (interview, Sukabumi, 2014). The legal framework is important since the success of sub-national government in handling the recruitment process requires it to have firm and comprehensive authority. Therefore, migrant worker recruitment seems to be more centralistic, despite the law that mandates the increasing responsibility of sub-national government in managing the migrant worker recruitment process.

Indeed, through Government Regulation No. 38/2007, sub-national governments have greater responsibility in supervising the recruitment process, including the registration of migrant workers, the screening of prospective migrant workers and the monitoring of the recruitment process. Although the obligation to supervise the recruitment process in the region is still in the hands of sub-national governments, the central government does not give greater authority to sub-national governments to carry out these functions, since Law No. 39/2004 does not stipulate specific authority to carry out the sub-national governments' role. For instance, sub-national governments have no real authority if they find misconduct perpetrated by private recruitment agencies. Only the Ministry of Manpower can revoke the licence of private recruitment agencies. Given this condition, there is a tendency that the initiatives undertaken by the sub-national governments fail because the authority to deal with very important issues, such as the establishment and monitoring of recruitment agencies, is still in the hands of the central government (Interview East Java Province Official, East Java, 2014). Consequently, although there are opportunities for autonomy, there is a strong trend towards the centralisation of central government administration in Jakarta. The result is the removal of the *de facto* authority of sub-national governments in the administration of placement workers, especially in supervising the recruitment process. So, even if there are problems experienced by migrant workers, such as illegal recruitment, the falsification of documents and the arbitrary charging of excessive fees, which are likely to occur in the recruitment process at the sub-national level, the central government has yet to give the sub-national government the authority to resolve these problems (interview, Malang Municipality Official, Malang, 2014).

Some provinces such as East Java and West Nusa Tenggara have tried to regulate the recruitment process in order to reduce the abuse by private recruitment agencies of potential migrant workers. However, due to the lack of a national legal framework for their authority, many of the initiatives have not worked well. In East Java, for instance, the provincial

government enacted its own regional regulation (*Perda*) whereby private recruitment agencies should open their own branches in the area where they want to recruit potential migrant workers (Local Regulation No. 2/2004 and Governor Regulation No. 42/2004). This means that the private recruitment agencies need to pay a registration fee to the sub-national government. This fee is considered as an insurance should problems be encountered by migrant workers recruited through the private recruitment agencies. However, this sub-national regulation is not effective in enforcing the regulation that private recruitment agencies should report their activities to the sub-national government since there is no legal basis upon which to enforce the law (Adi, 2014). Through their association, private recruitment agencies ask the central government to overrule the *Perda*, since it violates Law No. 34/2004 and should be abolished (Hardum, 2014). Besides, private recruitment agencies use informal recruiters, known as brokers or middlemen, as a way of getting potential migrant workers and sending them directly to Jakarta where many private recruitment agencies operate. The result is that many sub-national governments do not know how many migrant workers are sent from their administrative districts, since they have no control over the activities of the brokers who conduct recruitment activities in their administrative area (interview, local Member of Parliament, East Java, 2014).

Another instance where the initiatives implemented by sub-national government to create better governance in the recruitment process are constrained by the lack of authority given to supervise the recruitment process happened in West Nusa Tenggara. Due to the political willingness of the West Nusa Tenggara government, the province has a better registration system that means that it can easily identify suspicious applications from private recruitment agencies, such as “blank nominations” that have been sent by the official at the municipality level (DPR, 2015: 21). However, given their “unsettled supervision role”, they are not allowed to even raise an inquiry to the municipality office regarding the suspicious nomination. At the same time, the municipality government lacks the ability to conduct cross-checks of the details of recruits due to the small budget from the central government. Hence, both provincial and municipality officials choose to play safe by allowing suspicious recruitment to pass to the central government (Dewanto, 2014).

Why is the central government reluctant to give a greater role to sub-national governments so that they have greater authority in overseeing the private recruitment agencies? One might argue that this is due to the mainstream discourse held by the central

government, which stipulates that whilst the handling of domestic employment is the responsibility of sub-national governments, the handling of migrant workers is the responsibility of central government, since it is considered a foreign affairs issue (interview, Member of Parliament, Jakarta, 2014). Thus, giving licences to and evaluating the performance of private recruitment agencies should be under the authority of central government. However, the reason for the reluctance of central government to hand over the authority is far more complex. It is widely believed among migrant worker activists, as well as sub-national government officials, that the authority to give a licence both in the Ministry of Manpower and BNP2TKI has become an instrument to gain a kick-back fee from private recruitment agencies (interview, migrant worker activist, Jakarta, 2014).

Besides the lack of authority and the lack of a legal framework to operationalise their authority, the inability of sub-national governments to carry out effective supervision in the process of recruitment of Indonesian workers is also caused by confusion in implementing the policy made by central government given the institutional rivalry between the Ministry of Manpower and BNP2TKI. Since its inception in 2007, there have been many contradictory policies issued by the Ministry of Manpower and BNP2TKI, which have left the sub-national governments in regulatory limbo. The suspension of all private recruitment agency activities in the early 2014 could be a case in point with regard to how the rivalry between the two institutions creates confusion for the sub-national governments. In February 2014, following a letter of protest filed by the Private Recruiter Business Consortium (HIMSATAKI) demanding the suspension of the entire process of the placement of Indonesian workers, BNP2TKI sent a letter to the Ministry of Manpower, as well as sub-national governments, that resulted in the temporary termination of the placement of Indonesian migrant workers abroad by all private recruitment agencies. As of February 2014, 240 of 519 private recruitment agencies were suspended by the Ministry of Manpower. According to the private recruitment agencies suspended, their suspension by the Ministry of Manpower was allegedly due to their recruitment licences, as well as their employment agreements, being issued and validated by BNP2TKI.

This temporary suspension of all recruitment and placement activities can be seen as retaliation by BNP2TKI towards the Ministry of Manpower, which tried to undermine BNP2TKI's authority to issue recruitment licences. The policy issued by BNP2TKI caused the entire administration of the recruitment process to be suspended, thus making services to

prospective Indonesian migrant workers constrained. The conflicting policy stemming from the institutional rivalry between BNP2TKI and the Ministry of Manpower has seriously affected the sub-national governments. As a result, it is the sub-national governments that need to deal with the protests from the prospective migrant workers who feel most aggrieved by this policy.

Conclusion

The case of Indonesian migrant worker governance demonstrates some insights that need to be taken seriously. Firstly, it shows the importance of the analysis of the exploitation of the regulatory realm not only by private recruitment agencies, but also by regulatory institutions to secure their institutional interest. Hence, we should not be trapped in the debate regarding whether Indonesia's migrant worker governance should be more interventionist, rather than liberal. The study contends that Indonesia's migrant worker governance is both liberal, with the important role of private recruitment agencies and interventionist whereby the state deliberately attempts to restrict the demand of migrant workers through control over the private actors operating within the domestic market with its restrictive regulatory framework. However, as this paper has discussed, the more restrictive regulatory framework does not guarantee the emergence of better governance for the protection of migrant workers.

This leads to the second important insight, which is how the complexity of regulatory actors' interactions facilitates the persistence of bad management in the migrant worker recruitment process. The paper reveals that in the case of newly-democratised and decentralised Indonesia, the restrictive regulatory framework for the recruitment of migrant workers, which curbs private recruitment agencies, does not create better migrant worker governance, since the newly-established regulatory framework does not take into consideration the horizontal relationship between the old and new institutions and the vertical relationship between the central and sub-national governments. Horizontally, the bad institutional design of the new regulatory framework proposed to replace the old one has created institutional rivalry between the newly-established regulatory actor and the old one. Vertically, the reluctance of central government to decentralise authorities to sub-national government has amputated the ability of sub-national governments to perform a supervisory role in the recruitment process.

As shown in the analysis, the creation of BNP2TKI was aimed at creating more coherent coordination among the government institutions dealing with migrant workers. On the contrary, the current institutional arrangement for migrant worker recruitment has made the recruitment process a battleground enabling rent-seeking behaviour by individuals in the central government. At the national level, the establishment of BNP2TKI has created a dualism in the management of migrant workers between the Ministry of Manpower and BNP2TKI itself. As a consequence, the loopholes in the governance of migrant workers have increased due to the competition between the Ministry of Manpower and the newly-established BNP2TKI in managing the recruitment of migrant workers. The institutional rivalry among the regulatory actors has widened the regulatory loopholes that can be exploited by private recruitment agencies. At the same time, the institutional rivalry between the two has affected the management of migrant workers by sub-national governments. This rivalry creates confusion among the sub-national governments in implementing the policies made by the central government regarding the migrant worker recruitment process. As a result, it is not surprising that, in Indonesia's case, sub-national governments cannot interfere in many of the problems related to the recruitment process at the sub-national level. Considering that Indonesia has been one of the most significant exporters of migrant workers for the last two decades, the analysis regarding the institutional dynamics of the regulatory actors in the management of the migrant worker recruitment process can better inform migrant worker policy makers to focus not only on how to regulate private recruiters, but also how to create a better institutional design to minimise the chance of state agencies competing for authority.

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