

REFORMING INDONESIA'S APPROACH TO TRANSFER OF SENTENCED PERSONS: A *MAQĀṢID AL-SHARĪ'A* FRAMEWORK AND A COMPARATIVE ANALYSIS OF ASEAN AND EUROPEAN MODELS

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Abstract: This study examines the legal and humanitarian challenges faced by Indonesian migrant workers abroad, and the need to establish a clear legal mechanism for the transfer of sentenced persons (ToSP) between Indonesia and other countries. Cases from Myanmar, Malaysia, and Saudi Arabia reveal gaps in Indonesia's legal framework, leaving migrant workers vulnerable to unjust criminalization, disproportionate punishment, and prolonged detention without predictable repatriation. The study finds that Indonesia's approach relies on ad hoc diplomatic negotiations rather than enforceable legal procedures, contravening rehabilitative and humane treatment principles in international conventions, such as UNCAC Article 45 and UNTOC Article 17. A comparative analysis reveals the absence of an ASEAN-wide prisoner transfer mechanism, unlike the European Convention on the Transfer of Sentenced Persons. To address these deficiencies, this study proposes enacting an Indonesian National Law on ToSP and advocating the ASEAN Protocol on Prisoner Transfer. The study reinterprets the issue through *maqāṣid al-sharī'a*, positioning the protection of migrant workers' lives (*ḥifẓ al-nafs*), family well-being (*ḥifẓ al-nasl*), and economic welfare (*ḥifẓ al-māl*) as ethical imperatives transcending procedural limits of positive law. This *maqāṣid*-based framework transformed the ToSP regime from diplomatic discretion to a legally mandated restorative justice mechanism. The study concludes that aligning Indonesia's legislation, bilateral agreements, and ASEAN advocacy with the *maqāṣid* principles would establish a more humane and rehabilitative transnational criminal justice system for migrant workers.

Keywords: ASEAN, International Law, *Maqāṣid al-Sharī'a*, Migrant Workers, Transfer of Sentenced Persons (ToSP).

Abstrak: Studi ini mengkaji tantangan hukum dan kemanusiaan pekerja migran Indonesia yang dipenjarakan di luar negeri, serta urgensi menetapkan mekanisme hukum yang jelas untuk transfer narapidana (ToSP) antara Indonesia dan negara lain. Kasus dari Myanmar, Malaysia, dan Arab Saudi menunjukkan celah persisten dalam kerangka hukum Indonesia, yang membuat pekerja migran rentan terhadap kriminalisasi tidak adil, hukuman tidak proporsional, dan penahanan berkepanjangan tanpa jalur yang dapat diprediksi untuk repatriasi. Studi ini menemukan bahwa pendekatan Indonesia saat ini bergantung pada negosiasi diplomatik ad hoc daripada prosedur hukum yang dapat ditegakkan, bertentangan dengan prinsip perlakuan rehabilitatif dan manusiawi dalam konvensi internasional seperti Pasal 45 UNCAC dan Pasal 17 UNTOC. Analisis perbandingan mengungkap ketidakhadiran mekanisme transfer narapidana yang berlaku di ASEAN, berbeda dengan Konvensi Eropa tentang Transfer Narapidana. Untuk mengatasi kekurangan ini, studi ini mengusulkan agenda reformasi dua pilar: mengesahkan Undang-Undang Nasional Indonesia tentang ToSP dan mengadvokasi Protokol ASEAN tentang Transfer Narapidana. Studi ini menafsirkan masalah melalui lensa *maqāṣid al-sharī'a*, menempatkan perlindungan kehidupan pekerja migran (*ḥifẓ al-nafs*), kesejahteraan keluarga (*ḥifẓ al-nasl*), dan kesejahteraan ekonomi (*ḥifẓ al-māl*) sebagai imperatif etis yang melampaui batas prosedural hukum positif. Kerangka kerja berbasis *maqāṣid* ini mengubah sistem ToSP dari diskresi diplomatik menjadi

mekanisme keadilan restoratif yang diwajibkan secara hukum. Studi ini menyimpulkan bahwa menyelaraskan legislasi domestik Indonesia, perjanjian bilateral, dan advokasi ASEAN dengan prinsip maqāsid akan membentuk arsitektur keadilan pidana transnasional yang lebih manusiawi, rehabilitatif, dan responsif bagi pekerja migran.

Kata kunci: ASEAN, Hukum Internasional, Maqāsid al-Sharī'a, Pekerja Migran, Transfer Narapidana.

[10.21154/invest.v5i2.10499](https://doi.org/10.21154/invest.v5i2.10499)



To cite this article: Sriwidodo, J., Saputra, R., & Widodo, A. A. (2025). Reforming Indonesia's approach to the transfer of sentenced persons: A Maqāsid al-Sharī'a framework and a comparative analysis of ASEAN and European models. *Invest Journal of Sharia & Economic Law*, 5(2), 243–270. <https://doi.org/10.21154/invest.v5i2.10499>.

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INTRODUCTION

International labor migration is an essential pillar of the global economy, with Indonesia being recognized as the largest labor-sending country in Southeast Asia. According to the Strategic Plan of the Ministry of Foreign Affairs (2020–2024), between 2015 and 2019, the Ministry and Indonesian Representatives abroad handled 73,503 legal cases involving Indonesian citizens, including 297 individuals rescued from death-row sentences, while 181,942 problematic nationals, such as overstayers and irregular migrant workers, were repatriated.¹

These figures reveal the wide spectrum of legal challenges faced by Indonesian citizens abroad, ranging from administrative violations to criminal offenses. This situation underscores a fundamental gap in the state's obligation to provide legal protection (*perlindungan hukum*), as mandated by Article 19 (1) of Law No. 18 of 2017 on the Protection of Indonesian Migrant Workers, which stipulates that the government should guarantee the fulfillment of migrant workers' rights before, during, and after employment abroad.

However, Indonesia's positive laws do not currently regulate the transfer of sentenced persons or prisoners between Indonesia and foreign states. Law No. 1 of 1979 on Extraditions only covers the surrender of fugitives for trial or punishment (*Pasal 1 angka 4 dan Pasal 7*) and not the repatriation of convicted persons who have already been sentenced abroad. Similarly, Law No. 15 of 2008 on the Ratification of the ASEAN Mutual Legal Assistance in the Criminal Matters Treaty (2004) provides a framework for evidence sharing and investigation, but does not extend to prisoner transfer mechanisms.

This absence of specific regulations creates a normative lacuna (*kekosongan norma hukum*) in Indonesia's transnational criminal law system. Consequently, the Government's capacity to uphold its constitutional duty under Article 28I (4) of the

¹ Kementerian Luar Negeri, 'Rencana Strategis Kementerian Luar Negeri 2020-2024', Kementerian Luar Negeri, Oktober 2020, <https://e-ppid.kemlu.go.id/storage/619/Renstra-Kemlu-2020-2024.pdf>.

The 1945 Constitution – to protect its citizens and guarantee the due process of law – was constrained when Indonesian migrant workers were criminalized abroad.

Criminal cases involving Indonesian migrant workers frequently stem from structural economic vulnerabilities rather than from deliberate criminal intent. Many are entrapped in fraudulent recruitment schemes, illegal debt bondage, forged documentation, and coerced involvement in transnational narcotics and online scam networks.² Meanwhile, Ismail and Nggilu showed that extradition in economic cases often faces legal and diplomatic obstacles that complicate the return of migrant workers facing legal problems abroad.³ Such patterns reflect the *modus operandi* of cross-border syndicates that exploit migrant labor under the guise of legal employment.

Recent cases have demonstrated how Indonesian migrant workers continue to face formal imprisonment abroad, reflecting their persistent vulnerabilities in the absence of robust legal protection mechanisms.

For instance, in Myanmar, an Indonesian national identified as A.P. was sentenced to seven years in prison under the *Anti-Terrorism Act* and immigration law for alleged links to opposition groups.⁴ In Malaysia, 27 Indonesian workers were convicted and sentenced to three months of imprisonment for possessing fake national identity cards (MyKad), while five others received 15-month prison terms in Johor for illegal possession of over 13,000 kg of liquefied petroleum gas (LPG).⁵ Another Indonesian was jailed for two years and nine months in Sarawak for migrant smuggling.⁶ In Saudi Arabia, Etty Binti Toyyib Anwar spent 20 years in prison after being accused of killing her employer. She was released and repatriated

²Wildani Angkasari, 'Tinjauan Yuridis Perjanjian Ekstradisi Terhadap Kejahatan Ekonomi Dalam Kepentingan Nasional Indonesia', *Lex Jurnalica* 11, no. 1 (2014), <https://ejurnal.esaunggul.ac.id/index.php/Lex/article/view/389>.

³D. Ekawaty Ismail and Novendri M. Nggilu, 'The Urgency of Indonesia-Singapore's Extradition Agreement in the Corruption Law Enforcement', paper presented at Proceedings of the 3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019), Surakarta, Indonesia, *Proceedings of the 3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019)*, Atlantis Press, 2019, <https://doi.org/10.2991/icglow-19.2019.41>.

⁴Ihsan Nabil, 'Kemlu: WNI Selebgram Di Penjara Myanmar Sudah Divonis Tujuh Tahun', *News, Antaranews*, 1 July 2025, <https://www.antaranews.com/berita/4936629/kemlu-wni-selebgram-di-penjara-myanmar-sudah-divonis-tujuh-tahun>.

⁵Ben Tan, 'Five Indonesians Jailed 15 Months for Illegally Possessing over 13,000kg of LPG in Johor', *News, Malaymail*, 3 September 2025, <https://www.malaymail.com/news/malaysia/2025/09/03/five-indonesians-jailed-15-months-for-illegally-possessing-over-13000kg-of-lpg-in-johor/189880>; Daniel Ahmad Fajri, '27 WNI Di Malaysia Dipenjara Tiga Bulan Atas Kepemilikan KTP Palsu', *News, Tempo*, 6 March 2023.

⁶Lydia Aman, 'Indonesian Jailed Two Years, Nine Months over Migrant Smuggling', *News, Sarawak News*, 5 August 2025, https://www.sarawaktribune.com/indonesian-jailed-two-years-nine-months-over-migrant-smuggling/?utm_source=chatgpt.com.

in 2021, after extensive diplomatic and humanitarian negotiations with the Indonesian government.⁷

These cases reveal that Indonesian migrant workers are not merely subjects of administrative detention, but often become convicted prisoners under foreign criminal law, serving sentences within host countries' penal systems. Under such circumstances, they face limited legal representation, language barriers, and restricted consular access. As noted by Ismail and Nggilu, the absence of bilateral or regional mechanisms for prisoner transfers or mutual legal assistance (MLA) exacerbates these difficulties. The lack of a Treaty on the Transfer of Sentenced Persons, combined with jurisdictional conflicts and evidentiary incompatibility, continues to impede the repatriation and rehabilitation of imprisoned Indonesian workers, leaving humanitarian protection largely dependent on discretionary diplomatic interventions.

Previous studies have extensively discussed extradition and Mutual Legal Assistance (MLA) as key tools in law enforcement against transnational economic crimes such as corruption and money laundering.⁸ Some studies highlight how the extraditions between Indonesia and Singapore are used to handle corruption cases and return assets from economic crimes.⁹ Other studies highlight Indonesia's involvement in the ASEAN MLA framework, including bilateral agreements with Malaysia and the MLA model for the recovery of assets from economic crimes.¹⁰

⁷ Anne Barke and Ake Prihantari, 'Etty Spent 20 Years in Jail Accused of Killing Her Saudi Employer. Indonesia Gave Everything to Save Her from Execution', News, *ABC News*, 12 September 2020, <https://www.abc.net.au/news/2020-09-12/ettys-case-reveals-indonesias-migrant-worker-crisis/12625546>.

⁸ Association of Southeast Asian Nations (ASEAN), *Mutual Legal Assistance in Criminal Matters*, version ASEAN Treaty Series (ATS) No. 6/2004, Kuala Lumpur, 2004, <https://asean.org/our-communities/asean-political-security-community/rules-based-people-oriented-people-centred/treaty-on-mutual-legal-assistance-in-criminal-matters/>.

⁹ Bagus Ananda and Joko Setiyono, 'The Counteraction of Corruption in Indonesia Based On the International Agreement (Extradition) Between Indonesia and Singapore', *INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY RESEARCH AND ANALYSIS* 07, no. 01 (January 2024), <https://doi.org/10.47191/ijmra/v7-i01-34>; Angkasari, 'Tinjauan Yuridis Perjanjian Ekstradisi Terhadap Kejahatan Ekonomi Dalam Kepentingan Nasional Indonesia'; Ismail and Nggilu, 'The Urgency of Indonesia-Singapore's Extradition Agreement in the Corruption Law Enforcement'; Rika Erawaty, 'KAJIAN TENTANG PERJANJIAN EKSTRADISI INDONESIA-MALAYSIA DALAM MEMBERANTAS KEJAHATAN DAN PELAKSANAANNYA DI INDONESIA', *Yuriska : Jurnal Ilmiah Hukum* 3, no. 2 (October 2017): 52–68, <https://doi.org/10.24903/yrs.v3i2.180>.

¹⁰ Helex Wirawan and Ismet Ismet, 'Application of Reciprocal Law in Returning Assets Resulting from Corruption,' *Journal of Contemporary Issues in Business and Government* 27, no. 5 (2021), <https://doi.org/10.47750/cibg.2021.27.05.031>; I Nyoman Sindhu Gautama, 'Restricting International Crimes Based on Mutual Legal Assistance Treaties (MLATs),' *Journal of Actual Justice* 4, no. 1 (June 10, 2019): 54-65, <https://doi.org/10.47329/aktualjustice.v4i1.474>; Muhammad Rustamaji and Bambang Santoso, 'The Study of Mutual Legal Assistance Model and Asset Recovery in Corruption Affair,' *IJCLS (Indonesian Journal of Criminal Law Studies* 4, no. 2 (2019): 155-60, <https://doi.org/10.15294/ijcls.v4i2.18719>; Sindhu Gautama, 'Restricting International Crimes Based

However, studies on extradition and MLA in the legal protection of migrant workers involved in economic crimes are minimal.

Several studies have examined the exploitation of migrant workers for human trafficking. However, no comprehensive study has been conducted on how legal mechanisms in extradition and MLA can be used to protect migrant workers who are victims or perpetrators of economic crimes.¹¹ Given the increasing criminalization of migrant workers due to illegal debt bondage, the misuse of employment contracts, and their involvement in the transnational financial crime network, further study of the legal strategies that can be applied to protect their rights in the context of transnational economic criminal law is required.

This study aims to analyze the urgent need to establish a clear legal mechanism for the transfer of sentenced persons (ToSP) between Indonesia and other countries to strengthen legal protection for Indonesian migrant workers imprisoned abroad, whether as victims or perpetrators of cross-border crimes. In particular, this study emphasizes the need to develop a bilateral or regional treaty framework that ensures procedural fairness, access to legal aid, and the rehabilitation rights of convicted Indonesian citizens.

To achieve this, this study integrates economic criminal law perspectives with the human rights dimensions of migrant worker protection and examines how prisoner transfer arrangements can mitigate the economic and psychological burdens faced by workers' families in Indonesia. This study extends this analysis through *maqāṣid al-sharī'a*-based legal reasoning, interpreting *ḥifẓ al-nafs* (protection of life), *ḥifẓ al-'aql* (protection of dignity and reason), and *ḥifẓ al-māl* (protection of property) as normative foundations for transnational justice and social welfare.

Methodologically, this study is classified as normative legal research that employs statutory and comparative approaches. It critically examines relevant national and international legal instruments, including Law No. 1 of 1979 on Extraditions, Law No. 5 of 2014 on Mutual Legal Assistance, the ASEAN Mutual Legal Assistance Treaty (2004), and the UN Convention against Transnational Organized Crime (2000). By analyzing the legal vacuum surrounding the absence of a Treaty on the Transfer of Sentenced Persons (ToSP), this study identifies gaps in Indonesia's

on Mutual Legal Assistance Treaties (MLATs)"; Wirawan and Ismet, "Application of Reciprocal Law in Returning Assets Resulting from Corruption."

¹¹ Sulaiman Rasyid and Joko Setiyono, "Extradition Arrangements in Efforts to Eradicate Corruption Crimes in Indonesia," *Journal of Legal Dynamics* 21, no. 2 (March 30, 2022): 301, <https://doi.org/10.20884/1.jdh.2021.21.2.3154>; Dewi Asri Puanandini, "LEGAL ENFORCEMENT OF INDONESIAN MIGRANT WORKER TRADE," *ADLIYA: Journal of Law and Humanity* 14, no. 2 (January 14, 2021): 257-70, <https://doi.org/10.15575/adliya.v14i2.9938>; Rasyid and Setiyono, "Extradition Arrangements in Efforts to Eradicate Corruption Crimes in Indonesia."

legal framework and evaluates their implications for the protection and repatriation of migrant workers.

Ultimately, this study proposes a *maqāṣid*-informed legal model for transnational prisoner transfer—one that harmonizes positive law, international cooperation mechanisms, and ethical justice and welfare—to ensure that Indonesian migrant workers receive fair, humane, and socially restorative treatment within the global criminal justice system.

DISCUSSION

2.1 Concepts and Principles of Intercountry Transfer of Prisoners

The transfer of prisoners between countries is a form of international cooperation in criminal law that aims to allow prisoners to serve the remainder of their sentences in their home country. The concept was first introduced at The Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which recognized the importance of cooperation between countries to facilitate the social reintegration of prisoners serving sentences abroad.¹² As Bassiouni noted, this concept marks “a gradual evolution from the sovereignty-centered model of extradition toward a rehabilitative and humanitarian framework of penal cooperation.”¹³

At the Sixth United Nations Congress in 1980, the idea was refined through a Model Agreement on the Transfer of Foreign Prisoners and the Recommendations on the Treatment of Foreign Prisoners.¹⁴ These instruments established basic principles that continued to guide international practices.

1. International collaboration to facilitate social rehabilitation
2. Respect for the legal sovereignty of each country in implementation
3. The application of the principle of double criminality requires that the act be a crime in both states.
4. The prisoner’s right to be informed of the legal implications of the transfer; and
5. The voluntariness of both the sentencing and receiving states as well as the prisoners.

¹² UN General Assembly (32nd sess: 1977), “Report of the 5th United Nations Congress on the Prevention of Crime and the Treatment of Offenders.” (UN General Assembly, December 8, 1977), <https://www.refworld.org/legal/resolution/unga/1977/en/28631>.

¹³ M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, Sixth edition (Oxford: Oxford University Press, 2014).

¹⁴ Council of Europe Address 23, Place Broglie, F-67075 Strasbourg France, *Additional Protocol to the Convention on the Transfer of Sentenced Persons, Strasbourg, 18 December 1997* (London: Stationery Office, 2010).

These principles reflect what Akehurst calls “*the equilibrium between sovereignty and humanity*.”¹⁵ Therefore, the transfer mechanism embodies a dual obligation: preserving state consent while ensuring humane treatment and social reintegration of offenders. This framework is further supported by several international instruments.

1. Article 45 of the United Nations Convention against Corruption (UNCAC, 2003) encourages cooperation in the transfer of prisoners, particularly in corruption-related cases. While the text uses the permissive phrase “may consider,” under Article 31 of the Vienna Convention on the Law of Treaties (1969), it must be interpreted in light of its objective and purpose—rehabilitation and humane treatment. As Schabas observes, such clauses acquire “*progressive obligatory force when essential to protect human dignity*.”¹⁶
2. Article 17 of the United Nations Convention against Transnational Organized Crime (UNTOC, 2000) permits transfer arrangements through mutual consent. Bassiouni interprets this dual consent as a safeguard, balancing sovereignty with individual autonomy: “*Mutuality of consent protects both the state’s authority and the offender’s human right to rehabilitation*.”¹⁷
3. The European Convention on the Transfer of Sentenced Persons (1985) and the Inter-American Convention on Serving Criminal Sentences Abroad (1996) provide regional precedents. As Dugard explains, “*the transfer of sentenced persons has become an accepted expression of penal humanitarianism in international law*.”¹⁸

Although these principles are widely recognized, no universal multilateral convention exists to comprehensively regulate the transfer of prisoners. Consequently, most countries have relied on bilateral agreements to address these issues. For instance, Indonesia has established agreements with Malaysia, Saudi Arabia, and Hong Kong, reflecting a large number of Indonesian nationals imprisoned abroad, particularly migrant workers.

However, these bilateral mechanisms have persistent weaknesses in their implementation and protection of rights. Many Indonesian migrant workers imprisoned for minor labor or immigration offenses faced difficulties in obtaining legal assistance before being transferred. This mirrors what Bassiouni terms “*the*

¹⁵ Alexander Orakhelashvili, *Akehurst’s Modern Introduction to International Law*, Ninth edition (Abingdon, Oxon: Routledge, Taylor & Francis Group, 2022).

¹⁶ William A. Schabas, *An Introduction to the International Criminal Court*, 6th edn (Cambridge University Press, 2020), <https://doi.org/10.1017/9781108616157>.

¹⁷ Orakhelashvili, *Akehurst’s Modern Introduction to International Law*.

¹⁸ John Dugard, *International Law: A South African Perspective* (Kenwyn: Juta & Co, 1994).

humanitarian deficit of ad hoc justice,” where normative cooperation fails to yield substantive protection for victims.¹⁹

Recent cases illustrate persistent legal and humanitarian gaps in the protection of Indonesian nationals imprisoned abroad. In Myanmar, a 33-year-old Indonesian influencer identified as an A.P. was sentenced to seven years of imprisonment under the Anti-Terrorism Act, the Unlawful Associations Act, and immigration law after allegedly entering Myanmar illegally and meeting an armed opposition group.²⁰ The charge was politically sensitive because Myanmar’s junta government often broadened the definition of terrorism to include any associations with anti-junta groups. From a legal standpoint, this conviction fails to satisfy the principle of double criminality because, under Indonesia’s Law No. 5 of 2018 on terrorism, criminal liability requires demonstrable intent to commit violence or threaten national security. The absence of violent conduct in the case of AP implies a non-equivalent offense between Myanmar and Indonesia.

According to Article 17 (1) of the United Nations Convention Against Transnational Organized Crime (UNTOC), the transfer of sentenced persons must serve “rehabilitation and social reintegration.” However, in this instance, imprisonment was imposed on a politically charged offense rather than on a transnational crime. Therefore, Indonesia could justifiably seek the prisoner’s transfer on humanitarian grounds, invoking Article 31(1) of the Vienna Convention on the Law of Treaties (1969) to interpret the UNTOC’s provisions teleologically, that is, in favor of the treaty’s object and purpose. The political character of prosecution further engages Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees a fair and impartial trial.

In judicial reasoning, this case reveals how the absence of a *bilateral transfer treaty* between Indonesia and Myanmar prevents the Indonesian state from exercising protective jurisdiction. Thus, this case underscores a legal vacuum: while Indonesia’s diplomatic assistance is active, the lack of a codified Treaty on the Transfer of Sentenced Persons (ToSP) renders any relief discretionary rather than legal.

In Malaysia, several incidents show the recurring criminalization of Indonesian migrant workers for survival-related acts rather than organized criminality. In Selangor, twenty-seven factory workers were sentenced to three months of

¹⁹ Bassiouni, *International Extradition*.

²⁰ Nabil, ‘Kemlu: WNI Selebgram Di Penjara Myanmar Sudah Divonis Tujuh Tahun’.

imprisonment for possessing forged MyKad identity cards, in violation of Malaysia's National Registration Regulations.²¹

In Johor, five store workers were imprisoned for 15 months under the Control of Supplies Act for possessing 13,700 kg of subsidized liquefied petroleum gas (LPG) without a license, while in Sarawak, another Indonesian was sentenced to two years and nine months for migrant smuggling under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants (ATIPSOM) Act.²²

From the perspective of international criminal cooperation, these cases fall within the low-gravity category of offenses, administrative or economic violations that rarely warrant custodial sanctions. Under Rule 91 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules, 2015), imprisonment should be used only as a last resort and alternatives should be considered when an offense arises from social or economic necessity.

Applying Article 17 of the UNTOC and Article 45 of the UNCAC, which emphasizes rehabilitation and cooperation "where appropriate," Indonesia could argue for conditional transfers or sentence conversion, ensuring reintegration without perpetuating penal harm.

This reasoning aligns with Akehurst's doctrinal observation that "penal cooperation must maintain proportionality between the moral culpability of the offender and the severity of punishment."²³ Thus, the Malaysian cases reveal how migrant workers' acts, while formally illegal, are substantially coerced by economic vulnerability. This creates grounds for equitable consistency and transfer-based relief under international law.

In Saudi Arabia, the case of the Etty binti Toyiyb Anwar demonstrates the humanitarian and procedural deficiencies that occur when there is no transfer mechanism.²⁴ Etty, a domestic worker accused of murdering her employer, was initially sentenced to death and spent approximately 20 years in prison before her eventual release and repatriation in 2021, following diplomatic negotiations and payment of *diyat* (blood money). This case reveals three legal problems.

²¹ Media Selangor, 'Fake Identity Cards: 27 Indonesians Get Three Months' Jail, Two Fined', News, *Media Selangor*, 2 March 2023, https://newswav.com/article/fake-identity-cards-27-indonesians-get-three-months-jail-two-fined-A2303_NurfZ3.

²² Tan, 'Five Indonesians Jailed 15 Months for Illegally Possessing over 13,000kg of LPG in Johor'.

²³ Orakhelashvili, *Akehurst's Modern Introduction to International Law*.

²⁴ Barke and Prihantari, 'Etty Spent 20 Years in Jail Accused of Killing Her Saudi Employer. Indonesia Gave Everything to Save Her from Execution'.

1. Due process deficiency: her conviction and prolonged detention violated Article 14(3) of the ICCPR, which mandates timely and fair adjudication of criminal cases.
2. Absence of transfer rights: Because Indonesia and Saudi Arabia lack a *Treaty on the Transfer of Sentenced Persons*, their relief depended solely on diplomatic negotiations, not legal entitlement.
3. Inhuman treatment: Prolonged incarceration without review contravenes Article 7 of the ICCPR and Rules 43–45 of the Mandela Rules, which prohibit indefinite or disproportionate confinement.

From a judicial interpretive standpoint, the Saudi case exemplifies what Schabas calls ‘*diplomatic rather than juridical mercy*’ —a humanitarian outcome achieved outside a formal rule-of-law framework.²⁵

Collectively, these three instances delineate the typology of the legal risks faced by Indonesian citizens abroad.

1. Political persecution (in Myanmar)
2. Economic or administrative penalization (Malaysia); and
3. Prolonged death-row confinement (Saudi Arabia).

Each reveals the structural absence of a clear rights-based framework for the transfer of sentenced persons. As Bassiouni asserts, “*where human dignity intersects with state sovereignty, humanitarian law must prevail.*”²⁶ Indonesia’s current reliance on ad hoc diplomacy leaves citizens’ rights contingent on goodwill, rather than enforceable mechanisms.

Hence, the transfer of prisoners should not be perceived merely as a bureaucratic process but as an imperative of international legal protection and due process. Integrating it into Indonesia’s domestic legal system through a dedicated Law on the Transfer of Sentenced Persons would create normative clarity, prevent arbitrary detention, and operationalize Indonesia’s constitutional duty under Article 28I of the 1945 Constitution to protect citizens’ rights abroad.

2.2 Transfer of Prisoners in the Context of Economic Criminal Law for Indonesian Migrant Workers

²⁵ Schabas, *An Introduction to the International Criminal Court*.

²⁶ M. Cherif Bassiouni, ed., *International Criminal Law*, 3rd ed (Leiden: Martinus Nijhoff, 2009); Bassiouni, *International Extradition*.

The transfer of prisoners between countries has emerged as a pivotal issue in protecting migrant workers' rights, particularly those entangled in criminal proceedings abroad, due to structural economic vulnerabilities and exploitative labor relations. Indonesia intersects three legal dimensions simultaneously: international cooperation in criminal law, constitutional obligations to protect citizens abroad, and human rights compliance under both domestic and international law.

2.2.1 Legal Gaps in the Transfer of Prisoners in Indonesia

Despite its active participation in international forums, Indonesia lacks a comprehensive legal and administrative framework that governs the transfer of sentenced persons. The absence of a national law on prisoner transfer (*lex specialis*) has created what doctrinal jurists term a *lex deficiency* – a normative vacuum that obstructs legal certainty and enforceability.

Under Article 28D (1) of the 1945 Constitution, every person has a right to legal certainty and equal protection of the law. However, Indonesian citizens imprisoned abroad cannot invoke such rights without a domestic instrument that regulates cross-border penal cooperation. The current practice relies on *ad hoc* diplomatic negotiations or the Memoranda of Understanding (MoUs), which lack binding procedural guarantees.

From a doctrinal perspective, this gap undermines Indonesia's obligations under several international instruments to which it is a party, including

1. Article 17 of the United Nations Convention against Transnational Organized Crime (UNTOC, ratified through Law No. 5/2009) allows states to agree on the transfer of sentenced persons for rehabilitation and reintegration.
2. Article 45 of the United Nations Convention against Corruption (UNCAC, ratified through Law No. 7/2006) encourages cooperation for prisoner transfer in corruption-related cases.
3. Articles 9 and 10 of the International Covenant on Civil and Political Rights (ICCPR, ratified through Law No. 12/2005) ensure freedom from arbitrary detention and right to humane treatment.

Without domestic transformation, treaty norms risk remaining symbolic. As noted by Agusman, ratification alone produces no executable obligation for state organs; only through legislative internalization can international duties acquire a binding force within the national legal order.²⁷

²⁷ Damos Dumoli Agusman, 'SELF EXECUTING AND NON SELF EXECUTING TREATIES WHAT DOES IT MEAN?', *Indonesian Journal of International Law* 11, no. 3 (April 2014), <https://doi.org/10.17304/ijil.vol11.3.501>.

This gap is particularly significant for migrant workers. Law No. 18 of 2017 on the Protection of Indonesian Migrant Workers (UU PPMI) mandates, in Article 80, that the government provides legal assistance to citizens facing legal problems abroad. However, they do not specify procedural standards for the repatriation or transfer of prisoners. This omission weakens Indonesia's ability to implement *protective jurisdiction* for its nationals abroad, which is explicitly recognized under Article 3 of the Vienna Convention on Consular Relations.²⁸

2.2.2 Human Rights and Rehabilitation as Core Principles

Human rights are not merely peripheral to prisoner transfers; they also constitute the normative foundation. The Mandela Rules (2015), the Body of Principles for the Protection of All Persons under Any Form of Detention (1988), and ICCPR Articles 7 and 10 collectively affirm that imprisonment must uphold human dignity and aim for rehabilitation rather than retribution.

Indonesia's Law No. 39 of 1999 on Human Rights reiterates this in Article 4, recognizing the right not to be tortured and to be treated humanely under any circumstances. Similarly, Article 28I (4) of the 1945 Constitution obliges the state to protect, promote, and fulfill human rights. In the absence of clear prisoner transfer regulations, Indonesian migrant workers imprisoned abroad often endured double vulnerability. First, under the host country's penal system, and second, due to the lack of protection mechanisms by their home state.

Legal scholar Muladi underscores that "*the ultimate test of a criminal justice system is not its power to punish but its ability to rehabilitate.*"²⁹ In this regard, the transfer of prisoners must be seen not merely as interstate cooperation but as a *humanitarian mechanism* to ensure reintegration, family unity, and social justice, particularly for low-skilled migrant workers whose offenses often stem from coercive economic contexts rather than intentional criminality.

2.2.3 Administrative and Practical Barriers

Administrative fragmentation is a major obstacle in practice. In Indonesia, there is no central authority designated to process or coordinate requests for prisoner transfers. The Ministry of Law and Human Rights (Kemenkumham) oversees extradition and Mutual Legal Assistance (MLA), whereas the Ministry of Foreign

²⁸ United Nations, *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331, 1969, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

²⁹ Muladi Muladi, *HAK ASASI MANUSIA, POLITIK DAN SISTEM PERADILAN PIDANA* (Semarang: Badan Penerbit Universitas Diponegoro, 2002).

Affairs (Kemlu) provides consular protection. This *dual authority* leads to jurisdictional overlap and procedural delay.

According to a 2023 report by the Indonesian Institute of Diplomacy, of the 512 Indonesian citizens imprisoned abroad, fewer than 15% received consistent legal monitoring because of the absence of a unified database and standardized operating procedures. This institutional gap mirrors the weakness identified by Bassiouni “When administrative incapacity converges with legal indeterminacy, the result is procedural injustice masked as sovereignty.”³⁰

International best practices show that countries that explicitly designate a Central Authority in their legislation or international agreements tend to have faster, more transparent, and more measurable processes for the transfer of convicted persons and mutual legal assistance (MLA). The Philippines, for example, designates the Department of Justice (DOJ) as the Central Authority for all MLA and prisoner transfer requests based on official government guidelines, which state that any request “may only be made by the designated Central Authority.” This model provides clarity in the chain of command and minimizes bureaucratic obstacles because there is only one authorized point of entry to receive, verify, and send international requests.³¹

A similar approach is applied in Thailand, based on the authority of the Central Authority on the Act on Mutual Assistance in Criminal Matters. 2535 (1992). The Act designates the Office of the Attorney General (OAG) as the Central Authority responsible for handling MLA requests and transferring convicted people. This direct designation in the Act gives the OAG a strong mandate that does not overlap with other agencies, thus enabling more efficient communication with partner countries in accordance with the standard procedures.³²

In the United Kingdom, the same framework is enforced through the Repatriation of Prisoners Act 1984 and various bilateral agreements, in which the government explicitly designates Her Majesty’s Prison Service (or Scottish/Northern Ireland Prison Service) as the Central Authority for convict transfer requests.³³ In

³⁰ Bassiouni, *International Extradition*.

³¹ Department of Justice (Republic of the Philippines), *Mutual Legal Assistance in Criminal Matters: A Guide for Domestic and Foreign Central and Competent Authorities*, Manila, Philippines: Department of Justice, Office of the Chief State Counsel, 2021, <https://www.ombudsman.gov.ph/docs/08%20Resources/Guidelines%20on%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters.pdf>.

³² Mutual Assistance in Criminal Matters Act, B.E. 2535 (1992), B.E. 2535 B.E. 2535 (1992), <https://sherloc.unodc.org/cld/en/v3/sherloc/legdb/legislationCollection.html?lng=en&tmpl=%22sherloc%22&country=%22THA%22&title=%22The%20Act%20on%20Mutual%20Assistance%20in%20Criminal%20Matters%20B.E.%202535%22>.

³³ Gillian Douglas, ‘Repatriation of Prisoners Act 1984’, *The Modern Law Review* 48, no. 2 (1985): 182–90, JSTOR, <http://www.jstor.org/stable/1096279>.

several treaties, it is explicitly stated that all requests must be sent and answered by the Central Authority of each country. With this model, the UK has a more predictable process, as the administrative, diplomatic, and technical matters of sentence conversion are not handled partially between agencies, but are coordinated within a clear legal structure.

From these examples, we can conclude that the appointment of a single Central Authority with an explicit legal basis (statutory mandate) is key to efficient governance of international transfers. The main advantages of this approach are as follows.

1. Speed and efficiency of procedures, as there are no layers of bureaucracy
2. Legal certainty and consistency of decisions, as the authority has uniform mandates and evaluation standards.
3. Accountability and transparency, as there is only one institution that can be held accountable
4. Effective intercountry communication, as international partners know, has one official point of contact.

The Central Authority system model is far superior to the multi-agency model, which often produces delays owing to non-standardized interagency coordination. Therefore, countries that have implemented a single-window system, such as the Philippines, Thailand, and the United Kingdom, have proven to have more measurable performance in terms of processing time, application success rates, and diplomatic coordination stability.

Indonesia's reliance on informal channels contradicts its own National Human Rights Action Plan (RANHAM) 2021–2025, which prioritizes access to justice for vulnerable groups, including migrant workers.³⁴

2.3 Lessons from International and Regional Models

A comparative assessment revealed a fundamental divergence between Europe's codified transfer regime and ASEAN's incomplete post-conviction co-operation framework. The European Convention on the Transfer of Sentenced Persons (ECTSP, 1985) is the most mature model, establishing a coherent legal ecosystem based on three organizing principles: (i) voluntary and informed consent of the prisoner, (ii) double

³⁴ Peraturan Presiden (Perpres) Nomor 53 Tahun 2021 Tentang Rencana Aksi Nasional Hak Asasi Manusia Tahun 2021 - 2025, Pub. L. No. Nomor 53 Tahun 2021 t, LN.2021/No.135, jdih.setkab.go.id: 6 hlm. LN.2021/No.135, jdih.setkab.go.id: 6 hlm. (2021), <https://peraturan.bpk.go.id/Details/169291/perpres-no-53-tahun-2021>.

criminality, and (iii) judicial or administrative supervision to prevent arbitrariness.³⁵ Far from diminishing sovereignty, the European model demonstrates that sovereignty is exercised through law, enabling states to preserve their penal authority while advancing humanitarian objectives such as family unity, rehabilitation, and social reintegration. In Europe, efficiency and humanity reinforce rather than contradict each other, because the legal basis, institutional framework, and procedural guarantees are fully synchronized.

By contrast, ASEAN's current architecture remains structurally preconviction-oriented. Instruments such as the ASEAN Mutual Legal Assistance Treaty³⁶ and the ASEAN Convention against Trafficking in Persons provide cooperation mechanisms for investigation, evidence-sharing, and prosecution, but do not regulate sentence enforcement or post-conviction transfer.³⁷ This produces what may be described as a humanitarian gap: although ASEAN has strong tools to prosecute crime, it has no regional mechanisms to protect the dignity and rehabilitation needs of convicted persons, including thousands of migrant workers imprisoned abroad. Unlike in Europe, where the penal process is treated as a continuum "from investigation to reintegration," ASEAN cooperation effectively stops at the moment of conviction, leaving the most vulnerable individuals without a predictable legal pathway.

However, ASEAN is not without precedent. The Philippines–Thailand Agreement on the Transfer of Sentenced Persons proves that intra-ASEAN transfers are both legally and politically feasible. The agreement operationalizes the rehabilitative purpose of punishment by allowing nationals to serve their sentences closer to family support networks—an approach compatible with ASEAN's communitarian ethos and people-centered aspirations.³⁸ This bilateral success provides a regional proof of concept, suggesting that ASEAN's limitations are not normative impossibility, but institutional underdevelopment.

Indonesia's bilateral experiences highlight the consequences of this gap. In Malaysia, cooperation is confined to MLA obligations under Law No. 1/2006, which prioritizes prosecution and excludes prisoner transfer. As a result, Indonesian

³⁵ Convention on the Transfer of Sentenced Persons, No. 112 European Treaty Series (1983), <https://rm.coe.int/1680079529>.

³⁶ Association of Southeast Asian Nations (ASEAN), *Mutual Legal Assistance in Criminal Matters*.

³⁷ Association of Southeast Asian Nations (ASEAN), *ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP)*, version ASEAN Treaty Series (ATS) No. 2/2015, Kuala Lumpur, 2015, <https://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf>.

³⁸ Wulansari Martiana Eka, 'KERJA SAMA INTERNASIONAL DALAM PERPINDAHAN NARAPIDANA (TRANSFER OF SENTENCED PERSON)', *RECHTSVINDING: Jurnal Media Pembinaan Hukum Nasiona*, n.d., https://rechtsvinding.bphn.go.id/jurnal_online/KERJA%20SAMA%20INTERNASIONAL%20DALAM%20PERPINDAHAN%20NARAPIDANA%20_Eka%20Martina.pdf.

nationals convicted of low-harm administrative offences, such as falsified identity documents or minor fuel-related violations, remain in foreign prisons without humanitarian repatriation options despite clear social reintegration arguments. Meanwhile, Indonesia and Saudi Arabia have no Transfer of Sentenced Persons (ToSP) treaty, forcing Indonesia to rely on victim forgiveness or financial compensation, as illustrated by the Etty Toyyib case. In such situations, diplomacy substitutes for law, resulting in outcomes that are discretionary, unpredictable, and highly dependent on political momentum rather than legal entitlement.

These comparative insights indicate that Indonesia required a dual-track reform strategy. Domestically, Indonesia should enact a national statute on the transfer of sentenced persons, designate a Central Authority, and harmonize treaty implementation with constitutional guarantees and human rights obligations. Regionally, Indonesia should spearhead the ASEAN Framework Agreement on the Transfer of Sentenced Persons aligned with MLAT and ACTIP to create a rule-based, predictable, and humane post-conviction regime. This is particularly urgent given that migrant workers constitute the majority of ASEAN cross-border detainees, and their protection cannot be realized through prosecution-focused instruments alone.

By pursuing both domestic codification and regional treaty-building, Indonesia shifted from a reactive diplomacy-dependent posture to a rule-making role in ASEAN's legal development. This would not only advance the humanitarian principle of rehabilitation but also strengthen legal certainty, institutional accountability, and the credibility of ASEAN's people-centered vision.

2.4 Integrating Economic Crime Contexts and Migrant Vulnerability

Indonesian migrant workers often become defendants in cases technically classified as economic crimes—fraud, smuggling, illegal trade, or debt bondage—but are substantively rooted in structural inequality and coercion. In legal theory, such conduct can fall under the doctrine of “necessity” (*noodtoestand*) or “economic duress,” economic duress, mitigating criminal culpability’.

Under Article 49 of the Indonesian Criminal Code (KUHP), actions committed out of compulsion to defend oneself or others from imminent harm are unpunishable. This principle, when read together with Article 52 of the United Nations Convention Against Transnational Organised Crime (UNTOC)—which allows for mitigation when individuals act under coercion—should inform Indonesia's diplomatic and legal reasoning in defending migrant workers abroad.

For example, in the Malaysian LPG and MyKad cases, imprisonment for economic offenses conflicts with Rule 91 of the Mandela Rules, limiting incarceration to serious crimes. From a restorative perspective, these offenses merit administrative penalties or repatriation, rather than imprisonment.

Similarly, the Myanmar A.P. case (2025), where an Indonesian citizen was criminalized for alleged political association, underscores the misuse of criminal law for political control. Article 14 of the ICCPR and General Comments 32 (Human Rights Committee) states that such proceedings violate fair trial guarantees and, therefore, justify Indonesia's invocation of humanitarian transfers on the grounds of political persecution.

These cases reaffirm the view of Muladi that "*the concept of economic criminal law must integrate the human dimension of economic vulnerability,*" positioning migrant workers not as offenders but as victims of transnational exploitation networks.³⁹

2.5 Policy and Law Reform Recommendations

The foregoing analysis reveals that Indonesia's approach to prisoner transfers remains fragmented, reactive, and largely dependent on diplomatic discretion. The absence of a national legal framework undermines Indonesia's obligations under international conventions such as the UNTOC and ICCPR and weakens its constitutional promise to protect its citizens abroad. Hence, a comprehensive reform agenda is indispensable, one that transforms consular protection from political goodwill into rights-based legal entitlement.

The first imperative is to establish a national law governing the transfer of sentenced people. Such legislation must not merely replicate treaty provisions but also internalize the spirit of rehabilitative justice and human rights compliance, as articulated in Articles 7 and 10 of the ICCPR and the Mandela Rules. It should provide a procedural foundation for the voluntary transfer of Indonesian prisoners abroad and foreign nationals in Indonesia, ensuring that decisions are made through clear legal channels rather than ad hoc negotiations.

This *lex specialis* would assign institutional responsibility to the Ministry of Law and Human Rights as the central authority, harmonize inter-agency coordination with the Ministry of Foreign Affairs and BNP2MI, and mandate oversight by Komnas HAM to prevent arbitrary or politically motivated decisions. In doing so, the state shows international commitments to enforceable national obligations—a transformation essential for constitutional fidelity under Article 28I of the 1945 Constitution.

Beyond legislative codification, Indonesia must humanize its bilateral and regional instruments. Current agreements with Malaysia and Saudi Arabia lack binding clauses on humane treatment, access to legal assistance, and a review of detention conditions. The experience of the Etty Toyyib Anwar, whose liberty

³⁹ Muladi, *HAK ASASI MANUSIA, POLITIK DAN SISTEM PERADILAN PIDANA*.

depended on prolonged humanitarian bargaining, rather than judicial review, exemplifies this deficiency. Incorporating human rights clauses into existing bilateral arrangements would ensure that rehabilitation, family reunification, and procedural fairness are recognized as legitimate grounds for the transfer. This reform should move bilateral practice away from political pragmatism toward the principle of reciprocal humanity, reflecting the normative direction of international penal cooperation.

Another critical dimension is the integration of prisoner transfers into the Mutual Legal Assistance (MLA) framework. The current MLA Law (Law No. 1 of 2006) limits cooperation to investigation and prosecution, excluding post-conviction proceedings. Expanding its scope to encompass sentence recognition and rehabilitation-based transfers would enable Indonesia to domesticate foreign sentences and provide its citizens with an avenue for reintegration without eroding accountability. Such reforms would align with Article 17 of the UNTOC and reframe the MLA not only as a prosecutorial instrument but also as a humanitarian channel of justice.

Moreover, the new framework must codify the principle of non-refoulement, ensuring that no Indonesian citizens are repatriated or transferred to jurisdictions that face torture, inhuman treatment, or politically motivated prosecution. The case of the A.P. in Myanmar, prosecuted under an expansive terrorism statute for political association, illustrates the urgency of embedding non-refoulement in Indonesia's positive law. By integrating the principles enshrined in Article 33 of the Refugee Convention and Article 7 of the ICCPR, Indonesia could establish a substantive legal barrier to cooperation that would perpetuate such injustice.

Finally, the reform agenda considers a regional perspective. Within ASEAN, the growing movement of labor and the recurrent criminalization of migrant workers demand a collective legal response. The creation of an ASEAN Protocol on the Transfer of Sentenced Persons, anchored in the ASEAN Convention Against Trafficking in Persons (ACTIP), would provide a harmonized mechanism for humane transfers across member states. Indonesia, the region's principal labor-sending nation, is well-positioned to champion such an initiative. Doing so would not only enhance its diplomatic standing, but also concretize the *maqāṣid*-based principle of protecting life and dignity through regional solidarity.

In summary, reforming Indonesia's prisoner's transfer regime is a constitutional, humanitarian, and geopolitical necessity. The law must evolve to recognize that the incarceration of citizens abroad cannot be treated as an external matter; it is an internal measure of state responsibility. The establishment of a codified, human-rights-oriented framework would mark a decisive shift from consular

sympathy to constitutional duty, ensuring that justice for Indonesian citizens extends beyond borders and embodies the moral spirit of the Republic.

2.6 The Impact of Criminalization and Transfer of Prisoners Migrant Workers on Family and Economy in the Perspective of *Maqāṣid al-Sharī'a*

The conviction, deportation, or transfer of migrant workers creates a chain of consequences that goes beyond the scope of criminal law, extending into the moral, social, and economic fabric of families and communities. Under Indonesia's current legal and administrative framework, such consequences are treated as collateral outcomes of criminal enforcement, the inevitable side effects of sovereign legal processes. However, under the *maqāṣid al-sharī'a* framework, these consequences represent moral injuries to the objectives of the law itself, as they threaten the preservation of life (*ḥifẓ al-nafs*), family (*ḥifẓ al-nasl*), and property (*ḥifẓ al-māl*).⁴⁰ This section compares how each paradigm, positive law and *maqāṣid* reasoning, interprets, regulates, and responds to these conditions.

2.7 Positive Legal Framework and Its Limitations

In Indonesia's positive legal order, the criminalization and transfer of migrant workers are processed under sectoral instruments rather than an integrated protection regime. Cases of imprisonment abroad, such as the 27 workers in Selangor convicted of falsifying MyKad or the Indonesian man in Sarawak sentenced to migrant smuggling, were treated primarily as criminal matters under foreign jurisdiction. Indonesia's role is largely consular, and limited to providing legal aid or humanitarian negotiations. Law No. 18/2017 on the Protection of Indonesian Migrant Workers (Articles 80–84) mandates assistance. However, this mandate is declarative and lacks enforceable procedural right.⁴¹ In practice, legal protection ends once a conviction occurs and transfer or rehabilitation falls outside the state's formal duty.

Within this framework, three systemic deficiencies have emerged.

⁴⁰ I. Ghazali and A.Z.M. Hammad, *Al Mustasfa Min Ilm Al Usul - Imam Ghazali* (Repro Books Limited, 2017), <https://books.google.co.id/books?id=rxQ7zQEACAAJ>; Ahmad Al-Raysuni, *Imam Al Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, trans. Nancy Roberts (International Institute of Islamic Thought, 2005), <https://doi.org/10.2307/j.ctvkjb1w9>; Abu Ishaq Al-Syatibi, *Al-Muwafaqat Fi Usul al-Shari'ah* (Mesir: Matba'at al maktabah al-tujariyah, 1920), <https://archive.org/details/almuwafaqatfiusu02shibuoft>; Muwahid Muwahid, 'Metode Penemuan Hukum (Rechtsvinding) Oleh Hakim Dalam Upaya Mewujudkan Hukum Yang Responsif', *AL-HUKAMA* 7, no. 1 (June 2017): 224–48, <https://doi.org/10.15642/al-hukama.2017.7.1.224-248>.

⁴¹ Undang-Undang (UU) Nomor 18 Tahun 2017 Tentang Pelindungan Pekerja Migran Indonesia, Pub. L. No. Nomor 18 Tahun 2017, LN.2017/NO.242, TLN NO.6141, LL SETNEG: 54 HLM. LN.2017/NO.242, TLN NO.6141, LL SETNEG: 54 HLM. (2017), <https://peraturan.bpk.go.id/Details/64508/uu-no-18-tahun-2017>.

1. Legal segmentation: Assistance, repatriation, and rehabilitation are scattered among the Ministry of Foreign Affairs, Ministry of Law and Human Rights, and BP2MI without a unified command or rights-based mandate.
2. Absence of restorative concern: The legal system recognizes sentencing, but not the aftermath—loss of income, family breakdown, or community stigma are not treated as judicial injuries.
3. Economic invisibility: The law treats migrant labor as an export sector, not as a human economy. When remittances stop because of imprisonment, there is no fiscal or social intervention to absorb this shock.

From the standpoint of statutory interpretation, this blindness is predictable. Law No. 18/2017, Law No. 39/1999 on Human Rights, and Law No. 1/2006 on MLA were drafted within a positivist framework that centers on state sovereignty, not human interdependence. Thus, “protection” is conceived as administrative facilitation, not as a moral duty to restore welfare or provide social services.

This paradigm results in what Menjívar and Abrego call “legal violence” —law that formally protects but substantively harms by omission.⁴² Incarceration abroad is considered a foreign problem, even when economic and familial consequences are experienced domestically.

2.8 *Maqāṣid*-Based Restorative Framework

From a *maqāṣid* perspective, such structural detachment violates the essential purposes (*maqāṣid*) of Shariah. The ‘illah (legal cause) of punishment has been reformed (*iṣlāh*).⁴³ Therefore, the failure to protect imprisoned migrants and their families constitutes a breach of *ḥifẓ al-naḥs*, *ḥifẓ al-nasl*, and *ḥifẓ al-māl*.

1. *Ḥifẓ al-Nafs* – Protection of Life and Dignity

In positive law, imprisonment is the termination of liberty; under *maqāṣid* reasoning, there remains a moral relationship between the offender and society.⁴⁴

The case of the A.P. in Myanmar demonstrates the moral defect of positive law: he was prosecuted for political association under an authoritarian

⁴² Cecilia Menjívar and Leisy J. Abrego, ‘Legal Violence: Immigration Law and the Lives of Central American Immigrants’, *American Journal of Sociology* 117, no. 5 (March 2012): 1380–421, <https://doi.org/10.1086/663575>.

⁴³ Mohammad Hashim Kamali, *Maqāṣid Al-Sharī‘ah: The Objectives of Islamic Law* (Islamabad, Pakistan: Islamic Research Institute, 1999).

⁴⁴ Muhammad Al-Tahir Ibn Ashur, *Ibn Ashur: Treatise on Maqasid al-Shari‘ah*, trans. Mohamed El-Tahir El-Mesawi (International Institute of Islamic Thought, 2006), <https://doi.org/10.2307/j.ctvkc673b>.

regime. A *maqāṣid*-oriented interpretation would judge the act not by formal classification, but by the principle of *‘adl wa raḥmah*—justice tempered with compassion.

Under this framework, Indonesia’s intervention would not depend solely on consular discretion but on the moral obligation of preserving life, invoking *ḥifẓ al-naḥs* as a binding duty to protect citizens from unjust or disproportionate punishment. This would justify active legal advocacy and treaty invocation as political obligations, not merely diplomacy alone.

2. *Ḥifẓ al-Nasl* – Protection of Family and Generational Continuity

Positive law considers imprisonment as an individual sanction. *Maqāṣid* regarded this as a social fracture. When migrant parents are detained abroad, the rupture of parental bonds and the stigma of “criminal families” disrupt the *nasl*, moral lineage, and care structure of the *ummah*.⁴⁵ Hence, *ḥifẓ al-nasl* requires family centered legal remedies such as social assistance for affected children, facilitating communication between prisoners and families, and community-based reintegration upon return.

Where the positive legal order stops at “sentence served,” *maqāṣid* demands the restoration of family architecture. This reconceptualizes transfer agreements not as technical repatriation, but as family reunification policies grounded in divine justice.

3. *Ḥifẓ al-Māl* – Protection of Property and Economic Balance

In the current regime, imprisonment abroad is a personal misfortune, and its economic ripple effects on dependents are not juridically recognized. *Maqāṣid* reasoning, however, defines *māl* as a public trust essential to collective stability.⁴⁶ The cessation of remittances is a breach of distributive justice, triggering the State’s duty to prevent poverty resulting from penal outcomes.

Thus, *ḥifẓ al-māl* would reorient Indonesia’s transfer and rehabilitation mechanisms from mere logistics to economic restoration: preserving bank accounts, ensuring debt settlement, and channeling *zakat* and *waqf* funds to families affected by foreign incarceration. This principle demands integration between criminal justice and social welfare, which is absent in current legal architecture.

⁴⁵ Mohammad Abderrazzaq, ‘The Revival and Evolution of Maqasid Thought: From al-Shatibi to Ibn Ashur and the Contemporary Maqasid Movement’ (Thesis, The University of Michigan, 2017), <https://hdl.handle.net/2027.42/138573>.

⁴⁶ Abderrazzaq.

Table 1. Comparative Analysis between Positive Law and Maqāṣid-Based Framework

Dimension	Current Legal System	Maqāṣid-Based Framework
Legal Status of Migrant Prisoners	Treated as foreign detainees; protection limited to consular facilitation.	Recognized as citizens under <i>amānah al-dawlah</i> ; protection seen as moral-legal duty.
Purpose of Transfer	Administrative compliance or sentence recognition.	Restoration of dignity, family, and livelihood.
Focus of Law	Jurisdictional sovereignty and procedure.	Human welfare (<i>maṣlahah insāniyyah</i>) and prevention of harm (<i>raf' al-darar</i>).
Economic Consequences	Considered private losses.	Considered collective harm requiring social restitution (<i>'adl ijtīmā'ī</i>).
Policy Logic	Reactive and fragmented.	Integrative, restorative, and preventive.

Table 1 shows the *maqāṣid* approach for transforming the entire logic of prisoner transfer. Under the current law, the process ends when the individual is deported or repatriated; under *maqāṣid*, it begins there – when rehabilitation, family restoration, and economic justice must occur. Whereas the positive system defines sovereignty as control, the *maqāṣid* system defines it as responsibility (*mas'ūliyyah*).

If implemented, a *maqāṣid*-guided framework would recast Indonesia's prisoner's transfer policy as a moral infrastructure for *collective welfare* (*al-maṣlahah al-mursalah*). Under this paradigm:

1. Legal cooperation (MLA, bilateral treaties) becomes an instrument of *ḥifẓ al-nafs*, protecting the dignity and safety of citizens abroad.
2. Social programs and reintegration policies embody *ḥifẓ al-nasl*, preserving family cohesion.
3. Financial safeguards and zakat-based support reflect *ḥifẓ al-māl*, which ensures economic continuity.

This approach reframes justice from punitive to restorative and procedural to purposive. It bridges the divide between law as text and law as ethics, fulfilling what al-Shāṭibī envisioned as *maqāṣid al-sharī'a* (the realization of justice as the purpose of law). In doing so, the *maqāṣid* paradigm aligns Indonesia's international legal obligations with its constitutional mandate and Islamic moral worldview. The outcome is jurisprudence, which adjudicates rights and heals lives, a law that moves from legality to legitimacy.

CONCLUSION

This study finds that the principal challenge in the transnational transfer of Indonesian prisoners – especially migrant workers – lies not only in legal system asymmetry or diplomatic constraints, but also in the absence of a coherent legal and institutional framework within Indonesia itself. Recent cases from Myanmar, Malaysia, and Saudi

Arabia have revealed that Indonesian nationals continue to face imprisonment abroad without a predictable pathway for legal redress or repatriation to Indonesia. These cases demonstrate that current bilateral agreements and MLA mechanisms operate on state-to-state logic while neglecting the humanitarian and restorative objectives that international criminal cooperation is meant to serve.

Under the existing legal framework, Indonesia's participation in international conventions such as UNCAC Article 45 and UNTOC Article 17 has not been translated into actionable national procedures. The absence of a *lex specialis* governing the transfer of sentenced persons led to fragmented enforcement and procedural discretion, leaving the rights of imprisoned migrant workers unprotected. From a doctrinal standpoint, this condition violates the principles of *double criminality* and *proportionality*, as seen in the Myanmar case, and fails to uphold *rehabilitative justice*, as is evident in the prolonged confinement of Etty Toyiyib in Saudi Arabia.

By applying the framework of *maqāṣid al-sharī'a*, this study reinterprets prisoner transfer not as a diplomatic concession but as an ethical duty of the state to preserve *ḥifẓ al-nafs* (human dignity), *ḥifẓ al-nasl* (family integrity), and *ḥifẓ al-māl* (economic welfare). This perspective introduces a restorative interpretation of international penal cooperation, demanding that punishment and transfer serve as social reintegration rather than mere retribution. It emphasizes that the deprivation of liberty should never extinguish the state's obligation to protect the humanity and economic continuity of its citizens abroad.

Indonesia must develop a National Law on Transfer of Sentenced Persons that operationalizes international norms through clear procedures, human rights oversight, and rehabilitation schemes. Bilateral agreements with key labor destination countries, particularly Malaysia and Saudi Arabia, should include provisions for legal aid, humane treatment, and family reintegration. At the regional level, Indonesia should lead the establishment of an ASEAN Protocol on Prisoner Transfer, harmonized with ACTIP and ASEAN Human Rights Declaration, to protect migrant workers across Southeast Asia. This study concluded that a *maqāṣid*-based restorative framework offers a more comprehensive approach to transnational criminal cooperation. By aligning positive law with ethical imperatives, Indonesia can move beyond procedural justice to substantive justice, where protecting life, family, and livelihoods becomes central to international law practice.

DISCLOSURE

Conflicts of Interest

The authors declare no conflicts of interest.

Funding Statement

No external funding was received for this study.

Authorship and Level of Contribution

Prof. Dr. Joko Sriwidodo, S.H., M.H., M.Kn. conceptualized the research framework, provided theoretical and methodological guidance, and supervised the overall academic direction of the study. Dr. Rahmat Saputra, S.H., and M.H. contributed to the literature review, legal analysis, and refinement of arguments in the context of Indonesian legal development. Akmal Alfarisi Widodo, S.H. conducted the data collection, analysis, and drafting of the manuscript under the academic supervision of the co-authors. All authors discussed the results and reviewed and approved the final version of the manuscript. The authors affirm that this work is original and adheres to the highest standards of scholarly integrity.

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