

THE OUTSOURCING IN EMPLOYMENT LAW REVIEWED BASED ON JUSTICE AND LEGAL CERTAINTY ASPECTS

Mangaraja Manurung
Universitas Asahan
mrajamanurung1970@gmail.com

Abstract

The outsourcing is work with the PKWT systems, which are work agreements by companies that can support work at other companies. Before the enactment of the Job Creation Act, there were constraints on the activities of outsourced workers by not being able to do the main work for the company. After the Act's enactment, job creation did not have a job limit for outsourced workers. This study aims to discuss how elements of justice and legal certainty in the law are discussed—employment regarding Outsourcing and How to Outsource after the enactment of the Job Creation Act. This study used a statute approach to review all laws associated to the problems discussed. This research also applies a normative juridical research method under Indonesia's prevailing rules and regulations.

Keyword: Justice; Legal Certainty; Outsourcing.

A. INTRODUCTION

The legal protection is a kind of legal assurance that originates and is offered to legal entities in the form of preventive and coercive, written and unwritten legal instruments. In other words, legal protection exemplifies the function of the law itself: to give justice, clarity, benefit, and solutions for all human interests in society.¹ The notion of Omnibus Law is regarded as advantageous and effective for resolving norm disputes that arise in the pursuit of general regulatory purposes.² It is considered that the Omnibus Law is efficient in ensuring justice and legal certainty.

The deployment of the notion of the Omnibus Law in Indonesia is the product of the constitutional system's regulatory and legislature dynamics. This notion is viewed as a necessity to address the problem of inconsistent norms and overlapping rules and regulations that directly affect government administration.³ Its existence is intended to counteract hyper-regulation settings, which result in contradicting norms, in synchronizing and

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- 1 Febriansyah Ramadhan and Ilham Dwi Rafiqi, Study of constitutional court decisions cancelling all norms in the law, *Legality: Jurnal Ilmiah Hukum*, Vol. 29, No. 2, 2021, page 286.
 - 2 Dolfries J. Neununy, Urgensi Omnibus Law (Undang-Undang Cipta Kerja) Terhadap Hak Masyarakat Adat Di Wilayah Pesisir, *Balobe Law Journal*, Vol. 1, No. 2, 2021, page 119.
 - 3 Muhamad Azhar, Omnibus Law sebagai Solusi Hiperregulasi Menuju Sonkronisasi Peraturan Per-Undang-undangan di Indonesia, *Administrative Law and Governance Journal*, Vol. 2, No. 1, 2019, page 170.

harmonizing laws and regulations.⁴ Understandably, the position of the outsourced workers is very weak compared to the position of the job owner in practice. Sometimes, these rights are not fulfilled by employers and outsourcing companies.⁵ From this concept, a Job Creation Act emerges to ensure legal certainty for any kind of worker.

Based on the term, outsourcing is transferring a company's business to a third party to lower the company's workload.⁶ Since the enactment of Act No. 11 of 2020 on Job Creation, specific provisions of Act No. 13 of 2003 on Manpower have been modified as stated in the articles that govern the transfer of a portion of work to other organizations or outsourcing.⁷ The outsourcing issue is currently governed by the Job Creation Act and Government Regulation No. 35 of 2021 regarding Work Agreements for Certain Time, Outsourcing, Working Time and Rest Time, and Termination of Employment Relations, which simultaneously changes the term Outsourcing to Outsourcing.⁸

The Constitution of the Republic of Indonesia, enacted in 1945, is the ultimate source of law and serves as the foundation for enforcing existing laws based on providing justice and legal certainty to all citizens, without exception. Guarantee protection and assurance are fundamental to emphasize rights equality to the law. To attain justice, the state functions as a regulator and implementer to ensure everyone receives convenience and special treatment.

Furthermore, the principle of justice as the basis for forming the rule of law has a basis for causing justice in social life. It means that it is the nation's ideals as the point of view and spirit of the Indonesian nation, as described in the fifth Pancasila, which reads justice for all Indonesians found in the 1945 Constitution's Preamble.⁹

Certainty refers to stipulations and provisions when paired with legal language. It is referred to as legal certainty, "a legal instrument of a country that can secure the rights and obligations of every citizen." Based on history, the origin of the term legal certainty has significant meanings and concepts, particularly about the idea of separation of executive, legislative, and judicial authority. State institution has the role and function of each legislator as a maker of laws and regulations and the judiciary as a voice of the law's material. In his 1978 book, *The Spirit of Laws*, Montesquieu wrote that a

4 AAA Ngurah Sri Rahayu Gorda, Ida Ayu Ketut Artami, Putu Eva Ditayani Antari, Kadek Januarsa Adi Sudharma, and Robert Vaisile Moisa, Legal protection for copyright holders of commercialized remix song cover version, *Legality: Jurnal Ilmiah Hukum*, Vol. 30, No. 1, 2022, page 1.

5 Tri Widya Kurniasari, Kepastian hukum terhadap perlindungan pekerja outsourcing pasca undang-undang nomor 11 tahun 2020 tentang cipta kerja, *Jurnal Geuthèë: Penelitian Multidisiplin*, Vol. 5, No. 2, 2022, page 123.

6 Ni Made Trisna Mayasari and I Made Walesa Putra, Perlindungan Hukum Terhadap Tenaga Kerja Outsourcing, *Kertha Semaya: Journal Ilmu Hukum*, Vol. 6, No. 2, 2018, page 2.

7 Act No. 11 of 2020 concerning Job Creation.

8 Government Regulation No. 35 of 2021 concerning Work Agreements for Certain Time, Outsourcing, Working Time and Rest Time, and Termination of Employment Relations.

9 I Budiarta, *Hukum Outsourcing: Konsep Alih Daya, Bentuk Perlindungan, dan Kepastian Hukum*, Setara Press, Malang, 2016, page 19.

monarch governs the entire legal system and that the judiciary is merely the monarch's subservient.¹⁰ Soedikno highlighted the parameters that need to be met in law enforcement and provided a concept of legal certainty: "Reasonable basis for arbitrary action means a person can accomplish what is expected under particular conditions."¹¹

In the context of employment contracts and outsourcing systems, work is an everyday commercial operation. However, in Indonesia and many other nations, the technique has a fragmented, demeaning, discriminatory, and exploitative effect on workers due to the Employment Office diminished capabilities, functions, and obligations. This situation should be viewed in the broader framework of industrial relations, in which the government functions simply as a "regulator" and has no obligations to protect the people without a sound social security system in Indonesia. Therefore, the repercussions will be increasingly felt.

Based on the problems which were described previously, the researchers formulated several research questions as stated in the following: 1) What are the justice and legal certainty aspects of the workforce act about outsourcing? and 2) How has outsourcing changed since the Law of the Job Creation Act?

B. RESEARCH METHODS

This study used the statute technique, all legislation about the problems covered in this paper was examined. This study employed a normative juridical research method or conformed with the prevailing laws and regulations in Indonesia, as well as references from a wide range of academic articles on the concept of justice and legal certainty in outsourcing.

C. RESULTS AND DISCUSSION

1. The Outsourcing Justice and Legal Certainty

In the absence of justice and legal certainty in the realm of law, the continuity of law cannot be just.¹² According to Azhara and Agista, the form of legal protection for outsourced workers following the Job Creation Act can also be seen in the provisions requiring outsourcing companies to be legal entities,¹³ as well as the requirement for outsourcing companies to obtain business permits from the central government, as stipulated in Article 81 No. 20 of the Job Creation Act and Article 20 paragraph (1) of PP 35/2021. As per Article 66, paragraph 3 of this law, the completion of business license requirements for outsourcing businesses before the ratification of the Job Creation Act is

10 *Ibid*, page 35.

11 *Ibid*, page 190.

12 Kania Dewi Andhika Putri and Ridwan Arifin, Tinjauan Teoritis Keadilan dan Kepastian dalam Hukum di Indonesia (The Theoretical Review of Justice and Legal Certainty in Indonesia), *Mimbar Yustitia*, Vol. 2, No. 2, 2018, page 142.

13 Delviola Azhara and Chatarina Dwi Agista, Perlindungan Hukum terhadap Pekerja Outsourcing Pasca Berlakunya Undang-Undang Cipta Kerja, *Syntax Literate; Jurnal Ilmiah Indonesia*, Vol. 7, No. 5, 2022, page 5900.

ordered to obtain a license from the body in charge of workforce issues. The transfer of business licenses, which formerly fell within the purview of agencies in the labor market, is now the federal government's duty.¹⁴

For justice to be fulfilled, the law must be implemented. Justice is subjective and individual; it cannot be generalized.¹⁵ An excellent legal framework must provide legal protection for vulnerable parties. A competent judicial system must consider the interconnected components of the content, organization, and legal culture.¹⁶ Concerning the essence of the rule of law, its interests must be addressed. Theoretically, legal certainty protects every citizen from arbitrary actions by the government or non-government parties because the law holds the government and every individual or organization accountable for its implementation.¹⁷

The formulation of rules, particularly the principles of written legal law, is prevalent in the form of logical and moral legal principles as the basis for accepted and rational general abstract ideals in social life. The principles of objective rationalization are as follows: 1) true to the pledge; 2) no penalty without guilt; 3) the law is not retroactive; 4) equality before the law; 5) prioritize the public interest; 6) protection of human rights, then when viewed with subjective rational-legal principles, among others are 1) those who demand that they are charged with carrying out evidence; 2) presumption of innocence, moral principles include: 1) avoid evil deeds; 2) do good; 3) give to everyone what is due; 4) it is forbidden to harm others.¹⁸

Outsourcing requires definition and legal certainty about the rights of outsourced workers. The strategic objective of outsourcing is for corporations to gain or, regardless of, maintain a competitive advantage through outsourcing. Competitiveness between organizations often depends on three factors: product price, quality, and service. These are the main goals and expectations of outsourcing organizations. Service providers are required to help businesses retain and achieve a competitive advantage in terms of the product price, quality, and service. The organization expects employees who can contribute to maintaining a competitive advantage by offering excellent products and services.¹⁹

2. Legal Protection of Outsourced Workers from the Principle of Justice

Labor laws and regulations as stated in Act No. 13 of 2003 and part have also been updated in Act No. 11 of 2020 regarding Job Creation. The implementation of rules has many dimensions and

14 Kania Dewi Andhika Putri and Ridwan Arifin, *Op. Cit.*, page 143.

15 Hasaziduhu Moho, Penegakan Hukum di Indonesia Menurut Aspek Kepastian Hukum, Keadilan dan Kemanfaatan, *Warta Dharmawangsa*, Vol. 13, No. 1, 2019, page 4.

16 Anang Dony Irawan, Status Hukum Outsourcing Pasca Putusan Mahkamah Konstitusi Perkara Nomor 27/PUU-IX/2011, *Arena Hukum*, Vol. 12, No. 2, 2019, page 253.

17 I Budiarta, *Op. Cit.*, page 194.

18 Wafda Vivid Izziyana, *Hukum Outsourcing di Indonesia*, UNMUH Ponorogo Press, Ponorogo, 2020, page 38.

19 *Ibid*, page 127.

linkages, where the connection is not only with the interests of workers before, during, and after work but also with the interests of the business world, government, and society.²⁰

Protection for workers is essential to avoid inhumane practices such as the mandate described in human rights. Therefore, protection rights for permanent workers and outsourcing workers cannot be distinguished in terms of any legal provisions, even though the status of the agreement is different. We would like to bear in mind that the justice that the state must uphold and the normative rights mandated by law are benchmarks for a sense of justice. In the event of a dispute over an employment relationship with the entrepreneur, it is resolved by a fair settlement because the position of workers is the same as humans in general, who have a very decisive basis for survival and other rights in an employment relationship, even if the company or entrepreneur has a solid position, in order to ensure compliance with state law through the rule of law and reach a justice as the goal of justice for outsourcing workers both in the social and national order as reflected in the 1945 Constitution.

3. The Principle of Justice in Agreement and Employment Relations

In the perspective of Act No. 13 of 2003 in Article 1, No. 14 of the definition of an employment agreement means that the members of the contractual agreement, namely workers and employers, have the same and equal status. Article 1, No. 14 of Act No. 13 of 2003 will protect human dignity, particularly that of an outsourced worker, who, based on human rights, has the same dignity as an entrepreneur. When we return to the characteristics of the employment bond, which is an agreement due to a work contract, we see that there is also an "order" element in addition to the work and salary elements. Article 1 number 15 in Act No. 11 of 2020 with Government Regulations No. 35 of 2021 stipulates the material requirements for the existence of a work contract.

The definition of normative rights has many meanings, including commitments in contracts and other rights and norms in legal rules such as social security, holidays, and rest rights. The right to associate, a type of legal protection for workers, also serves as a forum for outsourced workers—Article 28 of the Republic of Indonesia Constitution of 1945. The regulation of normative worker rights includes the right to organize. Establishment as a type of legal protection for workers, even outsourced workers, transforms the idea of justice into the base of morality or morals as universal values and/or Pancasila values.

4. The Principle of Equality in Wage Arrangements and Workers' Welfare

The labor regulations prevent companies from discriminating based on worker status, color, ethnicity, and religion under Act No. 11 of

20 Mangaraja Manurung, *Status Hukum Pekerja Kontrak*, Global Aksara Pers, Sidoarjo, 2020, page 77.

2020 and PP No. 35 of 2021. Therefore, outsourcing workers' salaries and benefits should be comparable to those of permanent workers (PKWTT).²¹

According to Mochtar Pakpakan and Ruth Damaihati Pakpakan, the rights earned through outsourcing and PKWT were even lower than permanent employee rights. Suppose a worker becomes a contract worker or is outsourced. In that case, employee rights are inferior to those of permanent workers, including loss of social security, no severance pay, and other highly damaging considerations.²²

5. Legal Protection for Outsourcing Workers from the Legal Certainty Principle

Legal certainty for workers is essential for maintaining the rights of workers who are interconnected with employers to accomplish an agreed-upon objective.²³ It is because the contract specified in the employment relationship is enforced explicitly so that the law can be enacted on the occasion of the arbitrariness of both internal and external parties.

The legal certainty principle in the protection of outsourced workers can be studied in conjunction with aspects of the type of work, employment relationship, and business model of the outsourcing business person, as well as the maintenance right associated with the emergence of disputes with the employer.²⁴ There are references to the philosophy of legal protection and qualification criteria that might be utilized in the research on the conflict issue. These theories are believed to be relevant to a study on the protection and legal certainty of contract workers.

6. Legal Certainty in Preventive Protection of Outsourcing Workers

According to Article 65 paragraphs (6) and (7) of Act No. 13 of 2003, which has been repealed, following the decision of the Constitutional Court No. 27/PUU-IX related to Article 65 paragraph (7), the working relationship in carrying out the work is evident, which presents distortions from the firm as job provider to the firm as the recipient of the work, which is governed by a written employment contract in the Act No. 11 of 2022 (replacing PP No. 35 of 2021).

An employment agreement without a defined period is referred to as PKWTT in Indonesia, while an Employment agreement with a certain

21 Iftida Yasar, *Menjadi Karyawan Outsourcing*, Gramedia Pustaka Utama, Jakarta, 2013, page 29.

22 Mochtar Pakpakan and Ruth Damaihati Pakpakan, *Konflik kepentingan outsourcing dan kontrak dalam UU no. 13 tahun 2003*, Bumi Intitama Sejahtera, Jakarta, 2010, page 54.

23 Ahmad Siboy, The integration of the authority of judicial institutions in solving general election problems in Indonesia, *Legality: Jurnal Ilmiah Hukum*, Vol. 29, No. 2, 2021, page 237.

24 Muhammad Rizky Ramadhan, Muhammad Kamal, and Mochammad Andry Wardhana Wikra Mamonto, Omnibus Law in Indonesia: Legal Protection of Workers in Employment Contracts, *Golden Ratio of Law and Social Policy Review*, Vol. 1, No. 1, 2021, page 7.

period is referred to as PKWT.²⁵ In Law No, 11 of 2020 regarding Job Creation and Government Regulation (PP) No. 35 of 2021, PKWT workers can be held for two years (maximum). They may only be extended once for one year (maximum) in a PKWT based on a period. Meanwhile, under PKWTT, based on the completion of the task, the contract will terminate when the work is finished. The opinion of Sukanda et al. that there is ambiguity in the legal relationship between the employee and the employer regarding whether the worker's relationship is with the company where he works or with the employer leads to questions regarding this topic.²⁶

If referring to Act No. 11 of 2020 in correlation with Government Regulation No. 35 of 2021, there is a working relationship between companies offering worker/labor services and workers/laborers placed in the company providing the job (user company). Employer firms (user firms) can implement requirements of Act No. 11 of 2020 jo. PP No. 35 of 2021 is why they are exempt from accountability and must place it on the worker/labor service provider company (outsourcing company) instead. However, suppose it refers to Article 1 point 15 of Act No. 13 of 2003, which explains that an employment relationship is a contractual arrangement between an employer and a worker or laborer, which includes work, wages, and orders. In that case, it is a relationship between an employer and a worker/laborer. In this situation, where the employment relationship is not with the service provider firm (outsourcing company), the outsourced worker/laborer feels protected by this article to hold the company supplying the job accountable.

7. Working Types of Legal Certainty Outsourcing Workers

Act No. 11 of 2020, whereas for work submitted to a service provider for implementation, workers/laborers should meet the conditions established in Act No. 11 of 2020 jo. PP No. 35 of 2021. Previously, Article 65 paragraph (2) of Act No. 13 of 2003, among others, gave rise to different interpretations such that it did not represent the idea of legal certainty. Act No. 11 of 2020 jo. PP No. 35 of 2021 has amended it. In terms of "supporting activities," they mean to support and aid the execution of work following the workflow of the organization providing the labor. Article 66, paragraph 1 affirms the same thing, stating that the employer may not use workers/laborers to execute main activities or actions directly related to the manufacturing stages, with the exception of "supporting services" movements or activities unrelated to the manufacturing stages. It is emphasized in the article's explanation that activities unrelated to a company's core business include supporting

25 Raihan Hudiana and Heru Susetyo, Law and Human Right Protection of Outsourcing Labour Law Number 13 of 2003, In *3rd International Conference on Law and Governance (ICLAVE 2019)*, 2020, page 197.

26 Robie Brilliando Sukanda, Khairani Khairani, and Yussy Adelina Mannas, Legal Certainty for the Provision of Employee Services as the Intent of Protection of Labor Rights based on Labor Rights and Its Implementation in PT. Semen Padang, *International Journal of Multicultural and Multireligious Understanding*, Vol. 7, No. 6, 2020, page 568.

service activities or those not directly associated to the manufacturing stages. These activities include cleaning service businesses, worker/laborer catering businesses, security staff (security guard) businesses, mining and petroleum support service businesses, and worker/labor transportation businesses.

8. Outsourcing After the Enactment of the Job Creation Act

Previously, the regulation regarding outsourcing was regulated in Act No. 13 of 2003 regarding Employment. Still, after the decision of the Constitutional Court Number, 27/PUU-IX/2011 in its ruling stated the phrase "a certain time work agreement" in Article 65 issue 7 and the term "work agreement for a certain time" in Article 66 issue (2) letter b of Act No. 13 of 2003 regarding Employment (State Gazette of the Republic of Indonesia of 2003 No. 39 of 2003, adding to the State Gazette of the Republic of Indonesia Number 4279) contradicts the Constitution of the Republic of Indonesia of 1945 as long as the work agreement does not need the transfer of protection for workers whose work objects remain unchanged, although there is a change in the company that holds part of the piecework from another company or a company that provides workers/labor services.

The phrase "work agreement for a certain time" was previously not legally binding as long as the work agreement did not need the switch of protection of rights for workers/laborers whose object of work still exists, although there is an alteration in the firm that carried out part of the piece work from another firm or a firm that provided workers/labor services; Refusing the petitioner's demand for other than and the remainder and mandating that this decision be published as appropriate in the State Gazette of the Republic of Indonesia.

Particularly with the implementation of Act No. 11 of 2020 regarding Job Creation which partially revised the requirements of Act No. 13 of 2003 regarding Employment, one of which pertains to outsourcing regulations. Following the implementation of Act No. 11 of 2020 regarding Job Creation, legal clarity regarding outsourcing is crucial due to the absence of synchronization between the articles and within the articles. Employment Copyright Act renames outsourcing to outsourcing from outsourcing the execution of a portion of labor to other organizations. Concerning outsourcing, it is governed by Government Regulation No. 35 of 2021. Outsourced workers must be constrained by service provider work agreements and worker/labor service agreements.²⁷ The Employment Act currently defines outsourcing as delegating a portion of work to another organization. A part of the work is transferred through a job charter agreement and worker/labor services provision.

27 Ulil Albab and Angga Nugraha, legal assurance of labor transfer of power post application of law no 11 of 2020 concerning work creation, *Indonesian Journal of Law and Policy Studies*, Vol. 3, No. 1, 2022, page 10.

Job Creation in Act No. 11 of 2020 covers the rights and duties of outsourcing organizations and their employees. The outsourcing organization is fundamentally accountable for all issues resulting from the employment contract. Protection of workers, wages, welfare, working conditions, and any potential conflicts fall under the purview of the outsourcing company. Work contracts, company laws, and collective labor agreements govern a variety of matters. Moreover, the connection between the outsourcing firm and the employees is governed by a fixed time employment agreement (PKWT) or an indeterminate time work agreement (PKWTT).

D. CONCLUSION

According to the results, these conclusions can be drawn: (1) Justice and legal certainty are of the utmost importance when protecting the rights of outsourced workers/laborers (Act No. 11 of 2020 and Government Regulation No. 35 of 2021). Workers/laborers only have a working relationship with a provider company if they have a work agreement for a specific period or an indefinite work agreement scheme. Protection of wages and welfare, working conditions, and ensuing disputes are the labor/service provider's responsibilities; (2) Following Constitutional Court No. 27/PUU-IX/2011 and the implementation of Act No. 11 of 2020 about Job Creation, this Act removed Articles 64 and 65 and amended Article 66 of the Manpower Act to alter the requirements governing outsourcing. Regarding the work limits regulated by the work copyright law, there are no restrictions on work, not limited to any work. Outsourcing workers can perform their primary work without limitation, affecting the employment relationship uncertainty for workers who become permanent employees.

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