

*Research Article***The Constitutionality of Outsourcing Job Regulation in the Law on Job Creation**

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ABSTRACT

Government policy to adopt the idea of “omnibus law” through the forming of Job Creation Law aims to simplify investment and to fix regulations in Indonesia. Job creation Law consists of 11 clusters. One of the clusters regulates manpower mainly concerning Outsourcing Minimum Wage and termination of employment. This policy has potential to bring disadvantages to the interest of the workers and leads to protest by workers/labors. This study aims to investigate political direction of job Creation Law and question the constitutionality of the regulations of outsourcing work in Job Creation Law. Research method of this study was normative, meaning that by using legislation and conceptual approach to perform qualitative analysis. The result and Discussion of this study concludes that political direction of Job creation Law is still authoritarian politics so that resulting in Law that is conservative because the discussion about the Law did not involve the people participation. Moreover, the material formulation of outsourcing in Job Creation Bill has not aligned with the mandate of Supreme Court decision No 27/PUU-IX/2011.

Key words: Job Creation Law; Outsourcing; Workers.

A. INTRODUCTION

Through a long struggle full of sweat and tears, the founding fathers finally succeeded in establishing our beloved Nation, Indonesia. This independence is “the blessing from The Almighty God” as admitted and described in the preamble of The 1945 Constitution of The Republic of Indonesia. Presenting this State to world is not without reasons (Gaffar dkk, 2021). There are several goals which are desired to be accomplished as a state. These goals are written in The Preamble of The 1945 Constitution of The Republic of Indonesia in the fourth paragraph. They are to form a Government of the State of Indonesia which shall “protect the whole Indonesian nation and the entire native land of

Indonesia; to advance the public welfare; to educate the life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice” (Sumadi, 2016).

Among the four goals of the forming of the state, essentially there is only one main goal, which is welfare state (Nurhidayah, & McIlgorm, 2019). In order to achieve this main goal, The Government has been trying to make policies such as legislations together with The People’s Representative Council of the Republic of Indonesia (DPR) and their implementation rules (Mani, Mitra & Sambamoorthi, 2018). This is intended to merely guarantee the people’s welfare including constitutional guarantee and protection

for workers or labors who tend to be the victims of the misappropriation from companies they work for or from their employers. One example of misappropriation was conducted by Tolutug Marindo Pratama Inc. (PT TMP). TMP Inc. did not apply Province Minimum Wage (UMP) to its employees. TMP Inc. only paid its employees Rp 1,000,000 per month as their wage, way below Province Minimum Wage of North Sulawesi in 2013, which was Rp 1,550,000. Another violation committed by TMP Inc. was to not register its employee in the Employment Social Security Program (Jamsostek) (Caroline, 2020). It is worried that with the implementation of "Omnibus Law", which is mainly meant to simplify various regulations and rules in Law, may sometimes cause discrepancy in its regulations and even overlapping of regulations (Sodikin, 2020).

Legal policy to adopt the idea of "Omnibus Law" made by the Government led to the making and implementation of Job Creation Law (Hanifah, 2021), however, to date the discussion of this Law is still postponed temporarily because of protest (Hadiyati, 2022), and also strikes against the substances or "content" in the Law (Prabowo et.al., 2020). Substantially, Job Creation Law consists of 11 (eleven) Clusters, namely Simplification of permit; Requirements of investment; Manpower; Ease and protection for Micro, Small, and Medium Enterprises (MSME); Ease of business; Research and innovation support; Government administration; Sanction impose; Control of land; Ease of government project; and Special economic zone (SEZ).

Among those 11 Clusters, cluster that becomes public attention is "Employment Cluster". Many parties particularly workers or labors question some changed points regulated in Job Creation Law. Among those points is the issue of Minimum Wage, Regulation on Outsourcing Job, Termination of work, and so forth. Workers/labors or organizations of labor Union question The Government's transparency in the making of Job Creation Law. They said that they did not involve in the process of making the Law. Thus, the worker/labors assumed that the Law was made for the advantage of the corporations or employers while neglecting their rights as workers.

Substantially, there are some significant changes in Job Creation Law compared to the old Law, "Law No. 13 Year 2003 on Manpower". One difference is the regulation on outsourcing job as previously regulated in Article 64, Article 65, and Article 66. Nevertheless, compared to Job Creation Bill "Manpower Custer", Article 64 and Article 65 have been terminated, while Article 66 underwent some conceptual changes. The material of Articles on outsourcing job have ever been tested several times by The Constitution Court as stated in Decision Number 27/PUU-IX/2011, where The Constitution Court gave its recommendation for regulation of constitutional work contract, but it seemed that the Government and the House of Representatives as legislators took it for granted.

This study has some differences from the previous studies in national scope: (1) discussing

“ The Issue of Employment and Unemployment in Indonesia” (Saleh, 2017); (2) discussing “ The Implementation of Manpower Law in Job Contract between Corporation and Workers in Limited Liability Company (PT)” (Wahyuningsih, Sulastri, & Ramadhani, 2018); and (3) discussing “ Legal Protection for Workers’ Right in Fixed Time Employment Agreement in Employment” (Azis, Handriani, & Basri, 2019). This study also has several differences with other studies in international scope: (1) discussing “Analysis of the Importance of Omnibus Law “Cipta Kerja” in Indonesia” (Harahap, & Hamid, 2020); and (2) discussing “Economically Dependent Workers: main aspect of their protection in the Spanish Labour Law and Social Security System” (Porrás, 2021). However, different from previous studies, this study focuses on the issue of legal politics of the amendment of regulation on outsourcing job in Job Creation Law and questions the constitutionality of the material content on outsourcing job as stipulated in Job Creation Law.

B. RESEARCH METHODS

This study is a normative study using an approach to legislation (*statute approach*), conducting by examining the constitution and all legislations concerning the legal issue at hand and applying conceptual approach which is referred from doctrines, legal principles, and judges decisions in order to explain the issue which is discussed

C. RESULTS & DISCUSSION

1. Direction of Legal Politics of “Job Creation Law”

The correlation between law and politics can use the analogy of “the movement of train locomotive which is out of the railway”. If law is seen as railway while politics is seen as locomotive, it seems that the locomotive is frequently out of its railway where it is supposed to pass (Mulyadi, & Aridhayanti, 2015). Politics and law are two inseparable elements that must work together and strengthen each other (Fu, Gong, & Png, 2018), just as common saying “Law not served by power is an illusion; but power not ruled by law is a menace. However, in its implementation, law often becomes the reflection of the willingness of the holder of political power so that many people view law as power (Gozman, & Willcocks, 2019).

There are several followers of thought which agrees to the statement saying that law is power. *First*, Sophists in Greece stating that justice is what benefits the power. *Second*, Gumpowics said that law is decided by the conquest of the weak by the strong, law is orders of definitions made by stronger party to hold his power. Most of the time, politics has more power than law thus law is frequently intervened by politics (Pye, 2019).

Furthermore, law is often intervened by politics because there six characteristics of parties who hold political power. *First*, their number is always smaller than the number of the party which is under their power. *Second*, they

have abundant of wealth particularly to maintain their dominance in the form of material wealth, intellectual and moral respect. *Third*, in dispute, they are always better organized than the parties they subdue. *Fourth*, people of power class only consist of those people who hold dominant position in politics. *Fifth*, people of power class always try to practice monopoly and pass their political power to their own kind. *Sixth*, there is reduction in social change towards the change of the power class changes (Mulyadi, & Aridhayandi, 2015).

Thus, it is common to hear people consider law as a political product, therefore politics will strongly determine the character of a legal product generated (Woldemichael, 2017). Workers protection is particularly necessary in order for them to have proper jobs and life without discrimination on race, gender, and religions (Maksum, 2021). This also applies for people with special needs and the obligation to provide rights and obligation in the form of legal protection for workers (Dartanto et.al., 2020). Mahfud MD, in his book entitled “ Legal Politics in Indonesia”, introduced the term of *democratic* political configuration and *authoritarian* political configuration, and also other legal products which are responsive and conservatives. If the “political configuration” is democratic, it will result in responsive legal products, on the other hand, if the political configuration is authoritarian, it will result in conservative legal products. As for example, Basic Agrarian Law (UUPA) is a legal product with responsive character because it can

answer problems of land to the era of reformation. On the other hand, Election Law is a conservative legal product because it is made based on the interest of political elites so that there are always changes (MD, 2012). However, what becomes the question is how can we measure or set indicators whether Job Creation Law is a Legal Product which has responsive character or, on the opposite, conservative character. Therefore, according to the author, there are 2 (two) indicators to identify the character of a legal product, namely procedural indicator of Law making and weight of material substance of the Law.

Procedurally, the making of Law must pass through 5 (five) stages, namely planning, drafting, discussing, ratification or establishment, and enactment (Dahoklory, & Ali, 2020). The explanation is as follows: 1) “Planning” stage is normally conducted through a series of compilation of “national legislation program (prolegnas)”. Prolegnas is drafted based on scale of priority. There is annual scale of priority and 5 year period scale of priority; 2) In drafting stage, first of all, the “academic scrip” is completed then followed by the making of article by article. If the bill comes from the Government party, it will be represented by ministries or related government institution, while if the bill comes from the House of Representatives, it will be made by “Legislative Body”; 3). Discussion stage is conducted through 2 (two) levels of discussion, namely Level 1 and Level II. In level I, the discussion of the bill begins with introductory discussion and responses from

each fraction in the House of Representatives. Meanwhile, level II is plenary discussion related to decision making. The House of Representatives & the Government have to involve the participation of the people through General Hearing Meeting (RPDU), Introduction of the law to the people, and so forth; 4) "Ratification" stage is the responsibility of the president. However, if a Bill that has been commonly agreed has not ratified, before the law, within 30 (thirty) days, the Bill is legitimate to become Law and is ready to be enacted; and 5) "Enactment" stage is final process of the making of Law. In this final stage, the law is then promulgated in the *State Gazette*. This stage aims to provide information to the public that a Law has been made and must be obeyed.

However, if one of the stages is not fulfilled, or there is *an-prosedural*, it is commonly assumed as the "authoritarian political configuration" thus the Law must be aborted before the law. Likewise, if the substance of "material content" of the Law has potential to take away, bring disadvantages for the people, and not bring welfare for the people, and the substance is only for certain parties, it is common to say that it is a conservative legal product (MD, 2006). The next point will discuss how to prove whether the substance of Job Creation Law has potential to take away constitutional rights of the citizens particularly outsourcing workers/labors. At the next discussion, this study will emphasize the issue of "constitutionality" of regulation of outsourcing job in Job Creation Law.

2. Constitutionality of Regulation of Outsourcing Job in Job Creation Law

Before discussing further about constitutionality or questioning whether regulation of "outsourcing" job in Job Creation Law is aligned with the constitution, the author will first present the table showing the differences between the substances of Manpower Law and Job Creation Law, as follows:

Law No 13 Year 2003 On Manpower	Job Creation Law "Manpower Cluster"
<p>Article 64 Article 65 Article 66</p> <p>1. Workers/ labourers from labour suppliers must not be utilized by employers to carry out their enterprises' main activities or activities that are directly related to production process except for auxiliary service activities or activities that are indirectly related to production process.</p> <p>2. Labour suppliers which provide labour for auxiliary service activities or activities indirectly related to production process must fulfill the following requirements::</p> <p>a. There is employment relationship between the</p>	<p>Article 64 terminated Article 65 terminated Provision of Article 66 Law No 13 Year 2003 was amended thus it stipulates the following: Article 66</p> <p>1. Relation between outsourcing corporations and outsourcing workers/labors is based on definite period employment agreement indefinite period employment agreement.</p> <p>2. Protection of workers/labors, wage and welfare, work requirements and dispute arising become the responsibility of the outsourcing company.</p> <p>3. Outsourcing company as stated in section 2 is in the form of legal body and requires to fulfill business permit.</p> <p>4. Further provisions on protection of workers/labors as</p>

<p>b. worker/ labourer and the labour provider; The applicable employment agreement in the employment relationship as mentioned under point a above shall be employment agreement for a specified time which fulfills the requirements under Article 59 and/or work agreement for an unspecified time made in writing and signed by the parties;</p> <p>c. The labour provider shall be responsible for wages and welfare protection, working conditions and disputes that may arise; and</p> <p>d. The agreements between enterprises serving as labour providers and enterprises using the labour they provide shall be made in writing and shall include provisions as mentioned</p>	<p>stated in section 2 and business permit as stated in section 3 is regulated by Government Regulation.</p>	<p>under this act.</p> <p>3. Labour providers/ suppliers shall take the form of a legal entity business with license from a government agency responsible for manpower affairs.</p> <p>4. If what is stipulated under subsection (1), point a, point b, and point d of subsection (2), and subsection (3) is not fulfilled, the enterprise that utilizes the service of the labour provider shall be held legally responsible by law to be the employer of workers/laboures provided to it by the labour provider.</p>	
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The amendment of regulation of outsourcing job in Job Creation Law consists of several conceptual changes in Job Creation Law itself. *The first* is outsourcing job which was conducted based on the agreement of job supply or agreement of workers/labors supply has been revoked so that agreement of outsourcing job is conducted through Definite Period Employment Agreement (PKWT) or Indefinite Period Employment (PKWTT).

The second, there is no difference between main job or jobs that are related to production services, and supporting jobs. *The third*, requirements for hiring outsourcing workers are not determined explicitly in Job Creation Law, but instead, those requirements are regulated further in Government Regulation.

At this point, one question arises, whether the substance of outsourcing job in Job Creation Law has been aligned with the Constitution. To answer this question, 2 (two) indicators are given, namely, the indicator of Decision of the Constitution Court and Constitution (in case The 1945 Constitution) itself. It is important to note that Article 64, Article 65, and Article 66 Manpower Law had ever been tested several times in Constitution Court, referred to as Decision of Constitution Court No 27/PUU-IX/2011, petition proposed by worker/labors which felt that their rights were abused when performing the outsourcing job. To give constitutional guarantee, Constitution Court (MK) offered “two models” that can be used to guarantee the rights of workers/labors: First, MK required that work agreement between workers/labors and corporations which conduct the outsourcing job not in the form of PKWT, but in PKWTT. This means that according to MK, outsourcing agreement is merely constitutional or in line with the state constitution if it is performed in PKWTT; and *The Second*, it must apply the principle of Transfer of Undertaking Protection of Employment or TUPE for workers hired in companies which conduct outsourcing job.

In reality, “two models” proposed by MK to guarantee the rights of outsourcing workers/labors were neglected by the Government and the House of Representatives. This can be seen whenever we read the provision of Article 66 job Creation Law, It is still stated that outsourcing job can be performed through PKWT or PKWTT. Thus, according to the author, the provision of the outsourcing job has not been aligned with the mandate of the constitution or that it is unconstitutional because it has not accommodated the Decision of the Constitution Court (MK). Because, according to MK, outsourcing job in the form of PKWT has potential to violate the rights of worker/labors and does not provide legal certainty.

Meanwhile, the second indicator does not need to be further elaborate because basically when Decision of Constitution Court is issued, indirectly MK has used “two legal languages” , namely Constitution Language and Law Language, therefore on one side, MK spoke the voice of Constitution (*in casu* The 1945 Constitution), on the other side, MK spoke the voice of Manpower Law. However, the Decision of Constitution Court, *nota bene*, which is final and binding, is not implemented by the Government and the House of Representatives (Maulidi, 2017).

If the Decision of Constitution Court is not followed up or obeyed by the Government and the House of Representatives (Lumbuun, 2009), definitely this means that there are certain political interests or economic interests prioritized by the

Government and the House of Representatives so that there is impression that the Government and the House of Representatives ignored the Decision of Constitution Court. Therefore, the output resulted will affect the character of legal products generated, which is conservative, meaning that Law *a quo* will not last long because within days probably judicial review will be repropose by outsourcing workers/labors party before Constitution Court.

D. CONCLUSION

The direction of legal politics of the making of "Job Creation Law" is still authoritarian because the issuance process is still closed and not responsive. This means that Job Creation Law discussion stage did not involve the participation of the people through General Hearing Meeting. Even several new provisions in the Bill of Job Creation have not reflected the values of the constitution particularly the ones which accommodate the Decision of the Constitution Court. Therefore, the issuance of Job Creation Law is not supposed to be done in haste by the Government and the House of Representatives, but instead must be done step by step, carefully, and with transparency so that a responsive legal product can be achieved.

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