

ANALYSIS OF LABOR RIGHTS AFTER THE JOB CREATION LAW IN PERSPECTIVE OF HUMAN RIGHTS

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Abstract

The Job Creation Law has caused controversy from various circles of society, both in terms of the procedure for its formation and the contents, especially the labor cluster. Many materials in the Job Creation Law reduce workers' rights by creating a flexible working relationship. The relationship is more in favor of the interests of employers, thus raising the issue of legalizing modern slavery, which is contrary to human rights. This study analyzes changes in workers' rights, especially regarding wages, specific worktime agreements, outsourcing, and severance pay from a human rights perspective. This research was normative legal research, namely on the substance of workers' rights after the Job Creation Law from a human rights perspective, with a statutory approach and a conceptual approach. The analysis revealed that the job creation law policy is an effort to create the broadest possible employment opportunities and attract greater investment to Indonesia. In addition, it is to realize the human rights of workers who have not worked. The changes in the Job Creation Law and its implementing regulations that abolish and reduce workers' rights and

make work relations more flexible can violate workers' human rights. On the other hand, the Government is trying to strike a balance by creating new and fair workers' rights.

Keywords: Human Rights; Labor Rights; Labor Law

A. Introduction

Job Creation Law was formed to open up vast job opportunities. It was a solution to overcome the problems in the employment sector regarding unemployment and an increase in the workforce. From the formation process until it was ratified and declared valid, the Job Creation Law, especially the labor cluster, raised pros and cons from various groups, both in terms of procedures and content. The biggest contra is from the workers and trade unions because the workers' rights have been reduced, and some have even been removed from the provisions of Law No. 13 of 2003 on Manpower Law (Manpower Law). The Job Creation Law is considered to legalize modern slavery, especially the provisions on specific work time agreements and outsourcing. The form of the workers' rejection of the Job Creation Law is to hold a demonstration until the last request is submitted for formal review or judicial review to the Constitutional Court. It is for this reason that it is considered to be contrary to the 1945 Constitution of the Republic of Indonesia, especially violating the rights of workers.

On 25 November 2021, the Constitutional Court issued Decision No. 91/PUU-XVIII/2020¹ requesting a formal review of the Job Creation Law. It states that the establishment of the Job Creation Law is contrary to the 1945 Constitution of the Republic of Indonesia and does not have conditionally binding legal force. In addition, it is not interpreted as "not carried out" (without any corrections within 2 (two) years since the pronouncement of this decision" (conditionally unconstitutional), according to verdict number 3 of a quo decision.

¹ Constitutional Court Decision No. 91/PUU-XVIII/2020, stipulated on 4 Nov 2021

A quo decision is not the result of unanimous deliberation and consensus, and there are four Constitutional Justices with a different opinion than the nine judges. Constitutional Justices Arief Hidayat and Anwar Usman believe² that, essentially, the application for a formal review of the Job Creation Law should be rejected so that the examination of the constitutionality of material testing on other applications can continue. Several content materials in the Job Creation Law need to be granted, especially regarding employment law, because this is closely related to respect, protection, and fulfillment of workers' constitutional rights, which are related to wages, severance pay, outsourcing, and a Specific Time Work Agreement (PKWT).

The opinions of these two Constitutional Justices have shown that there are provisions of the Manpower Law that are amended by the Job Creation Law, which are contrary to the constitutional rights of workers. The different opinions of Constitutional Justice Manahan M.P. Sitompul and Constitutional Justice Daniel Yusmic P. Foekh³ are of the opinion that the material or substance of the Job Creation Law will remain constitutional for 2 (two) years.

Despite the differences in opinion of the Constitutional Court Justices above, the constitutional rights of workers must still be protected by the State. Regarding manpower, Article 27 paragraph (2) of the 1945 Constitution firmly states, "Every citizen has the right to work and a decent living for humanity." Article 28D paragraph (2) of the 1945 Constitution stipulates, "Everyone has the right to work and to receive fair and proper compensation and treatment in an employment relationship." The right to get a job is a human right that cannot be violated. Therefore, the State is obliged to uphold and provide protection to every worker. Work is a source of income or livelihood for workers to support their families, so a decent wage for humanity is the most basic right for every worker. In the

² *Ibid.*

³ *Ibid.*

implementation and protection of the constitutional rights of workers, the role of legal and policy aspects is crucial.

In Indonesia, the problems in the economy and Policies in the employment sector are influenced by the country's political situation. In the mid-1998 reform era, the Labor Law Reform program was launched containing essential principles, namely respect for human rights, democratization in the workplace, and community participation. Parties related to the manpower sector, namely workers, laborers, employees, employers, and companies, workers' organizations, employers' organizations, and the government, have mutually influencing and cooperating relationships. The Labor Law Reform program, with the spirit of human rights, was realized by establishing 3 (three) labor laws, namely Law No. 21 of 2000 on Trade Unions/Labor Unions, Law No. 13 of 2003 on Manpower, and Law No. 2 of 2004 on Settlement of Industrial Relations Disputes. These three laws represent significant advances in the protection of workers' human rights both in association, provisions on workers' rights during and after the employment relationship ends, and the way to resolve them.

Before the Draft Job Creation Law was made or drafted, the political and economic situation was in a state of uncertainty and global slowdown. There were also geopolitical dynamics in various parts of the world, as well as changes in industrial technology 4.0 in the digital economy. Opportunities in the era of Society 5.0 are the opening of new forms and jobs, as well as competition in the business world at the national, regional, and global levels that require investors and skilled workers who master digital technology. As a result, the employment relationship is more flexible. The workers can work in more than one job at the same time, and employers can hire workers according to their needs.

Business fields include overlapping regulations, low investment effectiveness and high unemployment rates, an increase in the new workforce, the large number of informal workers, and the large Micro and Small Enterprises (MSMEs) that are large but have low

productivity.⁴ The unemployment rate in Indonesia in August 2019 reached 7.05 (seven million and fifty thousand) people, and the new workforce has added 2.24 people.⁵ In August 2020, the number of unemployed increased to 9.77 million or 7.07%.⁶ This situation is growing due to the number of layoffs during the COVID-19 pandemic.

The legal and political policy considered urgent to overcome economic and business problems, including employment problems, is to prepare a Draft Law on Job Creation Law using the omnibus law method. Unemployment is a very complex problem. If not addressed immediately, it may lead to poverty. The growth in the number of the workforce must be balanced with the high absorption of the existing workforce. Otherwise, it will result in an increase in the number of unemployed, and it will affect the social welfare and society of the country.

Promoting public welfare is one of the goals of the Indonesian state, as stated in the fourth paragraph of the Preamble to the 1945 Constitution. Basically, the concept of the welfare state is based on the activity of the State in its role in managing and organizing the economy.⁷ Generally, a country can be classified as a welfare state if it has 4 (four) pillars, namely: a. social citizenship; b. full democracy; c. modern industrial relations systems; and d. right to education and the expansion of contemporary mass education systems. These four pillars are possible

⁴ Haiyani Rumondang, "Sosialisasi Undang-Undang No. 11 Tahun 2020 Tentang Cipta Kerja," in Direktorat Jenderal Pembinaan Pengawasan Ketenagakerjaan Dan Keselamatan Dan Kesehatan Kementerian Ketenagakerjaan RI, 2020, p. 6.

⁵ BPS : Tahun 2019, <https://www.bps.go.id/website/materiInd/materiBrsInd.20201105120056.pdf>.

⁶ BPS : Tahun 2020, [https://www.bps.go.id/pressrelease/2020/11/05/1673/agustus-2020--tingkat-pengangguran-terbuka--tpt--sebesar-7-07-persen.html#:~:text=Tingkat%20pengangguran%20terbuka%20\(TPT\)%20Agustus,juta%20orang%20dari%20Agustus%202019.](https://www.bps.go.id/pressrelease/2020/11/05/1673/agustus-2020--tingkat-pengangguran-terbuka--tpt--sebesar-7-07-persen.html#:~:text=Tingkat%20pengangguran%20terbuka%20(TPT)%20Agustus,juta%20orang%20dari%20Agustus%202019.)

⁷ Darmawan Triwibowo and Sugeng Bahagijo, *Mimpi Negara Kesejahteraan* (Jakarta: LP3ES, 2006), p.9.

in a welfare state because the State treats the implementation of social policies as the granting of social rights to its citizens.⁸

In the field of manpower, this can be realized by increasing the welfare of all Indonesian workers. Manpower is the backbone of development and an asset of a business entity, in addition to financial capital. The socio-economic aspect is an essential focus for realizing a just and prosperous society, supported by legal and other aspects.

The constitutional mandate in the field of employment is to ensure that every Indonesian citizen is not discriminated against to get a job and a decent life for humanity. Working and earning a decent wage for humanity is a human right that must be upheld, respected, and guaranteed to be enforced. Legal protection is needed for workers against human trafficking, forced labor or slavery, protection against violence and crime, arbitrary actions, and violations of human dignity and dignity, as well as other treatments that violate human rights.

The changes made by the Employment Creation Act (particularly the employment cluster) are employment flexibility, which is generally more favorable to employers. However, some benefit the workers.⁹ The flexibility that benefits employers includes, among others, in terms of wages, where the Provincial Sector Minimum Wage (UMSP) and Regency/City Sector Minimum Wage (UMSK) are abolished so that the minimum wage for all types of work is the same, no longer differentiated between heavier and lighter types of work, which are risky and less risky to the health and safety of workers. The previous PKWT provisions, which have been regulated regarding the validity period, are only for 3 (three) years and can only be extended once to 5 (five) years and can remove the extension. Other additional provisions of PKWT are based on the completion of the work, and there is no time limit. The previous outsourcing provisions were for 5 (five) types of work to be

⁸ Oman Sukmana, "Konsep Dan Desain Negara Kesejahteraan (Welfare State)," *JURNAL SOSIAL POLITIK* 2, no. 1 (2017): 103–122.

⁹ Petra Mahy, "Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments," *Asian Journal of Comparative Law* 17, no. 1 (2022): 51–75.

for all types of work. These two changes, of course, lead to a trend that employers are very accessible to use or dismiss workers according to their needs, so there is no certainty for workers about the continuity of their work, which is their human right. The decrease in the calculation of the amount of severance pay also shows alignment with employers so that workers' rights to the safety net for the continuity of their livelihoods when they lose their jobs are reduced.

The changes made by the Employment Creation Law (particularly the labor cluster) are employment flexibility, which is generally more favorable to employers. However, there are also benefits to the workers. After examining more deeply the changes made by the Job Creation Law, it was also revealed that there was a very significant change, especially in terms of the material content of the regulations in the Indonesian legal hierarchy. There is a lot of material that was previously contained in the Manpower Law; in fact, the Job Creation Law is contained in a Government Regulation of a lower position. Reflecting on the previous history of labor law, namely in the early 2000s until the enactment of Law No. 13 of 2003 on Manpower, so far, it is seen to a certain extent as an effort to hinder the increase of Ministerial Regulations into Laws. The Job Creation Law provides more detailed arrangements for the domain or authority of the Government so that in the future, it will be more vulnerable or easy to change. The reason is, of course, acceptable, considering the experience in Indonesia that the process of transforming law through the approval of the DPR is not easy and fast, so it is also seen that the Indonesian government is taking advantage of the COVID-19 pandemic to ratify the Job Creation Act.¹⁰

A deeper study of the changes made by the Job Creation Law also reveals a significant change, especially regarding regulatory content according to the Indonesian legal hierarchy. Many content materials were previously contained in the Manpower Act, and then the Job Creation Law was held in a Government Regulation of a lower position.

¹⁰ *Ibid.*

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The description above shows the need to conduct a study from a human rights perspective on changes in worker rights norms, especially regarding wages, PKWT, outsourcing, and severance pay after the Copyright Law, so it is hoped that the results can provide a more in-depth picture of changes in workers' rights that are still in the corridor of rights: human rights or vice versa. The results of this research study can be used as input for stakeholders related to the field of employment, as well as being able to contribute ideas to those who are pro and contra the regulation of labor rights in the Job Creation Law. The problem formulation of this research is how to regulate labor rights regarding wages, PKWT, outsourcing, and severance pay after the Job Creation Law in terms of a human rights perspective.

B. Method

This research is normative legal research. The nature of the research was descriptive and analytical. The data used were secondary. The method of collecting data was through library research, both from the UPH Medan Campus library and from the internet or the official website, in the form of statutory regulations and court decisions that are binding and related to this study.

Other secondary data are expert opinions and thoughts, research results published in journals, and data from the Central Statistics Agency related to employment. The data collected was analyzed qualitatively using deductive thinking. This research uses a statutory approach and a conceptual approach. The legal approach to research was the changes to the legislation on the Job Creation Law and

¹¹ *Ibid.*

its implementing regulations on the Labor Law. The conceptual approach was a way to examine changes in workers' rights in the Labor Law by the Job Creation Act so that it is known whether it is following human rights principles or vice versa. This concept will be used in the analysis process. The conceptual approach began with the views and theories of legal experts and doctrines that developed in the field of legal science, especially the principles of human rights and justice.

C. Discussion and Analysis

This section began with the principles of human rights and their application in Indonesian regulation related to manpower.

1. Human Rights in Indonesia

Universal human rights were first declared by the United Nations together with countries in the world on 10 December 1948 through Resolution 217 A (III), namely the International Convention on the Declaration of Human Rights (Declaration of Human Rights). This convention contains universally applicable standards of human values that are used as guidelines by UN member states when drafting national legislation in their respective countries. The consideration considers that the Declaration of Human Rights says the need for legal regulations to protect human rights. The aim is that people do not choose to fight against injustice and colonialism against humans. Article 22 of the Declaration of Human Rights states that as a member of society, everyone has the right to social security and the realization of economic, social, and cultural rights because everyone needs these rights for the dignity and growth of his personal freedom. Social security and these rights can be obtained by a State with various national efforts, as well as international cooperation under regulations and available resources in that country.

In Indonesia, before the Declaration of Human Rights in 1948, human rights had been stated in the constitution of the 1945 Constitution of the Republic of Indonesia. Since the reformation, it was amended 4 (four) times, especially by adding Article 28A to Article 28J

in 1 (one) particular chapter on human rights. Further regulation of human rights is regulated by Law No. 39 of 1999 on Human Rights, and other laws and regulations contain provisions on human rights. It is as mandated by Article 8 of Law No. 10 of 2004 on the Establishment of Legislations, namely that every formation of legislation must be based on the content of human rights. Law No. 10 of 2004 was amended by Law No. 12 of 2011 on the Establishment of Legislation. Article 6 of the Establishment of Legislation Law affirms that the content of the legislation must reflect the principles of protection, humanity, nationality, kinship, archipelago, diversity in diversity, justice, equality in law and government, and/or balance, harmony, and proportion. The Law No. 12 of 2011 expands the regulation of human rights based on Indonesian values, namely Pancasila with diverse values.

The definition of Human Rights, according to Article 1 letter a of Law No. 39 of 1999, is “a set of rights inherent in the nature and existence of humans as creatures of God Almighty and is His gift that must be respected, upheld and protected by the state, law and government, and everyone for the sake of honor and protection, human dignity and worth.”

2. Right to Work and Fair Pay as Human Rights

The following describes the provisions regarding the right to work and fair wages as human rights, starting from the Universal Declaration of Human Rights to the laws that apply in Indonesia.

2.1 Universal Declaration of Human Rights

a. Article 23 of the Universal Declaration of Human Rights:

Paragraph (1): “Everyone has the right to work, freely choose a job, has the right to just and favorable labor conditions and has the right to protection from unemployment”;

Paragraph (2): “Everyone, without discrimination, has the right to the same remuneration for the same work”;

Paragraph (3): “Every person who works has the right to just and favorable remuneration, which guarantees a dignified life for

himself and his family, and if necessary supplemented with other social protections”;

b. Article 24: “Everyone has the right to rest and holidays, including limitations on proper working hours and periodic holidays, while still receiving wages”;

c. Article 25 paragraph (1): “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including the right to food, clothing, housing, and health care as well as necessary social services, and the right to security in the event of unemployment, suffering illness, disability, being a widow/widower, reaching old age or other circumstances that result in a lack of livelihood, which is beyond his control.”

The principle of non-discrimination is the basis for interpreting the fulfillment of economic, social, and cultural rights. Regarding the human rights perspective, workers must have their rights fulfilled without being discriminated against based on race, color, gender, language, religion, and other identities. Regarding economic, social, and cultural rights, all are regulated in the Universal Declaration of Human Rights Articles 22-27.¹²

The right to work is a concept that states everyone has the right to work or participate in productive activities. There should be no prohibition against anyone from doing so¹³, including the right to equal pay for the same work and fair wages.

From a human rights perspective, the right to work and a decent and fair wage for humanity without discrimination, including the right to rest, are considered non-derogable rights or rights that no one, including the State, can reduce. The concept of justice is used in the

¹² Eko Riyadi, *Hukum Hak Asasi Manusia Perspektif Internasional*, Regional Dan Nasional, 1st ed. (Depok: PT RajaGrafindo Persada, 2018), p106-107.

¹³ https://id.wikipedia.org/wiki/Hak_atas_pekerjaan, accessed on 12 Des’21, 15.22 WIB.

Universal Declaration of Human Rights to realize human rights in the employment field.

2.2 Law in Indonesia

a. 1945 Constitution of the Republic of Indonesia

The Indonesian state upholds human rights as stated in the 1945 Constitution of the Republic of Indonesia, Chapter XA Article 28A, which states that the State guarantees the human rights of everyone to live and maintain life and life. Furthermore, Article 27 paragraph (2) affirms the right to work as part of human rights protected by the constitution, which reads: “Every citizen has the right to work and a decent living for humanity,” and Article 28D paragraph (2) reads: “Everyone has the right to work and receive fair and proper remuneration and treatment in an employment relationship.”

b. Law No. 11 of 2005 on with ratification of ICESCR (International Covenant on Economic, Social, and Cultural Rights) 1977

The concept of human rights, particularly the right to work, developed through the 1977 International Covenant on Economic, Social, and Cultural Rights (ICESCR) convention, which the State of Indonesia ratified through Law No. 11 of 2005. Article 6 and Article 7 of the ICESCR¹⁴ are used as the basis for recognizing the right to work as a human right, even providing a broad concept of the right to work, namely, the State is obliged to guarantee the availability of employment opportunities for all its citizens, as well as further detailing the right of everyone to work, fair and decent working conditions for humanity, including fair and equal wages without any discrimination in any form, decent living for workers and their families, occupational safety and health; equal opportunities for promotion based on seniority and competence, rest time, recreation and reasonable limitation of working

¹⁴ Elsam, “Kovenan Internasional Hak-Hak Ekonomi, Sosial Dan Budaya,” *Elsam*, no. 31 (2021): 1–11, <https://referensi.elsam.or.id/wp-content/uploads/2014/09/Kovenan-Internasional-Hak-Ekonomi-Sosial-dan-Budaya.pdf>.

hours and regular holidays while still being paid wages, as well as the right to freedom of association.

In more detail, the two articles of ICESCR read as follows:

Article 6 paragraph (1): “States Parties to this Agreement recognize the right to work, which includes the right of everyone to the opportunity to earn a living by doing work which he freely chooses or accepts and will take appropriate measures to protect this right”; paragraph (2): “Measures taken by States Parties to the Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and opportunities for full and productive employment based on conditions that guarantee fundamental political and economic freedoms for each individual”;

Article 7: States Parties recognize the right of everyone to the enjoyment of just and favorable conditions of work, in particular ensuring the remuneration of all workers, with:

- 1) Fair wages and equal pay for the same work without any difference, especially the wages of women who are guaranteed working conditions equal to those enjoyed by men;
- 2) A decent living for himself and his family under the provisions of the Agreement;
- 3) “Rest and restrictions on proper working hours and periodic holidays while still being paid wages, as well as earning wages on public holidays.”.

c. Manpower Law

Human rights in the field of manpower, which are recognized as constitutional rights, are translated into the Manpower Law. It turns out that the Labor Law has already adopted the provisions of the ICESCR before being ratified through Law No. 11 of 2005. The Manpower Law regulates several primary workers' rights, including:

1) To get a job, workers have the same opportunities and rights as well as treatment without discrimination, as well as non-discriminatory treatment from employers (Articles 5 and 6);

2) The right to gain improvement, development of competence and ability with job training in line with their talents and interests, the right to equal opportunities to participate in job training based on their field of duty, the right to recognition of work competencies or the results of internship programs, either from companies or certification bodies (Articles 11, 12 (3), 18 (1) and 23);

3) Placement of workers.

Equal rights and opportunities to choose, obtain, or change jobs and the right to a decent wage at home or abroad (Article 31).

4) Wages and welfare.

The right to income or wages that fulfill a decent living for humanity, overtime pay, the right to rest, the right to leave, the right to worship while still receiving wages, the right to compensation due to layoffs, the right to employment, social security (Article 88 (1), Article 90(1), 99(1));

5) The right to severance pays and/or service pay and compensation for entitlements after termination of employment (Article 156).

6) The right to treatment that upholds human dignity and religious values, as well as the right to morals and decency, security, and health in work relations (Article 86 (1));

7) The right to organize, to establish, to become an administrator or member of a trade union/labor union, and the right to strike in the event that bipartite negotiations fail (Article 104 (1).

3. Analysis of Wages, Specific Work Time Agreement, Outsourcing, and Severance pay, according to Manpower Law Before and After the Job Creation Law

The most crucial matters are highlighted in the amendments to the Manpower Law after the Job Creation Law, according to Said Iqbal, the President of the Confederation of Indonesian Trade Unions, both by workers and employers are wages, specific worktime agreements,

Outsourcing, layoffs, severance pay, worktime, Job Loss Guarantee Program (JKP), Foreign Workers and Sanctions.¹⁵ This paper is limited to analyzing wages, specific worktime agreements, outsourcing, and severance pay, which will also be related to JKP and sanctions.

3.1 Remuneration

A decent wage or remuneration for humanity is a worker's human right that cannot be reduced by non-derogability based on the mandate of Article 28D paragraph (2) of the 1945 Constitution. To determine a decent wage for humanity, the State must intervene. It is one manifestation of the role of the welfare state, which must be active in managing the economy of its people so that the goals of a prosperous society, including workers, can be manifested in their daily lives.

The provisions for determining the minimum wage by the governor are maintained by the Job Creation Law, namely UMP or the Provincial Minimum Wage and UMK or the Regency/City Minimum Wage, as stipulated by Article 88 of the Manpower Act juncto Article 81 of the Job Creation Law. After the Job Creation Law, the determination of the UMP and UMK amounts is no longer based on the needs of a decent living for workers as previously regulated in Article 88 paragraph (1) of the Manpower Law. But it is based on economic and labor conditions. Especially for Regency/Municipal MW requirements based on regional economic growth or inflation in the Regency/City concerned following Article 25 paragraph (2) and (3) Government Regulation No. 36 of 2021 on Wages.

Article 23 paragraph (3) Government Regulation No. 36 of 2021 stipulates a prohibition on employers from paying wages lower than the Minimum Wage. Article 36 PP No. 36 of 2021 provides an exception for the provision of the UMP and UMK for workers who work in Micro and Small Businesses, where wages can be determined based on an

¹⁵ Abdul Khakim, *Catatan Kritis Perubahan Undang-Undang Bidang Ketenagakerjaan Dalam Undang-Undang Nomor 11 Tahun 2020 (Omnibus Law)* (Bandung: Citra Aditya Bakti, 2021), p.44.

agreement between entrepreneurs and Micro and Small Businesses. The government also provides a minimum wage limit given by Micro and Small Business Entrepreneurs, which is 50% of the average consumption of the provincial community and 25% above the poverty line.

This government policy promotes Micro and Small Enterprises (MSMEs) as the most prominent business sector in Indonesia. In 2018, the number of MSMEs was 64.2 million units, or 99.9% of all businesses operating in Indonesia, and MSMEs absorbed 97% of the total workforce. The contribution of MSMEs is 60.3% of Indonesia's whole gross domestic product (GDP).¹⁶ MSMEs need to be developed by issuing provisions that ease MSME business actors, such as being able to provide wages below the UMP based on worker agreements with MSME entrepreneurs.

Anyone who pays wages to his workers below the UMP and UMK violates human rights and labor law. If analyzed based on the concept of justice, the employer who unjustly withholds the wages of his workers, the screams of the workers reach the ears of Almighty God. The reference is mainly to the social and economic devastation suffered by the poor working class of society (James 5:4).¹⁷ Justice means giving the right of people (workers) in a proportional balance between the harvest of business and wages.

Justice as part of social values has a broad meaning; even at a time or situation, justice can be contrary to the law, which is part of the social value system. An act of violating the law is a mistake, but if the action is not greed, it cannot be called injustice. On the other hand, an action that is not an act of violating the law can lead to injustice. Determination of Wages for Micro and Small Businesses, which may be lower than the Regency Minimum Wage, is acceptable as a form of

¹⁶ BPS: Year 2018, <https://databoks.katadata.co.id/datapublish/2020/04/08/pemerintah-beri-stimulus-berapa-jumlah-umkm-di-indonesia#>, accessed on 14 December 2021.

¹⁷ Herman Hendriks, *Keadilan Sosial Dalam Kitab Suci* (Yogyakarta: Kanisius, 1990), p.88.

justice because wages are based on the limited capabilities of Micro and Small Businesses, both in terms of capital and profits and the working time is also relatively shorter compared to prominent entrepreneurs.

The determination of wages for Micro and Small Business workers based on the agreement of both parties is analyzed with John Rawls' contract-based justice theory. It stated that the concept of good justice must be contractual by mutual agreement so that any concept of justice that is not contract-based must be set aside for the sake of justice itself.¹⁸ However, according to John Rawls' theory, the parties' position is free, rational, and equal. Workers and employers are unequal because the work, orders, and wages come from the employer. It is where the Government intervenes by providing a minimum wage limit that may be agreed upon by Micro and Small Business entrepreneurs with workers as described previously. It is also necessary to have good faith in the form of honesty and non-greed from entrepreneurs and workers so that the agreement on wages is genuinely by the profits obtained by Micro and Small Business entrepreneurs and does not violate the minimum limit set by Government Regulations No. 36 of 2021.

Other types of Minimum Wages, namely UMSP or Provincial Sectoral Minimum Wages and UMSK or Regency/City Sectoral Minimum Wages, which are regulated in Article 89 and Article 90, are removed by the Job Creation Law. It will undoubtedly cause injustice for workers whose work is heavier and pose a risk to their safety and health.

From a human rights perspective, the elimination of UMSP and UMSK from the Manpower Law by imposing the same Municipal Minimum Wage on all workers regardless of type of work is against the principle of non-discrimination of human rights, is against the principle of non-discrimination of human rights. The right to a fair and decent wage for the life of workers is a non-derogable human right as stipulated in Article 27 paragraph (3) and 28D paragraph (2) of the 1945

¹⁸ Andre Ata Ujan, *Keadilan Dan Demokrasi (Telaah Filsafat Politik John Rawls)* (Yogyakarta: Kanisius, 1999), p.32.

Constitution, and Article 23 paragraph (3) of the Universal Declaration of Human Rights for everyone. It is entitled to equal remuneration for the same work, adopted in Article 2 paragraph (3) PP No. 36 of 2021. Regarding the meaning of the same work, it is emphasized in the explanation of the article, namely that the work with the exact weight is measured from, among others, competence, work risk, and responsibility in a company, so it is contradictory to the abolition of UMSP and UMSK.

Citing the dissenting opinion of two Constitutional Justices, Anwar Usman and Arief Hidayat in the Constitutional Court Decision No. 103/PUU-XVIII/2020 stated that the wage norm in the Job Creation Law does not guarantee every worker the right to obtain a job and a decent living for humanity; does not provide guarantees, protection and fair legal certainty as well as equal treatment before the law for every worker; does not guarantee the granting of rights to every worker to work and to receive fair and proper remuneration and treatment in the working relationship of the worker/laborer with the entrepreneur; which instead takes over the workers' private property rights arbitrarily, because the economy is not structured on the principle of kinship and joint efforts.¹⁹ This opinion, of course, requires a basis for deeper study and consideration later when the judicial review of the Job Creation Law takes place. Still, at least the Constitutional Justices already have assumptions about wages.

A general explanation of PP No. 36 of 2021 states that development policies on the wage system focus on the aspect of protecting wages for workers in order to achieve their welfare, but the ability of companies and the condition of the national economy must also be considered. The hope is that a fair wage system can be realized. Furthermore, the challenges of the dynamics of globalization and the transformation of information technology must also be answered by regulations on wages because the impact of these challenges changes

¹⁹ Constitutional Court Decision No. 103/PUU-XVIII/2020, stipulated on 4 Nov 2021.

the social and economic order, especially changes in the field of employment, namely the patterns and types of work relationships that are increasingly complex.

Changes in the settings in PP No. 36 of 2021 on Wages Article 16 that wages can be paid hourly, daily, or weekly is a wage flexibility. It is a form of wage regulation in keeping with the dynamics and currents of globalization as well as the rapid transformation or development of information technology, which impact increasingly diverse patterns of working relationships. For example, in the era of technology, the current trend of workers (especially millennials) is to be able to work in several companies/entrepreneurs at once (multi-tasking) without having to follow working hours and can work from home. Hourly wages are already in effect in the world of work in Indonesia, for example, for construction workers, teachers, honorary lecturers, and others, which are determined by agreement. It is necessary to specifically regulate such workers to be fair so that, in practice, they are not equated with permanent workers who only work in one company and work 40 hours/week.

3.2 Specific Work Time Agreement / PKWT

The provisions of PKWT and outsourcing in the Manpower Act have regulated the terms and restrictions on using labor quite well. Workers whom PKWT and outsourcing systems bind are necessary and are explicitly legalized by the Manpower Act and restricted in their use. However, in practice, deviations always occur, where there is a lot of illegal use of PKWT and outsourcing workers.²⁰

The most crucial change in PKWT provisions after the creation of the Job Creation Law is Article 59, especially regarding PKWT, which is based on a period, the maximum time limit for PKWT. Before the Job Creation Law, the first PKWT can only be made with a maximum

²⁰ Ibnu Afan, "The Phenomenon of Work Contract and Outsourcing Viewed by Sociological and Law, Indonesia," *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 23, no. 5 (2018): 83–88.

time limit of 2 (two) years and can be extended only 1 (one) time for 1 (one) year. After the Job Creation Law as regulated in Government Regulation No. 35 of 2021 Article 8 paragraph (1), it is amended and becomes 5 (five) years and is not limited to how many times it can be extended. The subsequent provision for PKWT, which is based on the completion of the work, has no time limit.

From the perspective of the legislators (government and legislative), this change shows the flexibility of working relations, especially those based on PKWT, to open up wider job opportunities. From the entrepreneur's perspective, it can be assumed that PKWT opens up opportunities for employers to hire shorter or longer workers according to their business needs and reduces the risk of paying severance pay in the event of layoffs. From the worker's perspective, this can lead to uncertainty about the continuity of work, ultimately leading to the survival of workers.

The Government overcame this by establishing new rights through PP No. 35 of 2021 Article 15, namely providing a balance in the form of the employer's obligation to pay compensation money for workers every time the PKWT ends. This compensation money was not previously regulated in the Manpower Law and its implementing regulations. The compensation money is relatively small, but at least it can be used as a safety net when workers are no longer working because the PKWT ends. Other than compensation money, new rights established by the government through PP No. 37 of 2021, namely Job Loss Guarantee, in the form of JKP benefits for workers who are tied to a PKWT and PKWT if they are laid off, as long as the worker is willing to work again. The JKP benefits will be explained in the severance pay section.

The analysis above shows the government's efforts to provide a balance between the flexibility of the employment relationship, especially regarding the period and extension of the PKWT, which can lead to uncertainty in the continuity of work and workers' livelihoods, namely by protecting workers from providing compensation money and

JKP benefits in the event of layoffs. This JKP is also a transfer of the entrepreneur's obligations to the State.

3.3 Outsourcing

The provisions of the Manpower Law regarding the job transfer system, often called outsourcing, are regulated in Articles 64, 65, and 66. A company can hand over part of its work to other companies through a Job Chartering Agreement and an Agreement for the Provision of Workers' Services. The type of work that can be done is supporting, not main work. The Employment Agreement between the service provider company and the employee can be made with a PKWT or PKWTT.

Outsourcing is a known term in practice, and in Government Rule No. 35 of 2021, it is also called outsourcing. Prior to the Job Creation Law, the issue of outsourcing was one of the things that was most highlighted by the workers or trade unions because, in practice, the person being transferred was not the job. The *modus operandi* is to shift workers from one service provider company to another worker service provider company and so on. In contrast, workers continue to work at the employer's company for many years with the status of outsourced workers. Outsourced workers are tied to PKWT, so the period is limited, which is a maximum of 3 years; therefore, the mode that is often used in the above practice is the one most often used to avoid the consequences of PKWT becoming PKWTT (vide Article 59 paragraph (7) of the old Manpower Law) while avoiding severance pay.

The government plays an active role in limiting outsourcing practices that are not following the provisions by issuing Regulation of the Minister of Manpower and Transmigration No. 19 of 2012 as amended by Regulation No. 27 of 2014 that outsourcing is only for 5 (five) types of work, namely security, catering for workers, transporting workers, cleaning services and supporting services in mining companies.

The Employment Creation Law changed by removing Articles 64 and 65 of the Manpower Law, which regulates the submission of

part of the work through a Contracting Agreement so that the submission of part of the work can only be made through the Worker Service Provision Agreement (Article 66). Submission of part of the work should be done through a charter agreement. Provisions on outsourcing should only cover the transfer of work to another company but still regulate the transfer of jobs and workers from one outsourcing company to another.²¹

Another change can be seen, such as there is no longer a limit on the types of work that can be transferred to other companies. From the Government's perspective, the change in provisions regarding the limits on the types of outsourcing work is a policy of flexibility in employment relations under the objective of the establishment of the Job Creation Law to expand employment opportunities in Indonesia so that it can accommodate unemployment and labor bonuses in the future.

From the entrepreneur's perspective, this provision opens up opportunities for companies to use more outsourced workers in their business activities because it reduces labor and time in human resource management, reduces worker training costs, and is free from the risk of paying severance pay and compensation. From the worker's perspective, this provision is considered to open up modern slavery opportunities because workers increasingly have their rights to work continuity, no career, and minimum wages. After all, outsourcing opens up opportunities for workers with the status of outsourced workers with permanent PKWT, as was the practice during this time. The results of research by Yusel Demiral and his colleagues on precarious workers in Germany show that precarious work is a risk factor for depression for

²¹ Aloysius Uwiyono, "Revisi UU Cipta Kerja Perlu Benahi Aturan *Outsourcing*", 26 Januari 2022, <https://www.hukumonline.com/berita/a/prof-alloysius-uwiyono--revisi-uu-cipta-kerja-perlu-benahi-aturan-outsourcing-lt61f0c45204553/?page=1>, accessed on 12 February 2022.

workers, predominantly male workers, so research is needed in various countries on precarious work.²²

Workers have submitted a request for a judicial review of the provisions of Article 66 to the Constitutional Court. Through Decision No.27/PUU-IX/2011, the Constitutional Court considered the Transfer of Undertaking Protection of Employment (TUPE), which is an act of transferring protection to outsourced workers who are transferred from a service provider company to another service provider company, where work still exists or workers continue to work in the same employer. The next labor service provider company that accepts outsourced workers must make a statement that it is willing to assume the workers' rights as long as the work continues.

The Constitutional Court's decision was adopted by the Job Creation Law, which amended the provisions of Article 66 paragraph (3) of the Manpower Law to "in the case that the outsourcing company employs workers/laborers based on a PKWT, the work agreement must require the transfer of protection of rights for workers in the event of a change of employment as long as the job remains." According to Prof. Aloysius Uwiyo, the provision regarding TUPE is an effort or a shortcut to overcome the practice of outsourcing. Through TUPE, it is expected to provide protection for outsourced workers. Still, if this service provider mechanism applies, the working relationship should not be between workers and outsourcing companies but between workers and user companies or direct users either through PKWT or PKWTT.²³

Analysis from a human rights perspective on the policy of opening up opportunities for all types of work with an outsourcing system is the flexibility of employment relations, from one side. It clearly opens up the broadest possible employment opportunities for

²² Aloysius Uwiyo, "Revisi UU Cipta Kerja Perlu Benahi Aturan Outsourcing"; Yusel Demiral, "Precarious Work as Risk Factor for 5-Year Increase in Depressive Symptoms," *International Journal of Environmental Research and Public Health* 19 (2022): 13–14.

²³ Aloysius Uwiyo, *Op.Cit.*

workers who have yet to find work (which is a fundamental right of job seekers). On the other hand, it can violate workers' human rights if it is not returned to the nature of outsourcing so that it only benefits the entrepreneur.

In theory, the more flexible the employment relationship, the weaker the intervention or protection of the State against workers because it is left to the labor market. The flexibility of the current employment relationship is necessary, but the State must still protect the workers' rights in the relationship. In principle, the nature of outsourcing or outsourcing is the handing over part of the work to other companies, not the handing over of workers. The type of work submitted is undoubtedly different from the core business. Even if you want to use the concept of a worker service provider, service provider companies are only limited to service providers who provide skilled and ready-to-work labor so that the working relationship of workers is with the employer rather than the provider services that can be based on PKWT or PKWTI.

3.4 Severance Pay

Changes in the amount of severance pay due to layoffs are also pros and cons because the Job Creation Law changes the calculation to be smaller than the previous provision, meaning that the normative rights of workers due to layoffs are reduced and removed.

The abolition of Article 156 paragraph (4) letter c, namely the issue of housing, medical, and care reimbursement, and the abolition of the phrase "at least" from Article 156 paragraph (2), resulting in a reduction in severance pay from 2 times the provision to be smaller for certain types of layoffs, such as layoffs due to changes in company status or ownership, mergers, consolidations, acquisitions of companies where the new employer or company is not willing to accept workers; Layoffs because the company closed due to efficiency; The dismissal is due to the worker dies, enters retirement age and the entrepreneur is declared proven to have committed an act as regulated in Article 169 paragraph

(1). The amount of severance pay is no longer regulated in law but at the level of government regulation, namely PP No. 35 Year 2021.

The different opinions of two Constitutional Justices, Anwar Usman and Arief Hidayat, in Decision No. 103/PUU-XVIII/2020, states section 6.5 that the 14 articles regarding layoffs and severance pay that are amended, additions and deletions are contrary to the 1945 Constitution, in particular Article 24D paragraph (1) and Article 28H paragraph (4), because these 14 articles do not provide fair guarantees, protection and legal certainty for workers to receive proper compensation in an employment relationship as rights the constitution, and the 14 articles are arbitrarily depriving or arbitrarily taking over the workers' private property rights in the form of severance pay that have been given, guaranteed and protected by the 1945 Constitution and the Manpower Law also.²⁴

The authors cannot assume about the legislative ratio of the drafters of the Job Creation Law, which reduces the granting of the right to severance pay. From several socialization webinars, especially the employment cluster of the Job Creation Law, including those held by the Ministry of Manpower and Transmigration, it was stated that severance pay in Indonesia is high compared to other ASEAN countries. Prior to the employment creation bill, Chatib Basri, a senior economist at the University of Indonesia, said that Foreign Direct Investment for foreign direct investment preferred Vietnam to Indonesia because Vietnam's severance pay was half the severance pay in Indonesia. It can be seen from the fact that in 2019, 33 factories left the PRC, none of which switched to Indonesia but preferred Vietnam, Cambodia, and Thailand because they were considered investment-friendly. Investments fled to Vietnam because licensing was facilitated, the land was cheap, labor was easy and affordable, and the productivity was 2 (two) times that of Indonesians.²⁵

²⁴ Constitution Court Decision No. 103/PUU-XVIII/2020, stipulated on 4 Nov 2021.

²⁵ Abdul Khakim, *Op. Cit.*, p. 21, 25.

Further analysis shows that the Job Creation Law creates new worker rights after layoffs, namely through Government Regulation No. 37 of 2021 on the Job Loss Guarantee Program (JKP). Every worker who is laid off will receive JKP in the form of cash benefits, information, and access to information about job vacancies and job training programs, except for layoffs due to resignation, permanent total disability, retirement, and death. The JKP benefits apply to workers whose working relationship is bound by a PKWTT or PKWT and must be willing to work again²⁶.

Cash benefits are given for 6 (six) months, namely the first 3 (three) months, 45% of wages/month, and the next 3 (three) months, 25% of wages/month, organized by BPJS Ketenagakerjaan. Access to information about job vacancies and job vacancies in the form of self-assessment or self-assessment and/or career counseling organized by the Ministry of Manpower, as well as the benefits of job training.²⁷ In addition to workers receiving severance pay for PKWTT workers or compensation money for PKWT workers, all laid-off workers also receive JKP benefits.

The analysis of the authors' team shows that the makers of the Job Creation Law create a balance by reducing the calculation of severance pay to attract investors, especially from abroad, by increasing workers' rights to JKP benefits to protect workers who have been laid off. Considering the letters c and d of the Manpower Law as the philosophical and sociological basis for forming the law, it can be concluded that *das sollen* is the value of employment law; first, the formulation of labor law must provide protection for workers/laborers and their families following human dignity; second, labor law also pays attention to the progress of the business world. These two values must be balanced to be fair, which is reflected in the substance and implementation of labor legislation. Here, justice means a balance of protection.

²⁶ Article 19 and Article 20 of Government Regulation No. 37 of 2021.

²⁷ Article 25 to Article 29 of Government Regulation No. 37 of 2021.

D. Conclusion

The abolition of UMSP/UMSK violates the human rights stipulated by Article 27 paragraph (3) and 28D paragraph (2) of the 1945 Constitution, and Article 23 paragraph (3) of the Universal Declaration of Human Rights because it creates injustice for workers whose work is more complicated and poses a risk to their safety and health, wages/rights of workers who work in different situations, working conditions and business sectors but are treated the same. The regulation of the Job Creation Law on wages, where the UMP is excluded for Micro and Small Enterprises, where the amount of wages is left to the agreement of workers and employers, is basically contrary to human rights because it is discriminatory. It can be fair if the agreed payment of wages is following the capabilities of Micro and Small entrepreneurs.

Changes by the Employment Creation Law to the provisions of the PKWT create uncertainty about the continuity of work and workers' livelihoods. Workers can be employed forever with temporary worker status, thus contradicting the human rights stipulated in the 1945 Constitution of the Republic of Indonesia. The right to JKP, at least, is a balance that can be used as a safety net when workers are no longer working because the PKWT ends.

The human rights perspective on policy opens up opportunities for all types of work with an outsourcing system that violates workers' human rights if it is not returned to the nature of outsourcing. The Employment Creation Act allows all types of work to be outsourced or outsourced, and this opens up even more excellent opportunities for modern slavery because workers will be increasingly unprotected with their rights to work continuity, no career, and wages are still based on the minimum wage.

Amendments to the Job Creation Law in the form of a significant reduction in the workers' rights to the calculation of severance pay due to layoffs and the abolition of compensation for housing, medical care, and treatment are contrary to human rights. The balanced effort made in the form of establishing a new right, namely

JKP, for workers affected by layoffs shows that there has been a shift in the responsibility of the entrepreneur to the government.

E. Suggestion

For the Government, making and implementing policies regarding wages, PKWT, outsourcing, and severance pay must be guided by the values of social justice and human rights stipulated in the 1945 Constitution of the Republic of Indonesia. For Employers, making agreements or work contracts with good intentions and flexibility in employment relations is carried out by maintaining a balance between the rights and obligations of workers and employers, as the implementation of the principle of non-discrimination in the 1945 Constitution and the Universal Declaration of Human Rights. For workers, it is necessary to build legal awareness regarding labor rights and increase productivity through increasing skills and competencies so that they have competitiveness and fighting power in the era of globalization that supports sustainable development, including the development of human resources as a driver of national development.

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