

# Legal Protection for Outsourcing Workers from the Perspective of Justice Principles and Legal Certainty

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## Abstract

Research on Legal Protection for Outsourcing Workers from the Principles of Justice and Legal Certainty is done by utilizing the type/model of normative legal research through legal interpretation that is based on a theory of justice, legal certainty theory, and the theory of legal protection. The results of research show that based on Act Number 13 of 2003 on Manpower Regulation Implementation the outsourcing workers in Indonesia have not been given a sense of justice because there is no equality in the agreement and the employment relationship, the absence of equal wages and the earned benefits compared to permanent workers, legal uncertainties also occur in the case of outsourcing workers that will not be easily fixed. The agreement can be terminated any time. Besides, job description is also not clear and cannot be moved from one company employer to another company employer.

**Keywords:** Outsourcing Worker, Legal Protection, Justice and Legal Certainty.

## 1. Introduction

*Outsourcing* is associated with the employment relationship. It is often discussed by the professional and the observer who deals with goods and services production. Therefore outsourcing is intentionally done to reduce the cost of labor/workers in which the protection and work requirements given are far less than that they should be that are so very detrimental to workers. The implementation of outsourcing system can lead to the uncertainty for the workers that are sometimes followed by a strike, so the purpose of establishing the outsourcing system as mentioned above is not achieved due to disruption of goods and services production process. This can occur because before the Act

No. 13 Year 2003, State Gazette 2003 No. 39, State Gazette No. 2003 4279 (hereinafter referred to Act No. 13 of 2003), there is no legislation in the field of employment that governs the protection of the workers/laborers in implementing outsourcing system. Civil code provides the regulation as can be found in the Article 1601 b, which regulates the agreements of working contract, which is an agreement in which the first party positions as the one who provide work for the other party who plays a role as the employee who accepts a payment. Civil code that governs the employment work is only one aspect of *outsourcing*.

From the law determining employment perspective, the term *outsourcing*, related to the employment relationship among the related parties like the provider (the outsourcing company), the employee and the user (the company that uses the service of the outsourcing company). On the legal relationship, there are three aspects mentioned namely the company that provides the work, that is usually called the the company receiving job (outsourcing company), the corporate as the users and the workers themselves. Employment relationship in outsourcing is between the workers and the provider (outsourcing company) as outlined in the terms of reference. The employment relationship is basically

**Employment agreement without definite period of time** termed in Indonesian as **PKWTT**, but there is also a term **Employment agreement with definite period of time** called as **PKWT**. This kind of agreement can be implemented if all the requirements are fulfilled both formal and material as provided in Article 59 of Act No. 13 of 2003. Thus the work on outsourcing relationships are not always in the form PKWT, and it is wrong to assume that outsourcing workers have always been the same as PKWT.

Outsourcing is a working system that has developed along the growing needs of employers for flexible working relationship, it is easy to recruit and to perform termination for the workers. Although it is not permitted by the Act, the employer usually recruit using a certain period employment agreements, namely an agreement that shows a certain working period between workers/laborers and businessmen/employers to hold a working relationship within a certain time as stipulated in Article 1 verse 1 Kepmenakertrans No. 100 / MEN / VI / 2004 on Provisions on the Implementation of Certain Time Employment Agreement / PKWT<sup>1</sup>, (hereinafter referred to Kep. 100 / Men / VI / 2004).

Furthermore, when it is observed more closely, there is vagueness or ambiguity of norm in outsourcing arrangements that opens multiple interpretations. It is prone to disharmony working relationship between workers and companies in the outsourcing system. The vagueness of the settings is related to the rule of law employment relationship as stipulated in Act No. 13 of 2003 jo Kep. 100 / Men / VI / 2004, which can be in the

<sup>1</sup> Surya Tjandra dan Marina Pangaribuan, *Kompilasi Putusan Pengadilan Hubungan Industrial Terseleksi 2006-2007*, (Jakarta : Penerbit TURC, 2008), hlm. 135.

form PKWT working relationship and / or PKWTT, as mentioned in Article 65 verse (6) and (7) and Article 66 verse (2) b and d in conjunction with Article 59 of Act No. 13 of 2003. With regard to regulation, the employment relationship occurred is between the worker/labor and the outsourcing company (the job provider). If a number of conditions specified in the Act are not fulfilled, then by law the status of a working relationship between workers / laborers and the provider turned into the working relationship between the worker / laborer with the user.<sup>1</sup> In practice, outsourcing labor agreements are made on the basis of PKWTT/contract that makes it easy for the companies to dismiss the workers if the company does not need them<sup>2</sup>. On the other side, the workers always wanted to be on permanent workers (PKWT).

As an illustration, there are some cases that have become a court decision regarding the outsourcing business practices. The practices are carried out in violation of Article 65 and 66 of Act No. 13 of 2003. The Central Jakarta District Court No. 170 / G / 2007 / PHI PNJKT.PST.<sup>3</sup> The judges considered that the Defendant I (Service Provider Company) has been practicing business as a provider of workers / laborers that violates the provisions of Article 66 paragraph (1), paragraph (2), and paragraph (3) of Act No. 13 of 2003 in conjunction with Article 2 Kep.101 / Men / X / 2004. Consequently, in accordance with Article 66 verse (4) of Law No. 13 of 2003, by law, the employment status is returned to the employment relationship between the workers with the company that gives the work so that the workers can be the workers of the user with PKWT status. Meanwhile, the decision No. 171 / PHI / G / 2007 / PHI.PNJKT.PST.<sup>4</sup> Judges announced that by law the employment relationship between the workers with the second defendant (the user) from PKWT be PKWTT. It is because the business practices of the working contract is in contravention of Article 59 and Article 65 of Act No. 13 of 2003.

From the background mentioned above, the formulation of the problem that becomes the focus of study in this research is: How is the legal protection for outsourcing workers in terms of the principle of fairness and legal certainty?

## **2. Legal Protection For Outsourcing Workers From The Perspective Of Justice Principle**

The concept of law protection is the legal protection for outsourcing workers on the basis of repressive and preventive protection. The protection of preventive law in this case is defined as the protection of the basic rights for outsourcing workers provided by the state (government) through legal arrangements in laws and legal protection. Meanwhile, a repressive protection is defined as protection of the rights for outsourcing workers to maintain or defend the basic rights they have to have when there is a dispute in the employment relationship with the employer (outsourcing) in order to obtain a legal justice. The concept of legal protection comes from the fact that in principle the workers' status in employment relationships is weaker than that of the employer or a company that has a stronger bargaining position.

John Rawls's theory of justice, in principle, views justice as fairness. It is the principle of freedom that demands the equal position as the underlying basis of social welfare. John Rawls tried to offer three forms of settlement related to problems of justice by building a theory of justice based on the contract. First, the principle of equal freedom for everyone (the greatest equal principle), that everyone should have the same rights on the most extensive basic freedoms, covering the same freedom for everyone. This principle is intended to give or provide the same role without forgetting and leaving others who are difficult to obtain status and opportunities in economic activity. The third principle of equality that is fair to get a chance for everyone (the principle of fair equality of opportunity), that economic inequality should be arranged in such a way so as to give an opportunity for everyone to enjoy it. This principle is expected to provide the greatest benefit to those who are less fortunate, and provide confirmation that the conditions, equal opportunities, all levels and positions should be open to everyone.<sup>5</sup> Social justice is a decisive step to achieve a fairness and prosperous situation for all Indonesian citizen. The first step to achieve this direction by implementing the provisions of Article 27 paragraph (2) and Article 28 UUDNRI 1945.

The definition of basic rights posed above covers many aspects that are not only the employment agreement but other collective agreements such as wages, overtime payment, working hours and so on. It is also not limited to what is stipulated by the Act such as Social Security, leave rights, the right to rest, a guarantee of safety and so on, but including rights granted by employers to workers such as a cooperative venture or other ventures like canteen for workers as an additional effort, including the right for recreation based on the company's directors' permission.

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<sup>1</sup> Abdul Rachmad Budiono, *Hukum Perburuhan*, (Selanjutnya disebut Abdul Rachmat Budiono I), (Jakarta : PT. Indeks, 2009), p. 44.

<sup>2</sup> Surya Tjandra & Marina Pangaribuan, *Loc.cit*

<sup>3</sup> Surya Tjandra dan Marina Pangaribuan, *Op.cit*, p. 135-136

<sup>4</sup> *Ibid*, p. 136-137.

<sup>5</sup> Bahder Johan Nasotion, *Op.cit*, p. 83-84. See also Andre Ata Ujan, *Op.cit*, p.71 dan Agus Yudha Hernoko, *Op.cit*, p. 45-46

## 2.1 Principles of Justice in Employment Agreement and Employment Relation

After observing some definitions of employment agreement, and based on the Act No. 13 Year 2003 Article 1 verse 14, it can be said that in an employment agreement the subjects, which are the workers and the employers/companies are to have equal position. Thus, Article 1 verse 14 Act No. 13 Year 2003 raises human dignity of workers up to the same level as that of the employers. However, if we see the characteristics that exist in the employment relationship as the results of employment agreements, the element of "command" is still found in addition to the element of work and wages as the essential one that must be found in an agreement as obligatory materials, as defined in Article 1 verse 15 in conjunction with Article 65 verse (2) and Article 66 verse (2) Act No. 13 Year 2003.

The regulations mentioned above indicate that the position of one party, the workers, is not equal, i.e. in low position compared to the position of the employers/ companies. It is, therefore, in the employment relation between both parties, their legal position is obviously not equal and balanced. The employment agreement and employment relation of the workers with PKWT has not met the principles of justice due to several reasons, among others are:

1. PKWT is written and formal. It results in unequal position between the workers and employers. It is also contrary to the principles of freedom of determining the terms in a contract.
2. The work period is short either in terms of limited time or kind of job. The longest period of work is 3 years and it cannot be prolonged. If the workers want to prolong the contract they have to wait for 3 months and their working period becomes zero again. While in PKWT, when the job ends, the employment relation also ends. The work period depends on the kind of job. This will definitely limit the rights of the workers to get good jobs so that they can develop their personality and to have good living from the jobs they do. This is very much different from the workers with PKWTT.
3. The workers are easily fired. The employers can create conditions to justify their firing their workers. They can even avoid their obligations such as giving compensation money, incentives, etc. Or when they give, the amount of money is much smaller than the amount of money received by the PKWTT workers, who are not that easy to be fired. But if they are fired, they get their normative rights as regulated in the law.

Regarding the injustice facts in the implementation of agreements and employment relation of PKWT workers, Herlien Budiono,<sup>1</sup> who has a concept of justice found in typical Indonesian contracts, differentiates justice in a contract, procedural justice, from substantive justice. This is similar to the concept of justice proposed by Jhon Rawls.

Since the PKWT workers undergo the injustice treatment with their standard agreements, in which the equality and the bargaining power of the workers are not proportionally taken into account by the employers, the procedural justice in a contract is not fulfilled.

## 2.2 The Principle of Justice in Managing Wages and Workers' Wellness

Article 88 to Article 98 Act No. 13 Year 2003 forbid the employers to discriminate the workers based on either sex, ethnic, race, religion, or status of the workers (PKWT or PKWTT). Based on this, the wage and welfare of outsourcing workers should actually not be different from those of full time workers (PKWTT).<sup>2</sup> The wage cannot be lower than what is regulated in the legal rules or at least it is equivalent with the wage of full time employees. This is affirmed by Article 65 verse (4) and Article 66 verse (2) c Act No. 13 Year 2003. The amount of wage refers to Regional Minimum Remuneration (UMR).

Components of normative rights of the workers basically include wage, overtime pay, leave entitlements, holiday allowance, social security and layoff compensation.

Gradually, the regulations on wage and welfare of outsourcing workers (PKWT) become the same as those of PKWTT workers but if we look more closely at several elements or important components, we will find significant differences that often cause the outsourcing workers to feel anxious. The regulations have not yet reflected equality principles in regulating the wage and welfare of the workers.

From the above description, the regulations of wages and welfare of the workers including outsourcing workers are: 1) The right to wages, consisting of base salary and fixed allowance, 2) the right overtime pay, 3) The right to holiday allowance, 4) The right to leave entitlements, 5) The Right to social security that includes health insurance, accident insurance, pension plan, life insurance, and 6) The right to layoff compensation.

The pension plan that is required by the Act No. 40 Year 2004 has not been accommodated by the Act No. 13 Year 2003 and Act No. 3 Year 1992 about Social Security for Workers (Jamsostek). Consequently, the

<sup>1</sup> Herlien Budiono, *Asas Keseimbangan Bagi Hukum Perjanjian di Indonesia Hukum Perjanjian Berlandaskan Asas-asas Wigati Indonesia*, (Bandung : PT. Citra Aditya Bhakti, 2006), p. 113-117

<sup>2</sup> Iftida Yasar, *Menjadi Karyawan Outsourcing*, (Jakarta : PT. Gramedia Pustaka Utama, 2010), p. 105-106

outsourcing workers do not have pension plan. Likewise, the outsourcing workers, according to Article 156 in conjunction with Article 65 and Article 66 Act No. 13 Year 2003, should have the right to compensation layoffs. In the case of employment termination due to the expiry of contract, the outsourcing workers do not get the compensation either in the form of layoff compensation, gratuity incentive, and right compensation.

Having observed the rights of outsourcing workers the rights of full-time workers, it is obvious that they are generally the same. However, the various determinants including the detailed agreement obviously do not reflect the principles of justice that is the proportional equality to the rights. They do not reflect the theory of distributive justice of Aristotle that every one is given the same rights to the same things, and to the different things rights are also given according to their dissimilarity.

### **3. Legal Protection For Outsourcing Workers From The Perspective Of Legal Certainty**

#### **3.1 Legal Certainty of Employment Relationship**

Based on Article 65 verse (6) and (7) of Law No. 13 of 2003, it can be seen that the employment relationship given by the user to the provider as the receiver of the work is governed by a written employment agreement between the provider (the outsourcing company) and the workers. The employment relationship can be set based on two criteria namely PKWTT or PKWT if it meets the requirements of Article 59 of Law No. 13 of 2003.

From the explanation posed above, it is clear the status of outsourcing workers can be PKWTT or PKWT and they have an employment relationship with the provider (outsourcing company) not with the user. Based on some references and literature review, the outsourcing companies use PKWT for some reasons, including: 1) it is not a must for the company to make the status of employment is PKWTT, although the contract is over, 2) it is easier for the company to terminate the relationship, at least until the end of the contract, 3) the absence of obligation for the companies to provide compensation when the employment relationship ends due to termination of the contract.

In Article 59 paragraph (4) of Law No. 13 of 2003 and Ministerial Decree No. Kep.100 / Men / VI / 2004, it is stated that workers with PKWT status have for a maximum of two years contract and may be extended only in one period of time while PKWT is based on the completion of the work and will end when the work has been completed.

With regard to Article 66 paragraph (2) a of Act No. 13 of 2003, that the provider has the employment relationship with the workers who work for the user company. The user can make the provisions of Article 66 paragraph (2) a of Law No. 13 of 2003 to be the reason why they do not have to take the responsibility. They give the responsibility to the provider (outsourcing) company. However, if it is seen from the explanation of Article 1 point 15 of Law No. 13 of 2003 which states that the employment relationship is the relationship between employers and workers bound by employment agreement, which has elements of jobs, wages, and commands.

If there is not any revision to Article Pasal 66 verse (2)a or Article 1 verse 15 Act No. 13 Year 2003, there is definitely legal uncertainty for employers and workers.<sup>1</sup> The solution can be possibly reached through a regulation process for example by making additional rules that regulate rights and obligations of the company that uses the service of workers or user and of the company that provides the service of workers or outsourcing company. By this, it is clear who is responsible for late wages, health care, incentive for meal, salary, and transportation for sick workers.

Another legal uncertainty is caused by Article 65 verse (8) and Article 66 verse (4) Act No. 13 Year 2003. The former Article regulates that if work requirements that is given by the user to the provider does not meet the requirements stated in verse (2) and the provider does not have legal entity as regulated in verse (3), the status of employment relation between worker and provider, alters into, by law, between worker and user. On the other hand, Article 66 verse (4) Act No. 13 Year 2003 regulates that the requirements stated in verse (1), verse (2) letter a, letter b and letter d, and verse (3) are not met, the status of employment relation between worker and provider, alters into, by law, between worker and user.

The Decree of Constitutional Court and Decree of Ministry of Manpower and Transmigration mentioned above are to provide legal certainty in giving legal protection to outsourcing workers. This is to guarantee them to be able to keep working and to receive the same remuneration and fair and decent treatment as most PKWTT workers do. The government should follow up this decree through making regulations which are in accordance with Act No. 12 Year 2011, like the Minister Decree, and amend Article 59 verse (1), Article 64 to Article 66 Act No. 13 Year 2003.

Regarding the status of the employment relation between outsourcing worker, provider, and user as regulated in labor law and the opinion of some scholars mentioned above, based on the principles of legal certainty either in terms of their elements or their importance, it can be said as follows:

First, from the perspective of the importance of legal certainty, as mentioned earlier by Bachsan Mustafa,

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<sup>1</sup> *Ibid*, p. 486



one of its elements is, in the implementation of administrative law, surely about the legal position of its legal subject and object. In relation to provision in Article 65 verse (8) and Article 66 verse (4) Act No. 13 of 2003, legal uncertainty is identified, that is inconsistency in determining legal object (employment relations) regarding the legal subject regulated.

Second, from the perspective of the legal certainty principles regulated in Article 6 verse (1) letter (i) Act No. 12 Year 2011, it can be said that every regulation must contain or reflect the principles of legal certainty, that is, every single law must be able to construct security in community through legal certainty.

The possibility of the shift of legal relation to occur from worker and provider/outsourcing company to worker and user, which is in accordance with Article 65 verse (4) and Article 66 verse (8) Act No. 13 Year 2003, shows weak position the outsourcing workers have compared to the strong position of the employers. It is obvious, then, the outsourcing workers have not been properly protected by law.

### 3.2 Legal Certainty for Work Type of Outsourcing Workers

The work whose implementation is given by the user to provider must meet the requirements found in Pasal 65 ayat (2) UU No. 13 Tahun 2003, while the work whose implementation is given by the user to headhunters company must meet the requirements found in Article 66 verse (1).

The difference between main activities of a company from its secondary activities becomes more unclear. This obscure can be seen in Article 65 and 66 Act No. 13 Year 2003 along with their explanation and Decree of Ministry of Manpower and Transmigration No. 100/Men/VI/2004. This unclearness is caused by the absence of the work detail that can be outsourced. This condition can be used by employers to hire outsourcing workers based only on their interests, thus blurring the concept of outsourcing workers with contract workers, which in fact is quite different.

Based on legal certainty theory regarding the regulations of work type that can be outsourced, it can be said that one of the elements of legal certainty, as suggested by Schelthana, is the control that is free from the influence of other parties that have power.

In this case the outsourcing workers are under the power of employers. The employers can take advantage from the unclear work that can be outsourced to control the workers who really need jobs. They must accept the terms of employment without considering first whether the jobs they take are major jobs or secondary/supporting jobs in the company.

From the perspective of the importance of legal certainty principles, it is identified that:

1. It is definitely about the legal rules that govern the administration in an abstract way.
2. It is definitely about the legal position of the subject and object of the law in the implementation of administrative law.
3. Preventing the possibility of an arbitrary act of any party, including of government (state).

The second and third elements of legal certainty in administering outsourcing system are not fulfilled. Regarding the second element, the object of law, in this case the outsourced jobs, is not clear. The jobs that cannot be outsourced, which are secondary ones, are not clearly specified. The detail explanation of the main activities of a company is also not clearly mentioned.

The third element is not fulfilled because of the uncertain object of law – the job that can be outsourced – making it difficult to prevent arbitrary acts done by the employers. For example they determine the requirements especially about the jobs that can be outsourced and must be met by outsourcing workers. The material content of manpower regulations regarding outsourcing particularly the jobs that can be outsourced, do not reflect the principles of legal certainty as instructed by Article 6 verse (1) i Act No. 12 Year 2011.

The regulation on the type of work that can be outsourced according to Act No. 13 Year 2003 and its description of implementation are to provide legal certainty and legal protection for workers. In reality, it is difficult, in certain circumstances, to define or determine the jobs that can be classified as secondary or supporting jobs. This occurs due to differences in perception and sometimes interests, which are to take advantages.<sup>1</sup> This condition may create legal uncertainty. Therefore, to reduce confusion and multi interpretation, every user of outsourcing service needs to establish the scheme of production process of goods or services so that main jobs and supporting jobs can be determined.

## 4. Conclusion And Suggestion

### 4.1 Conclusion

Based on the description that has been presented in the discussion in the previous chapters, it can be concluded that:

1. **What can be concluded, in terms of fairness, regarding the legal protection for outsourcing**

<sup>1</sup> Adrian Sutedi, *Op.cit.*, p. 222-223.

**workers are as follows:**

- 1) Agreement and employment relationship does not reflect the principle of freedom to reach equal position between workers and outsourcing company. This is because both PKWT and PKWTT must be written and formal as defined in Article 65 verse (6) and verse (3), and Article 66 verse (2) b Act No. 13 Year 2003.
- 2) There is no equal wages and welfare between the outsourcing workers with PKWT and the outsourcing workers with PKWTT, the wage and welfare of the former is much lower than those of the latter.
2. **What can be concluded regarding the legal protection for outsourcing workers, in terms of legal certainty, are as follows:**
  - 1) There is no legal certainty since there is a missing link in legal relationship with the user.
  - 2) There is not any clear types of work that can be outsourced since in Article 65 verse (2) and Article 66 verse (2) Act No. 13 Year 2003 there are no clear and specific criteria of the supporting jobs that are not directly related to the production process and clear steps of company's activities. Consequently, this results in different interpretation of one company from the other companies.
  - 3) There is inconsistency in the Decree of Supreme Court regarding the jobs that can be outsourced. Decree of Supreme Court No. 05/K/PHI/2006 says that a supporting job or a job that is indirectly related to the production process in a company and is carried out continuously cannot be classified as the job that can be outsourced while the Decree of Supreme Court No. 131K/PDT/SUS/2007 says otherwise.

#### 4.2 Suggestion

Based on the conclusions mentioned above, there are some recommendations provided:

1. In order to ensure justice in the legal protection for outsourcing workers, amendment of Act No. 13 Year 2003 is necessary. It can be done by reconstructing legal relationship between the three parties, especially employment relationship between outsourcing workers and the user and between the outsourcing workers and the provider. The rights and obligations must be fair and proportional, and equal wages and well-being should reflect the principles of justice.
2. In order to ensure legal certainty in outsourcing, amendment of Act No. 13 Year 2003 is necessary. The amendment of the Act should reflect the principles of legal certainty. This can be done through producing clear, firm and consistent regulations on: 1) the type and criteria of the jobs that can be outsourced, and scheme or detailed activities of the user; 2) the legal entity of outsourcing company, either contractor company or headhunters company, must be PT (Company Limited) or Cooperative.

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