

Research Article

The Indonesian Outsourcing Workers' Rights in the Tourism Business Sector: Toward Better Protection?

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ABSTRACT: The problem of outsourcing workers extends to the tourism industry. The unique challenge of 'seasonality' makes it more difficult to protect the outsourcing workers' legal rights in the said sector. The research examines the outsourcing regulation in Indonesia by referring to the Job Creation Law, by questioning whether the existing regulations provide prominent legal protection for outsourcing workers, especially in tourism sectors, and how the future law allows for improved protection. The research method used is normative legal research with statutory and legal conceptual approaches. The results of the study show that the amendment of the Manpower Law incorporated into the Job Creation Law and its implementing legal instruments significantly changed outsourcing regulation. As the Job Creation Law has abolished Article 64 of the Manpower Law, the scheme established by the Constitutional Court to prevent companies from exploiting workers in their decisions has become vague in the Job Creation Law. Following global practices, the country can implement a flexible workers policy while simultaneously protecting their rights which Indonesia must adopt.

KEYWORDS: Outsourcing, Rights Protection, Tourism Business.

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I. INTRODUCTION

In every business sector, an outsourcing strategy is worth considering.¹ The practice of delegating the non-core activities work to a subcontractor company² would bring competitive advantages to the principal companies, since it enables them to cut the production cost and focus on the main business.³ When facing a crisis such as the COVID-19 pandemic, given its advantages outsourcing is one form of solution to maintain businesses.⁴

In Indonesia, where tourism is a promising industry,⁵ outsourcing is quite common.⁶ However, what lacking is the guarantee of the outsourcing workers' legal protection. Like other outsourcing workers in different sectors, those who work in the tourism industry are also placed in a triangular-subordinative employment relationship.⁷ But the worst part, unlike others, tourism sector workers face a unique challenge: seasonality.⁸ In the tourism industry, the term seasonality is defined as an irregular rise and fall of

¹ Filiz Mizrak, "Outsourcing as A Competitive Strategy" (2023) *Current Research in Social, Human, and Administrative Sciences* 1–20 at 9.

² Siswanto Siswanto, "Implementation of Outsourcing (Transfer) Job Under Labor Law Number 13 Year 2003" (2023) *Proceedings of the 3rd International Conference on Business Law and Local Wisdom in Tourism (ICBLT 2022)* 302–312 at 303.

³ Tomás F Espino-Rodríguez, "Research on Outsourcing by Hotel Firms: Current State and Future Directions" (2023) *4:1 Tourism and Hospitality* 21–35 at 21.

⁴ Deli Bunga Saravistha, Ni Ketut Supasti Dharmawan et al, "Enhancing the Right to Tourism for Local People in Era Covid-19: Study Concerning Tourism Sectors Regulation" (2022) *15:2 Baltic Journal of Law & Politics* 1969–1978 at 1975.

⁵ Henky Hotma Parlindungan & Hendra Manurung, "Indonesia Effort To Attracting Investment In Tourist Destination Development" (2023) *5:2 Jurnal Industri Pariwisata* 177–188 at 179.

⁶ Ni Desak Made Santi Diwyarthi Made Santi Dwiarthi, "Implementasi Peraturan Ketenagakerjaan pada Hotel Berbintang di Bali" (2018) *3:2 Pariwisata Budaya: Jurnal Ilmiah Agama Dan Budaya* 42–50 at 47–48.

⁷ Nabiyla Risfa Izzati, "Improving Outsourcing System In Indonesia: Fixing The Gap Of Labour Regulation" (2017) *29:3 Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 528–541 at 530.

⁸ Kamila Radlińska & Bogusława Gardziejewska, "The Seasonal Labor Hoarding in Tourist Enterprises—Choice or Necessity?" (2022) *14:12 Sustainability* 6995 at 2.

demand.⁹ The factors contributing to such a condition are varied, be it climatic conditions or even regulatory challenges.¹⁰

Seasonality in tourism has been a major challenge as pointed out by many researchers as the sector has a very dynamic demand.¹¹ The fluctuation of the number of visitors hamper a steady business growth since there are always 'peak season' and 'low season'¹² depending on how many visitors would go on vacation. In high peak season, business may gain a maximum profit, on the contrary, little to no profit is inevitable in the low season. Therefore, Martín argues seasonality "may jeopardize sustainable development...due to its impact on the economy....and the labour market"¹³ If this existing problem meets the application of outsourcing, vulnerability is something that the outsourcing workers cannot escape. The concern from such an issue is the rise of workers' exploitation. It could happen as outsourcing workers will only be deemed as 'commodities' not as 'human beings'. They could be replaced by other outsourcing workers at the moment when the principal company no longer needs them. As seasonality portrays fast-paced employment, no future will be guaranteed to the outsourcing workers.

The more concerning aspect of this problem is the vague legal instruments to protect those outsourcing workers. The idea of outsourcing—which for the first time appeared in Law 13/2003 concerning Manpower—has long been a subject of a heated debate. The Manpower Law was issued to guarantee the right to job opportunities and the rights of workers,¹⁴ not to

⁹ Ahmad Alshuqaiqi & Shida Irwana Omar, "Causes and Implication of Seasonality in Tourism" (2019) 11 *Journal of Advanced Research in Dynamical and Control Systems* 1480–1486 at 1481.

¹⁰ World Tourism Organization (UNWTO), ed, *What Tourism Managers Need to Know (English version)* (World Tourism Organization (UNWTO), 1997).

¹¹ Radlińska & Gardziejewska, *supra* note 8 at 2.; Judie Cukier-Snow & Geoffrey Wall, "Tourism Employment in Bali, Indonesia" (1994) 19:1 *Tourism Recreation Research* 32–40 at 35.

¹² World Tourism Organization (UNWTO), *supra* note 10.

¹³ Juan Antonio Duro & Judith Turrión-Prats, "Tourism seasonality worldwide" (2019) 31 *Tourism Management Perspectives* 38–53 at 8.

¹⁴ Desak Putu Dewi Kasih et al, "Indonesia's Contra-Productive Regulation against the Rights of Unskilled Workers for Balinese in New Zealand" (2023) 7:1 *Sriwijaya Law Review* 135–149 at 135.

mention outsourced workers. Although arguably the provisions within the said law have safeguarded protections for outsourcing workers, the issue of stimulating rapid economic development through investment seems preferred by the Indonesian government proven by the enactment of the Job Creation Law 11/2020 and its amendment into Law 6/2023. In such a newly controversial law, the outsourcing-related provisions were changed which arguably threatens the outsourcing workers.

The challenge of seasonality and the poor protection by law as briefly mentioned undoubtedly harm the welfare of those who work in the tourism industry. It shall be noted that Indonesian workers in the tourism industry are significant, including the outsourced ones. Bali, for instance, is one of Indonesia's provinces whose economy depends on tourism, the sector attracts a high number of workers, and not a few of them work based on outsourcing contracts. Nationally, 40-50% of workers in the formal sectors are outsourced, amounting to 55 million workers.¹⁵ This means that the number of outsourced workers in Indonesia reaches 22-27.5 million workers spread across various sectors including the tourism sector. In 2022, Bali's workers in the formal sector reached 46.57%¹⁶ of the total labor force which was recorded at 2.74 million people.¹⁷ The fact of this labour force condition then shows that of the total 1.3 million people in Bali Province who work in the formal sector, around 40-50% are outsourced workers, most of whom are in the tourism sector.

This paper is arguably the first one to examine the protection of outsourcing workers in the tourism working field. Although admittedly, research on outsourcing workers' legal protection has been conducted prior. To name a

¹⁵ Ridhwan Mustajab, "Mayoritas Tenaga Kerja RI dari Sektor Informal pada Agustus 2022", (30 November 2022), online: *DataIndonesia.id* <<https://dataindonesia.id/sektor-riil/detail/mayoritas-tenaga-kerja-ri-dari-sektor-informal-pada-agustus-2022>>.

¹⁶ Badan Pusat Statistik, "Persentase Tenaga Kerja Formal Menurut Provinsi (Persen), 2020-2022", (2022), online: *Badan Pusat Statistik* <<https://www.bps.go.id/indicator/6/1168/1/persentase-tenaga-kerja-formal-menurut-provinsi.html>>.

¹⁷ Badan Pusat Statistik, "Keadaan Ketenagakerjaan Provinsi Bali Agustus 2022", (7 November 2022), online: *Badan Pusat Statistik* <<https://bali.bps.go.id/pressrelease/2022/11/07/717718/keadaan-ketenagakerjaan-provinsi-bali-agustus-2022.html>>.

few, Yovita Tiwang has researched the Job Creation Law to its capabilities in protecting the workers. However, the said research is limited to the analysis of the outsourcing-related provisions.¹⁸ The research conducted by Indah Kesuma and Aloysius Uwiyono is alike. In their research paper, it is argued that there is a lack of protection for outsourcing workers after the enactment of the Job Creation law due to the absence of written agreement obligations.¹⁹

This article seeks to answer whether the current law has provided good legal protection for outsourcing workers in the tourism industry. To do so, the paper will analyze the applicable outsourcing-related provisions including the process of its amendment and the impact of the changes of the law to the aforementioned protection. Subsequently, the analysis will be equipped with a comparative study to fill the gap that the current law has and simultaneously incorporate it into the future legal framework to achieve better protection for outsourcing workers in the tourism industry.

II. METHODOLOGY

This article used normative legal research by way of solving the regulatory issues in outsourcing workers' rights protection within the current legal framework. The said method is employed because the research question pertains to regulatory problems,²⁰ especially in providing the protection that the outsourcing workers in the tourism industry deserve. The use of such a method is proper as this research also aims to find a formulation of legal substance to fill the gap that exists in the current law. This article used statutory, comparative and legal conceptual approaches.²¹ As this research is normative, the primary data is legal materials, comprising primary and

¹⁸ Yovita Tiwang, “Perlindungan Hukum Terhadap Pekerja Alih Daya (Outsourcing) Berdasarkan Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja” (2023) 12:3 1075–1089.

¹⁹ Indah Kesuma & Aloysius Uwiyono, “Outsourcing Workers Legal Protection Under The Post Validation Of Job Creation Law” (2022) 6:1 ULREV, online: <<https://unramlawreview.unram.ac.id/index.php/ulrev/article/view/220>>.

²⁰ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Fajar Inter Pratama Offset, 2005) at 33.

²¹ *Ibid.*

secondary legal materials. The former includes law, government regulations, and court decisions, meanwhile the latter includes books, journal articles and other types of scientific papers. The legal materials are collected by literary studies and analysed qualitatively. The result of the research is accordingly constructed in this article using the descriptive-analysis method.

III. OUTSOURCING WITHIN THE INDONESIAN LEGAL SYSTEM

To understand how outsourcing works in Indonesia, it is important to analyse the legal framework enacted to regulate the practice of outsourcing. The first-ever regulation to formally legalize outsourcing appeared to be Indonesia's Manpower Law. Later, the Indonesian government enacted the Job Creation construed with the omnibus method and the Government regulation in lieu concerning the Job Creation Law.

A. Outsourcing Regulations under the Indonesia's Manpower Law

Massive workforce growth with underwhelming employment has created a suboptimal workforce absorption. The logical consequence of the said phenomenon is the increase in unemployment.²² On the other hand, a profit-oriented company will naturally choose the most profitable option in conducting its business, including hiring its employees. Outsourcing comes as a solution that connects both parties—the unemployed can get workloads that match their capabilities—and companies can also get employees with lower wages.

Amidst the massive outsourcing process around the world, globalization leads to the implementation of Business Process Outsourcing (“BPO”). The motive for such implementation is to gain flexibility in operating businesses, as most companies desire. Hence, it is logical for Indonesia's government to promise that BPO would be the solution to the worker distribution problem. The government furthermore claimed that BPO has a relatively easy

²² Ahmad Soleh, “Masalah Ketenagakerjaan dan Pengangguran di Indonesia” (2017) 6:2 Jurnal Ilmiah Cano Ekonomos 1–22 at 2.

recruitment process and thus aligns to increase job opportunities in Indonesia. Based on those premises, by enacting the Manpower Law, for Indonesia allows the BPO mechanism.

In the Manpower Law, provisions regarding BPO can be found in Articles 64-66. Article 64 deals with the matter of agreement of contract of work. It outlines the need for a written agreement to legally transfer part of the principal company's work to the outsourcing company. Article 65, on the other hand, specifies the permissible jobs to be outsourced, *i.e.* the non-core business activity, accordingly the delegation may only include tasks where it is: (i) separate from the main business; (ii) entirely auxiliary; and (iii) not directly inhibits the production process if the task is uncompleted. Concerning the way the task is being performed, Article 65 governs that the principal company may give direct or indirect orders.

Article 65 of the Manpower Law further regulates that to carry out the delegation of tasks, the commissioned or outsourcing company must be a legal entity. A violation of this requirement will result in a change of the workers' status: previously as the workers for outsourcing company to be the principal companies. On the matter of protection and work requirements, article 65 obligates the outsourcing company to give at the minimum the same level as applied in the principal company, and that policy shall not violate the applicable law.

Aside from the foregoing, the outsourcing company must meet several requirements according to Article 66 of the Manpower Law to legally commission the delegated task. *Firstly*, it must ensure that an employment relationship with the worker exists. *Secondly*, the employment relationship is only for a fixed term. *Thirdly*, accept the responsibility of the worker's wage, welfare protection, working conditions, and any dispute arising from the employment relationship. *Lastly*, bases its outsourcing work on a written agreement made with the principal company containing articles as referred to under the Manpower Law.

Those regulations of BPO in Manpower Law, which were arranged with various considerations, had been subject to worker unions' refusal. Workers deem such a system harmful as it strengthens modern exploitation. In

response, workers conducted several demonstrations to reject the implementation of BPO in Indonesia.

The workers' struggle continued with the application of a judicial review of Manpower Law specifically on outsourcing-related provisions before the Indonesian Constitutional Court. The Applicant argues that Articles 59 and 64 of the Manpower Law, including Article 65 and Article 66 relating thereto, put workers only as a production factor – employed when it's needed and terminated when it isn't. The content of those articles was considered to reduce the workers' quality of life and welfare, despite being guaranteed by Article 27 paragraph (2), Article 28D paragraph (2), and Article 33(1) of the Indonesian Constitution.

Through the decision number 27/PUU-IX/2011, the Constitutional Court later ruled that the phrase "... a fixed term work agreement" in Article 65(7) and the phrase "...work agreement for a specific time" in Article 66(2) are conditionally unconstitutional. In this vein, the said articles may be deemed constitutional only if they are interpreted as giving the protection of rights for workers whose jobs remain despite the principal company delegating its part of work to another outsourcing company, not the company that these workers worked for previously.

B. Outsourcing Regulations under the 2020 and 2023 Job Creation Law

The developing social infrastructure and working culture in industrial activities in the local area supports the society's economy.²³ The unemployment rate will be decreased and thus urbanization will be prevented.²⁴ BPO which Manpower Law previously governed was amended in Job Creation Law, seen as the government's strategic step to accelerate national economic development through a more flexible and simple process of BPO. Romainur argues two implications may arise: One, the BPO

²³ Aisha Lien Saraswati, "Tanggung Jawab Perusahaan Atas Kecelakaan Kerja Pekerja Outsourcing Yang Tidak Didaftarkan Bpjs Ketenagakerjaan" (2020) 3:4 *Jurist-Diction* 1199.

²⁴ Sehat Damanik, *Outsourcing dan Perjanjian Kerja Menurut Undang-Undang No. 13 Tahun 2003 tentang Ketenagakerjaan* (Jakarta: DSS Publishing, 2007).

strategy would benefit the enterprise owner due to its efficiency, simultaneously creating more job opportunities that allow worker's skill upliftment.²⁵ However, two, BPO may lead to exploitation as employers will utilise the available system to hire workers with much lower costs to gain a more optimum profit. With that in mind, little to no security of industrial relations would not be guaranteed.²⁶

The two contradicting implications did not seem to be a problem for President Joko Widodo's administration. To achieve an 'investor friendly' and harmonious law, the government simplified all forms of regulatory limitations. The Omnibus law-making method was introduced and employed in the changing of the investment law and other related regulations, not to mention the Manpower Law.²⁷ Those changes are incorporated in Law 11/2020 Concerning Job Creation ("2020 Job Creation Law").

Several BPO-related provisions in Manpower Law were subject to change in Job Creation Law. Articles 64 and 65 of Manpower Law were deleted, and Article 66 of Manpower Law was simplified. The newest provision states:

“...employment relationship between the outsourcing company and its workers shall be written in the form of a work agreement for a specified and/or unspecified period. Protection of the workers, wage and prosperity, work requirements, and disputes arising shall follow applicable laws for which the outsourcing company is responsible. The agreement made for the specified time must require the transfer of workers' rights if there is a change in the outsourcing company if the object of the job exists...”

Government Regulation 35/2021 was issued as an implementing instrument of the Job Creation Law which contains detailed outsourcing provisions.²⁸

²⁵ Iman Buchari, “Implikasi Prinsip Transfer of Undertaking Protection of Employment (TUPE) Terhadap Hak-Hak Pekerja Berstatus Perjanjian Kerja Waktu Tertentu (PKWT)” (2020) 2:1 Jurnal Ilmu Hukum Kyadiren 166–177.

²⁶ *Ibid.*

²⁷ Vincent Suriadinata, “Penyusunan Undang-Undang Di Bidang Investasi: Kajian Pembentukan Omnibus Law Di Indonesia” (2019) 4:1 JRH 115–132 at 116.

²⁸ Nurul Listiyani, Rakhmat Nopliardy & Ibelashry Justiceka, “Kajian terhadap Perlindungan Hukum bagi Pekerja Kontrak Waktu Tertentu (PKWT) dalam Undang-Undang Cipta Kerja” (2022) 4:2 Jurnal Terapung: Ilmu-Ilmu Sosial at 11–12.

However, a better protection provision is nowhere to be found. Article 18 to Article 20 of the said government regulation as the implementing instrument of Article 81 number 20 of the Job Creation Law has no significant difference from the previous Article 66 Manpower Law. The difference is merely the addition of outsourcing company definition, that is: "... a business entity in the form of a legal entity that meets the requirements to carry out certain jobs based on an agreement agreed with the employer company." Besides, there is Article 18(4) as an additional rule which governs that "Workers Protection, Wages Welfare, Working Conditions, and disputes that arise as referred to in paragraph (3) are regulated in a Work Agreement, Company Regulation or Collective Labor Agreement."

Those additional articles by no means strengthen the worker's protection as the content of it is still too general and does not yet specify the interests that are considered vital by the workers. Even more disconcerting is the fact that crucial provisions designed to mitigate worker exploitation were omitted. The aforementioned is true if one takes into account the rules on the limitation of jobs to be outsourced. In the previous law, the permitted jobs are only non-core activities. Therefore, principal companies still need to hire workers on a general basis— permanent or contract, not outsourcing. The deletion of such provision may be interpreted as formal permission for the principal company to employ outsourcing workers on core business activities. As a result, the compensation in terms of wages will not be worth the amount of work they carry out. In other words, "modern exploitation" perpetuates.

The 2020 Job Creation Law gained almost no support from the working class. The controversy was not only derived from its pro-investor substance but also its lawmaking process. Many believed that the House of Representatives did not include public participation in the making of the said law.²⁹ Demonstrations took place. The judicial battle to annul the law is non-avoidance. For the first time in its history of existence, the Indonesian Constitutional Court ruled that the lawmaking process of the 2020 Job Creation Law is conditionally unconstitutional. In its Decision No.

²⁹ Helmi Chandra Sy & Shelvin Putri Irawan, "Perluasan Makna Partisipasi Masyarakat dalam Pembentukan Undang-Undang Pasca Putusan Mahkamah Konstitusi" (2022) 19:4 Jurnal Konstitusi 766–793 at 771.

91/PUU-XVIII/2020, the Constitutional Court mandated the lawmaking body rectification of the existing law two years from the day when the decision was pronounced.

Instead of doing a proper rectification by a way of ensuring society's meaningful participation, the government used 'a creative legal method'. Relying on a so-called emergency emerging from a global crisis, Government Regulation in Lieu of Law 2/2022 on Job Creation was enacted. The law was perceived to be a shortcut to amend the 2020 Job Creation Law. The substance, however, has little differences. The said government regulation was then agreed to be an applicable law by enactment of Law 6/2023 (Job Creation Law).

On the matter of outsourcing, the change was only made on Article 64 of Manpower Law. In the previous version, the basis of outsourcing practice was not specifically regulated. Rather, it only stipulates the requirements of outsourcing. In the newest version, the provision of that article was amended by adding two additional paragraphs. Those two additional provisions add to the government's role in determining the partial implementation of outsourcing.

IV. LEGAL PROTECTION OF INDONESIAN OUTSOURCING WORKERS IN THE TOURISM SECTOR

A. Practice of Outsourcing in Tourism Business

In the tourism industry, workers face the unique difficulty that those who work in different business sectors do not necessarily experience, that is seasonality. Such problems are caused by the dynamic of that business. Tourists would not come to the tourist destination every day, and therefore, there are some adjustments made in the employment policy.

As rightly noted by Radlińska and Gardziejewska, seasonality affects the condition of the labour markets and local entrepreneurship.³⁰ The problem is, when applying the outsourcing scheme, the tourism sector workers will be trapped in the problem of repeated changes in the workplace. Not to mention

³⁰ Radlińska & Gardziejewska, *supra* note 8 at 2.

that the seasonal nature of tourism increases the possibility of worker vacillation. This motive is derived from the core idea of outsourcing, which is, flexibility and cost efficiency, so that the workers do not have employment sustainability. Such a circumstance is contradictory to Article 12 paragraph 2 of the Framework Convention on Tourism Ethics, which Indonesia has signed, that states "Employees and self-employed workers in the tourism sector and related activities ... should be given adequate social protection; job insecurity should be limited so far as possible..."

When seasonality meets the outsourcing scheme which allows the principal company to change the workers the moment they need to do so, the workers in the tourism industry will not have any guarantee of job security. They will be in constant need of applying for jobs. Eventually, the legal protection for those workers under this issue shall be taken into consideration.

B. The Legal Protection of Outsourcing Workers

1. The Outsourcing Workers' Rights According to Job Creation Law

Workers have their absolute constitutional rights under Article 27(2) of the 1945 Constitution, which states that every citizen shall be entitled to work and a living that is decent for humanity. Article 33(1) of the Constitution rules that the economy shall be structured as a joint enterprise by the principle of kinship.³¹ These two constitutional rights lead to the conclusion that in principle, Indonesia's economy, including its employment policy shall put workers' welfare along with their rights protection and equal opportunity without discrimination.³²

Furthermore, outsourcing companies are responsible for the protection, wages, and disputes that arise³³ shall not contain things that are not aligned with the applicable law as stipulated under Article 81, Number 20 of the Job

³¹ Suhartoyo Suhartoyo, "Perlindungan Hukum Bagi Buruh Dalam Sistem Hukum Ketenagakerjaan Nasional" (2019) 2:2 Administrative Law and Governance Journal 326–336.

³² *Ibid.*

³³ Syarifa Mahila, "Perlindungan Hukum Hak Pekerja Outsourcing Pasca Putusan Mahkamah Konstitusi" (2012) 16:6 Jurnal Lex Specialis 48–55.

Creation Law. As per the ways to fulfil workers' wages and welfare protection, no explicit provisions are found. However, the only rule exists; the fulfilment is based on the applicable law. According to the positive law, workers' welfare includes matters relating to minimum wage, rest, and leave,³⁴ as now regulated in Article 81 Number 24 of the Job Creation Law.

On the other side, if a work agreement for a specified period were used as the basis of an employment relationship, such agreement is obliged to set the requirement of "Transfer of protection of rights for workers/labourers in the event of a change in an outsourcing company and as long as the object of work remains in place." This rule is clearly stated in Article 81, Number 20 of the Job Creation Law. The term "Transfer of protection of rights for workers/labourers" basically means that workers' rights protection by the newest outsourcing company, at the very least, shall be the same as the previous agreement held by the previous company. Meanwhile, "object of work remains in place" means the same jobs as the previous. A more comprehensive explanation can be fully seen in the explanation part of Article 81, Number 20 of the Job Creation Law.

One important thing to note is that according to Article 66(2) letter c of the Manpower Law, particularly in the explanation part, outsourcing workers have the same rights under a work agreement, company regulations, or collective labour agreement on the protection of wages and welfare, working conditions, as well as disputes that arise with other workers in the principal company. However, this regulation in the Job Creation law has been deleted. Therefore, equal rights with workers in the principal firm have no longer been granted.³⁵ The outsourcing company is subsequently fully responsible for the outsourcing workers' protection making demands on the fulfilment of their rights such as wage or non-wage income (such as bonuses, religious holiday allowances, and others) shall be delivered to the outsourcing company based on the agreement made previously, company regulation of

³⁴ Erzika Permatasari, "Apakah Pekerja Outsourcing Juga Berhak atas Bonus dari Perusahaan Penggunanya? - Klinik Hukumonline", (2021), online: <<https://www.hukumonline.com/klinik/a/apakah-pekerja-ioutsourcing-i-juga-berhak-atas-bonus-dari-perusahaan-penggunanya-1t56d0e622e2812>>.

³⁵ *Ibid.*

collective work agreement. The outsourcing company is responsible when workers have no guarantee of their work continuity under the abovementioned requirement.

2. Outsourcing Workers' Position in Job Creation Law

The theory of industrial relations based on Pancasila grants equal positions between employees and employers.³⁶ However, in practice, it reflects otherwise. Employers who are the one who holds capital have a higher position than workers, and this can be shown in several policies or rules imposed by the companies, which only focus on companies' advantages.³⁷ Throughout its history, it is known that employment relationships recognize the term "relationship between boss with their labour or boss with their slaves or boss with their servants."³⁸ In the early days after independence, the industrial relationship was governed in Book III, Chapter 7A Code of Civil Law, and Book II Code of Commercial Law, Chapters One to Three.³⁹

Three years after Indonesia's Independence Day, the government enacted Law 12/1948, later amended to Manpower law. These provisions are a form of government intervention in providing protection, especially for workers who have always been in unequal positions. Although the employment relationship between workers and employers is a private matter, workers' position that receives orders from employers shows a subordinate nature. The absence of equal legal positions between principal and outsourcing companies leads to injustice and distrust.⁴⁰

³⁶ Heru Suyanto & Adhi Nugroho Andriyanto, "Perlindungan Hukum Terhadap Hak-Hak Pekerja Outsourcing Berdasarkan Asas Keadilan" (2016) 3:2 Jurnal Yuridis 1–14.

³⁷ Damanik, *supra* note 24.

³⁸ Djoko Heroe Soewono, "Kedudukan Pengusaha Dan Pekerja Dalam Perspektif Juridis-Historis" (2008) 3:1 Jurnal Inspirasi 1–12., <http://hukum.unik-kediri.ac.id/wp-content/uploads/2019/04/final-5-kedudukan-pengusaha-dan-pekerja-jurnal-inspirasi-edisi-april-2008-no.-1-vol.-3-issn-no.-1907-2015-by-stkip-ta.pdf>

³⁹ *Ibid.*

⁴⁰ Arifuddin Muda Harahap, "Analisis Undang-undang Nomor 13 Tahun 2003 Tentang Ketenagakerjaan Di Tinjau dalam Kajian Politik Hukum" (2019) 10:2 Penelitian

Although outsourcing workers work for principal companies, they are paid by the outsourcing ones. The former is obligated to take care of the outsourcing workers' rights although the two were only involved in indirect industrial relations. Principal companies shall reward the outsourcing workers by fulfilling their constitutional rights. The rights are under legal instruments such as Manpower Law as the basis of other implementing laws. Conversely, various companies neglected the fulfilment of outsourcing workers' rights, justifying the act of negligence with the premise that no industrial relationship exists between the two.

The main problem is that, until the enactment of the Job Creation Law, the guarantee of outsourcing workers' equal position with outsourcing companies and the principal companies is yet to be established. The weaker position of outsourcing workers has become the issue that the Job Creation Law should have covered by amending outsourcing regulation. In reality, the amendments were not made in that orientation as seen in the position of those three actors are remains triangular, which risks the workers' rights. This circumstance is inconsistent with the primary goal of labour law, which is to provide fundamental rights and equal opportunities without discrimination.

3. Analysis of Legal Protection of Outsourcing Workers After the Enactment of Job Creation Law

As Bronislaw Malinowski wrote, law has a significant role in daily activities, not only in the event of violence and conflict.⁴¹ Because of its vulnerability, workers need a law to protect them in a subordinative employment relationship. More importantly, as stated by Kranenburg, welfare states shall aim to create public order and manifest their people's prosperity,⁴² which is wide-ranged based on equitable and balanced justice.⁴³ In the 1945

Medan Agama 281–297, <<http://jurnal.uinsu.ac.id/index.php/medag/article/view/6820/3046>>.

⁴¹ Soeroso, *Pengantar Ilmu Hukum* (Jakarta: Sinar Grafika, 2006).

⁴² Suyanto & Andriyanto, *supra* note 36.

⁴³ Franz MS, *Kuasa dan Moral* (Jakarta: PT. Gramedia, 1990).

Constitution, the welfare state conception exists within its preamble. Therefore, the government should manifest its aims. In the context of employment relations, this correlates to the State's role in preventing workers' exploitation.⁴⁴

Following the enactment of the Job Creation Law and Government Regulation 35/2021, the changes made are arguably degrading the workers' rights protection. *Firstly*, the Job Creation Law and Government Regulation 35/2011 change and eliminate the concept of an outsourcing system as previously set in Article 64 of Manpower Law, where BPO shall be conducted in the form of a "written agreement of contract of work" or "workers provider agreement." Hence, the scheme that the Constitutional Court has formed to prevent exploitation by companies—which only focuses on their business, degrading workers' constitutional rights—has become blurry in the Job Creation Law.

Secondly, Job Creation Law eliminates the form of employment relationship between outsourcing companies and the principal firm as previously governed in Article 65 paragraph (6) of Manpower Law that states "the employment relationship is undertaking the work as referred to under paragraph (1) shall be determined and specified further with a Ministerial Decree " and paragraph 7 that states "the employment relationship as referred to under paragraph (6) may be based on an employment agreement for an unspecified period or on an agreement for a specified period if it meets what is required under Article 59."

Thirdly, the Job Creation Law eliminates the limitation of permissible jobs. Prior, Manpower Law set the permissible works to be those conducted separately from their main activities, conducted with direct or indirect order by the principal company; works that are only auxiliary service and not directly related to production service. The absence of permissible job limitations would increase BPO drastically, although this system—which forms a triangular position— is likely to disadvantage the workers.⁴⁵

⁴⁴ Suyanto & Andriyanto, *supra* note 36.

⁴⁵ Nuradi Nuradi, "Perlindungan Hukum Pekerja Alih Daya Dalam Pelaksanaan Hubungan Industrial Guna Mendukung Terwujudnya Iklim Investasi Yang Kondusif

Fourthly, the Job Creation Law has eliminated the legal guarantee for outsourcing workers to be permanent. The previous provision, particularly Article 65(8) rules that if the requirements of outsourcing companies are not met, the principal companies will be held responsible for being the official employers of the outsourcing workers. If such a circumstance occurs, the employment relationship between the principal company with the previously outsourcing workers shall be based upon a fixed or unfixed employment agreement. Such legal implication was also ruled under Article 66(4) of the Manpower Law and the implementation shall be following the Constitutional Court Decision.⁴⁶

V. OUTSOURCING WORKERS LEGAL PROTECTION IN GLOBAL PERSPECTIVE: MUST LEARNED LESSONS FOR INDONESIA

Outsourcing has not been limitedly practised in Indonesia; in fact, many States have adopted the exact flexible labour mechanism.⁴⁷ Nevertheless, every State has its approach to practising such a mechanism. These various approaches must not neglect the must-respected fundamental rights enshrined in the ILO Declaration, which was previously discussed.

To formulate a legal framework that strikes a balance between the goal of escalating the nation's economic benefits and justice for the workers, an overview of successful States' practices shall be conducted. At the international level, many States have been named as outsourcing destination States but still managed to provide legal protection for the outsourcing workers. By comparing the current provisions of BPO in Indonesia with these global practices, several concepts might be adopted to provide better protection for outsourcing workers.

Bagi Tercapainya Kesejahteraan Pekerja” (2019) 5:1 Palar | Pakuan Law Review 20–37.

⁴⁶ Indonesian Constitutional Court Decision No. 07/PUU-XII/2014.

⁴⁷ Business, “What Countries Make the Best Outsourcing Partners”, online: <<https://www.business.com/articles/countries-for-business-process-outsourcing/>>.

1. Rights to be Informed

ILO has recommended that temporary agency workers make a written work agreement with their workers containing specific terms and conditions. Before effectively working, workers shall be informed regarding all the necessary information relating to the rights and obligations of the agency.⁴⁸ An example of this practice can be seen in China, where the work agreement must provide information on the period of work, salary amount, remuneration method, and other essential information.⁴⁹

Unlike the recommendation and China's practice, Indonesia does not regulate the work agreement that shall contain such information. The agreements are made according to the free will of employers and employees. Without such a specification, likely, the companies are not give all pertinent information, which eventually harms the workers. Information of this kind does matter as workers would at least have the fundamental knowledge. Such a condition would lead to more critical discussions to achieve a better bargaining position and each party's desired goal. Moreover, this type of information is essential if an alleged breach of a work agreement exists.

2. Prevention of Potential Abuse of Outsourcing Workers

ILO has once addressed the issue of abusive use of outsourcing workers, and its publication recommends that the method to prevent that is to limit the activities that these workers could take.⁵⁰ Several States have used this approach, Ecuador in its constitution has regarded the use of outsourcing workers in a principal firm's core activities as a form of job insecurity and instability; thus the action is banned.⁵¹ Besides, Brazil, the other projected economic power state, has banned the practice of outsourcing the principal

⁴⁸ Private Employment Agencies Recommendation 1997 (No. 188) Chapter II No. 5.

⁴⁹ Labour Contract Law of The People's Republic of China Order of The President of The People's Republic of China No.65, Art. 59.

⁵⁰ International Labour Organization, *Non-Standard Employment Around The World Understanding Challenges, Shaping Prospects* (Geneva: International Labour Office, 2016)., *Ibid.*

⁵¹ Ecuador's Constitution of 2008, Art. 327.

core activities.⁵² While being able to mitigate the potential abuse of outsourcing workers, Brazil and Mexico are the top two countries in outsourcing destinations;⁵³ proving that business attraction and protection toward workers can be simultaneously conducted.

In Asia, States also limit the jobs to be outsourced. In Singapore, for instance, outsourcing is most used in activities such as security and cleaning services, as well as administrative-secretarial work.⁵⁴ In Vietnamese Law, outsourcing is permissible for limited jobs such as translator, receptionist, tour guide, sales assistant and other 16 other jobs as stipulated in their labour code.⁵⁵ The Philippines also regulates the permissible jobs to be outsourced *i.e.*, undesirable activities and those that are not directly related to the principal's operation activities.⁵⁶

As discussed above, the Job Creation Law eliminates the permissible outsourced job provisions. On the one hand, the absence of limitations would attract companies to outsource parts of their work in Indonesia. However, on the other, this condition only perpetuates exploitation because this model would only make Indonesia's workers 'cheap labour.' Companies—that are profit-oriented entities—would only utilize this normative gap to employ outsourcing workers in their core activities because cheaper worker options are currently available. These circumstances would only undermine the workers' rights as they are entitled to a proportional wage based on their jobs.

3. The Concept of Joint Responsibility

⁵² International Labour Organization, *supra* note 50.

⁵³ Bnamericas, “Mexico, Brazil most attractive offshore outsourcing locations in Latin America”, (12 September 2012), online: <<https://www.bnamericas.com/en/news/mexico-brazil-most-attractive-offshore-outsourcing-locations-in-latin-america-gartner>>.

⁵⁴ Melisa R Serrano, Mary Leian C Marasigan & Vera Eileen V Puppos, *Non-Standard Employment in Selected Asean* (Jakarta: ASEAN Services Employees Trade Unions Council, 2014).

⁵⁵ Government Decree No. 29/2019/ND-CP, Art. 20; Appendix I.

⁵⁶ *Multi-party work relationships; concepts, definitions and statistics* *, by International Labour Office (2018).

The concept of triangular within BPO shows that, unlike the regular one, the industrial relationship involves a multi-party. As discussed earlier, parties in the BPO work agreement are usually the workers and their agency (outsourcing company), while the principal firm is not included. As in an industrial relationship, this agreement would not raise rights and obligations between the principal company and the outsourcing workers. The implication is that the principal firm might not be held accountable for protecting the outsourcing workers' rights. Based on this condition, the concept of joint responsibility must be established.

In global practice, European States⁵⁷ such as Argentina, France, Italy, and the Netherlands, as well as other Non-European States such as India,⁵⁸ Canada,⁵⁹ and South Africa⁶⁰ have implemented the joint or shared responsibility concept, particularly for wages and social security entitlement. This concept would make both the outsourcing agency and the principal firm liable for any non-compliance with the obligation to fulfil workers' rights. The outcome of this is that the principal firm will have a solid motive to find a reliable agency and perform the check and balances mechanism to avoid unwanted harm.

In Indonesia, the BPO-related regulations do not set such type of liability. In fact, in the currently applicable law, all responsibility regarding the fulfilment of outsourcing workers' rights is entitled solely to the outsourcing company. Hence, the probability for these principal firms to only utilize the outsourcing workers as their 'cheap labour' is arguably high, and it will fall within the act of exploitation. Considering this would be pivotal in ensuring outsourcing workers' rights fulfilment, Indonesia could adopt the concept of joint responsibility.

⁵⁷ Silvia Spattini, "Analysis, Agency Work: a Comparative" (2012) 1:3-4 E-journal of International and Comparative Labour Studies 169-210.

⁵⁸ Ingrid Landau, Petra Mahy & Richard Mitchell, *The regulation of non-standard forms of employment in India, Indonesia and Viet Nam* (Geneva: International Labour Organization, 2015).

⁵⁹ Stronger Workplaces for a Stronger Economy Act and Employment Standards Act 2000.

⁶⁰ South Africa's Labour Relations Act.

V. CONCLUSION

Outsourcing workers in the tourism sector has not been protected adequately within the current legal framework since it does not fully prevent potential exploitation. The Manpower Law admittedly provided a few legal protections by limiting the type of jobs that can be outsourced and thus minimising the probability of workers' exploitation. However, the Job Creation Law has significantly changed the practice of outsourcing because it eliminates the provision on permissible jobs and no other form of protection given. Moreover, in the Job Creation Law, the entitlement of responsibility for the outsourced worker's protection is solely to the outsourcing agency. Such a provision increases the chance for the company to treat the workers as 'cheap labour'. Therefore, the newest provisions do not implicate a better condition. The problem becomes worse since the very nature of the tourism industry job is seasonal, where the workers are under the threat of having no job security. Such a condition put the workers in a hopeless position, having no choice but to work even though vulnerable to exploitation. To reach the end of protecting outsourcing workers' legal rights, Indonesia can adopt several provisions as practised by other countries. First, Indonesia can implement the rights to be informed to make a formal obligation of the employers to give the necessary information in the employment contract, where the workers have adequate knowledge of the working conditions. Second, re-regulating the permissible job to be outsourced by way of limiting the jobs only to a non-core activity to make sure that the principal company do not utilize the outsourcing workers as cheap labourers to do the main business activities. Third, the joint responsibility concept fosters the legal protection of outsourced workers as the principal companies will prudently choose their partners to carry out the delegated task.

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CONFLICT OF INTEREST

The authors declare no competing interests.

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