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Legal Politics of Easing the Admission of Foreign Workers under Law No. 11/2020 on Job Creation

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ABSTRACT

The Indonesian government drafted a law on job creation using the omnibus law method and is effective on November 2, 2020, which aims to regulate job creation attempts that are expected to accommodate Indonesian workers in the midst of competitive competition. There is a statement that the Omnibus law was approved to allow foreign workers into Indonesia freely, which is incorrect statement. In fact, in Article 89 regarding the amendment to Article 42 Paragraph 1 of Law No. 13/2003, there are requirements for hiring foreign workers in Indonesia. The article states that every employer who employs foreign workers must have an endorsement of the plan for the use of foreign workers from the central government. Therefore, this research aims to find out the legal politics of easing the admission of foreign workers after the issuance of the Law on job creation and legal protection of Indonesian workers after the issuance of the Law. This research is descriptive normative research which used legal doctrines, legal issues and legal principles related to the research topic. There are several results from the research, such as (1) the existence of regulations that regulate the easing of foreign workers after the issuance of Law No. 11/2020 on job creation, which consists of Articles 42, 44, 46; (2) the existence of legal politics in the easing of foreign workers in Indonesia, by prioritizing the interests of companies in using foreign workers; (3) prioritizing the rights of local workers in getting jobs easily.

Keywords: Foreign Workers, Legal Politics, Omnibus Law on Job Creation

INTRODUCTION

The government has drafted a strategic policy for legal reform through the Omnibus Law on Job Creation. The concept of the omnibus law approach is a regulatory concept that in the process of its creation aims to eliminate conflicting and contradictory regulations that cause obstructions to the development of the country.¹ The government and its members have created a draft job creation law that aims to achieve strategies in Indonesia's economic development efforts as a way to attract foreign investors to invest in Indonesia. There are about 4.15 million people or about 1.98% of the working-age population who have become unemployed due to the impact of the Covid-19 pandemic. Therefore, it is expected that with this regulation, unemployment will be reduced in Indonesia. Even though the main purpose of this regulation is to improve the general welfare and realize a sense of social justice for all Indonesian people. Unfortunately, the existence of this law has led into pros and cons in the community and only benefits the corporation. One of the cons is the easing of the admission of foreign workers in Indonesia, which is concerned that it will have an impact on local revenue. Although there is a regulation that every employer who employs foreign workers must have an endorsement of the plan for the use of foreign workers from the central government. In fact, there are still few of many regions do not yet have Regional Regulations on Retribution for the Renewal of Permits to Employ Foreign Workers (IMTA) as the legal basis in their retribution.² On the other hand, the increase in violations committed by foreign workers due to the significant increase in their population in Indonesia, such as many foreign workers who deliberately do not report in fulfilling their obligations as stipulated in Law No. 6/2011 Article 71 letter a on immigration. Another impact is limiting employment opportunities for Indonesian citizens in obtaining strategic positions in a particular company.

In the Job Creation Law, this rule was changed in Article 81 point 4 and there are some people who are pro this arrangement, such following below:

1. Facilitate permits for foreign workers;
 2. Facilitate directors, commissioners, and foreign shareholders in obtaining written permits;
 3. Detailed RPTKA (Plan for the Use of Foreign Workers) removed;
 4. Foreign workers may not be in personnel positions;
 5. Remove provisions regarding job positions and competency standards;
- and

¹ Winda Fitri and Luthfia Hidayah, "Problematisasi Terkait Undang-Undang Cipta Kerja Di Indonesia: Suatu Kajian Perspektif Pembentukan Perundang-Undangan," *e-Journal Komunitas Yustisia Universitas Pendidikan Ganesha* 4, no. 2 (2021): 725–735.

² Anis Tiana Pottag, "Politik Hukum Pengendalian Tenaga Kerja Asing Yang Bekerja Di Indonesia," *Media Iuris* 1, no. 2 (2018): 236–250.

6. Remove provisions regarding a company being obliged to repatriate foreign workers to their country.

As a state of law (*rechtstaat*), one of the obligations for the Indonesian state is to provide legal certainty for foreign workers who work in Indonesia, which involves several government institutions, such as the Ministry of Manpower, the Ministry of Law and Human Rights, and also Immigration. Therefore, this research aims to find out the legal politics of easing the admission of foreign workers after the issuance of the Law on job creation and legal protection of Indonesian workers after the issuance of the Law.

LITERATURE REVIEW

The Concept of Using Foreign Workers according to the Manpower Law

Before the Law No. 13/2003 on Manpower, the use of foreign workers in Indonesia was regulated in Law No. 3/1958 on the placement of foreign workers. In its development, the regulation on the use of foreign workers is no longer regulated in a separate law, but has become part of the compilation in the new Manpower Law. In the Manpower Law, the regulation on the use of foreign workers (TKA) is in Chapter VIII Articles 42-49. The regulation contains the obligation of employers who use foreign workers to obtain a written permit; have a plan for the use of foreign workers that contains the reason, type of position and period of use of foreign workers; the obligation to appoint Indonesian workers as assistants to foreign workers; and the obligation to repatriate foreign workers to their origin country after the end of the employment contract. The manpower law states that every employer who employs foreign workers must have an endorsement of the plan for the use of foreign workers from the central government, except representatives of foreign countries, such as diplomatic and consular as stipulated in Ministerial Decree Number: KEP/173/MEN/2000 concerning the Period of Employment Permit for Foreign Workers.³ This aims to provide expanded employment opportunities for Indonesian workers. Therefore, the government issued a number of legal instruments, such as licensing, health protection guarantees, and supervision.⁴ There are a several existing arrangements in the Manpower Law such following below:

1. Ministerial Decree on certain positions and certain time (Article 42 Paragraph 5);

³ Karvin Fadila and Abdullah Sulaiman, "Mekanisme Penggunaan Tenaga Kerja Asing Di Indonesia Berdasarkan Peraturan Presiden Nomor 20 Tahun 2018 Tentang Penggunaan Tenaga Kerja Asing," *Journal of Legal Research* 1, no. 1 (2019): 190–214.

⁴ Solechan, "Kebijakan Penguatan Kewajiban Alih Pengetahuan Tenaga Kerja Asing," *Administrative Law & Governance Journal* 1, no. 1 (2018): 93–102.

2. Ministerial Decree on Procedures for Ratification of the Plan for Using Foreign Workers (Article 43 Paragraph 4);
3. Ministerial Decree on Position and Competency Standards (Article 44 Paragraph 2);
4. Ministerial Decree on certain positions prohibited to be occupied by foreign workers (Article 44 Paragraph 2);
5. Ministerial Decree on certain positions in educational institutions that are exempt from compensation payments (Article 47 Paragraph 3);
6. Government Regulation on the amount of compensation and its use (Article 47 Paragraph 4);
7. Presidential Decree on the use of foreign workers and the implementation of education and training of assisted workers (Article 49).

Any submission regarding the planning of using foreign workers in Indonesia must be limited both in quantity and the fields that can be occupied by these foreign workers. It aims to ensure that the presence of foreign workers in Indonesia is not considered as a serious threat to Indonesian workers.⁵ It is expected that their presence is a motivator for Indonesian workers to be more professional and always improve their abilities in order to compete both among fellow Indonesian workers and with foreign workers. Therefore, the Manpower Law limits the positions that can be occupied by foreign workers. Foreign workers are prohibited from occupying positions that manage personnel and/or positions as stipulated in the Decree of the Minister of Manpower and Transmigration No. 223/2003 concerning positions in educational institutions that are exempted from the obligation to pay compensation. This compensation payment is exempted for employers of foreign workers, such as government agencies, representatives of foreign countries, international institutions, social institutions, religious institutions, and certain positions in educational institutions.⁶

The Concept of Using Foreign Workers according to the Job Creation Law

Presidential Regulation No. 20/2018 on using foreign workers is the basic provision containing the employment of foreign workers before the enactment of the Job Creation Law which aims to assist the national economy and increase investment therefore it is required to rearrange the licensing of using foreign workers in Indonesia, that is, Law No. 11/2020 on job creation. The issuance of Law No. 11/2020 amends and removes several articles in Law No. 13/2003 on Manpower, which in the regulation of Law No. 11/2020 on Job Creation facilitates foreign workers to get into Indonesia. First, according to the provisions of Article

⁵ Ayu Putri Rainah Petung Banjaransari, "Regulation of The Use of Foreign Workers in Indonesia After The Job Creation Act: Problems and Solutions," *Constitutionale* 3, no. 1 (2022): 43–58.

⁶ Menteri Ketenagakerjaan Republik Indonesia, *Peraturan Menteri Ketenagakerjaan Republik Indonesia Nomor 8 Tahun 2021 Tentang Peraturan Pelaksanaan Peraturan Pemerintah Nomor 34 Tahun 2021 Tentang Penggunaan Tenaga Kerja Asing* (Jakarta, 2021).

42, foreign workers only need to have a Foreign Worker Usage Plan (RPTKA) authorized by the Central Government without the need for a written permit from the minister or a appointed official. Second, the provisions of Article 43 regarding RPTKA are removed. Third, Article 44 regarding job standards and competency standards is further regulated in a ministerial decree. Furthermore, the provisions of Article 42 Paragraph (1) and Paragraph (2) require employers to have an RPTKA as the basis for a permit. In addition, individuals are prohibited from employing foreign workers. The RPTKA is issued by the Ministry of Manpower and Transmigration and is valid for one year.⁷ If the employer does not fulfill the above obligations when employing foreign workers in Indonesia, it will be subject to sanctions.

Meanwhile, in Article 42 Paragraph (3) contains a provision that employers who employ foreign workers must have an RPTKA authorized by the Central Government, but it is exempted for several parties, such as directors of commissioners with share ownership, diplomatic employees, consular officers, and foreign workers needed by employers due to emergencies (start-up companies, vocational training, business visits, and research for a certain period of time). Then, in Article 42 Paragraph (4) regulates foreign workers who are employed in Indonesia only in employment relationships for certain positions and certain times and must have competence in accordance with the position to be occupied. The issuance of Article 42 in Law No. 11/2020 on Job Creation automatically changes and abolishes Article 42 of Law No. 13/2003 on Manpower, which requires foreign workers to obtain a written permit from the Minister of Manpower or other designated officials. Foreign workers who came to Indonesia earlier under Presidential Regulation 20/2018 had to obtain a number of permits, including the Plan for the Use of Foreign Workers (RPTKA), Permit to Use Foreign Workers (IMTA), and Limited Stay Visa (VITAS). Due to the enactment of Law No. 11/2020 on Job Creation, foreign workers only need RPTKA which is authorized by the Central Government, therefore foreign workers currently no longer need written permits from the Minister or other appointed officials, the permit to use foreign workers has been reduced and now only requires the ratification of RPTKA.⁸ Then, in Article 46 of Law No. 13/2003 concerning Manpower, which previously regulated foreign workers who were prohibited from occupying positions such as personnel and certain positions which were further regulated in a Ministerial Decree. In Law No. 11/2020 on Job Creation, restrictions on foreign workers' positions in Indonesian companies in Article 46 as stipulated in Law No. 13/2003 are eliminated. The abolition of Articles 43 and 44 of Law No. 13/2003 in Law No. 11/2020 further facilitates the entry of foreign workers. This will have an

⁷ Adella Virginia Zakasri, "Rencana Penggunaan Tenaga Kerja Asing (RPTKA) Sebagai Izin Menggunakan Tenaga Kerja Asing Di Indonesia" (Universitas Airlangga, 2019).

⁸ Siti Ngaisah, "The License for Hiring Foreign Workers in Indonesia," *IUS POSITUM (Journal of Law Theory and Law Enforcement)* 2, no. 1 (2023): 11–21.

impact on the disqualification of local labor or in this case the labor of Indonesian citizens and will lead to social jealousy, because foreign workers get different facilities from Indonesian workers, such as the difference in wages between foreign workers and Indonesian workers in one job even though they are in the same position. In addition, considering that the unemployment rate in Indonesia is quite high, the easy entry of foreign workers into Indonesia will have an impact on the reduction of employment opportunities in the country itself.⁹

RESEARCH METHODOLOGY

The method used is a descriptive normative method combined with a statutory approach. Normative method in legal research means used legal doctrines, legal issues and legal principles related to the research topic. If one or more appropriate techniques are added to the statutory approach used as an indicator approach, it will be more accurate and assist in enrich the legal considerations that are relevant in solving the legal issues.¹⁰ There are two data sources of this research consist of (1) primary source, such as Law No. 13/2003 on Manpower and Law No. 11/2020 on Job Creation; (2) secondary source, such as legal experts' statements, previous researches, and another legal source from internet.

RESULT AND DISCUSSION

Legal Politics through the Omnibus Law on Job Creation

Legislation cannot be separated from legal politics because it determines the direction of a country's legal policy. Planning, drafting, discussing, ratifying until legislation is formal legal politics. At first, the establishment of the Job Creation Law came from the political will of the President, Joko Widodo by using the omnibus law method, which is used to combine several different regulatory substances to create a regulation. The purpose of the Job Creation Law is to simplify regulations and deregulate regulations that are expected to expand employment and business empowerment. In addition, the omnibus law method is also expected to attract many foreign investors to Indonesia due to the easing of licensing by the Indonesian government.

Good governance is basically a concept that refers to the process of reaching decisions and their implementation that can be jointly accountable. It is a consensus reached by the government, citizens and the private sector for the governance of a country. The implementation of good governance is an absolute necessity for the majority of people in order to create a political system of government that is more

⁹ Fithriatus Shalihah, "Perubahan Pengaturan Penggunaan Tenaga Kerja Asing Dalam Hukum Ketenagakerjaan Indonesia," *ILREJ: Indonesia Law Reform Journal* 1, no. 3 (2021): 417–425.

¹⁰ Definition of Stutory Approach on Stefani Margareta and Miftakhul Huda, "The Legal Footing of Petok D as The Evidence of Land Ownership and Rights," *IUS POSITUM (Journal of Law Theory and Law Enforcement)* 2, no. 2 (2023): 30–46.

impartial to the interests of society in accordance with the principles of democracy universally.¹¹ The principles of good governance are used as a standard of government performance in managing the government. The principles of good governance include community participation, rule of law, transparency, stakeholders, consensus-oriented, equality, effectiveness and efficiency, accountability, and strategic vision.¹² The creation of the Job Creation Law No. 11/2020 was due to a proposal from the government to attract foreign investors to Indonesia, which the government considers that the labor sector is an inhibiting factor for investment in Indonesia. Therefore, the government creates social dumping in the Job Creation Law by reducing the minimum wage and presenting policies that can benefit foreign investors. Unfortunately, the regulations in the Job Creation Law are detrimental to Indonesian workers due to the government's lack of responsibility for the welfare of Indonesian workers. This is also contrary to the constitutional mandate contained in Article 27 Paragraph 2 and Article 28D Paragraph 2 of the 1945 Constitution, which should be a lower norm must hold on to a higher norm, and therefore the formation of the Job Creation Law No. 11/2020 should adhere to or support closely with Article 27 Paragraph 2 and Article 28D Paragraph 2 of the 1945 Constitution related to the constitutional rights of every citizen in obtaining employment.

The Easing of Law on the acceptance of Foreign Workers after the Issuance of Law No. 11/2020 on Job Creation

The government's desire to facilitate investment in Indonesia has resulted in the Job Creation Law No. 11/2020. Changes to articles governing foreign workers were amended by the government to be in line with the government's expectations regarding the presence of foreign investors in Indonesia. The presence of foreign workers in Indonesia can be regarded as one of the foreign exchange carriers for the country where there is a requirement to pay compensation for each foreign worker employed. In Article 3 of the Decree of Manpower and Transmigration Minister that there is a payment of this compensation which is then exempted to the employer of foreign workers including government agencies, representatives of foreign countries, international agencies, social institutions, religious institutions, and certain positions in educational institutions.

Beforehand, the Manpower Law No. 13/2003 had stipulated the regulation of foreign workers in Indonesia, then in 2019 President Joko Widodo conveyed in his speech to focus on the establishment of the Job Creation Law, followed by 2020 the Job Creation Draft Law was made to produce Law No. 11/2020 on job creation and then became Government Regulation in Lieu of Law No. 2/2022 on Job Creation.

¹¹ Fitria Andalus Handayani and Mohamad Ichsana Nur, "Implementasi Good Governance Di Indonesia," *Publica: Jurnal Pemikiran Administrasi Negara* 11, no. 1 (2019): 1–11.

¹² Philipus M Hadjon, *Pengantar Hukum Administrasi Indonesia* (Yogyakarta: Gadjah Mada University Press, 2019).

Indeed, along the way of the amendment, there were several articles that were later adjusted in relation to the regulation of foreign workers between the latest and previous regulations.

Legal Protection of Indonesian Citizens on Legal Easing for Foreign Workers in Indonesia under Law No. 11/2020 on Job Creation

According to Hans Kelsen in Stufenbau Theory, the legal system is a ladder system with hierarchical rules which the lowest legal norms must rely on higher legal norms, and the highest legal rules (such as the constitution) must rely on the most basic legal norms (*grundnorm*).¹³ Therefore, the form of the highest norm will be the most abstract and will become more technical when it comes down to the lower norms underneath. It also provides the rule that a norm is the embodiment of the norm higher up and therefore should not contradict with the more abstract norm mentioned earlier.

When we reflect the Stufenbau Theory into Indonesian regulatory governance, it is clear that the 1945 Constitution of the Republic of Indonesia is the most basic legal norm (*grundnorm*) which is abstract so that its implementation needs to be technicalized with regulations underneath such as Laws, Government Regulations, Regional Regulations, and so on. Based on this system, every content of the constitution is basically a mandate that must be used as a reference target for fulfillment by the rules underneath. For instance, when the Constitution mandates that governors, mayors and regents be elected democratically, the Election Law emerges, which is basically an implementation of the mandate. Another case is when the 1945 Constitution in Article 33 mandates the economy, then rules such as the Basic Agrarian Law and the Cooperative Law emerge, which are also the implementers of the abstract norms mentioned in the constitution.

In that regard, the same thing should occur with the guarantee of employment for the people. The 1945 Constitution as the *grundnorm* clearly states in Article 27 Paragraph (2) that every citizen has the right to work and a livelihood that is worthy of humanity. Based on this article, there are at least two variables of rights that need to be guaranteed by the state to its citizens, i.e. the right to work and the right to a decent livelihood. Although the two variables are generally correlated, they can be described as follows:¹⁴

1. The Right to Work

The use of the phrase “entitled to” in the constitution was not drafted without meaning. However, the use of the phrase can be interpreted more in-depth. For example, there is a difference between the phrase “entitled to” and the phrase “entitled to obtain.” The phrase “entitled to get” means

¹³ Satjipto Raharjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2014).

¹⁴ Muhammad Ridho, “Urgensi Pelonggaran Ketentuan Masuknya Tenaga Kerja Asing Dalam Undang-Undang No. 11/2020 Tentang Cipta Kerja,” *Jurnal Gema Keadilan* 7, no. 2 (2020).

that a person has the right to get a job but the person has to look for it first. In short, the phrase only guarantees a person's right to look for a job. On the other hand, it would be very different if the phrase used was "entitled to." The phrase "entitled to" philosophically means that a person has the right to get a job without the need to look for one. In short, the use of the phrase "entitled to" is a sure guarantee of employment for citizens.

Therefore, the guarantee of employment for citizens is a direct mandate derived from the constitution. It means that the government's duty to provide the widest possible employment opportunities to the community is not only a recommended policy but indeed an obligation that must be fulfilled.

2. A Decent Livelihood

The phrase "a decent livelihood for humanity" means the supporting facilities for a decent livelihood for the standard of human life such as houses and residences for those who are ready and have their own families and other livelihood facilities according to the standard of human life, not animals. Therefore, it can be concluded that Article 27 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia means that the government is obliged to ensure that every citizen gets a job which also correlates and aligns with a decent livelihood for humanity for every citizen.

3. The Polemic of Foreign Workers in Indonesia

Labor issues are still a major concern of the world, especially the diplomatic relations of ASEAN countries which have penetrated into the economic field through the ASEAN Economic Community. Polemics of foreign workers in Indonesia, such as existing job opportunities, adequate labor competence, opportunities for foreign workers to fill vacancies that cannot be filled by Indonesian workers. Therefore, in order to balance the contribution of foreign workers and Indonesian workers proportionally in national development, legislation is needed to ensure that foreign workers working in Indonesia are foreign workers who really have competencies that Indonesian workers do not have. It aims to transfer knowledge and expertise from foreign workers to Indonesian workers in accordance with the mandate of the 1945 Constitution.

CONCLUSION AND SUGGESTION

Conclusion

The state's responsibility towards foreign workers should be able to accommodate the right to work, which in doing its duties has set a decent standard of living for citizens. There is a legal easing of foreign workers after the issuance of Law No. 11/2020 Articles 42, 44, and 46 on Job Creation. In Article 42, it is stated that in the previous regulation, foreign workers must have a VITAS (Limited Stay Visa), IMTA (Permit to Use Foreign Workers), RPTKA (Plan for Using Foreign Workers) and written permits from the minister, while now only the RPTKA is required. Meanwhile, Article 44, which used to regulate companies to comply with job requirements and competency standards, is now removed. In addition, Article 46, which used to regulate the provisions of foreign labor positions, is now removed.

The existence of legal politics in the easing of foreign workers law by prioritizing the interests of companies in using foreign workers as the requirements for the entry of foreign investors into Indonesia in order to increase foreign exchange. There is no urgency in easing the foreign worker law when it comes to the welfare of decent work for Indonesian workers because it is clear that our country's constitution specifically mandates the sustainability of local labor so that the government must prioritize the right to work and a decent life for the Indonesian citizens themselves.

Suggestion

Considering the relatively short time of making Job Creation Law and the Constitutional Court's decision that the Job Creation Law is formally flawed, the suggestion to be conveyed is that the government conducts a review of its product in the form of Law No. 11/2020 on Job Creation by prioritizing socialization and observing the atmosphere and fluctuations that exist in the midst of society after the issuance of Law No. 11/2020 on Job Creation. Because the concern is that the existence of this Job Creation Law actually provides a big threat to the loss of opportunities to get a job which then also impacts the country's economy.

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