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Provisions Analysis of Arrangements for Post-Foreign Workers are Entitled to Law No 11 of 2020 Concerning Job Creation, Indonesia

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Abstract. International migration is one of the issues in international relations, where the movement of people between countries is getting more accessible. The problem of international migration is based on legal and illegal immigration into the territory of a nation. The focus of this research is contract workers, professionals or foreign workers. The study aims to analyse the arrangements for foreign workers after the enactment of law No 11 of 2020 concerning Job Creation. The research method, the normative legal research with a statutory regulation approach and a concept approach, uses primary, secondary, and tertiary legal materials. Legal materials are processed and analysed in a coherent, systematic manner. Then a conclusion is drawn using the chosen theory. In conclusion, arrangements for foreign workers do not provide certainty, fairness and legal benefits because even law No 11 of 2020 concerning Job Creation continues to apply until with improvements within a maximum period of two years, implementing regulations are not permitted to be issued, then the provisions in the Job Creation Law will become less functional.

Keywords: regulation; foreign workers; job creation.

INTRODUCTION

International migration is one of the issues in the world of international relations. Geographical boundaries between countries are increasingly unclear as well. The movement of people between countries is more accessible. In general, the problem of global migration rests on matters concerning legal and illegal immigration into the territory of a nation. Immigrants can be divided into several groups, namely [1]:

- 1) Settlers, namely immigrants who wish to live permanently in the destination country;
- 2) Contract workers, namely immigrants who will live in a particular country according to the term of the work contract;
- 3) Undocumented workers, namely immigrants who work illegally in the destination country. Immigrants whose residence permit has expired use tourist or tourist visas and enter through the smuggling process;
- 4) Professionals, namely immigrant workers from established companies who move from one country to another;

5) Asylum seekers and refugees, namely refugee seekers who have left their home countries to flee from the threat of danger.

In this study, the focus is on "Contract workers", Professionals known as foreign workers. In Indonesia, employment is regulated in the 1945 Constitution of the Republic of Indonesia (from now on abbreviated as the 1945 Constitution of the Republic of Indonesia), Article 27, paragraph 2: "Every citizen has the right to work and a living worthy of humanity". This article means that every citizen is an Indonesian citizen because only Indonesian citizens have legal relations with their country, so the state guarantees decent work and livelihood for humanity. Furthermore, labour issues are regulated in Law No 13 of 2003 concerning Manpower. This law regulates Indonesian and foreign workers: 1) Every employer who employs foreign workers must have written permission from the Minister or an appointed official. 2) Individual employers are prohibited from hiring foreign workers.

Article 43: 1) Employers who use foreign workers must have a plan for employing foreign workers that the Minister approves.

Article 44: 1) Employers of foreign workers must comply with the provisions regarding positions and applicable competency standards.

Article 46: 1) Foreign workers are prohibited from occupying positions in charge of personnel and/or specific situations.

From the elucidation of the article regarding foreign workers above, it is known [2]:

1. In hiring foreign workers, they must have written permission from the Minister or the appointed official.
2. The use of foreign workers must have a plan for the benefit of foreign workers, which the Minister approves.
3. Employers of foreign workers must comply with the applicable terms of position and competency standards.
4. Foreign workers are prohibited from occupying positions in charge and/or specific situations.

Furthermore, arrangements for foreign workers are regulated in Presidential Regulation (Perpres) No 20 of 2018 concerning Procedures for Using Foreign Workers. The issuance of this Presidential Decree caused polemic in the community because of a surge in investment and projects from China, raising the issue of an increase in workers from China. The government's response to issuing the Presidential Decree was to improve the investment climate by regulating and simplifying licensing procedures and bureaucracy [3]. In 2020, the No of foreign workers reached 98,902 people. Workers from China are ranked first, namely 35,781 people or equivalent to 36.17%, followed by Japan 12,823 people, South Korea 9,097, India 7,356 people, Malaysia 4,816 people, Philippines 4,536 people, United States 2,596 people, Australia 2,540 people, England 2,176 people, Singapore 1,994 people, and, 15,187 from other countries [4].

The ratification of law No 11 of 2020 concerning Job Creation, the regulation of foreign workers, which was previously regulated in Law No 13 of 2003, was "take offer" (taken over) by Law No 11 of 2020, where the processing of permits for foreign workers (from now on written TKA) experienced pruning in its management, based on Presidential Decree No 20 of 2018, TKA who enter Indonesia must have a No of permits, including

Limited Stay Visas (VITAS), Plans to Use Foreign Workers (RPTKA), and Permits to Use Foreign Workers (IMTKA). With the entry into force of law No 11 of 2020 concerning Job Creation, the processing of permits for foreign workers has been cut, whereby every employer who employs foreign workers must have a Plan for the Use of Foreign Workers (RPTKA), which the Central Government approves, Article 81 point 4 of the Copyright Law Work,

If one looks closely at the regulation of norms in Article 81, point 4, there is a blurring of models regarding certain positions, specific times, and competencies according to post. On the other hand, in Law No 11 of 2020, foreign workers are prohibited from occupying positions that manage personnel. Still, there are exceptions for employers of foreign workers from the obligation to arrange plans to employ foreign workers.

Law No 11 2020 issuance is expected to provide fresh air for foreign investors, impacting the Indonesian economy [4]. Thus, this research focuses on regulating foreign workers after the enactment of Law No 11 of 2020 concerning Job Creation.

METHODS

Typethis research is normative legal research. Also known as doctrinal research [5]. Normative legal analysis has the character of finding legal rules, principles, and doctrines to answer legal issues at hand because of the authoritarian nature of legal science [6]. The statutory approach method (statute approach) and the concept approach (conceptual approach). Sources and Types of Legal Materials: primary, secondary, and tertiary legal materials. The technique of collecting legal materials is through a literature study of legal materials, both primary legal materials, secondary legal materials, tertiary legal materials or non-legal materials. Search for legal materials through the internet media [7]. Processing and analysing legal material is carried out coherently and systematically, making it easier for researchers to conduct the research. Processing of legal materials is carried out through classification techniques. Namely, legal fabrics that have been collected are grouped into classes with the same symptoms or those considered to be the same [7]. Next, conclude the research results using the help of the theory that has been mastered [7].

RESULTS AND DISCUSSION

TKA in Law No 13 of 2003 concerning Manpower is regulated in Articles 42 to Article 49, where Articles 46 and 48 are deleted, then these articles are taken over (take the offer) and held in Law No 11 of 2020 concerning Copyright Work, from Article 81 No 4 to Article 81 No 11.

In Law No 11 of 2020, every employer who employs foreign workers must have a plan for using foreign workers approved by the Central Government. TKA can be engaged in Indonesia only in a working relationship for a specific position and a specific time and has the competence by the place to be occupied. TKA is prohibited from occupying positions in charge of personnel. Provisions regarding particular classes and times, as referred to in paragraph 4, are regulated in PP, Further elaboration regarding the use of foreign workers is held in PP No 34 of 2021.

Law No 34 of 2021 concerning the Use of Foreign Workers to Implement Article 81 and Article 185 letter b Law No 11 of 2020 concerning Job Creation. Article 2 regulates the obligations of TKA Employers to prioritise the use of Indonesian workers in all types of available positions. If Indonesian workers cannot occupy the place referred to, then foreign workers can occupy the work. The use of foreign workers is carried out by considering the conditions of the domestic labour market. Thus, Article 2 emphasises that TKA employers prioritise Indonesian workers in all available positions. Unless Indonesian workers cannot occupy the parts, these positions can be occupied by TKA by considering the conditions of the domestic labour market.

Elements of TKA employers, namely, (Article 3, paragraph 1:

1. Government agencies, representatives of foreign countries and international agencies.
2. Foreign trade representative offices, foreign company representative offices, and foreign news agencies conducting activities in Indonesia
3. Foreign private companies doing business in Indonesia
4. Legal entities in the form of limited liability companies or foundations established under Indonesian law or foreign business entities registered with the competent authority (except for limited liability companies in the form of individual legal entities)

5. Social, religious, educational and cultural institutions

6. Impresariat service business.

7. Business entities as long as they are allowed by law to use TKA.

TKA can only be employed by TKA employers in a working relationship for a specific position and time certain positions, and have competence by the place to be occupied. After receiving input from the relevant ministries/institutions, the Minister determines the specific situation (stipulated in Article 4).

TKA employers who employ TKA must have RPTKA, which the Minister or an appointed official ratifies. If a TKA employer hires a TKA that another TKA Employer is using, each TKA Employer must have an RPTKA Approval by RPTKA approval (Article 6).

Employers of TKA in hiring TKA, must:

1. Appoint workers of Indonesian citizenship as TKA Associate Workers who are employed to transfer technology and transfer expertise from TKA.
2. Implementing education and job training for TKA Associate Workers as referred to in letter A by the qualifications of the positions occupied by TKA.
3. Returning TKA to their country of origin after their work agreement ends.
4. TKA Employers are obliged to facilitate Indonesian language education and training for foreign workers, but this does not apply to: directors and commissioners, heads of representative offices, supervisors, managers and supervisors of foundations, and foreign workers employed for temporary work (Article 7).

In hiring foreign workers, it is prohibited (Articles 9–11):

1. Employing TKA with multiple positions in the same company.
2. Employ foreign workers in personnel positions, which the Minister determines after receiving input from the relevant ministries/institutions.

The latest development regarding Law No 11 of 2020 concerning Job Creation is that on Thursday, November 25 2021, the Constitutional Court (after this abbreviated as MK) read out the decision on the judicial review of Law 11 of 2020

concerning Job Creation with Case No 91/PUU-XVIII/2020. The MK granted a formal judgment of the Job Creation Law. In its decision, the Constitutional Court stated that the formation of the Job Creation Law did not have conditionally binding legal force as long as it was not interpreted that improvements had not been made within two years of this decision being pronounced [8].

Several important notes related to the review of law No 11 of 2020 concerning Job Creation, as follows:

1. The Job Creation Law is still in force until improvements are made according to the time limit specified in the decision.
2. The Constitutional Court then ordered the President and the House of Representatives to improve the Job Creation Law within two years of the decision's pronouncement.
3. The Constitutional Court stated that it was suspending the issuance of new implementing regulations relating to the Job Creation Law. This can cause other legal problems, including establishing derivative rules for the Copyright Law. By not allowing the issuance of implementing regulations, the provisions in the Job Creation Law will not function, even though, on the other hand, the Constitutional Court stated that the law is still valid.
4. If improvements are not made, the Job Creation Law will become unconstitutional.
5. If the President and DPR RI cannot complete the revision of the Job Creation Law within two years, then the law or articles or content revoked or amended by the Job Creation Law shall be declared valid again.
6. The Constitutional Court expressly stated to suspend all actions/policies that are strategic and have broad implications. It is also not justified to issue new implementing regulations relating to the Job Creation Law. This raises ambiguity because it raises the question of determining if a policy is strategic and has a broad impact, then the procedure is postponed. Should all guidelines based on/related to the Job Creation Law be suspended?
7. There were dissenting opinions submitted by four of the nine Constitutional Justices. Constitutional Justices Arief Hidayat, Anwar Usman, Manahan MP Sitompul, and Daniel Yusmic P. Foekh argued that the Job Creation Law was con-

stitutional and rejected the formal review submitted by the applicant.

8. As an illustration, drafting the Job Creation Law was not completely open. The discussion continued amid a pandemic requiring people to perform physical distancing, making participating challenging [9]. The omnibus law in the statutory system in Indonesia is a legal breakthrough implemented by the government. It has not been regulated in direction No 12 of 2011 concerning the Formation of Legislation as a methodological framework for forming laws and regulations. The essence of omnibus law in creating rules and regulations is a concept and method in structuring statutes and regulations in a country with a strategic and essential position in achieving state goals as mandated by the Constitution [9].

If the regulation of foreign workers after the enactment of law No 11 of 2020 concerning Job Creation analyzed with three legal values put forward by Gustav Radbruch, namely legal certainty (*rechtmatigheid*), legal justice (*gerechtigheit*), and legal benefits (*zwechmatigheid* or *doelmatigheid* or utility). Legal certainty related to statutory regulations in this case, namely; Law No 13 of 2003 concerning Manpower, Law No 11 of 2020 concerning Job Creation; PP No 34 of 2021 concerning the Use of Labor; Regulation of the Minister of Manpower of the Republic of Indonesia No8 of 2021 concerning Implementation Regulations for PP No 34 of 2021 concerning the Use of TKA; and the Constitutional Court's decision No 91/PUU-XVIII/2020 which granted a formal review of the Job Creation Law. There is a Constitutional Court Decision No 91/PUU-XVIII/2020, which presents a formal review of the Job Creation Law, where the Constitutional Court's decision states in its ruling that the Job Creation Law is still valid until reform is made by a maximum period of two years, then in terms of legal certainty, legal justice, and legal benefits - Law No 11 of 2020 concerning Job Creation does not provide legal certainty, legal fairness, as well as legal benefits.

Thus, the regulation of foreign workers after the enactment of law No 11 of 2020 concerning Job Creation, after the Constitutional Court's decision No 91/PUU-XVIII/2020 concerning Formal Review of Law No11 of 2020 concerning Job Creation of the 1945 UUDNRI, does not provide certainty, fairness and legal benefits, because even Law No11 of 2020 concerning Job Creation continues to apply until by repairing the formation

within a maximum period of two years, it is not permitted to issue implementing regulations. The provisions in the Job Creation Law will become less functional.

CONCLUSIONS

Arrangements for foreign workers after the enactment of law No 11 of 2020 concerning Job Creation, after the Constitutional Court's decision No 91/PUU-XVIII/2020 concerning the Formal Review of Law No 11 of 2020 concerning Job Creation of the 1945 UUDNRI, do not provide certainty, fairness and legal benefits, because even Law No 11 of 2020 concerning Job Creation con-

tinues to apply until with improvements within a maximum period of two years, implementing regulations are not permitted to be issued, then the provisions in the Job Creation Law will become less functional.

The government, in carrying out the Constitutional Court's decision No 91/PUU-XVIII/2020 concerning the Formal Review of Law No 11 of 2020 concerning Job Creation Against the 1945 UUDNRI to improve law No 11 of 2020 concerning Job Creation, requires precision and caution, especially the use of foreign workers, to provide greater certainty, fairness and legal benefits.

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