THE ACCELERATED MODEL OF THE RIGHT TO WORK THROUGH THE HARMONIZATION OF MANPOWER POLICIES (A Case Study of Outsourcing Manpower after the Constitutional Court Decision Number 27/PUU-IX/2011 about the Review of Law Number 13 of 2003 Concerning Substantive Justice Attainment)

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ABSTRACT

Workforce is an essential and strategic human right issue in a welfare state that shall be manifested by this country. The fact regarding demonstrations demanding the repeal of outsourcing and the enactment of the Constitutional Court decision number 27/PUU/IX/2011 about the testing of Law number 13 of 2003 became the state response in ensuring Article 27 (2) of 1945 Constitution. An appropriate regulation, therefore, shall be formulated for the local implementation through the harmonization of policies to accelerate the right to work for a proper life. This model is in line with the development of Rodiyah's research (2011), a model of effective formulation of legislative provisions namely Integrative RegMap and Regulatory Impact Assessment (IRR) tested by Rodiyah's research (2012), an implementation of IRR model; showing the immense urgency, essence and strategy for the formulation of policy to accelerate the right to work. This study examined and created an acceleration model through the harmonization of policies that regulate workforce.
The focus of this research was on a case study of outsourced workforce after the decision of the Constitutional Court number 27/PUU-IX/2011 about the testing of Law number 13 of 2003 to attain substantive justice. The primary legal resources utilized were 1945 Constitution, legislations, government regulation and MK decision related to workforce whereas the sociologically empirical legal resources were the owner, the employer of outsourced workforce, the policy maker, related scholars and human right experts. The target output of this research was to create a model in the form of a publicly tested Academic Document and then compose a local development including an acceleration of its regulation, a textbook and an international journal publication.
The research paradigm employed constructivism in accordance with the focus to construct Academic Document to accelerate the right to work and a qualitative approach with hermenitic investigation. The data were analyzed using the theoretical framework from Chambliss and Seidman law and the implementation theory from Joseph Goldstein in the analysis interection of constructivism model in R&D analysis model. The study was conducted in state institutions (Mandiri Bank and BRI), a garment/convection company and procurement company in Central Java.
This research will have been conducted for two years. The first year, this 2014, was focused on the empirical database related to the implementation of right to work in the outsourcing management and its model policy in the form of an Academic Document.
The result indicated a philosophical, sociological and normative urgency to immediately create an academic document in order to fulfill the need of society to work. Philosophically, working is a basic human right as strongly suggested by the 1945 Constitution. Sociologically, the stakeholder relationship between the employee and the capital owner shall be harmonious by prioritizing the equal postition manifested in the implementation of proportionally correct right and duty. Juridically, a number of statutes in Law number 13 of 2013 shall be operationalized. According to the empirical database, there were many human right violations in the implementation of workforce protection particularly in outsourcing. For example, the minimum wage standard was not paid, the productivity pressure was profoundly high with more than eight-hour-working time a day, the work safety was not guaranteed, an insurance mechanism was not provided and the continuation of working to support one's career was unfeasible. Ironically the workers were unable to identify the kind of violations they suffered due to their limited educational background, knowledge and economical dependency.

Keywords: Acceleration Model, Harmonization, Right to Work.

A. INTRODUCTION

Law Number 13 of 2003 concerning Manpower particularly Article 59 regulating duration contract of an employment (a contract employee) and Article 64 regulating the handover of partial works to another company (outsourcing) have direct and indirect impacts to all contract and outsourcing workers/labors in Indonesia. The practices have been profoundly disadvantageous to people rights to work, to have decent living, to obtain proper wage, to be treated equally and properly in the workplace and to have prosperous and welfare life as mandated in Indonesia's constitution.

On April 2011, the Electric Meter Reader Officer Alliance *(AP2ML)* proposed a judicial review for the Article of 59, 46, 65, and 66 of Law Number 13 of 2003 regarding Manpower (Law Number 13/2033) related to the regulation of fixed-term contract of employment and outsourcing. To their view, the provisions contradicted the 1945 Constitution.

Through the decision of Institutional Court Number 27/PUU-IX/2011 on 17 January 2012, the proposal was granted. It was decided that the phrase of "fixed-term contract of employment" on Article 65 Clause (7) and phrase "fixed-term contract for

employment" in Article 66 Clause (2) of Law Number 13/2003 contradicted the 1945 Constitution and had no legal power. The content is exercised as long as the handover of protection rights for worker/labor is not required by the second or third party firms regardless the change in the outsourcing service provider.

Regarding the aforementioned decision, there have been various interpretations. On the one hand, the labor activists celebrated that good news as their fruitful hope. On the other, they deem it as an imaginary imagination. The existence of a contact system and outsourcing has negative implications for labors due to the absence of a career certainty. Furthermore, they were under the constant threat of a contract breaching and difficulty to find new occupation amid the unemployment issues and the limitedness of vacancies. The similar circumstance is also applied to outsourcing labors in a considerable number of companies.

A certain situation in this system frequently exists where the client company terminates the contract with the outsourcing provider. If this happens, the contract labors are still under the provider's responsibility. Nevertheless, a particular condition may be applied when the client company takes over the labors to be directly employed or changes the previous outsourcing provider to the new one in which the status of labors subsequently changes to the new firm. That second condition – the change of outsourcing provider – becomes the illustrated situation and the background of Constitutional Court decision.

"The Constitutional Court Decision was followed by the official letter regulating the existing mechanism to ensure the rights of outsourcing workers. The letter of B.31/PHIJSK/I/2012 regarding the Implementation of Constitutional Court Decision Number 27/PUU-IX/2011 on 17 January 2012 was addressed to the incumbent head in the Manpower Institutions all over Indonesia. The content was related the review of article 59, 65 and 66 of Law Number 13 of 2003 about Manpower towards 1945 Constitution.

This condition indicates that manpower is a strategic and important human right issue in a welfare state. In this regard, the state had responded to demonstrations demanding the repeal of outsourcing and the enactment of the Constitutional Court decision number 27/PUU/IX/2011 about the review of Law number 13 of 2003 by ensuring Article 27 (2) of 1945 Constitution. This urgent fact, therefore, shall be considered as the need to harmonize of manpower policies. The model created here is in line with the development of Rodiyah's research (2011), a model of effective formulation of legislative provisions namely Integrative RegMap and Regulatory Impact Assessment (IRR) tested by Rodiyah's research (2012), an implementation of IRR model; showing the immense urgency, essence and strategy for the formulation of policy to accelerate the right to work. This study examined and created an accelerated model through the harmonization of manpower policies.

An empirical, sociological and normative background was scrutinized in this study to create an accelerated model related to the right to work through the harmonization of manpower policies. The case studied here is the outsourcing manpower after the decision from Constitutional Court Number 27/PUU-IX/2011 regarding the review of Law Number 13 of 2003 to attain substantive justice.

The research was focused on why it is urgent to accelerate the right to work through the harmonization of manpower policies and on how the accelerated model of the right to work through the harmonization of manpower policies after the decision of Constitutional Court Number 27/PUU-IX/2011 on 17 January 2012 attains the substantive justice. The research with constructivism paradigm generally aims at: (1) exploring social reality; (2) scientifically, normatively and empirical-sociologically criticizing social issues and their impacts for the society; and (3) understanding a case. From that elaboration, therefore, the purposes of this research were to (1) find normative, empirical, sociological urgency of the acceleration of the right to work through the harmonization of manpower policies and (2) to create an accelerated model of the right to work through the harmonization of outsourcing policies after the decision of Constitutional Court Number 27/PUU-IX/2011 on 17 January 2012 to attain the value of substantive justice.

B. RESEARCH METHODOLOGY

A constructivism paradigm was employed as the results were based on a contextual content of policy formulation[1]. Besides that, a qualitative approach was used to examine the legal norm formulating outsourcing manpower policy of Law Number 13 of 2003 and the Constitutional Court Decision number 27/PUU-IX/2012. Sociologically, the accelerated model of the right to work was investigated with the policy harmonization in Central Java. The research locations were some state owned enterprises (PLN - the state electric supply company, Mandiri Bank and BRI) and the outsourcing provider and the company in Central Java (garment and construction companies).

The data were obtained from hermeneutic approach and their validity was tested using triangulation technique (Berg, 1998: 4; Patton, 1989: 108-109; Miles and Huberman, 1992:434; Brannen, 1997:20). The informants' data were obtained from the technique of participative observation and in-depth interview as well as focused group discussion based on theoretical concepts. Secondary and primary data sources were selected in line with the employed concept and theory. Furthermore, the data were analyzed using interactive analysis models through data collection, presentation, conclusion and verification.

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[1] Agus Salim, 2006. *Teori dan Paradigma Penelitian Sosial*.Yogyakarta: UGM Press

C. RESULT AND DISCUSSION

Manpower is all citizens with working age (starting from 15 years old) who are potentially able to produce goods and service. Before the year of 2000, the limitation of citizens' age in Indonesia was at least 10 years old (See the Census of 1971, 1980 and 1990). However, since 2000 census and in line with international provision, the manpower is defined as citizens whose age are 15 years old and more. This indicator can be used as the discourse for decision makers in the national or regional level to plan manpower policy in their area. Moreover, it can be used to calculate the number of manpower or potential citizens who are able to produce goods and service.

The calculation of manpower can be carried out by adding all citizens with working age (starting from 15 years old) in a country. The number is usually obtained from national census. Meanwhile the percentage of manpower can be calculated by a comparison between the number of citizens with working age and the total citizens in that country. The formulation used is the total of manpower = citizens whose age is 15 years old + citizens whose age is 16 years old + citizens whose age is 17 years old + …etc

$$\% \text{ Manpower} = \frac{\text{The citizens whose age starting from 15 years old}}{\text{The total citizens}} \times 100$$

The source of the data analyzed was from the publication of national census of 2013 including the citizens whose age is starting from 15 years old. According to the formulation above, in 2013, the number of citizens aged from 15 years old in Central Java was 2.991.800 people. Therefore, the efforts to provide protection and welfare shall be considered through the mechanism of Law Number 13 of 2003 with Law Number 4 of 1979 regarding the children's welfare (Emei Dwinanarhati Setiamandi, 2012). Considering those mandates, the mechanism of outsourcing shall not be applied in this context (as the change of manpower status tends to be interpreted as the good commodity). Unfortunately, outsourcing in Indonesian has been applied ubiquitously. In the business world, the term can be defined as the handover of some non-core or supporting works by a client company to the other through the contract with labor/worker service provider. This option is usually undertaken to reduce the production cost or to focus on the major issues in that company.

1. The Normative, Empirical, Sociological Arugments Related to the Urgency to Accelerate the Right to Work through the Harmonization of Manpower Policies.

The normative argument of urgency to accelerate manpower protection through the harmonization was undertaken from analysis of Law Number 13 of 2003 which is used as the legal basis of outsourcing in Indonesia. The system is divided into two parts: the work contractor and the labor/worker service provider. On the development of revision draft of Law Number 13 of 2003, the contractor was abolished due to its tendency to sub contracting directing instead of the manpower. The relation between the outsourcing manpower and the client company is regulated in Law Number 13/2003 in which the issue of outsourcing is stated in Article 64, 65 (consists of 9 clauses) and 66 (consists of 4 clauses).

Article 64 is the basis of the enactment of outsourcing policy. It is stated that a company can handover some parts of the work to the other party through a written agreement of contractor or labor/worker service provider."

Article 65 contains several provisions including:

a. the handover of some parts of the work to another company is carried out through a written agreement of contractor or labor/worker service provider (clause 1);

the work handed over to the other party as implied in clause (1) has to fulfill the following prerequisites:
1) separated from the major activities;
2) conducted with direct or indirect order from the job provider or client company;
3) is completely a non-core activity in that company;
4) does not hinder the production process directly. (clause 2)

b. another company (the recipient) shall have legal entity (clause 3); work protection and prerequisites equal to the provider or in line with the provisions (clause 4);
c. a change or an addition to the aforementioned prerequisites is regulated in the Ministerial decision (clause 5);

d. the work implementation is regulated in a written agreement between the client company and the employed worker/labor (clause 6)

e. the work relationship between the client company and the employed worker/labor is based on the agreement of particular time or in a particular time (clause 7);

f. if some requirements are not fulfilled, e.g. the prerequisite related to the transferred work to the client company and the legal license of that company, the relation between the worker/labor with the service provider company becomes the relation between the worker/labor with the client company (clause 8).

Article 66 of Law Number 13 of 2003 regulates that workers/labors from the worker/labor service provider may not be employed by the job provider to conduct core activities or activities directly related to the production process except for a non-core service activities which are not directly related to the production process. Such provider has to fulfill several requirements including:

a. the work relationship between the worker/labor and the worker/labor service provider;

b. the prevailing contract between the worker/labor and the worker/labor service provider for a fixed or non-fixed time shall be written and signed by both parties;

c. the protection for remuneration, welfare, work requirements and disputes as the responsibility of labor/worker service provider;

d. the agreement between the labor/worker service provider and the client company shall be written.

The labor/worker service provider is a company with legal license and a permit from a legitimate manpower institution. If the above requirements are not fulfilled (except for the welfare protection), the legal status of work relationship between the worker/labor and the employee service provider becomes the work relationship between the worker/labor and the client company. Article 66 states that outsourcing is allowed for non-core activities and activities which are not directly related to the production process.

The mechanism to propose a license for the worker/labor service provider is operationally regulated in the decision of Manpower and Transmigration Ministry of Republic of Indonesia, No.Kep.101/Men/VI/2004 of 2004 (Kepmen 101/2003). However, this outsourcing regulation is deemed insufficient.

President Instruction Number 3 of 2006 regarding the investment climate policy states that outsourcing is one of the important factors that shall be seriously considered to attract investors to Indonesia. The serious consideration was actualized when the ministry of Manpower and Transmigration created a revision draft for Law Number 13 of 2003.

In this regard, outsourcing shall not be examined in the short term as the company's spending will be higher for the management fee. This application shall be considered for the long term starting from the career development of the employee, efficiency in the human resource department, organization, benefit, etc. The company can focus on the major business competence for a better performance in the market in that the supporting elements may be handed over to the other professional party. Unfortunately, this transfer creates some perplexing manpower issues.

Normatively regulated in the decision Number 27/PUU-IX/2011 on 17 January 2012, the Constitutional Court granted the proposal regulating manpower. It was decided that the phrase of “fixed-term contract of employment” on Article 65 Clause (7) and phrase “fixed-term contract for employment” in Article 66 Clause (2) of Law Number 13/2003 contradicted the 1945 Constitution and had no legal power. The content is exercised as long as the handover of protection rights for worker/labor is not required by the second or third party firms regardless the change in the outsourcing service provider.

The empirical argument addresses the fact that the worker/labor opposes outsourcing because of its disadvantageous impacts in terms of welfare and career development. Two arguments related to this issue are: **First,** regarding the contractor and outsourcing manpower that are confusingly mixed. The business process outsourcing is different with the manpower outsourcing for the jobs related to security, catering, transportation, etc as regulated in Law Number 13 of 2003. The first type is merely related to business matter in which the company transfers some of its works to the other party/company. So far, the transaction process is settled well and this is not the matter opposed by workers/labors. The system rejected by the workers/labors is the manpower outsourcing in which they are recruited by A company (as the worker/provider service provider) but shortly afterwards they work for B company as the client company. In this case, though the work order and place are in B, the remuneration comes from A company. Later, the A company receives management fee from B company as the payment for such recruitment and management of related workers/labors.

The rejection for this manpower outsourcing appears in two levels namely the opposition for the regulation and for the implementation. The first level occurred due to the various interpretations of manpower policies. Consequently, the use of outsourcing becomes wider, not only in five fields (security, catering, transportation, cleaning and mining) but also in the production area. In manufacturing industries, furthermore, the outsourcing workers/labors are also employed in the production stage. They work in the same place with the permanent employees and do the same job but their wage is lower due to their status as an outsourcing worker/labor. This is the case opposed by them. Meanwhile in the implementation level, the background issues of this opposition are because their wage is lower than the minimum standard in that the amount is sometimes reduced (regardless the existence of management fee) and they are excluded from social programs.

The other fact indicates that the manpower in Central Java also has similar characteristics with national as the labors/workers’ lack of bargaining position. The number of skilled labors who have that competence is very few. In fact, the job market is

currently dominated by unskilled labors with a low level of formal education. Data from the central statistics bureau in May 2012 showed that from 113.5 million working citizens (starting from 15 years old), 55.85 millions of them (49.27%) attended elementary education, 20.23 millions (17.85%) attended junior high school, 26.65 millions (23.51%) attended vocational/senior high school and only 10.62 millions (9.37%) had a diploma/bachelor qualification. This marginal majority (whose educational background is elementary or secondary) shall receive a protection from the state. For the time being, they are the ones who become the 'victims' of manpower outsourcing system.

The sociological argument demonstrates that Indonesian society with the cooperative, voluntary and communal culture frequently does not need a legal contract containing complicated procedures. Therefore, the state role to protect the manpower is profoundly necessary to reduce the threats of human exploitation.

2. The Accelerated Model of the Right to Work through the Harmonization of Policies Regulating Outsourcing Manpower after the Constitutional Court Decision Number 27/Puu-Ix/2011 on 17 January 2012 to Attain Substantive Justice.

The accelerated model of the right to work through the harmonization of manpower policies was analyzed using IRR model namely Integrative RIA (Regulatory Impact Assessment)-RegMap *(*Regulatory Mapping). This formulation which is based on RIA stages is initiated from the mapping of formulation vertically and horizontally. The prerequisites of IRR usage are:

a. IRR can be implemented if RegMap is effectively carried out by legislative body. The stakeholders formulating local regulation are Regional Representative Council (Legislative Body, Census Committee, BPLD) and qualified local governments demonstrating an academic competence, moral conduct, Pancasila character, and responsibility for the society.

b. The effective implementeation of IRR shall be supported by sufficient local spending and budget .

c. The awareness of the society in the formulation of local regulation can be effectively enhanced through social or religious organizations there as well as the regional professional associations.[2]

This IRR model is utilized to analyze the normative harmonization of policies vertically and horizontally which later is presented in the Academic Document as the basis of local regulation draft related to manpower in Central Java. According to Law Number 12 of 2011, the draft consists of five chapters taken from the legal research or study and other disciplines relevant to the content material made. This academic document will become the basis of formulation of local regulation concerning manpower.

The substantial context indicates that the legal relation of outsourcing provider and its client company is bonded by the cooperation contract when providing and managing labors/workers in particular fields. In this regard, the workers are placed in the client company. The employees signed a work contract with the outsourcing company as the basis of work relationship. In that agreement, the employees work through the harmonization of policies regulating outsourcing manpower.

An issue related to the placement of outsourcing employees emerges in this relationship. It is stated that they should obey the company regulation or joint work agreement in the outsourcing client company whereas the work relation between them is legally absence. Considerations underlying the obedience of employees to the job provider company are:

a. The workplace/location of the employees is in the job provider company;

b. The Standard Operational Procedures (SOP) or the working rules of the job provider company, stated in its regulation, shall be implemented by the employees;

c. The proof of employee obedience is on the Memorandum of Understanding between the outsourcing company and the job provider company in terms of employment norms, duration and rules. The benefit and additional remuneration are usually in line with the decision from the outsourcing company.

When an employee violated a rule, the client company does not have any authority for dispute reconciliation since the legal basis of such relation is absence. Therefore, the responsibility is burdened to the provider company though the violated rule is from the client company.

The rule of a company includes the right and responsibility between the company and the outsourcing employees. Both parties are tied to the previously agreed contract. In this case, the existing legal relation is between the outsourcing and the client company whereas the employees and the client company does not have any work relation directly in the agreement of certain or uncertain working period.

[2] Democratic Aspects in Formulating Local Regulation in the Socio-Legal Perspective Journal: legal issues. National Accreditation. Volume 41 N0.1, January. 2012. ISSN: 2086-2695.

If studied from the essence of rule implementation, the regulation from the client company could not be exercised for the outsourcing manpower due to the absence of employment relationship. On the other hand, the rule from an outsourcing company prevails for the outsourcing workers/labors.

The outsourcing employees placed in the client company, of course, shall obey the prevailing procedure and work ethic that company. The agreement between the provider and client company shall be clear in advance. In this case, the points stated in the rule of the client company shall not be fully implemented by the outsourcing employees since the benefit between the permanent and outsourcing employees are different. To avoid misunderstanding, the agreed contract shall be socialized to the outsourcing employees by the provider company. The purpose of such practice is to minimalize the demand of outsourcing workers/labors to be admitted as permanent employees due to the lack of information regarding the legal relation between the employees and the client company.

The misunderstanding had occurred in Ayodya Ltd, one of the providers of outsourcing employees for a project by the Ministry of Public Work. They questioned the continuation of their career and their monthly remuneration. It happened due to the lack of socialization concerning the employee's legal status with Ayodya Ltd as the provider of outsourcing workers/labors.

The reconciliation of dispute between the outsourcing employees with related parties is regulated in Article 66 clause (2) point c of Law Number 13 of 2003. As stated there, the responsibility is burdened to the outsourcing provider company. As a result, though the rule by the client company is violated by employees, the dispute reconciliation shall be initiated by the outsourcing provider company.

In this regard, the outsourcing provider shall fulfill their responsibility to accommodate the interests of the employees and the client company since the daily performance of the outsourcing workers/labors is recorded by the client. The provider is suggested to regularly delegate a representative to monitor the work of outsourcing employees in the client company in order to avoid conflicts and to supervise their performance.

What should be considered here is on the potential fields for an outsourcing system. The implementation shall refer to the Law Number 13 of 2003 concerning manpower. Therefore, the sectors that may be applied for outsourcing include security, transportation, catering and cleaning service as well as mining.

D. CLOSING

It can be concluded that the harmonization of manpower policies will be able to protect the worker/labor's constitutional right and the fulfillment of decent living standard through the accelerated model of IRR legislation. IRR was performed by the mechanism of academic document encompassing the composition of hilosophical, sociological, normative urgencies through scientific research in order to fulfill the need of society related to employment issues. Philosophically, the right to work is a human right mandated by 1945 Constitution. Sociologically, the employment relationship between the worker/labor and the capital owner shall be harmonious by prioritizing the equal position which is actualized in the proportional implementation of rights and duties. Judicially, a considerable number of articles in Law Number 13 of 2003 shall be implemented. The database indicates that empirically various human right violations have been committed during the implementation of manpower protection particularly under the ***outsourcing*** system. For example, the minimum wage standard was not paid, the productivity pressure was profoundly high with more than eight-hour-working time a day, the work safety was not guaranteed, an insurance mechanism was not provided and the continuation of working to support one's career was unfeasible. Ironically the workers were unable to identify the kind of violations they suffered due to their limited educational background, knowledge and economical dependency.

It is recommended to investigate the manpower issues through the composition of a academic document to enhance the formulation of a local regulation draft. The local government here is suggested to establish a partnership to conduct such legal research. The objective is to create a document that contains the regulation of the right to work and to receive decent living standard. The stakeholders initiating the outsourcing agreement should consider the separation of core business with non-core business in a written document composed by the management of such company. In its implementation, the contract in line with the legal framework should include the employment period and other related matters. The employees sign the contract with the outsourcing provider company to be placed in the client company. During the placement, furthermore, they shall obey the procedures in the outsourcing provider company in that the scheme is included in the employment contract. The emerging disputes related to manpower shall be reconciled internally between the outsourcing provider and the client company in which the provider shall conduct regular meetings with the employees to discuss manpower issues occurred during the implementation of such outsourcing.

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