

Transfer of Undertaking Protection of Employment: Ideas and Praxis

Syahwal ✉

Faculty of Law, Universitas Negeri Semarang, Indonesia

Rofi Wahanisa

Faculty of Law, Universitas Negeri Semarang, Indonesia

Septian Eka Adiyatma

Faculty of Law, Universitas Negeri Semarang, Indonesia

Alleandria La Graha

Faculty of Law, Universitas Negeri Semarang, Indonesia

✉ Corresponding email: syahwal@mail.unnes.ac.id

Abstract

The discussion in this article departs from the issues about the continuity of work of outsourced workers who are trying to be protected by the principle of Transfer of Undertaking Protection of Employment. The articles were prepared non-doctrinally in order to address the issue by incorporating outsourced workers by using the interview method and the statute approach. As a result, the TUPE principle failed to

provide protection to outsourced workers. Which failure results from the practice of terminating the work agreement when the contract of business cooperation ends. Furthermore, the protection of the continuity of work for outsourced workers is based only on the moral obligations of the new outsourcing company. Based on the causes of this failure, the development of labour law must impose legal obligations on new outsourcing companies by incorporating the TUPE clause into the contract of business cooperation between the outsourcing company and the user company.

Keywords

Outsourcing; Continuity of work; Neoliberalism.

I. Introduction

The decade of the 1970s, accompanied by the neoliberal revolution following the crisis that occurred at that time. This decade was the decade in which the country redesigned the economic system by breaking away from efforts to regulate the market.¹ Withdrawal from the market is believed to be an antidote to the current crisis, of course the medicine provided by neoliberalism. As a result, the labor market becomes flexible. The state no longer intervenes in the relationship between workers and employers, as long as state intervention is deemed unprofitable for capital and the flexibility of the labor market, then such intervention must be prevented or limited.

¹ Guy Standing, "Globalization, Labour Flexibility and Insecurity: The Era of Market Regulation," *European Journal of Industrial Relations* 3, no. 7 (1997), 12; Thomas I Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, dalam Alfredo Saad-Filho dan Deborah Johnston (ed.), *Neoliberalism: A Critical Reader*, (London: Pluto Press, 2005), 21; Rajesh Venugopal, "Neoliberalism as Concept," *Economy and Society* 44, no. 2 (2015), 165-187.

The state's withdrawal from the market is not immediate, the state must provide an institutional framework that will support a flexible labor market. Therefore, the state reorganized the labor market to adopt the ideas of neoliberalism.² must have a place in the policies taken by the state in line with the state's acceptance of neoliberalism. Ultimately, the ideas brought about by neoliberalism manifest themselves in labor law. Not without reason, labor law has long been considered a variable that hinders the creation of flexibility in the labor market. Labor law then experienced deregulation and reregulation, to the extent that changes in labor law were deemed capable of creating the flexibility needed by capital.

Changes in labor law to create a flexible labor market have led to the proliferation of non-standard employment relationships, as one of the flexibility features available in the labor market. One form of non-standard work relationship that is widely used is outsourcing work relations (in other works, this relationship is also called triangular employment relationship) which is seen as one of the steps that can be taken by investors to reduce labor costs and gain profits.³ Workers are hired when production increases, and dismissed when production decreases without any obligations to fulfill various rights arising from the termination of the employment relationship.

The ease with which outsourced workers lose their jobs shows the vulnerability of outsourced workers in terms of the certainty and security of their job continuity. For this reason, the workers submitted a petition to the Constitutional Court arguing that the outsourcing work relationship - especially the work relationship resulting from a certain time work agreement - had violated the constitutional rights of the outsourced workers, especially the right to work. Regarding this petition, the Constitutional Court decided that the use of outsourcing

² Andrew Herod dan Rob Lambert, *Neoliberalism, Precarious Work and Remaking the Geography of Global Capitalism*, dalam Rob Lambert dan Andrew Herod (ed.), *Neoliberal Capitalism and Precarious Work: Ethnographies of Accommodation and Resistance*, (UK: Edward Elgar, 2016), 25; David Harvey, *A Brief History of Neoliberalism*, (New York: Oxford University Press, 2005), 14-31.

³ Ronald Janssen, *Precarious Work Makes for a Precarious Recovery*, dalam Nicolas Pons-Vignon (ed.), *There is An Alternative: Economic Policies and Labour Strategies Beyond the Mainstream*, (Geneva: International Labour Office, 2011), 112.

work relationships was considered unconstitutional as long as it was not based on a work agreement for an indefinite period of time or a work agreement for a certain time which contained a clause on the transfer of protection for outsourced workers when there was a change in outsourcing company. The latter is referred to as the principle of transfer of undertaking protection of employment (hereinafter written as TUPE).

The development of discourse regarding TUPE principles in labor law in Indonesia shows that the study of TUPE principles is often carried out doctrinally by examining the inclusion of TUPE principles in the Indonesian labor law framework.⁴ A study that complements the widespread doctrinal assessment was carried out by Sudiarawan⁵ who assessed the variables inhibiting the implementation of TUPE principles using the perspective of company experience. Based on previous TUPE principle research, it appears that this article has a position as a complement to existing discourse. This article does not merely look at the Indonesian labor law framework related to TUPE principles, but also complements it with the real situation of TUPE principles based on the experience of outsourced workers.

Departing from the matters above, this article formulates

⁴ Previous research examining the TUPE principles doctrinally can be seen in: Pratama Herry Herlambang, "Implementation on Transfer of Undertaking Protection of Employment to Outsourcing Labors in Semarang Indonesia: A Legal Approach," *Journal of Indonesian Legal Studies* 3, no. 1 (2018): 109-130; Suyoko dan Mohammad Guhron AZ, "Tinjauan Yuridis terhadap Sistem Alih Daya (Outsourcing) pada Pekerja di Indonesia [Juridical Review of the Outsourcing System for Workers in Indonesia]," *Jurnal Cakrawala Hukum* 12, no. 1 (2020): 99-109; Imam Buchari, "Implikasi Prinsip Transfer of Undertaking Protection of Employment (TUPE) terhadap Hak-Hak Pekerja Berstatus Perjanjian Kerja Waktu Tertentu (PKWT) [Implications of the Principle of Transfer of Undertaking Protection of Employment (TUPE) on the Rights of Workers with Fixed Time Work Agreement (PKWT) Status]," *Jurnal Ilmu Hukum Khyadiren* 1, no. 2 (2020): 166-177.

⁵ Kadek Agus Sudiarawan, "Pengaturan Prinsip Transfer of Undertaking Protection of Employment (TUPE) dalam Dunia Ketenagakerjaan Indonesia: Di Antara Potensi dan Hambatan [Setting the Principles of Transfer of Undertaking Protection of Employment (TUPE) in the World of Indonesian Employment: Between Potentials and Obstacles]," *Jurnal Magister Hukum Udayana* 4, no. 4 (2015): 796-804.

problems related to how to apply the TUPE principles in providing protection for outsourced workers? Starting from the formulation of the problem, this article focuses on examining the objectives of the inception of the TUPE principle and the reality of implementing the TUPE principle from the perspective of protecting outsourced workers for the continuity of their work. It is hoped that this article will have significance in discourse and efforts to provide protection for continued employment for outsourced workers.

II. Method

Based on the problem formulated, this research was carried out in a non-doctrinal manner. In short, non-doctrinal research is research that does not place law in a room with closed logic. Therefore, this research will involve the experiences of outsourcing workers when encountering TUPE principles. There are at least three outsourced workers whose experiences will be the subject of discussion in this research. Even though it was conducted in a non-doctrinal manner, this research does not necessarily leave the law behind. This research, however, still utilizes legal regulations to examine and explore the normative framework of TUPE principles.⁶

The data obtained was analyzed qualitatively, the implication being that the analysis process had started since data collection was carried out.⁷ The results of the analysis are explained descriptively through a series of problem solving sentences.

⁶ Irwansyah, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel [Legal Research: Choice of Article Writing Methods & Practices]*, (Yogyakarta: Mirra Buana Media, 2020), 120.

⁷ Sulistyowati Irianto, *Praktik Penelitian Hukum: Perspektif Sosiolegal [Legal Research Practice: Sociolegal Perspectives]*, in Sulistyowati Irianto dan Sidharta (ed.), *Metode Penelitian Hukum: Konstelasi dan Refleksi [Legal Research Methods: Constellations and Reflections]*, (Jakarta: Yayasan Pustaka Obor Indonesia, 2013), 310.

III. Legal Framework of Outsourcing in Indonesia

In the period 1997-1998, Indonesia under the authoritarianism of the New Order experienced a crisis which resulted in the collapse of Soeharto's throne after sitting for more than 3 (three) decades.⁸ A momentum of downfall called the Reformation. Apart from undermining Soeharto's throne of power, the Reformation also undermined the character of Indonesian labor law. New Order era labor law was a labor law with a corporatist character with strong state support, which then shifted towards labor law that relied on ideas under the big agenda of neoliberalism.⁹

Law Number 13 of 2003 on Manpower then emerged as a legal product in the field of labor law which will regulate and direct the course of labor-employer relations in Indonesia. The most important content that comes along with the presence of the Law No. 13 of 2003 is the provision of juridical legitimacy to outsourcing employment relationships which also marks an era in which the neoliberalization program of Indonesian labor law begins to roll out.¹⁰ The Law No. 13 of 2003 is the first formal umbrella that provides juridical legitimacy to outsourcing work relationships, after previously similar practices only grew as a business practice.¹¹

Please note that an outsourcing work relationship is a work relationship that deviates from standard work relations. This relationship only involves two parties, namely the worker and the employer. In contrast to that, the outsourcing work relationship

⁸ Surya Tjandra, "Understanding Workers' Law Reform in Indonesia 1998-2004," *Labour and Management in Development* 9, (2008), 9.

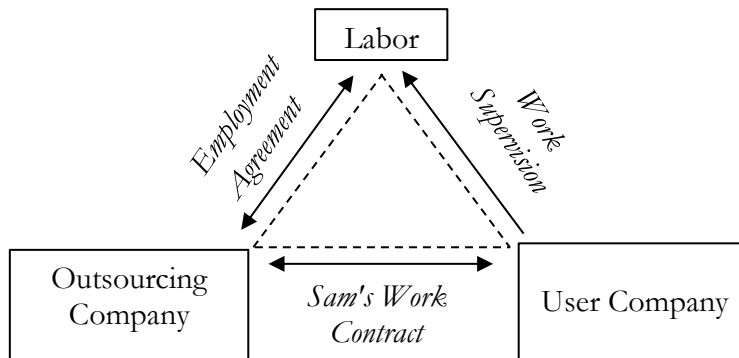
⁹ *Ibid.*

¹⁰ Jafar Suryomenggolo, "Labour, Politics, and the Law: A Legal-Political Analysis of Indonesia's Labour Law Reform Program," *Labour and Management in Development* 9, (2008), 5; The outsourcing work relationship can be found in the provisions of Article 64 which states "*a company can hand over part of the work implementation to another company through a work contracting agreement or worker/labor service provider made in writing.*"

¹¹ Ari Hernawan, "Hukum dan Kekuasaan dalam Hubungan Industrial [Law and Power in Industrial Relations]," *Jurnal Mimbar Hukum*, Edisi Khusus (2011), 92.

involves 3 (three) parties, namely the outsourcing company, the user company, and the outsourcing workers. Outsourcing companies are companies that are involved in legal relations with outsourced workers, while user companies are not involved in any legal relations with outsourced workers but are bound by business contracts with outsourcing companies. The legal framework in outsourcing work relationships is presented in the image below.

Figure 1. Legal Framework for Outsourcing Work Relations



Source: Processed by the Author from various sources.

Based on Figure 1, it can be understood that an outsourcing work relationship is a work relationship that intrinsically involves three parties who are related to each other. These parties are workers, outsourcing companies, and user companies. This then shows the deviation of the outsourcing work relationship from the standard work relationship, so that it is recognized as a form of non-standard work relationship. Furthermore, the construction of the outsourcing work relationship shows that in the outsourcing work relationship there are two forms of legal relationship. The first legal relationship is established between outsourced workers and outsourcing companies which arises from the existence of a work agreement. The second legal relationship is the legal relationship between the outsourcing company and the user company, which arises from a cooperation contract between the outsourcing company and the user company.

There are various forms of non-standard work relationships, outsourcing work relationships being the most widely used work

relationship. Not without reason, its use can reduce company costs that must be spent on labor costs. However, an outsourcing employment relationship is recognized as an employment relationship in which the company can change working conditions and circumvent the law so that it can be freed from some of the obligations to fulfill labor rights.¹² So it is understandable when workers in outsourcing work relationships find themselves losing various rights.

Despite the force majeure conditions encountered by outsourced workers, the national legislative program does not actually highlight them. This can be seen when the state 'diligently' legitimizes and perpetuates the legitimacy of legal products that are touted for creating jobs, namely Law Number 6 of 2023 on Job Creation. In it, outsourcing arrangements were changed, because the rigidity contained in previous labor law regulations was suspected to be a stumbling block for investors to invest their capital in Indonesia.¹³ As a result of this paradigm, the regulations regarding outsourcing work relations in Law No. 6 of 2023 are more flexible compared to Law No. 13 of 2013.

The Job Creation Law once wavered, after Constitutional Court Decision Number 91/PUU-XVIII/2020, the Constitutional Court declared the Job Creation Law conditionally unconstitutional. The court decision is seen as delegitimizing the Job Creation Law, although formally it must be acknowledged that the Job Creation Law is still legitimate because the Constitutional Court did not cancel the juridical legitimacy of the Job Creation Law. After the Constitutional Court Decision Number 91/PUU-XVIII/2020, doubts were formed about the legitimacy of the Job Creation Law, on the one hand there are groups who view the Job Creation Law as no longer legitimate, while on the

¹² Melisa R Serrano, *From Standard to Non-Standard Employment: The Changing Patterns of Work*, dalam Melisa R Serrano, *Between Flexibility and Security: The Rise of Non-Standard Employment in Selected Asean Countries*, (Jakarta: ASEAN Services Employees Trade Unions Council, 2014), 23.

¹³ United Nations Committee on Economic, Social and Cultural Rights, *Second Periodic Report Submitted by Indonesia Under Articles 16 and 17 of the Covenant, due in 2019*, 30 Juli 2021, E/C.12/IDN/2, par. 82; Kementerian Koordinator Bidang Perekonomian Republik Indonesia, "Naskah Akademik Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja", diakses melalui laman <https://uu-ciptakerja.go.id/naskah-akademis-ruu-tentang-cipta-kerja/>, pada tanggal 8/11/2022, 116.

other hand, there are groups who view the Job Creation Law as still having legitimacy.

The government quickly responded to doubts regarding the legitimacy of the Job Creation Law by issuing a Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation. Alacrity under the pretext of the need for legal certainty, however, capital requires certain laws. The series of state movements against Job Creation shows the state's efforts to strengthen the legitimacy of the Job Creation Law, after previously faltering. The Job Creation Perppu was later legitimized into Law Number 6 of 2023. The law indeed reactivated Article 64 of the Law No. 13 of 2003 on Manpower. However, only to answer doubts about the legitimacy of outsourcing after Article 64 of the Manpower Law was abolished in Law Number 11 of 2020 on Job Creation.

IV. The Ideas of Tupe

It has been reviewed that outsourced workers are faced with vulnerabilities. This review is in line with research by Broughton et.al¹⁴ which shows the vulnerability of workers who are tied to triangular work relationships - including outsourcing work relations. Vulnerabilities include low wages, lack of rights to carry out collective bargaining, and minimal prospects for career development. This was also acknowledged by the Singapore Federation of Workers' Unions, which in its petition to the Constitutional Court stated that there were no guarantees for outsourced workers to work and get decent jobs.¹⁵ Workers who work in outsourcing work relationships have a much lower guarantee of continued employment when compared to workers who work in jobs with standard work relations. It cannot be separated from the fact that outsourced workers are workers who are born in line with the flexibility

¹⁴ Broughton et.al, *Precarious Employment in Europe Part 1: Patterns, Trends, and Policy Strategy*, (Brussels: European Parliament. Directorate-General for Internal Policies, 2016), 16-8.

¹⁵ See the Constitutional Court Decision No. 87/PUU-XVIII/2020 on Judicial Review of Law No. 11 of 2020 on Job Creation against The 1945 Constitution of the Republic of Indonesia, 03 November 2021, 10 and 50.

of the labor market, so that outsourced workers have to face the fact that their work is often adjusted to the company's production needs.¹⁶

Outsourced workers as workers born in line with the presence of the flexible labor market bring flexibility characteristics to themselves. As a result, outsourced workers often end their employment relationship because outsourced workers offer numerical flexibility to the company.¹⁷ The numerical flexibility contained in outsourcing workers is exploited by outsourcing companies to reap profits. The company then easily terminates the employment relationship of outsourced workers without having to think about a number of rights that must be fulfilled as a result of the end or termination of the employment relationship. This situation shows the absence of guarantees and protection for outsourced workers regarding the continuity of their work.

The series of vulnerabilities experienced by outsourced workers must be seen as a result of the state's acceptance - albeit vague - of the idea of neoliberalism.¹⁸ The state has a tendency to avoid assumptions that question its acceptance of the ideas of neoliberalism. Despite the state's resistance, a vague acceptance can be seen of the growth of the informal economy and the perpetuation of new forms of employment relations that either exclude workers from the scope of labor protections provided by law or employment relationships that cause employers to become opaque, as in triangular employment relationships.

The vulnerability of job continuity for outsourced workers is one of the essential features of outsourcing work relationships. Supporters of outsourcing work relationships often deny this essential feature and view it as a bridge through which workers can get work with a more

¹⁶ The flexibility provided by the flexible labor market has allowed companies to adjust the jobs within the company, along with the workers who will work on the jobs provided. This adjustment is based on the company's needs, both from production processes that can increase or decrease as well as new conditions that arise in the market. See further in: Eleni Rompoti, et.al, "Employment Flexibility and Industrial Relations Reforms in Greece of Memoranda," *E-Journal of International and Comparative Labour Studies* 11, no. 2 (2022), 43-44.

¹⁷ Celia Stanworth dan Janet Druker, "Dimensions of Employers' Use of Temporary Agency Labour in the UK," *Personnel Review* 35, no. 2 (2006), 176.

¹⁸ Guy Davidov and Brian Langille, *Boundaries and Frontiers of Labour Law (Goals and Means in the Regulation of Work)*, (Oregon: Hart Publishing, 2006), 11.

stable and permanent work relationship.¹⁹ The existing facts negate that voice. Voices that promote outsourcing work relationships as a bridge to stable and permanent work relations have become voices that cover up the noisy pursuit of profits by reducing workers' rights. Companies can increase or decrease the quantity of workers employed in line with fluctuating company needs.²⁰ Apart from that, studies in the field show that outsourcing work relationships are not a bridge connecting outsourced workers to a stable and permanent work relationship,²¹ but rather a trapping bridge that makes workers trapped and trapped in outsourcing work relationships for a long time without any guarantee of continued employment.

Outsourced workers' awareness of the threat that outsourcing work relationships pose to the continuity of their work is the reason for outsourced workers to carry out an examination of Article 59, Article 64, Article 66 and Article 66 of the Manpower Law. Outsourced workers understand very well that outsourcing work relationships that are established through fixed-term work agreements result in a lack of security and certainty of continuity of work for outsourced workers.²²

Regarding the threat to continuity of employment for outsourced workers, the Constitutional Court in Constitutional Court Decision Number 27/PUU-IX/2011 proposed two models for implementing outsourcing work relations in Indonesia so that outsourced work relations can continue to guarantee the right to continuity of work for

¹⁹ Berndt Keller dan Hartmut Seifert, "Atypical Employment and Flexicurity," *Management Review* 16, no. 3 (2005), hlm. 317; Chris Forde, "Temporary Arrangements: The Activities of Employment Agencies in the UK," *Work, Employment, & Society* 15, no. 3 (2001), 637.

²⁰ Susan N Houseman, "Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey," *Industrial and Labour Relations Review* 55, no. 1 (2001), 155; Susan N Houseman, Arne L Kalleberg, dan George A Erickcek, "The Role of Temporary Agency Employment in Tight Labor Markets," *Industrial and Labour Relations Review* 57, no. 1 (2003), 106-11; Arne L Kalleberg, "NonStandard Employment Relations: Part-time, Temporary and Contract Work," *Annual Review of Sociology* 26, (2000), 347.

²¹ Read further in: Joakim Hveem, "Are Temporary Work Agencies Stepping Stones into Regular Employment?," *IZA Journal of Migration* 21, no. 2 (2013): 1-27.

²² See Constitutional Court Decision No. 27/PUU-IX/2011 on Judicial Review of the Law No. 13 of 2003 on Manpower against The 1945 Constitution of the Republic of Indonesia, 17 Januari 2011, 7.

outsourced workers. One of the two models of protection for outsourced workers is a guarantee of transfer of protection measures for outsourced workers who have labor status with a certain term work agreement when there is a change in outsourcing company.

The form of protection for outsourced workers with transfer of protection measures offered by the Constitutional Court is the most likely model - if and only if the company is determined to fulfill the right to continued employment of outsourced workers - used by outsourcing companies. Why is that, because the first model with an indefinite work agreement, *nolen volens*, forces outsourcing companies to be permanently bound to workers, which means the rights of outsourced workers are better. In fact, in the company's view, labor rights are production costs that must be minimized and reduced in order to reap profits.

This argument is based on a conflict of interest between workers and companies. It cannot be ruled out, the assumption that the profits obtained by companies (read: capitalists) originate from the exploitation of workers by capitalists, as the expression "*the rate of surplus value is therefore an exact expression for the degree of exploitation of labor power by capital, or of the laborer by the capitalist*".²³ Company profits are obtained from actions to minimize and suppress labor rights to the minimum level. Marx confrontationally stated that capital is dead labor, like a vampire that lives by sucking living labor. The more capital lives, the more labor is exploited.²⁴

In principle, the use of an outsourcing work relationship with an indefinite work agreement will also deny the doctrine of flexibility that is upheld by the company. It becomes clear that outsourcing companies will avoid using employment relationships with indefinite work agreements. However, short time periods and the absence of guarantees of continued employment for workers are a source of benefits, such as the right to wages calculated based on the length of work.

²³ Karl Marx, *Capital I*, (London: Lawrence & Wishart, 2010), 227.

²⁴ *Ibid*, hlm. 241.

TUPE can simply be interpreted as a change in ownership of a business entity or certain business activities.²⁵ In the context of an outsourcing employment relationship, TUPE is applied when there is a replacement of the outsourcing company that has established a legal relationship with the user company. TUPE seeks to protect the continued employment of agency workers. Protects outsourced workers from unfair employment termination practices and aims to protect outsourced workers from arbitrariness by employers. When there is a change in an outsourcing company, outsourcing workers face the risk of not getting a job because the outsourcing company no longer has work to do. Based on TUPE principles, when the cooperation contract ends and there is a change of outsourcing company, the new outsourcing company must accept outsourcing workers.²⁶ This effort shows that the TUPE principle seeks to protect outsourced workers' rights to continue their work.

Apart from trying to protect outsourced workers from uncertainty and insecurity regarding the continuity of employment, the TUPE principle also seeks to protect the rights of outsourced workers, especially in the field of welfare. As the Constitutional Court emphasized, new outsourcing companies must provide workers' rights by taking into account the length of service as long as the work exists and continues. New outsourcing companies are also prohibited from making changes to the work conditions, rights and obligations of workers as stated in the previous work agreement, as long as they increase profits for outsourced workers.²⁷ In the discourse, several types of rights possessed by workers are determined based on length of service. For example, the rights in question consist of the right to wages, work benefits, as well as the right to social security. Therefore, the TUPE principle also protects the length of work that outsourcing workers have had and is still taken into account so that outsourcing workers are not considered or treated like new workers.²⁸

²⁵ Fang Lee Cooke et.al, "For Better and For Worse: Transfer of Undertakings and the Reshaping of Employment Relations," *International Journal of Human Resource Management*, 15, 2 (2004), 277-278.

²⁶ See in: Constitutional Court Decision No. 27/PUU-IX/2011, *op.cit*, 44-45.

²⁷ *Ibid.*

²⁸ *Ibid.*

V. Employment Agreements vs. Cooperation Contracts: The TUPE Clause Dilemma

Constitutional Court Decision Number 27/PUU-IX/2011, is often seen as a pioneer of the TUPE principle in its efforts to provide protection for outsourced workers. However, in Indonesian labor law, the true pattern of TUPE principles can be found in the provisions of Article 4 (c) of the Decree of the Minister of Manpower and Transmigration of the Republic of Indonesia Number: Kep.101/MEN/VI/2004 on Procedures for Licensing Companies Providing Worker/Labor Services (hereinafter written as Kepmenakertrans 101/2004). The provisions of the article that mentioned stipulate that when an outsourcing company gets work from a user company, the cooperation contract between the outsourcing company and the user company must contain an affirmation that the outsourcing company is willing to accept outsourced workers from the previous outsourcing company for the types of work that are continuously available at the user company.

Constitutional Court Decision Number 27/PUU-IX/2011 confirms the concept of TUPE as a clause that must be included in the agreement. What is left behind and forgotten about the court decision is that it does not include an explanation regarding which agreements will be burdened with the requirement to contain a clause on the transfer of protection for outsourced workers. This question becomes important when examining the legal framework for outsourcing work relations, which contains two agreements, namely the work agreement between outsourced workers and outsourcing company and the second agreement is a cooperation contract between the user company and the outsourcing company.

The question above was answered in the Circular Letter of the Director General of Industrial Relations Development and Social Security for Workers, Ministry of Manpower and Transmigration of the Republic of Indonesia Number: B. 31/PHIJSK/I/2012 concerning Implementation of the Decision of the Constitutional Court Number 27/PUU-IX/2011. Based on the a quo circular letter, outsourcing work relationships originating from a fixed-term work agreement must

contain a transfer clause for the protection of the rights of outsourced workers. It is clear then that the agreement which is burdened with the obligation to contain a transfer clause for the protection of outsourced workers is the work agreement between the outsourced worker and the outsourcing company.

Different things are stated in the Minister of Manpower and Transmigration Regulation Number 19 of 2012 concerning Conditions for Handing Over Part of Work Implementation to Another Company (hereinafter written as *Permenakertrans 19/2012*). Through the provisions of Article 19 letter b in conjunction with Article 32 paragraph (1), a clause on the transfer of protection for outsourced workers must be included in the cooperation contract. Which clause requires the new outsourcing company to accept outsourcing workers from the old outsourcing company if the work is still available.

Not only that, through the provisions of Article 32 paragraph (2), *Permenakertrans 19/2012* also includes protection for outsourced workers for their work period. Which protection is another dimension of the TUPE principle that was removed from the Constitutional Court Decision Number 27/PUU-IX/2011. Based on the provisions of the a quo article, the new outsourcing company is required to continue to consider and take into account the work period that the outsourcing workers have completed at the old outsourcing company. The implication is that when an outsourcing company will provide outsourced workers' rights which are calculated based on years of work, then the work period that has been completed becomes the basis for the calculation.

The reversal carried out by *Permenakertrans 19/2012* lasted for a long time. Until 2020, through the provisions of Article 81 Number 20 of the Job Creation Law which changed the provisions of Article 66 paragraph (3) of the Employment Law in conjunction with Article 19 paragraph (1) of Government Regulation Number 35 of 2021 concerning Specific Time Work Agreements, Outsourcing, Working Time and Rest Time and Termination of Employment (hereinafter written in *PP 35/2021*), a clause on the transfer of protection for outsourced workers must be included in the work agreement. The a quo provisions stipulate that when an outsourcing company employs workers based on a work agreement for a certain period of time, the

work agreement must contain a clause that requires the transfer of protection of rights for workers when the outsourcing company changes and as long as the object of work remains. The provisions regarding the transfer of protection clause for outsourced workers are repeated in Article 81 Number 20 of the Job Creation Law.

VI. Praxis of Tupe: Discovering the Failure of TUPE

TUPE requires new outsourcing companies to accept workers from old outsourcing companies. However, based on the previous review, TUPE is not applied *mutatis mutandis* with the change of outsourcing company. Slipping into TUPE, it is revealed that there are two preconditions for the implementation of TUPE. The preconditions include that the agreed work still exists at the user company and the outsourcing worker is still bound by an employment relationship with the old outsourcing company.

As an illustration, outsourcing company A has an employment relationship with outsourced workers through a fixed-term employment agreement for a period of three (3) years. In the second year of implementing the employment relationship, the user company where the outsourced worker works no longer uses outsourcing company A and replaces it with outsourcing company B. Based on TUPE principles, outsourcing company B is required to continue the remaining employment relationship without any changes to the terms of employment, rights and obligations for the parties as long as the changes do not bring benefits to outsourced workers. Based on this illustration, two conditions for the application of the TUPE principle are met. That the work agreed upon is still available and the outsourcing worker still has the remaining term of the work agreement with the old outsourcing company.

In practice, the TUPE principle often fails to provide protection for the continuity of employment for outsourced workers. The meaning of TUPE in terms of the transfer of protection for workers often raises

questions, such as whether the work agreement and the labor rights in it that the worker enjoyed from the old employer must be fulfilled by the new employer, who may not intend to use the worker in question again. Doubts about the TUPE principle were conceptually supplemented by Sudiarawan²⁹ through his research which revealed that the old outsourcing company did not have the power to intervene with the new outsourcing company when the new outsourcing company was not willing to accept outsourced workers and continued the existing work agreement between the outsourced workers and the old outsourcing company.

These discourses show that principles involve the possibility of failure. This is inseparable from the failure to fulfill the preconditions required by TUPE. In practice, labor relations with outsourcing companies are based on a specific work agreement with a term adjusted to the cooperation contract between the outsourcing company and the user company. For example, outsourced workers are bound by a work agreement for a very short period of time, namely 1 (one) year and continues to be extended for a short period of time, namely 1 (one) year.³⁰ This practice implies that workers work for short periods of time but with a long total working period. As outsourced workers have worked for a total of 2 (two) years and 9 (nine) months,³¹ 4 (four) years 7 (seven) months, and 4 (four) years 6 (six) months.

Empirical facts reveal that the reason behind the use of a fixed-term work agreement for a period of 1 (one) year as well as an extension is because the term of the outsourcing work agreement is adjusted to the cooperation contract between the outsourcing company and the user company. In short, when the cooperation contract ends, *mutatis mutandis*, the work agreement also ends. Such conditions are the cause of the failure of outsourced workers to fulfill the preconditions required by TUPE.

Apart from adjusting the term of the outsourcing work agreement to the cooperation contract, it was also revealed that there was a 'tyrannical' clause in the work agreement. This clause gives the

²⁹ Kadek Agus Sudiarawan, *op.cit.*, 802.

³⁰ Data obtained from interviews with outsourcing workers 1 on December 16 2022.

³¹ Data obtained from interviews with outsourcing workers 2 on December 16 2022.

outsourcing company the right to terminate the outsourcing work agreement at any time if the cooperation contract between the outsourcing company and the user company also ends. The 'tyrannical' clause in the employment agreement reads; "The first party - the outsourcing company - can terminate the work agreement before the expiration date if the cooperation contract between the outsourcing company and the user company ends." Based on this clause, it appears that the company has enormous authority to terminate the employment agreement immediately after the cooperation contract ends.

Adjusting the term of the work agreement with the cooperation contract as well as the presence of 'tyrannical' clauses very clearly leads to one result, namely the end of the work agreement when the cooperation contract ends. The expiration of the employment agreement clearly means that the TUPE principle cannot be applied, because the TUPE preconditions require that the employment agreement continue to exist. In the end, outsourced workers wallow in insecurity and uncertainty about the continuity of their work. If examined closely, these two reasons are what caused TUPE to fail in its efforts to protect outsourced workers.

In line with this, the Constitutional Court has vaguely interpreted the possibility of a practice of denying the implementation of TUPE. Therefore, the Constitutional Court complements the TUPE principles by giving workers the right to file a lawsuit if the TUPE principles are not implemented by the company. The Constitutional Court in its decision emphasized that the company's failure to implement the TUPE principles means that outsourced workers have the right to file a lawsuit with the industrial relations court regarding rights disputes.

Suppose then that the outsourced worker is able to prove the loss of the right to continued employment and the lawsuit is granted. So the fulfillment of workers' rights must be carried out by outsourcing companies. The question is, which outsourcing company is obliged to fulfill these rights. Is the old outsourcing company required to fulfill or reimburse a number of costs to outsourced workers or is the new outsourcing company declared obliged to fulfill workers' rights?

Trust in the courts as a medium for workers' struggle cannot be taken for granted. However, the courts are often not the last shield for workers. The court is an ideological battleground that can support

workers or overthrow workers.³² Labour's fallout in court stemmed from the court's reluctance to apply TUPE principles. As is clear in Decision Number 23/Pdt.Sus-PHI/2017/PN.Sby ju. Decision Number 290 K/Pdt.Sus-PHI/2018. The panel of judges at the Supreme Court decided not to apply the TUPE principle on the basis that the employment relationship between the old outsourcing company and the outsourcing workers had ended before the user company replaced the outsourcing company.

Speaking formally, the court decision does not contain any questions. That TUPE requires two preconditions with the provision that failure to fulfill one precondition means TUPE cannot be applied. It appears that the safety net provided by the Constitutional Court is not enough to force companies to fulfill their obligations to protect the continued employment of outsourced workers.

The next thing that is suspected to be the cause of the failure of the TUPE principle is the requirement to include a transfer of worker protection clause in certain-term work agreements. The placement of labor protection transfer clauses in work agreements is questionable because the protection of outsourced workers expected from labor protection transfer clauses emphasizes the important role of new outsourcing companies.

Questions arise when looking into contract law. That the agreement is binding according to law only for the parties who make it. Then it became clear that the transfer of worker protection clause does not bind new outsourcing companies but only binds workers to the old outsourcing company.

Complementing this, in the law of engagement there is a principle of personality which is contained in the provisions of Article 1315 BW; "In general, a person cannot enter into an agreement or agreement other than for himself." It is reiterated in Article 1340 BW that "an agreement is only valid between the parties who make it. An agreement cannot bring losses to third parties; third parties cannot benefit from it other than in the cases regulated in article 1317." The provisions in the BW

³² Syahwal Syahwal, "Paradigm of Application of the No Work No Pay Principle in Determining Process Wages," *Jurnal Penelitian Hukum de Jure* 23, no. 2 (2023), 179-192.

show that the new outsourcing company is legally not bound by the transfer clause for protection for outsourced workers.

The exception mentioned in Article 1340 BW is contained in Article 1317 BW which regulates that an agreement can be made for the benefit of a third party, if an agreement made for oneself, or a gift to another person, contains such a condition. Agreements for the benefit of third parties as regulated in Article 1317 BW must fulfill at least 2 (two) conditions, namely the purpose of the agreement between the stipulator and the promisor must be to create independent claim rights for the third party and the next condition is that the third party's rights must be combined with a right that promised by the stipulator to himself, or by gift from the stipulator to the promisor.

Based on the terms of the agreement for the benefit of the third party, the transfer clause for the protection of outsourced workers in the work agreement between the outsourced worker and the old outsourcing company does not include an agreement for the benefit of the third party. The implication is that the new outsourcing company is not legally obliged to provide protection as sought by the TUPE principles.

The employment law framework which only requires TUPE clauses to be included in employment agreements, creates an untouched empty space, which creates a loophole for outsourcing companies not to comply with TUPE clauses. It is not surprising that the failure of TUPE is often due to the failure of TUPE principles to be transplanted into law.³³ Complementing this, the absence of an obligation for new outsourcing companies to comply with the TUPE clauses, moreover the invalidity of old work agreements for new outsourcing companies, means that the application of TUPE principles only relies on the basis of mere morality.

The question then becomes whether the new outsourcing company will have this sense of morality or whether the new outsourcing company will have certain standards of morality which actually legitimizes its actions in ignoring the protection of job

³³ Trevor Colling, *Tendering and Outsourcing: Working in the Contract State?*, dalam Susan Corby dan Geoff White (eds.), *Employee Relations in the Public Services: Themes and Issues*, (London: Routledge, 1999), 138.

continuity for outsourced workers. This question will be the subject of further explanation in the next sub-discussion.

VII. Hegemony of Neoliberalism and The Illusions of Morality in TUPE

The TUPE principle can be said to hide behind the snare of morality. As legal norms stipulate that TUPE clauses are included in employment agreements, they are not binding for new outsourcing companies. The implication is that, formally and legally, the new outsourcing company has no obligation to comply with the TUPE clauses contained in the employment agreement. Therefore, the implementation of TUPE will only rely on the 'big heart' of the new outsourcing company. Even though this is not the case, TUPE fails to protect workers.

In legal philosophy, the question of morality has become an open field. Kant had questioned the distinction between obligations born of law and obligations born of morals. While the first was born from a legal text issued by an authorized institution, the second obligation was born from a purely internal impulse.³⁴

Kant views that every individual has the same standard of morality, without being influenced by external circumstances such as the life experiences they encounter and shape them. This is the categorical imperative, that every individual has the same sense of obligation to act. However, today's morality is not a priori, it is constituted. As has become common knowledge, dominant ideology contains hegemonic power to shape morality.³⁵

Legal norms that leave the fulfillment of workers' rights to internal encouragement from outsourcing companies cannot be considered to have fallen from the sky. Such legal norms are built and

³⁴ Immanuel Kant, *The Metaphysics of Morals*, (New York: Cambridge University Press, 1991).

³⁵ Marek Mikus, "The Justice of Neoliberalism: Moral Ideology and Redistributive Politics of Public-Sector Retrenchment in Serbia," *Social Anthropology* 24, no. 2 (2015), 211-227.

designed by law makers. Recalling that outsourcing legal norms were born in line with the state's acceptance of neoliberalism. It becomes important then not to lose sight of this fact. These legal norms have become a hegemonic product of neoliberalism in Indonesian labor law.

The legal norm regarding TUPE clauses releasing new outsourcing companies from legal obligations is a form of flexibility guaranteed by neoliberalism. That entrepreneurs - employers - do not need to face the slightest problem of workers' rights. Complementing this, neoliberalism in practice also often creates ambiguity regarding worker-employer relations. This is done as an effort to help obscure accountability, for example in outsourcing work relationships. Workers do not have the right to hold the new outsourcing company accountable for employing them, while the old outsourcing company no longer has jobs and does not have the ability to intervene with the new outsourcing company in terms of recruiting workers.

This fact shows the success of neoliberalism in hegemonizing labor law norms. In this matter, neoliberalism plays a defensive role by providing protection to companies for the relationships created in their outsourcing work relationships.³⁶ That the law will guarantee that the use of outsourcing work relationships will not harm outsourcing companies, both old and new outsourcing companies.

Based on this explanation, the TUPE principle which is based on the morality of new outsourcing companies will rely on internal encouragement from the company. That the TUPE principle must be accepted is because the TUPE principle is fundamentally a form of protection of the right to work for workers which has become a universal moral as enshrined in various human rights legal instruments. Relying on morality is a very shaky support. However, it must be acknowledged that companies as entities that pursue profit always try to negate workers' rights.

Realizing this, the legal norms of the TUPE clause clearly must be reconstructed. The future development of labor law must attract new outsourcing companies to be legally responsible, not just morally responsible. Therefore, the TUPE clause must not only be included in

³⁶ David Singh Grewal and Jedediah Purdy, "Introduction: Law and Neoliberalism," *Law and Contemporary Problems* 77, no. 4 (2014), 1-23.

the work agreement but also in the cooperation contract between the outsourcing company and the user company.

VIII. Conclusion

TUPE is a form of protection for outsourced workers, especially in relation to the continuity of their work and the continuation of the rights of outsourced workers. In order to protect outsourced workers, TUPE has two preconditions, namely that the agreed work is still with the user company and the outsourced worker is still bound by the work agreement. In fact, outsourced workers often fail to receive protection from the TUPE principles. This is because before the transfer of the outsourcing company, the outsourcing work agreement between the outsourcing worker and the outsourcing company had expired or been terminated. This makes the TUPE principle for outsourcing workers merely a sweetener provision used to cover up exploitative practices in outsourcing work relationships.

IX. References

- Broughton. *Precarious Employment in Europe Part 1: Patterns, Trends, and Policy Strategy*. Brussels: European Parliament. Directorate-General for Internal Policies, 2016.
- Buchari, Imam. "Implikasi Prinsip Transfer of Undertaking Protection of Employment (TUPE) terhadap Hak-Hak Pekerja Berstatus Perjanjian Kerja Waktu Tertentu (PKWT) [Implications of the Principle of Transfer of Undertaking Protection of Employment (TUPE) on the Rights of Workers with Fixed Time Work Agreement (PKWT) Status]." *Jurnal Ilmu Hukum Khyadiren* 1, no. 2 (2020).

- Colling, Trevor. *Tendering and Outsourcing: Working in the Contract State?*. In Susan Corby and Geoff White (ed.). *Employee Relations in the Public Services: Themes and Issues*. London: Routledge, 1999.
- Constitutional Court Decision Number 27/PUU-IX/2011 on Judicial Review of the Law Number 13 of 2003 on Manpower against The 1945 Constitution of the Republic of Indonesia, January 17, 2011.
- Constitutional Court Decision Number 87/PUU-XVIII/2020 on Judicial Review of the Law Number 11 of 2020 on Job Creation against The 1945 Constitution of the Republic of Indonesia, November 03, 2021.
- Cooke, Fang Lee, Jill Earnshaw, Mick Marchington, and Jill Rubery. "For Better and For Worse: Transfer of Undertakings and the Reshaping of Employment Relations." *International Journal of Human Resource Management* 15, no. 2 (2004).
- Davidov, Guy and Brian Langille. *Boundaries and Frontiers of Labour Law (Goals and Means in the Regulation of Work)*. Oregon: Hart Publishing, 2006.
- Forde, Chris. "Temporary Arrangements: The Activities of Employment Agencies in the UK." *Work, Employment, & Society* 15, no. 3 (2001).
- Grewal, David Singh and Jedediah Purdy. "Introduction: Law and Neoliberalism." *Law and Contemporary Problems* 77, no. 4 (2014).
- Harvey, David. *A Brief History of Neoliberalism*. New York: Oxford University Press, 2005.
- Herlambang, Pratama Herry. "Implementation on Transfer of Undertaking Protection of Employment to Outsourcing Labour in Semarang Indonesia: A Legal Approach." *Journal of Indonesian Legal Studies* 3, no. 1 (2018).
- Hernawan, Ari. "Hukum dan Kekuasaan dalam Hubungan Industrial [Law and Power in Industrial Relations]." *Jurnal Mimbar Hukum*, edisi khusus, (2011).
- Herod, Andrew and Rob Lambert. *Neoliberalism, Precarious Work and Remaking the Geography of Global Capitalism*. In Rob Lambert and Andrew Herod (ed.). *Neoliberal Capitalism and Precarious*

- Work: Ethnographies of Accommodation and Resistance*. UK: Edward Elgar, 2016.
- Houseman, Susan N, Arne L Kalleberg, and George A Erickcek. "The Role of Temporary Agency Employment in Tight Labor Markets." *Industrial and Labour Relations Review* 57, no. 1 (2003).
- Houseman, Susan N. "Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey." *Industrial and Labour Relations Review* 55, no. 1 (2001).
- Hveem, Joakim. "Are Temporary Work Agencies Stepping Stones into Regular Employment?" *IZA Journal of Migration* 21, no. 2 (2013).
- Interview with outsourcing workers 1 on December 16 2022.
- Interview with outsourcing workers 2 on December 16 2022.
- Interview with outsourcing workers 3 on December 16 2022.
- Irianto, Sulistyowati. *Praktik Penelitian Hukum: Perspektif Sosiolegal [Legal Research Practice: Sociolegal Perspectives]*. In Sulistyowati Irianto and Sidharta (ed.). *Metode Penelitian Hukum: Konstelasi dan Refleksi [Legal Research Methods: Constellations and Reflections]*. Jakarta: Yayasan Pustaka Obor Indonesia, 2013.
- Irwansyah. *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel [Legal Research: Choice of Article Writing Methods & Practices]*. Yogyakarta: Mirra Buana Media, 2020.
- Janssen, Ronald. *Precarious Work Makes for a Precarious Recovery*. In Nicolas Pons-Vignon (ed.). *There is An Alternative: Economic Policies and Labour Strategies Beyond the Mainstream*. Geneva: International Labour Office, 2011.
- Kalleberg, Arne L. "NonStandard Employment Relations: Part-time, Temporary and Contract Work." *Annual Review of Sociology* 26, (2000).
- Kant, Immanuel. *The Metaphysics of Morals*, New York: Cambridge University Press, 1991.
- Keller, Berndt and Hartmut Seifert. "Atypical Employment and Flexicurity." *Management Review* 16, no. 3 (2005).
- Kementerian Koordinator Bidang Perekonomian Republik Indonesia. "Naskah Akademik Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja". Diakses melalui laman <https://uu->

- ciptakerja.go.id/naskah-akademis-ruu-tentang-cipta-kerja/, pada tanggal 8/11/2022.
- Marx, Karl. *Capital I*. London: Lawrence & Wishart, 2010.
- Mikus, Marek. "The Justice of Neoliberalism: Moral Ideology and Redistributive Politics of Public-Sector Retrenchment in Serbia." *Social Anthropology* 24, no. 2 (2015).
- Palley, Thomas I. *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*. In Alfredo Saad-Filho and Deborah Johnston (ed.). *Neoliberalism: A Critical Reader*. London: Pluto Press, 2005.
- Rompoti, Eleni, Alexis Ioannides, and Theodoros Koutroukis. "Employment Flexibility and Industrial Relations Reforms in Greece of Memoranda." *E-Journal of International and Comparative Labour Studies* 11, no. 2 (2022).
- Serrano, Melisa R. *From Standard to Non-Standard Employment: The Changing Patterns of Work*. Dalam Melisa R Serrano. *Between Flexibility and Security: The Rise of Non-Standard Employment in Selected Asean Countries*. Jakarta: ASEAN Services Employees Trade Unions Council. 2014.
- Standing, Guy. "Globalization, Labour Flexibility and Insecurity: The Era of Market Regulation." *European Journal of Industrial Relations* 3, no. 7 (1997).
- Stanworth, Celia and Janet Druker. "Dimensions of Employers' Use of Temporary Agency Labour in the UK." *Personnel Review* 35, no. 2 (2006).
- Steger, Manfred B and Ravi K Roy. *Neoliberalism: A Very Short Introduction*. New York: Oxford University Press, 2010.
- Sudiarawan, Kadek Agus. "Pengaturan Prinsip Transfer of Undertaking Protection of Employment (TUPE) dalam Dunia Ketenagakerjaan Indonesia: Di Antara Potensi dan Hambatan [Setting the Principles of Transfer of Undertaking Protection of Employment (TUPE) in the World of Indonesian Employment: Between Potentials and Obstacles]." *Jurnal Magister Hukum Udayana* 4, no. 4 (2015).
- Supreme Court Decision Number 290 K/Pdt.Sus-PHI/2018 of Industrial Relations Disputes between Hadi Iswanto and Sugiono

- against PT Prima Persada Nusantara and PT Haleyora Powerindo, Kasasi, April 10, 2018.
- Suryomenggolo, Jafar. "Labour, Politics, and the Law: A Legal-Political Analysis of Indonesia's Labour Law Reform Program." *Labour and Management in Development* 9, (2008).
- Suyoko and Mohammad Guhron AZ. "Tinjauan Yuridis terhadap Sistem Alih Daya (Outsourcing) pada Pekerja di Indonesia [Juridical Review of the Outsourcing System for Workers in Indonesia]." *Jurnal Cakrawala Hukum* 12, no. 1 (2020).
- Syahwal. "Paradigm of Application of the No Work No Pay Principle in Determining Process Wages." *Jurnal Penelitian Hukum de Jure* 23, no. 2 (2023).
- Tjandra, Surya. "Understanding Workers' Law Reform in Indonesia 1998-2004." *Labour and Management in Development* 9, (2008).
- United Nations Committee on Economic, Social and Cultural Rights. *Second Periodic Report Submitted by Indonesia Under Articles 16 and 17 of the Covenant, due in 2019*. 30 Juli 2021. E/C.12/IDN/2.
- Venugopal, Rajesh. "Neoliberalism as a Concept." *Economy and Society* 44, no. 2 (2015).

Acknowledgment

I would like to express my gratitude to Prof. Dr. Ari Hernawan (Gadjah Mada University) for his valuable comments and many discussions on the writing process of this manuscript. I also thank the editors and reviewers of the Indonesian Journal of International Clinical Legal Education.

Funding Information

This research was supported by the Faculty of Law, Universitas Negeri Semarang.

Conflicting Interest Statement

There is no conflict of interest in the publication of this article.

Publishing Ethical and Originality Statement

All authors declared that this work is original and has never been published in any form and in any media, nor is it under consideration for publication in any journal, and all sources cited in this work refer to the basic standards of scientific citation.