REVIEW ARTICLE

Enforceability of Restrictive Covenants in Employment Contracts: Comparing India and Indonesia

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Abstract

In contemporary times, one of the fundamentals that bind and guide any professional relationship is a contract and throughout the negotiations, the parties to it try to assert their interests for ensuring gains. In this process, quite often, several clauses are inserted for ensuring greater exploitation without greater investments and this is witnessed quite often in India, especially in employer-employee contracts. Referred to as restrictive covenants, the Indian Courts have often interpreted the Indian Contract Act, 1872 in a progressive fashion, duly preventing the employee from being reduced to a bonded labourer, on numerous occasions. But this does not mean that in all the situations, such covenants are impermissible – the extent to which an employer can restrict the employee for maintaining confidentiality andprotecting trade secrets among other things is what is largely determined by the Courts. Discussing the stance of the Indian Judiciary on such restrictive covenants, the Authors, through the medium of this paper seek to shed light on the extent to which they are enforceable and, in the circumstances, where they are valid. In a nutshell, the Authors seek to warn the employers to refrain from engaging in such practices which are likely to

harm the principles of humanism enshrined in the Constitution and alert the employee of the scope of their duties towards the employer.

Keywords: *Child Criminalization, Children as Criminals, Comparative Law, Juvenile Delinquency*

1. INTRODUCTION

In the modern world, every formal and commercial relationship is established, governed and even terminated as per the terms and conditions of the contract between the parties for ensuring the appropriate discharge of respective duties in return for appropriate consideration. During the negotiationof the clauses of the contract, it is obvious, that both the parties try to assert their vested interests, such that they could for themselves, make a maximum profit from this relationship by holding minimum liability. In certain cases, however, one of the parties to the contract has an edge over the other, be it due to a strong financial position or with regards to the topic at hand, the very ability to employ people for a reasonable fee, go to the extent of insisting upon the insertion of such clauses within the contract, that trap the relatively inferior party (the employee in this case) within the clutches of the business entity. In the Common Law, the following types of agreements in restraint of trade were identified traditionally:

a. Servant promising the Master to not engage in similar business upon termination.
b. Not to work with the competitor upon termination.
c. Agreement between traders for regulating competition by controlling prices and profits (*Shree Gopal Paper Mills Ltd. v. Surendra K. Ganeshdas Malhotra*, AIR 1962 Cal 61).

As of today, the restrictions have been perpetuated in modern times and evolved to a great extent and are referred to as "restrictive covenants" in the legal realm. Their primary aim is to prevent the employee from either working

in an organization which is working in a similar domain as that of the contracting party upon termination, soliciting the employees of the contracting company, safeguarding confidentiality or even withholding employees by offering them paid leaves with the idea of securing talent. Such clauses, when one-sided or unreasonably harsh (*Weiler International Electronics (P) Ltd. v. PunitaVelu Somasundaram*, 2002 SCC OnLine Bom 1006), conflict with the principles of contract law prevailing in the country, but also undermine the ethos of the Indian Constitution – in every case, where restraint is not in the best interests of either the parties or the public is invalid in the eyes of the law (*Shree Gopal Paper Mills Ltd. v. Surendra K. Ganeshdas Malhotra*, AIR 1962 Cal 61). The mannerism in which the said violations manifest certainly needs to be assessed for examining the justifiability of the enforcement of such covenants in India.

2. AN INSIGHT INTO RESTRICTIVE COVENANTS IN EMPLOYER CONTRACTS

India is home to 53 million unemployed persons, which is interesting, more than the population of several countries, including developed economies. Owing to the outbreak of COVID-19, such numbers have increased drastically and in such a hostile climate, professionals are almost ready to undertake any job, whether sustainable or not, for fulfilling their financial interests. Their vulnerability is duly exploited by the employers to a great extent through the medium of abhorrent, restrictive clauses, with the sole intention of retaining individuals, upon whom the employer is investing his resources, both tangible and intangible, thereby making them "industry-ready" for furthering their business interests. From the employer's perspective, this may appear to be a legitimate concern and is even valid, mostly until the employee is associated with the employer and in a few, limited, instances, even after his or her termination. And the apprehensions of the employers often lead them to insert clauses within their contracts of

maintaining confidentiality, preventing other entities from poaching their employees or prohibiting the employees from soliciting their customers or clients or even, quite unreasonably disallow the employees from working in the said industry for a stipulated time upon termination. Under the guise of such clauses, the employers try to retain talent, but often transgress the rights of the employees in certain instances and the same is discussed hereunder.

A. Non-Disclosure Agreements

It is certainly valid on the part of the employer to expect from the employee, the assurance of safeguarding the confidentiality and upholding integrity by not working *in parallelos*with a competitor entity when associated therein. Making employees responsible for preserving trade secrets, i.e. technical know how's of operating the business entity, the mannerism of making profits etc. through the medium of a contract is certainly permissible in India and restrictive covenants added herein to that effect are valid (*Faccenda Chicken Ltd v. Fowler*, (1986) 1 All ER 617). The employer can very well press the employee to maintain confidentiality in this regard since any disclosure of this information would likely cause significant or any actual damage to him and/or his entity (*Lansing Linde Ltd v. Kerr*, (1991) 1 All E.R.418) and hence, to his goodwill in the market (*Zee Telefilms Ltd. v. Sundial Communications (P) Ltd.*, 2003 SCC OnLine Bom 344). Any information, which is utilized by an employee, knowing that it is confidential, such that it ends up significantly harming the employer's business, then, a breach is said to have manifested and the employer is certainly entitled to relief (*Terrapin Ltd v Builders' Supply Co (Hayes) Ltd.*, [1967] RPC 375) Data, which has been deemed confidential under the relevant terms of the contract, is expected to be treated only for the purpose stipulated therein and such a breach allows the other party to sue for compensation (*Danieli Corus BV v. SAIL*, 2017 SCC OnLine Del 12327). Where the services of an employee are

terminated, such that he has access to confidential information and he utilizes the same for furthering his commercial interests, then, he can be prevented, by law from doing so (*V.V. Sivaram and Others v. FOSECO India Limited*, 2006 133 CompCas 160 Kar). Under the guise of secrecy, any clause that aims at preventing the employee from seeking employment anywhere else is impermissible (*Tapas Kanti Mandal v. Cosmo Films Ltd.,*Writ Petition No.2875 of 2018). This does not suggest that the employee cannot refer to any data of the employer for furthering his prospects in the industry, but in doing so, he or she has to ensure that the same is not disclosed to any other competitor (*V.N. Deshpande v. Arvind Mills*, AIR 1964 Bombay 423). When there is an explicit clause of confidentiality in the contract and if the employee comes across any confidential information and during his association with the organization, provides the same to a competitor, then, he can be held liable for breaching the contract (*John Richard Brady and Ors. v. Chemical Process Equipments P. Ltd and Anr.,* MANU/DE/0586/1987). If the employee utilizes the confidential data so obtained from the employer, be it directly or indirectly from the employer without his or her consent while being employed, then, the clause of confidentiality is said to have been violated (*Saltman Engineering Co. v.Cambell Engineering Co.,* (1948) RFC 203). Under the pretext of confidentiality, the employee cannot be forced to be employed by the employer at any point in time (*American Express Bank Ltd. v. Priya Puri*, 2006 SCC OnLine Del 638). In a nutshell, there is no bar for the employee to utilize all the skills he has learnt during the employment elsewhere upon termination, but at no point can he or she, disclose the trade secrets of the former employer. However, in such cases, the employee would, even after termination, be required to not disclose the confidential information so obtained during his or her association with former employer and it may seem just on the part of the Court to penalize an employee or press injunctions against one (*Diljeet Titus v.*

Mr. Alfred A. Adebare and Others, 2006 (32) PTC 609 Del), who does so – revealing such data to a competitor post-resignation is unjustified, as per the Indian law (*Anindya Mukherjee v. Clean Coats Pvt. Ltd.*, 2011 (2) ARB LR 241(Bom)

B. Non-Poaching Agreements

This established jurisprudence also affects the agreements so entered into by companies, for preventing employees from switching from the business setup of one of the parties to the other. Referred to as "no-poaching" agreements, the Courts have upheld their legality, citing the need for safeguarding confidential information as it does not curtail the employee from seeking employment, but only restricts, by the will of the parties to the contract, to secure a job with the other business entity bound by it (*Wipro Limited v. Beckman Coulter International*,2006 (3) ARBLR 118 Delhi). Thus, in the case of the operation of non-poaching contracts between such entities, such solicitation by either of the parties to it would be deemed impermissible, but, if the imposition of such a restraint is likely to affect the economic interests of the employee, then, it could be allowed (*Jet Airways (I) Ltd. v. Jan Peter Ravi Karnik*,2000 (4) BomCR 487).

C. Non-Solicitation Agreements

Like thenon-poaching clauses, even the non-solicitation clauses too, can have applications beyond the termination of the contract of the employee on a few occasions. That is to say, the agreements between the employers and employees, which aim at prohibiting the latter from utilizing expertise for entering into business relations with fellow employees or the customers for personal gain are justified, except in certain circumstances. As per the established principles of contract law, no "actionable wrong" manifests when a competitor hires an employee from the other entity and since the interests of the worker supersede the business prospects of a particular

company, such solicitation cannot be deemed impermissible (*Diodes Incorporated v. Gustav Franzen*, (960 Cal. App. 2nd 244). That is to say, competitors are free to poach the employees working at other entities for consolidating their presence in the market and restriction to that effect is likely to curtail competition and subsequently affect the growth of the economy (*People's Security Life Insurance Co. v. Milton S. Hooks*, (1988) 322 N.C. 216; 367 S.E. 2nd 647). Therefore, companies are free to solicit employees in the absence of such clauses and it won't be unjustified when it is clear that such a move has been undertaken solely for promoting business interests (*Pepsi Foods Ltd. &Ors. v. Bharat Coca-Cola Holdings Pvt. Ltd. &Ors*., (1999) IILLJ 1140 DEL). But, where a solicitation clause exists explicitly and is agreed upon by the employee, then, he or she is under an obligation to not poach any of the employees of such an entity for expanding the business establishment (*Eli Research India Pvt. Ltd. v. Deepak Gupta*, 2017 SCC Online Del 8403).With regards to the solicitation of customers, as per the Delhi High Court, they being neither trade secrets nor property are open to being solicited (*City Ice and Cold Storage Co. v. Kinnee*, 140 Wash.381, 249 P.782). That is to say, that an employee, upon the termination of services, can deal with the customers for promoting his business interests and the same is permissible herein. According to the Madras High Court, though, merely approaching the customers of the former company of the employee does not amount to a violation of a non-solicitation clause and it is essential to prove that orders were placed by them (*M/s FL SmidthPvt. Ltd. v. M/s. SecanInvescast (India) Pvt. Ltd.,* (2013) 1 CTC 886). Although different jurisdictions have differing opinions, what is evident, is that as far as there is a non-solicitation agreement, the parties to the contract are bound to respect it, even after the termination or the resignation of the employee.

While the precedents cited above are testament to the permissibility of the extent to which the clauses about preserving confidentiality, non-poaching and even on-

solicitation can be made operative even after the termination of the contract, it is legally backed by the Exception clause to Section 27 of the Indian Contract Act, 1872[1], which allows the former to refrain the latter from operating a similar business within the local limits in a manner, that would affect the goodwill[2] of the former. From all that is discussed above, it is evident thatthe violation of confidentiality is certainly capable of affecting the goodwill of the employer, so is, the solicitation and the poaching of employees and therefore, any measures introduced to that effect through the means of contract for preventing the same from manifesting is justified in the Indian law.

D. Non-Compete Clauses

There is, nonetheless, a fine line between the impact on the goodwill of the business and the loss incurred due to reasonable competition and it is for the Court to decide when the either of the same manifests. That is to say, restrictive covenants so discussed above so far, are valid when they have a gruesome impact on the very character of the employer, but an injunction cannot be pressed against an employer whose actions are deemed legitimate in the commercial world. The problem, however, arises when a contract between the aforesaid parties aims at restricting the freedom of the employee to find a job in a similar domain, even with a competing entity, upon resignation or termination, as the case may be. In such situations, restrictive covenants appear to be void as per Section 27 of the Indian Contract Act, 1872 as *prima facie,* it restrains the employees from exercising business, trade or profession. A plain reading of the said provision reveals that no person in

[1]Exception 1.- Saving of agreement not to carry on business of which goodwill is sold.-One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

[2]*Trego v. Hunt*, (1896), App. Cas. 7 - *"often it happens that goodwill is the very sap and life of the business , without which the business would yield little or no profits . It is the whole advantage whatever it may be , of the reputation and connection of the firm , which may have been built up by years of honest work or gained by lavish expenditure of money".*

India can lawfully be restrained from exercising any profession or trade lawfully and agreement to that effect, is void. Impliedly, any agreement, which prohibits the employee from either working with or competing with the employer upon termination, then, the contract is deemed illegal in the eyes of law (*Modicare Ltd. v. Gautam Bali*, 2019 SCC OnLine Del 10511). While any employee, who breaches the contract unilaterally and starts working with a competitor can be restricted from doing so until the end of the stipulated period mentioned therein[3], the general notion prevailing in India is that restrictive covenants cannot prohibit the employee from seeking employment in a similar industry with a different entity for "any" given time after termination (*Percept D'Mark (India) (P) Ltd. v. Zaheer Khan*, (2006) 4 SCC 227). Such a restriction would be deemed as an "unlawful restraint", very well within the meaning of Section 27 of the Indian Contract Act, 1872 and hence, would stand inoperative in the eyes of law (*Arvinder Singh v. Lal Pathlabs (P) Ltd.*, 2015 SCC OnLine Del 8337). An attempt to curtailthe scope for employment for an employee even after termination of his services therein is nothing more than an ambiguous clause and hence inoperative (*Superintendence Company of India (P) Ltd.v. Krishan Murgai*, (1981) 2 SCC 246). Any agreement which aims at restraining the employee from even working in the industry during his or her employment is certainly valid (*Niranjan Shankar Golikari v. The Century Spinning and Mfg. Co.*, 1967 SCR (2) 378), but if the employer tries to enforce the contract even after termination, then, it is impermissible. That is to say, the *Doctrine of Restraint of Trade* (*Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545) does not operate during the employment of the employee but the moment it is terminated, it comes into operation. Such a restrictive covenant is bad in the eyes of the law, primarily because the

[3]*Charlesworth v Macdonald*, (1898) I.L.R. 23 Bom - *"An agreement of this class does not fall within Section 27. If it did, all contracts of personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for anyone else than the person with whom he so agrees."*

employee in such a situation is compelled to either work with the employer or be left with no choice but to be engaged anywhere (*Steller Information Technology Pvt. Ltd. v. Rakesh Kumar,* 2016 SCC Online Del 4812). Likewise, such arbitrary restrictions are capable of preventing the employee from growing personally as well as in the professional domain (*LE Passage to India Tours & Travels Pvt. Ltd v.Deepak Bhatnagar*, 209(2014) DLT 554). And if employees are not given the appropriate chance to progress, then, it is likely to have repercussions on the development of the country as a whole (*Ambiance India Pvt. Ltd. v. Naveen Jain*, 122(2005) DLT421).

3. OPTIMIZATION OF TREATY ARRANGEMENTS IN LABOR CONTRACTS IN INDONESIA PERSPECTIVE OF THE WELFARE LAW STATE

Forms of legal protection for Workers in Indonesia, one of which is stated in Law Number 13 of 2003 concerning Manpower it is stated that labor law is a collection of regulations on all matters related to labor at the time before, during and after the period of employment. Based on article 1 paragraph 14 of Law Number 13 of 2003, an employment agreement is an agreement between a worker / laborer and an employer or employer that contains the terms of employment, rights, and obligations of the parties.

In Law Number 13 of 2003 Article 1 paragraph 2 also explains about labor, labor is everyone who is able to do work to produce goods and / or services both to meet their own needs and for the community. Labor is an important factor in a company, where it is the workers who are the backbone of the company's wheel drive, and it is appropriate for workers to get decent rewards. Number of Workers by Age Group (February 2022) Based on data from the Central Statistics Agency (BPS), the number of Indonesian labor force reached 144.01 million people in February 2022. This number reaches 69.06% of the total working-age population of 208.54 million people. Even so, it is unfortunate that at the time of the commemoration of

Labor Day it is almost always filled with large-scale demonstrations that are essentially workers who demand their welfare.

The purpose of Indonesia as a welfare state that has been formulated in the Preamble to the 1945 Constitution of the Republic of Indonesia in Alenia IV one of them states, protecting the entire Indonesian nation and all Indonesian bloodshed and to advance the general welfare. General welfare as stated in the preamble to the 1945 Constitution of the Republic of Indonesia if connected with the sound of the 5th Precept of Pancasila, so that it is clear that the general direction becomes, advancing the general welfare of social justice for all Indonesians has the implication that the State of the Republic of Indonesia has the responsibility to provide welfare and prosperity for all Indonesians spread throughout the regions in Indonesia. So, it is not just welfare and justice for a particular individual, class or group. In this context, the management of the Tourism sector must also depart from the perspective of realizing the objectives of the welfare state (Karma Resen, 2015)

The welfare of these workers / laborers is inseparable from the labor contract agreements carried out by the workers / laborers with the company. Optimization of the role of agreements in labor contracts is very important in improving the welfare of workers/ laborers.

A. Arrangement of Agreements in Labor Contracts in Indonesia

The 1945 Constitution of the Republic of Indonesia mandates that every citizen has the right to work and a decent livelihood for humanity. In line with that, Law Number 13 of 2003 concerning Manpower emphasizes that every worker has equal opportunities without discrimination to obtain employment. Therefore, the protection of labor rights is the responsibility of the state. In addition, agreements on contracts to workers need to be continuously optimized and socialized considering that not

all workers know the law, especially Law Number 13 of 2003 concerning Manpower (Haq & Main, 2021).

In the Big Dictionary of Indonesian, an agreement is "a written or oral consent made by two or more parties, each agreeing to abide by what is said in that agreement"(Department of National Education, 2005)

The Legal Dictionary explains that an agreement is "an agreement made by two or more parties, written or oral, each agreeing to abide by the contents of the agreement that has been made together." According to Article 1313 of the Civil Code, "An agreement is an act by which one or more persons bind themselves to one or more persons "(Sudarsono, 2007)

Meanwhile, according to Rutten in Prof. Purwahid Patrik who stated that an agreement is an act that occurs in accordance with the formalities of the existing legal regulations depending on the conformity of the will of two or more people aimed at the emergence of legal consequences of the interests of one party at the expense of the other party or for the benefit of each party reciprocally (Purwahid Patrik, 1988).

The terms agreement and contract are often equated in meaning. Despite this, there are some legal experts who distinguish the two terms. If you go back to the laws and regulations as stated in Chapter II of the Third Book of the Civil Code entitled "Agreements Born of Contracts or Agreements" it is clearly seen that the law provides an equal understanding between contracts and agreements. Based on this understanding, it can be said that between an agreement and a contract is interpreted more or less the same. Thus, any provisions related to the law of the agreement also apply in the law of contract. In this case the author agrees with the understanding stated in the title of Chapter II of the Third Book of the Civil Code. For this reason, in this study, the word "agreement" was used to represent the words agreement or contract.

R. Subekti stated that a covenant is "an event where one promises to another person or in which two people promise each other to do something." According to Salim HS, an Agreement is "a legal relationship between one subject and another in the field of property, whereby one legal subject is entitled to merit and so is the other subject of law obliged to carry out his achievements in accordance with what he has agreed upon."(Salim MS, 2008)

The elements listed in the agreement / contract, namely:

1) The existence of a legal relationship. A legal relationship is a relationship that has legal consequences. The legal consequence is the emergence of rights and obligations.
2) The presence of a legal subject. The subject of law is the supporter of rights and obligations. Subjects in treaty law include legal subjects regulated in the Civil Code, as it is known that the Civil Law qualifies legal subjects consists of two parts, namely human beings and legal entities. So those who form agreements according to Civil Law are not only individual or collective human beings, but also legal entities or rechtpersons, for example Foundations, Cooperatives and Limited Liability Companies.
3) The existence of achievements. Achievement according to Article 1234 of the Civil Code consists of giving something, doing something, and not to do something.
4) In the field of wealth. In general, the agreement that has been reached between two or more businesspeople is set forth in a written form and then signed by the parties. Such documents are referred to as "Business Contracts" or "Trade Contracts" (M Husni, 2009).

Agreements are the most important source in an agreement, in this case an employment contractual relationship.

B. Agreement in Labor Contract in Indonesia

Based on article 1 paragraph 14 of Law Number 13 of 2003, an employment agreement is an agreement between a worker / laborer and an employer or employer that contains the terms of employment, rights, and obligations of the parties.

The following is a form of protection of contract labor rights based on Law Number 13 of 2003 concerning Manpower. According to Law Number 13 of 2003 concerning Manpower, the rights for contract workers are:

1) Equal treatment without discrimination (Article 6)
2) Job training (Article 12 Paragraph 3)
3) Work placement (Article 31)
4) No probation period (Article 58 Paragraph 1)
5) Working time (Article 77 Paragraph 2)
6) Overtime working time (Article 78 Paragraph 1)
7) Overtime pays (Article 78 Paragraph 2)
8) Rest and leave time (Article 79 Paragraph 2)
9) Time for compulsory worship (Article 80)
10) Female labor that menstruates (Article 81 Paragraph 1)
11) Labor force of women who give birth (Article 82)
12) Breastfeeding female labor (Article 83)
13) Protection of occupational safety and health (Article 86 Paragraph 1)
14) Decent income (Article 88 Paragraph 1)
15) Minimum wage (Article 90 Paragraph 1)
16) Social security of labor (Article 99 Paragraph 1)
17) Severance pay rights (Article 156 Paragraph 2)
18) The right of money to award the period of service (Article 156 Paragraph 3) (Haq & Main, 2021).

The form of labor law protection is categorized into 3 (three) types, namely:

1) Technical Protection, which is a type of protection related to efforts to protect work from the danger of accidents caused by aircraft or work tools or by materials that are processed or worked on by the company. This type of protection is called Occupational Safety and Health (K3).

2) Social Protection, which is a type of protection related to society whose purpose is to allow the worker to receive and develop his life as a human being in general, as a member of society and as occupational health.
3) Economic Protection, which is a type of protection related to efforts to provide the worker with an income sufficient to meet the daily needs of the worker and the worker's family, including in the event that the worker is unable to work because it is beyond his will.(Wildan, 2017)

Furthermore, the regulation regarding employment agreements is regulated in Chapter IX of The Employment Relations of Law Number 13 of 2003, which contains:

1) The form of employment agreement is made in writing or orally (Article 51 Paragraph 1)
2) Basis of employment agreement, made on the basis of:
   a. agreement of both parties;
   b. the ability or ability to perform legal acts;
   c. the presence of promised work; and
   d. The promised work does not conflict with public order, decency, and applicable laws and regulations. (Article 52 Paragraph 1)
3) The content of the employment agreement, the employment agreement made in writing at least contains:
   a. name, company address, and type of business;
   b. name, gender, age, and address of the worker/laborer;
   c. job title or type of work;
   d. place of work;
   e. the amount of wages and the manner in which they are paid;
   f. terms of employment that contain the rights and obligations of employers and workers / laborers;
   g. the start and term of entry into force of the employment agreement;

h. the place and date of the employment agreement is drawn up; and
i. signature of the parties to the employment agreement. (Article 54 Paragraph 1)

4) Time Employment agreement, made for a certain time or for an indefinite time. The employment agreement for a certain time as referred to in paragraph (1) is based on:
   a. term; or
   b. the completion of a particular work. (Article 56)
5) Termination of the Employment Agreement. The employment agreement terminates if:
   a. the worker died;
   b. expiration of the term of the employment agreement;
   c. the existence of court decisions and / or decisions or determinations of industrial relations dispute resolution institutions that have permanent legal force; or
   d. the existence of certain circumstances or events stated in the employment agreement, company regulations, or collective labor agreement that may lead to the termination of the employment relationship.

The employment agreement does not terminate due to the death of the employer or the transfer of rights to the company due to the sale, inheritance or grant. (Article 61 Paragraphs 1 and 2).

C. Agreement in Employment Contract Welfare State Perspective of Indonesia

In the development of a concept of a legal state, it undergoes development from time to time. The classical or formal concept of the legal state became the initial concept in the legal state. Given the weakness of the classical legal state concept, the formal legal state understanding has been modified into a modern legal state concept which is also

known as the welfare *state* teaching (W Riawan Tjandra, 2008).

This idea of a welfare state resonated with the thinker economist from England, John Maynard Keynes (1883-1946). In his thinking, Keynes showed how humanitarian institutions, especially the state, have an important role to play in "twisting" human livelihoods. If humans are allowed to "fight" with other humans without any institutions, what happens is the impossibility of every human effort itself. Keynes was also an important architect for the creation of a *welfare state* (Yudi Latif, 2015).

The welfare state can briefly be defined as a form of democratic government that places the state as an institution responsible for the welfare of the people, through a series of public policies in integrating economic policies and social policies for the achievement of welfare and social justice. The PSIK Research Team (2008) states that the welfare state system is oriented to:

1) Promote economic efficiency;
2) Reducing poverty;
3) Strengthening social equality;
4) Develop social integration or avoid social exclusion;
5) Ensuring social stability;
6) Promote individual independence.

The concept of the welfare state became the cornerstone of the position and function of government in the modern state. The welfare state which is a modern legal state is the antithesis of the concept of a formal (classical) legal state, which is based on the thought of carrying out strict supervision of the administration of state (especially executive) power which in the time of absolute monarchy has proven to be a lot of abuse of power (Karma Resen, 2015).

According to Utrecht, the employment of the government of a modern legal state is very wide. The government of a modern legal state is in charge of

maintaining security in the broadest sense, that is, social security in all fields of society (Utrecht, 1986).

Pancasila is the basis of the Indonesian State, which adheres to harmony and balance, both in human life as individuals and in relationships between fellow human beings. In the sense of the 2nd precept (two), namely the precepts of just and civilized humanity, human beings are treated equally in accordance with their dignity, dignity and degree as creatures of God where each individual becomes the holder of equal rights and obligations without being discriminated against based on ethnicity, race, religion, gender, or social strata. (Tolla & Widyastuti, 2020)

With this, if we connect with the agreement in the labor contract, it can cause an unbalanced bargaining power due to the strong and weak position in a contract, then the state is not only authorized but has the obligation to intervene in limiting the work of the agreement in this labor contract in the form of laws and regulations. This, in line with Hatta's very comprehensive thinking about social justice can be seen and traced by the existence of Pancasila. For Hatta, the fifth precept, "Social Justice for all Indonesians", is the last goal of the Pancasila ideology by emphasizing equal rights for every citizen.

4. CONCLUSION

Clauses disallowing the employee from pursuing a job in the same industry as he was associated with the employer post-termination are invalid. It would certainly amount to “economic terrorism” and a situation, no less than that of “bonded labour” would arise herein. And while every employee has the fundamental right against forced employment, he or she also enjoys the freedom of professing a trade or profession of choice. Section 27 of the Indian Contract Act, 1872 aligns with the Article 19(1)(g), suggesting that while no citizen of India can be restricted from exercising any profession, he or she can certainly be barred from indulging in activities which are against the

best interests of the public. Naturally, when an agreement is being challenged on the basis that it restrains trade, the burden lies on the employer to showcase how the contract is protecting the interests of both parties in a reasonable manner. However, this would be deemed inapplicable in cases of partnerships as the Courts have gone to the extent of declaring an arrangement between a retiring partner and others to be valid wherein, he sold his goodwill further promising to not engage in business therein.

Nonetheless, while preserving the confidentiality of the employer and even non-poaching and non-solicitation agreement so extended post-termination are justified through Article 19(6), the aspects of Garden Leaves, i.e. prohibition from working with a competitor for due consideration and non-compete clauses for retaining talented employees is protected vide Article 19(1)(g) of the Constitution. Naturally, the former appears to be enforceable in limited instances whereas the latter cannot be justified owing to constitutional limitations. Especially with regards to the notion of garden leave, the jurisprudence is yet to evolve, but the High Court of Bombay, in *VFS Global Services Private Limited v. Suprit Roy* has held such an arrangement to violate Section 27, as it unfairly restricts the employee from realizing his talent to the optimum. The stance has also been upheld by the Aurangabad Bench of the Bombay High Court, which, in *Tapas Kanti Mandal v. Cosmo Films Ltd.*, held that garden leaves are not enforceable and rather, restricted trade herein.

Nevertheless, what this Court observed with regards to the jurisprudence of negative covenants in India, which is also its essence, is summarized hereunder: "A negative covenant, which oppresses a person either to perform personal service or to remain idle or starve is considered inequitable, onerous and oppressive term and tends to obliterate the object underlying section 27 of the Indian Contract Act forbidding a compelled servitude. An employee seeking better employment would not be

injuncted on the ground that he has confidential information and under the garb of confidentialilty employer cannot be allowed to perpetuate forced employment. Freedom to change employment is a vital and important right of an employee, which cannot be curtailed on the ground of confidentiality and such a restriction will be hit by section 27 of the Contract Act."

In Indonesian contexts, this study concluded that the Indonesian state is a country of law that upholds the welfare of its people, especially the welfare of Indonesian workers. In Law Number 13 of 2003 concerning Manpower, it also regulates regulations regarding agreements in labor contracts which include agreements between workers / laborers and employers or employers that contain the conditions of employment, rights, and obligations of the parties. According to Prof. R. Subekti stated that an agreement is "an event where a person promises to another person or where two people promise each other to do something", the agreement is the most important source in an agreement, in this case the employment contract relationship. The government and society need to optimize and improve labor protection by providing opportunities for workers to take part in making their employment contract agreements. This will also affect the welfare of the workers. The welfare state has an important role in labor agreements in Indonesia. The welfare state is a form of democratic government that places the state as an institution responsible for the welfare of the people, in this case the workers. The implementation of the Agreement in the labor contract should be carried out in accordance with the provisions of Law Number 13 of 2003 concerning Manpower in order to create welfare for workers / workers. As a result of the large number of violations by employers / companies in a certain time employment agreement results in many losses for workers / laborers, both material losses and other losses. Employers should also provide good information to prospective workers, so that these

prospective workers understand about employment agreements, especially employment agreements for a certain time. In Indonesia itself, it is necessary to maximize the supervisory role of the Government to realize agreements in labor contracts based on Pancasila and the 1945 Constitution of the Republic of Indonesia. In the future, it is hoped that the government can crack down on employers who are proven to have violated the provisions of the Manpower Act. Then it is necessary to increase socialization by the Government in terms of labor agreements, so that these prospective workers can fully understand the rights and obligations as workers and understand the contents of the employment agreement letter.

5. DECLARATION OF CONFLICTING INTERESTS

The authors state that is no potential conflict of interest in the research, authorship, and/or publication of this article.

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