THE FREEDOM OF CONTRACT PRINCIPLE IN CONTRACT OF EMPLOYMENT

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Abstract

This study aims to examine the application of the principle of freedom of contract within employment contracts. The employment contract serves as the foundational agreement between an employee and an employer. As a type of contract, the employment contract inherently adheres to the principle of freedom of contract. This research employs a normative juridical method, utilizing secondary data and descriptive qualitative analysis. The findings indicate that while the principle of freedom of contract applies to employment contracts, its scope is limited by specific material and formal requirements outlined in Law No. 13 of 2003 concerning Manpower. The principle functions effectively when both parties possess equal bargaining power; however, when there is a disparity, such as the unequal socio-economic status between the employer and the employee, the principle's application may be hindered, potentially disadvantaging the employee.

1. Introduction

The first gateway to the relationship between workers/employees and employers is the employment contract, as it establishes the employment relationship. An employment relationship is a relationship between workers/employees and employers based on an employment contract.[1] The employment contract holds a strategic position in the employment relationship, as it serves as the primary legal foundation in such relations. Being the main legal basis, the employment contract functions to protect the interests, provide legal grounds, and ensure legal certainty for both workers/employees and employers, particularly for workers. This is because the employment contract includes provisions that safeguard the rights of workers/employees. According to Djumadi, one of the forms of legal protection and certainty for workers is through the implementation and enforcement of the employment contract.[2] With the existence of an employment contract, it is expected that employers will no longer be able to treat workers arbitrarily.[3] The employment contract outlines the mutual rights and obligations of both parties.[4] Therefore, both parties in the employment relationship are bound by what they have agreed upon in the contract, as well as the applicable laws and regulations.[5] Similarly, according to Lanny Ramli, the employment contract serves as the initial legal reference and also the final legal reference for the legal subjects involved, should any disputes arise during the course of employment.[6] With the assurance of the rights and obligations of both parties, the parties will feel secure and guaranteed, ultimately leading to efficient and productive work.[7]

A work contract, as an agreement, possesses specific characteristics, particularly related to labor or employment matters. However, in principle, a work contract is also a type of agreement. Therefore, as long as it pertains to provisions of a general nature, Book III of the Indonesian Civil Code still applies to work contracts. The main legal framework for such agreements is found in Book III of the Civil Code, which governs Obligations.[8] Consequently, the legal aspects of agreements, such as the principles of contract law, will be applicable, including the following principles: the principle of consensualism, the principle of freedom of contract, the principle of *pacta sunt servanda*, the principle of good faith, and the principle of personal responsibility.

The principle of freedom of contract can be considered the most important principle in agreements, as stated by Yohanes Sogar Simamora. Freedom of contract is regarded as the most

[1]Pasal 1 angka 15 Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*
[2]Djumadi, *Hukum Perburuhan: Perjanjian Kerja*, (Jakarta: RadjaGrafindo Persada, 2006), hlm.7.
[3] *Ibid.*
[4] *Ibid.*
[5]*Ibid.*
[6] Ranny Ramli, "Perjanjian Kerja Sebagai Upaya Perlindungan Hukum Bagi Tenaga Kerja dan Pengusaha", *Jurnal Yuridika Vol.16, No.3,* (Maret-April 2001):175.
[7]*Ibid.*
[8]Anggitariani Rayi Larasati Siswanta dan Maria Mu'ti Wulandari, "Penerapan Asas Kebebasan Berkontrak pada Perjanjian Baku pada Perjanjian Kerja, *Jurnal Soedirman Law Review Vol.4, No.4,* (2022): 412, DOI: https://doi.org/10.20884/1.slr.2022.4.4.221.

significant domain in contracts, although it has experienced fluctuations over time.[9] Similarly, Ghansam Anand argues that the principle of freedom of contract is one of the most prominent principles in the formation of contracts, being a universal principle adopted by the contract laws of nearly all countries.[10] The principle of freedom of contract is closely related to the content, form, and type of the agreement being made, and it is enshrined in Article 1338, paragraph (1) of the Civil Code, which states that all agreements made legally shall be binding as laws for those who create them. According to Nindyo Pramono, the principle of freedom of contract can be deduced from the word "all," which carries five meanings:[11] (1) every person is free to enter into or refrain from entering into an agreement; (2) every person is free to make agreements with anyone; (3) every person is free to determine the form of the agreement they make; (4) every person is free to determine the content and terms of the agreement they make; and (5) every person is free to choose the applicable law, meaning they are free to select the law under which the agreement will be governed. The existence of the principle of freedom of contract has led to the creation of various types of agreements tailored to the needs of society. In fact, agreements that emerge and develop in society (unnamed contracts) are more prevalent than named agreements under Book III of the Civil Code.[12] Therefore, the principle of freedom of contract also responds to the demands of the business world, which requires speed and certainty in order to provide practical, efficient, and effective services.[13]

The principle of freedom of contract does not imply absolute freedom without restrictions; rather, it is a freedom that recognizes certain boundaries. These boundaries include agreements that are not prohibited or in violation of the law, public order, or morality. According to Peter Mahmud Marzuki, on the one hand, the principle of freedom of contract requires protection, but on the other hand, it must be limited, as it is impossible for the principle of freedom of contract to be applied absolutely without restrictions. These limitations can evolve over time in response to societal developments and public interest.[14] The restrictions on the freedom of contract arise and are regulated within Book III of the Civil Code (Article 1320 of the Civil Code). These include the emergence of formal agreements *(formale contracten)* and real agreements *(reile contracten)*, the rise of standard agreements, and the intervention of authorities in contracts acting as protectors of the party in a weaker socio-economic position.[15] Indeed, the principle of freedom of contract functions optimally when the parties are in an equal bargaining position.

[9]Yohanes Sogar Simamora, "Prinsip Hukum Kontrak Dalam Pengadaan Barang dan Jasa Oleh Pemerintah", *Disertasi Ilmu Hukum Program Pasca Sarjana Doktor Ilmu Hukum*, (Surabaya: Unair, 2005), Hlm.32.

[10]Ghansam Anand, "Prinsip Kebebasan Berkontrak dalam Penyusunan Kontrak", *Jurnal Yuridika Vol.26, No.2,* (Mei-Agustus 2011): 90.

[11] Nindyo Pramono, *Hukum Komersial,* (Jakarta: Universitas Terbuka, 2005), hlm. 2.6.

[12]*Ibid.*

[13]Fani Martiawan Kumara Putra, "Paksaan Ekonomi dan Penyalahgunaan Keadaan Sebagai Bentuk Cacat Kehendak dalam Perkembangan Hukum Kontrak", *Jurnal Yuridika Vol.30, No.2,* (Mei 2015): 235.

[14]Peter Mahmud Marzuki, "Batas-batas Kebebasan Berkontrak", *Jurnal Yuridika Vol.18, No.3,* (Mei 2003): 199.

[15]Dede Agus, Jurnal "*Perlindungan Konsumen Atas Penggunaan Perjanjian Baku Dalam Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen*", Serang: Universitas Sultan Ageng Tirtayasa, 2018, diunduh dari http://jurnal.untirta.ac.id/index.php/nhk/article/download/4817/3461-fullteks.pdf pada tanggal 21 Juli 2019.

However, in reality, situations often arise where the positions of the two parties are imbalanced, such as in employment contracts.

The formation of a work contract often involves an imbalance of power between the parties. On one side, workers are socially and economically weaker or under pressure because they desperately need employment, while on the other side, employers hold a stronger and more decisive position. As a result, the work contract that is formed may disadvantage the workers and benefit the employers. This imbalance necessitates restrictions on the principle of freedom of contract within the context of work agreements.

A work contract, being an agreement with specific characteristics, particularly concerning labor and employment, is regulated under Law No. 13 of 2003 on Manpower,[16] along with Law No. 6 of 2023 regarding the Ratification of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation into Law and its amendments following the Constitutional Court's Decision No. 168/PUU-XXI/2023 on the Judicial Review of Law No. 6 of 2023 on Job Creation. However, in principle, a work contract is also a type of agreement. Therefore, the legal issue discussed in this paper concerns the principle of freedom of contract and the limitations of this principle in the context of work agreements.

2. Research Method

This research is a legal study of a normative juridical type, conducted to find solutions to legal issues, with the outcome offering prescriptions on what should be done regarding the raised issues.[17] The data used in this research is secondary data obtained through literature study, which includes primary legal sources, secondary legal sources, and tertiary legal sources. The research employs a statute approach, which involves examining and analyzing labor laws and regulations, as well as a conceptual approach, which aims to understand the legal concepts related to labor and civil law. The data is analyzed using a qualitative analysis method, along with a descriptive-analytical writing approach.

3. Literature Review

A. Contract Law

Contract law still refers to Book III of the Civil Code, which differs from Book II of the Civil Code concerning property law, as the latter adopts a closed system. In contrast, Book III of the Civil Code follows an open system, meaning that anyone is allowed to make an agreement on anything, whether it is already regulated by law or not, as long as it does not violate laws, public order, or morality, as stipulated in Article 1337 of the Civil Code, which states: "A cause is unlawful if it is prohibited by law, or if it is contrary to morality or public order." Consequently, contract law is supplementary in nature, meaning the provisions of Book III of the Civil Code may be set aside

[16]Bab IX tentang Hubungan Kerja, Pasal 50 s/d Pasal 66 Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*
[17]Peter Mahmud Marzuki, *Penelitian Hukum,* Kencana Prenada Media Group, 2007, Jakarta, Hlm. 35.

if the parties have established their own provisions. If the agreement does not regulate specific matters regarding the intentions of the parties, it will automatically be subject to and governed by Book III of the Civil Code. In Book III of the Civil Code, the term "agreement" is a translation of the word *overeenkomst*, which means to agree or to be in accord.[18] According to Article 1313 of the Civil Code, an agreement is a legal act whereby one or more persons bind themselves to one or more other persons.

Due to the open system and supplementary nature of the regulation of contract law, it grants the parties the broadest freedom to make any agreements, as long as they do not violate the law, public order, or morality. This freedom is known as one of the most important principles in contracts, namely the principle of freedom of contract, which is reflected in Article 1338, paragraph (1) of the Civil Code, stating that all agreements made legally shall be binding as laws for those who create them. The principle of freedom of contract represents the embodiment of free will, as an extension of human rights.[19]

This principle is closely related to the content, form, and type of the agreement made. The provisions of Article 1338, paragraph (1) must be read in conjunction with Article 1320 of the Civil Code, because a legally made agreement must fulfill the criteria for a valid contract, which are: (i) the agreement of the parties (without coercion, deceit, or fraud), (ii) the capacity to act (legal competence to enter into a legal act), (iii) a definite object (the subject matter of the agreement), and (iv) a lawful cause (a legitimate purpose). Other essential principles contained in the contract law under Book III of the Civil Code include (i) the principle of consensualism, (ii) the principle of *pacta sunt servanda*, (iii) the principle of good faith, and (iv) the principle of personality. The principle of consensualism (the principle of agreement or consent) means that a contract exists as soon as the parties reach mutual consent. In other words, the contract is valid and legally binding from the moment the parties agree on the main terms of the agreement (Article 1320, item 1, in conjunction with Article 1338, paragraph (1) of the Civil Code). The principle of *pacta sunt servanda* means that an agreement made by the parties, once it meets the criteria for a valid contract, is legally binding as a law for those who created it (Article 1338, paragraphs (1) and (2) of the Civil Code). The principle of good faith dictates that what is agreed upon by the parties must be performed in accordance with the demands of justice and must not violate propriety (Article 1338, paragraph (3) of the Civil Code). Lastly, the principle of personality means that only the parties who enter into the contract are bound by it, and it does not affect third parties (Article 1340, paragraphs (1) and (2) of the Civil Code).

B. Employment Agreement

The relationship of law, both heteronomous and autonomous, in every work relationship,

[18]Khoirul Anwar, "Buku III Kitab Undang-undang Hukum Perdata", https://lawtherapy.blogspot.com/2010/01/hukum-perdata.html. Diakses pada tanggal 22 Juli 2019.
[19]Ery Agus Priyono, "Penerapan Asas Kebebasan Berkontrak dalam Pembuatan Perjanjian Franchise Es Teler 77", *Jurnal Masalah-Masalah Hukum Jilid 44, No.2*, (April 2015): 127.

labor relationship, or industrial relationship results in the presence of both public law and civil law aspects within labor law. Therefore, labor law can be considered dual in nature, with one side being public law and the other being civil law. Iman Soepomo argues that some people contend labor law is no longer *privaatrechtelijk* (civil law) but rather *publiekrechtelijk* (public law).[20] The civil law nature of labor law stems from the existence of the employment relationship, which arises after an employment agreement is made.[21] Since it originates from an agreement, the employment contract, in principle, remains an agreement. Thus, as long as the provisions are of a general nature, the general provisions of Book III of the Civil Code still apply to employment contracts. As a result, the legal aspects of agreements will also be reflected, in addition to being a contract with specific characteristics related to labor and employment, which are now specifically regulated under Law No. 13 of 2003 on Manpower[22], along with Law No. 6 of 2023 regarding the Ratification of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation into Law, as well as its amendments following the Constitutional Court's Decision No. 168/PUU-XXI/2023 on the Judicial Review of Law No. 6 of 2023 on Job Creation.

An employment relationship arises from an employment agreement between the employer and the worker/laborer[23], the regulation of which originates in Book III, Chapter 7A of the Civil Code, from Articles 1601 to 1603, which have been in effect for the Indonesian population since 1879. In this section of the Civil Code, the employment agreement is considered one form of an agreement to perform work, as outlined in Article 1601 of the Civil Code, which recognizes three types of agreements: the employment agreement, the service agreement, and the work contract. In Book III of the Civil Code, the employment agreement is categorized as a named agreement (*benoemde/nominaat contracten*). According to Salim HS, Article 1319 of the Civil Code divides agreements into two categories: named agreements and unnamed agreements *(onbenoemde/innominaat contracten)*[24]. Named agreements are those explicitly regulated by law (as found in Book III of the Civil Code), such as sale and purchase, exchange, leasing, donation, safekeeping, loan agreements, power of attorney, employment agreements, and others. On the other hand, unnamed agreements refer to those that are not specifically regulated by law and lack a

[20]Iman Soepomo, *Pengantar Hukum Perburuhan,* (Jakarta: Djambatan, 2003), Hlm.11.
[21]Pasal 50 Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*
[22]Bab IX tentang Hubungan Kerja, Pasal 50 s/d Pasal 66 Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*
[23]Pasal 50 Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*
[24]Salim HS, *Hukum Kontrak: Teori dan Teknik Penyusunan Kontrak,* (Jakarta: Sinar Grafika, 2006), Hlm. 47.

particular name, such as leasing, venture capital, factoring, credit card operations, consumer financing, franchising, and others. Both named and unnamed agreements are subject to the general provisions of Book III of the Civil Code concerning contracts.[25] This is based on Article 1319 of the Civil Code, which states that all agreements, whether they have a specific name or are unnamed, are governed by the general rules found in this chapter and the preceding chapter.

4. Results and Discussion

A. The Definition and Elements of an Employment Contract

According to Iman Soepomo, an employment agreement is a contract made between a worker and an employer, where one party (the worker) binds themselves to work for the other party (the employer) in exchange for a wage, and the other party (the employer) commits to employing the worker and paying wages.[26] Subekti, as cited by Djumadi, defines an employment agreement as a contract between an employer and an employee, characterized by the presence of a specific wage or salary, a hierarchical relationship (*dienstverhouding*), where one party (the employer) has the right to issue orders that the other party (the worker) must follow.[27] Thus, it can be concluded that an employment agreement must meet the following essential elements:[28] (i) there is a person working under the direction of another person; (ii) the execution of work; (iii) for a specific period of time; and (iv) the provision of wages. Therefore, an employment agreement is a contract containing the elements of work, service (under the direction or leadership of another), wages, and a specified duration. These four elements are the essential aspects of an employment agreement.

An employment agreement, as a contract specifically regulated under Law No. 13 of 2003 on Manpower,[29] is defined by this law as a contract between a worker/employee and an employer or employer representative that outlines the terms of employment, rights, and obligations of the parties involved.[30] According to Law No. 13 of 2003, an employment agreement contains three essential elements: the element of work, the element of wages, and the element of instruction. This is stated in Article 1, number 15 of Law No. 13 of 2003, which defines an employment relationship

[25]*Ibid.*
[26]Iman Soepomo, *Op.cit,* Hlm.70.
[27]Djumadi, *Op.cit,* Hlm.30.
[28]Falentino Tampongangoy, "Penerapan Sistem Perjanjian Kerja Waktu Tertentu di Indonesia", https://docobook.com/penerapan-sistem-perjanjian-kerja.html. Diakses pada tanggal 22 Juli 2019.
[29]Bab IX tentang Hubungan Kerja, Pasal 50 s/d Pasal 66 Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*
[30] Pasal 1 angka 14 Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*

as a relationship between an employer and a worker/employee based on an employment agreement, encompassing the elements of work, wages, and instructions. Thus, an employment relationship arises after the conclusion of an employment agreement. Therefore, it can be said that the employment agreement is the first gateway to the relationship between the worker/employee and the employer.

B. Requirements for a Valid Employment Agreement

In principle, the provisions of Article 1320 of the Civil Code regarding the requirements for a valid agreement remain the general guideline for the validity of an employment agreement, with specific provisions governed by Law No. 13 of 2003 on Manpower.[31] According to Article 1320 of the Civil Code, the requirements for a valid agreement are: (a) mutual consent between the parties involved; (b) the capacity to enter into a binding agreement; (c) a certain subject matter; and (d) a lawful cause. Meanwhile, Law No. 13 of 2003 on Manpower stipulates that an employment agreement is based on:[32] (a) mutual consent of both parties; (b) the ability or capacity to perform a legal act; (c) the existence of the agreed-upon work; and (d) the agreed-upon work does not conflict with public order, morality, or applicable laws and regulations.

Both in the Civil Code and in Article 52, paragraph (1) of Law No. 13 of 2003 on Manpower, mutual consent between the parties signifies that the agreement made must uphold the principle of consensualism. In an employment agreement, consent occurs when the employee/worker accepts the work offered, and the employer agrees to employ the worker. Competence in an employment agreement means that both parties, the worker/employee and the employer or the employer's representative, are capable of entering into an employment contract. A person is legally considered competent to make an agreement when they are of legal age (adulthood) and are mentally sound. In labor law, the definition of legal age/adulthood can be inferred from Article 1, number 26 of Law No. 13 of 2003, which states: "a child is anyone under the age of 18 (eighteen) years." Therefore, adulthood/legal age is 18 years, at which point an individual can enter into an employment agreement for any type of work. The element of a certain subject matter (Article 1320 of the Civil Code) and the agreed-upon work (Article 52, paragraph (1) of Law No. 13 of 2003) constitutes the

[31] Pasal 52 ayat (1) Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*
[32] Pasal 52 ayat (1) Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*

core object of the agreement. The object of the agreement, which is the agreed work, must have a lawful cause (*causa*) and must not violate public order, morality, or the prevailing laws and regulations.

When all four requirements are met, the employment agreement made is considered valid by law, and as a consequence, it is regarded as a law for those who made it. According to Lalu Husni, these four conditions are cumulative. This means that an employment agreement made by the parties that fails to meet the requirements of mutual consent and the ability or competence to perform legal acts (subjective requirements) can be annulled. Meanwhile, an employment agreement made by the parties that violates the conditions of having agreed-upon work and where the work is contrary to public order, morality, and prevailing laws and regulations (objective requirements) is automatically void.[33] The subjective requirements relate to the parties involved, while the objective requirements concern the subject matter of the agreement. Article 52, paragraph (2) of Law No. 13 of 2003 states that an employment agreement made by the parties that violates the provisions mentioned in paragraph (1) letters a and b may be annulled.[34] Furthermore, Article 52, paragraph (3) of Law No. 13 of 2003 stipulates that an employment agreement made by the parties that violates the provisions mentioned in paragraph (1) letters c and d is automatically void by law.[35]

C. Types of Employment Agreements and How to Create an Employment Agreement

Employment agreements are generally categorized into two types: fixed-term employment agreement and indefinite-term employment agreement.[36] According to Article 56, paragraph (1) of Law No. 13 of 2003 concerning Manpower, employment agreement can be made for a specified period or for an indefinite period. Article 56, paragraph (2) of Law No. 13 of 2003 defines fixed-term employment agreement as a work agreement between a worker/laborer and an employer, which is established for a certain period or based on the completion of a specific task. The provisions of Article 56 of Law No. 13 of 2003 have been amended by Law No. 6 of 2023 on Job

[33]Lalu Husni, *Pengantar Hukum Ketenagakerjaan Indonesia,* (Jakarta: RajaGrafindo Persada, 2016), Hlm. 66.

[34]Menurut Pasal 52 ayat (1) Undang-Undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan*, huruf (a) kesepakatan kedua belah pihak; dan huruf (b) kemampuan atau kecakapan melakukan perbuatan hukum.

[35]Menurut Pasal 52 ayat (1) Undang-Undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan*, huruf (c) adanya pekerjaan yang diperjanjikan; dan huruf (d) pekerjaan yang diperjanjiakan tidak bertentangan dengan ketertiban umum, kesusilaan, dan peraturan perundangan yang berlaku.

[36]Pasal 56 ayat (1) Undang-undang Republik Indonesia Nomor 13 Tahun 2003 tentang *Ketenagakerjaan.*

Creation, which expanded Article 56 from two paragraphs to four paragraphs. Paragraphs (3) and (4) primarily regulate that fixed-term employment agreement, whether based on a specific time period or the completion of a particular task, is determined through an employment agreement and regulated by government regulations. However, Article 56, paragraph (3) of Law No. 6 of 2023 was annulled by Constitutional Court Decision No. 168/PUU-XXI/2023 regarding the Judicial Review of Law No. 6 of 2023 on Job Creation. The Constitutional Court ruling declared that Article 56, paragraph (3), in Article 81, item 12 of the Annex to Law No. 6 of 2023, is in contradiction with the 1945 Constitution of the Republic of Indonesia and has no binding legal force unless interpreted to mean that the duration for the completion of a specific task shall not exceed a maximum of five years, including any possible extensions.[37] Therefore, fixed-term employment agreement based on a certain time period can be established for a maximum of five years. Fixed-term employment agreement may only be used for specific tasks, which, by their nature or type of work, are expected to be completed within a certain period. It cannot be applied for permanent work, such as work that is finished in one instance or temporary, work that is expected to be completed within a short period, seasonal work, or work associated with new products, new activities, or additional products still in trial or testing phases.[38] Fixed-term employment agreement cannot be used for permanent work, and if it does not meet the provisions of Article 59, paragraphs (1) and (2), it will be automatically converted into a indefinite-term employment agreement.[39] In creating a fixed-term employment agreement, the agreement must be written and use the Indonesian language in Latin script. Additionally, fixed-term employment agreement cannot stipulate a probationary period; if such a period is included, it will be automatically void, and the work period will be counted as part of a indefinite-term employment agreement.[40]

An indefinite-term employment agreement is a work agreement between a worker/laborer and an employer to establish a permanent employment relationship.[41] According to Djumadi, an indefinite-term employment agreement is characterized by its lasting nature, and the legal consequence if one party wishes to terminate or end the employment relationship, especially the

[37]Putusan MK Nomor 168/PUU-XXI/2023 tentang Uji Materil Undang-undang Nomor 6 Tahun 2023 tentang Cipta kerja.
[38]Pasal 59 ayat (1) Undang-undang Nomor 6 Tahun 2023 *tentang Cipta Kerja*.
[39] Pasal 59 ayat (2) dan (3) Undang-undang Nomor 6 Tahun 2023 *tentang Cipta Kerja*.
[40]Pasal 57 dan 58 Undang-undang Nomor 6 Tahun 2023 *tentang Cipta Kerja*.
[41]Friska Martalena Simanjuntak, Tesis *"Penerapan Asas Kebebasan Berkontrak Dalam Perjanjian Kerja Waktu Tertentu di The Forest Trust (Non Profit Organization) Kantor Perwakilan Indonesia"*, Semarang: Universitas Dipenogoro, 2012, diunduh dari http://eprints.undip.ac.id/52183/1/Tesis_lengkap_Friska_Martalena_Simanjuntak-12.pdf, tgl. 21 Juli 2019.

employer, is that they must obtain approval and fulfill obligations such as paying service fees, severance pay, compensation, and other terms.[42] In addition to being agreed upon as a indefinite-term employment agreement, it may also occur in cases where a fixed-term employment agreement does not meet the provisions of Article 59, paragraphs (1) and (2) of Law No. 6 of 2023 concerning Job Creation, in which case it automatically converts into a indefinite-term employment agreement.[43]

In the creation of an indefinite-term employment agreement, it can be made either in writing or verbally (Article 51 of Law No. 13 of 2003 concerning Manpower). Furthermore, indefinite-term employment agreement may include a probationary period of no more than 3 (three) months, with the provision that wages must not be paid below the applicable minimum wage (Article 60 of Law No. 13 of 2003 concerning Manpower). The probationary period requirement must be stated in the employment agreement. If the employment agreement is made verbally, the probationary period condition must be communicated to the worker/laborer and included in the appointment letter. If it is not stated in the employment agreement or the appointment letter, the probationary period condition is deemed nonexistent (Explanation of Article 60, paragraph (1) of Law No. 13 of 2003 concerning Manpower).

D. Form and Content of the Employment Agreement

According to the provisions of Article 51, paragraph (1) of Law No. 13 of 2003, an employment agreement may be made in writing or verbally. Thus, an employment agreement can take either a written or verbal form. However, in modern times, a written form of employment agreement offers more legal certainty. According to Koko Kosidin, a written employment agreement is more beneficial because it explicitly outlines the terms and intentions of both parties, thereby ensuring legal certainty, avoiding ambiguity, and serving as written evidence in the event of a dispute.[44] It would be even better and its validity further ensured if the agreement is made into an authentic deed before a notary.[45]

In the case of a written employment agreement, Law No. 13 of 2003 on Manpower sets out the formal requirements for the agreement, which must at least

[42]Djumadi, *Op.cit*, Hlm.62.
[43]Pasal 59 ayat (3) Undang-undang Nomor 6 Tahun 2023 *tentang Cipta Kerja*.
[44]Koko Kosidin, *Perjanjian Kerja-Perjanjian Perburuhan dan Peraturan Perusahaan*, (Bandung: Mandar Madju, 1999), Hlm. 26.
[45]*Ibid.*

include:[46]

a. The name, address of the company, and the type of business;
b. The name, gender, age, and address of the worker/employee;
c. The position or type of work;
d. The workplace location;
e. The amount of wage and the method of payment;
f. The terms and conditions of employment, including the rights and obligations of the employer and the worker/employee;
g. The commencement date and duration of the employment agreement;
h. The place and date the employment agreement is made; and
i. The signatures of both parties to the employment agreement.

In addition, a written employment agreement must be made in at least two copies, each having the same legal force, with one copy for the worker/employee and one copy for the employer.[47] Regarding the provision that an employment agreement can be made in written or oral form, there is an exception for Fixed-Term Employment Agreement. These agreements must be made in writing, using the Indonesian language and Latin script. If the agreement is made in both Indonesian and a foreign language, and there is a discrepancy in interpretation between the two, the version in the Indonesian language will prevail.[48] The provisions of Article 57 of Law No. 6 of 2023 concerning Job Creation are as follows:

(1) A fixed-term employment agreement must be made in writing and must use the Indonesian language and Latin script.

(2) If a fixed-term employment agreement is made in both Indonesian and a foreign language, and there is a difference in interpretation between the two, the version of the fixed-term employment agreement made in the Indonesian language shall prevail.

In accordance with the principle of freedom of contract, the parties are free to determine the content of the employment agreement as long as it does not conflict with laws, morality, or public order.[49] This principle of freedom of contract is derived from the provisions of Article 1338

[46]Pasal 54 ayat (1) Undang-undang Nomor 13 Tahun 2003 *tentang Ketenagakerjaan.*
[47]Pasal 54 ayat (3) Undang-undang Nomor 13 Tahun 2003 *tentang Ketenagakerjaan.*
[48]Pasal 57 Undang-undang Nomor 6 Tahun 2023 *tentang Cipta Kerja*.
[49]Abdul Khakim, *Pengantar Hukum Ketenagakerjaan Indonesia: Berdasarkan Undang-undang Nomor 13 Tahun 2003*, (Bandung: Citra Aditya Bakti, 2003), Hlm.28.

paragraph (1) while taking into account Articles 1320, 1335, and 1337 of the Civil Code. [50] According to Iman Soepomo, the content of the employment agreement is a fundamental issue, meaning that the work agreed upon must not contravene mandatory legal provisions, public order laws, or the moral norms of society.[51]

In Law No. 13 of 2003 jo. Law No. 6 of 2023 concerning Job Creation, the principle of freedom of contract is also embraced, albeit with certain limitations, including formal requirements (Article 54 paragraphs (1) and (3) of Law No. 13 of 2003, Article 57 of Law No. 6 of 2023) and material requirements in the creation of employment agreements (Article 54 paragraph (2), Article 127, and Article 128 of Law No. 13 of 2003). In principle, the provisions of Article 1320 of the Civil Code regarding the requirements for the validity of agreements remain the general guideline for the validity of employment agreements, with specific guidelines already regulated by Law No. 13 of 2003, particularly in Article 52 paragraph (1)[52]. This article states that an employment agreement is made based on: the mutual consent of both parties, the ability or legal capacity to perform legal acts, the existence of the agreed-upon work, and the work agreed upon must not contradict public order, morality, and applicable laws. With the fulfillment of these four requirements, the employment agreement made is considered valid under the law and, as a consequence, is binding like a law for the parties who made it. The formal requirements are outlined in Article 54 paragraphs (1) and (3) of Law No. 13 of 2003, Article 57 of Law No. 6 of 2023, and the material requirements in the creation of employment agreements are contained in Article 54 paragraph (2), Article 127, and Article 128 of Law No. 13 of 2003. The original texts of the articles mentioned are as follows:

Article 54 paragraph (2) of Law No. 13 of 2003:

The provisions in the employment agreement as referred to in paragraph (1) letter e (the amount of wages and the method of payment) and letter f (terms of employment that include the rights and obligations of the employer and the worker/laborer) must not contradict the company regulations, collective labor agreements, and applicable laws and regulations.

[50] *Ibid.*
[51] Iman Soepomo, *Hukum Perburuhan: Bidang Hubungan Kerja*, (Jakarta: Djambatan, 2001), Hlm.59.
[52] Esti Ropikin, Tesis *"Penerapan Asas Kebebasan Berkontrak Dalam Pembuatan Perjanjian Outsourcing Dan Perjanjian Kerja Waktu Tertentu*", Semarang: Universitas Diponegoro, 2010, diunduh dari http://eprints.undip.ac.id/24624/1/Esti_Ropikin.pdf pada tanggal 22 Juli 2019.

Article 127 paragraphs (1) and (2) of Law No. 13 of 2003:

1. The employment agreement made by the worker/laborer must not conflict with the collective labor agreement.
2. If the provisions in the employment agreement as referred to in paragraph (1) conflict with the collective labor agreement, the provisions in the employment agreement are null and void, and the provisions of the collective labor agreement shall apply.

Article 128 of Law No. 13 of 2003:

If the employment agreement does not include provisions regulated in the collective labor agreement, the provisions of the collective labor agreement shall apply. Explanation of Article 54 paragraph (2) of Law No. 13 of 2003: What is meant by "must not contradict" in this paragraph is that if there are existing company regulations or a collective labor agreement within the company, the contents of the employment agreement—whether in terms of quality or quantity—must not be lower than the provisions set forth in the company regulations or collective labor agreement of the relevant company.

In determining the contents of an employment agreement, both parties must consider the provisions of the collective labor agreement and company regulations (the contents of the employment agreement, both in terms of quality and quantity, must not be lower than the company regulations or collective labor agreement). According to F.X. Djumialdji, in practice, the content of employment agreements generally includes wages, the type of work, and the duration of employment[53]. Employment agreements typically contain only basic or minimal work conditions, which is why additional regulations, such as company rules and collective labor agreements, are needed to provide a complete set of work conditions.[54]

Furthermore, the position of the collective labor agreement is critical, as Zaeni Asyhadie states that the collective labor agreement holds the highest position in the company.[55] Therefore, if the employment agreement does not adhere to the provisions of the collective labor agreement and contains contradictory or missing regulations as stipulated in the collective labor agreement, the employment agreement will be void by law, and the provisions of the collective labor agreement

[53]FX. Djumialdji, *Perjanjian Kerja,* (Jakarta: Sinar Grafika, 2005), Hlm.23.
[54]*Ibid.*
[55]Zaeni Asyhadie, *Hukum Kerja: Hukum Ketenagakerjaan Bidang Hubungan Kerja,* (Jakarta: RadjaGrafindo Persada, 2007), Hlm.55.

will apply instead.[56]

While individual employment agreements are made between workers and employers, collective labor agreements are negotiated collectively (with the involvement of labor unions and employers), and they aim to represent workers' interests that may not be addressed through individual employment agreements. [57] According to Djumadi, the relationship between the employment agreement and the collective labor agreement is as follows:[58] (i) the collective labor agreement serves as the primary regulation for the employment agreement, (ii) the employment agreement cannot override the existence of the collective labor agreement, (iii) the provisions in the collective labor agreement automatically apply to the employment agreement, (iv) the collective labor agreement is a bridge toward creating a sound employment agreement, and (v) the collective labor agreement is one of the primary tools in achieving harmonious, secure, stable, and dynamic industrial relations based on Pancasila.

This connection shows the legal relationship between the employment agreement and the collective labor agreement, where both are created to protect the interests, legal standing, and legal certainty for workers, labor unions, employers, and employer organizations. The legal relationship refers to a relationship that produces legal consequences. Legal consequences are the outcomes arising from legal relationships regulated/established by Law No. 13 of 2003 on Manpower, specifically Articles 54 paragraph (2), 127, and 128.

The restrictions on material and formal requirements in the creation of employment agreements highlight the limitations on the principle of freedom of contract. As is well-known, the principle of freedom of contract is closely related to the content, form, and type of agreement being made. The principle of freedom of contract is contained in Article 1338 paragraph (1) of the Civil Code, which states that all agreements made legally shall be binding as laws for those who make them. This means that anyone can enter into any agreement, as long as it is not prohibited by law, does not contradict morals, and does not disturb public order. In other words, even though employment agreements adhere to the principle of freedom of contract *(contractvrijheid)*, as is the case with agreements governed by Book III of the Civil Code, they are still constrained by the

[56]Pasal 127 ayat (1) dan (2) Undang-undang Nomor 13 Tahun 2003 *tentang Ketenagakerjaan.*
[57]Andanti Tyagita, "Prinsip Kebebasan Berserikat dalam Serikat Buruh Sebagai Upaya Perlindungan dan Penegakan Hak normatif Pekerja", *Jurnal Yuridika Vol.26, No.1,* (Januari-April 2011): 10-11.
[58]Djumadi, *Op.cit,* Hlm.116.

material and formal requirements established by Law No. 13 of 2003 and Law No. 6 of 2023 on Job Creation.

According to Djumadi, the principle of freedom of contract in employment agreements is no longer pure and intact, due to the regulations in the field of labor law, which are not just regulatory *(regelend)* but also mandatory *(dwingend)*, sometimes accompanied by various criminal sanctions.[59] However, even though there are restrictions on the freedom to contract when creating an employment agreement, this does not mean that the agreement loses its meaning, usefulness, or legal force, as long as it remains within reasonable limits. The principle of freedom of contract does not imply absolute freedom without restrictions but refers to the freedom to contract within boundaries. This means that the agreement must not be prohibited by law, must not contradict morals, and must not disturb public order.

Peter Mahmud Marzuki argues that on one hand, the principle of freedom of contract requires protection, and on the other hand, it needs to be limited. It is impossible for the principle of freedom of contract to be applied absolutely without any limitations, and these limitations may change over time in accordance with the development of society and public interests. [60] The restrictions on the freedom of contract arise and are regulated in Book III of the Civil Code (Article 1320), which include the creation of formal contracts *(formele contracten)*, real contracts *(reile contracten)*, standard contracts, and the intervention of authorities in contracts to protect the socially and economically weaker party.[61].

Indeed, the principle of freedom of contract works well when the parties are on an equal footing; however, in practice, the parties often find themselves in an unequal position, as is the case in employment agreements. In the Constitutional Court's ruling in Decision No. 168/PUU-XXI/2023 on the Judicial Review of Law No. 6 of 2023 on Job Creation, it was stated that employment agreements are made between employers and employees or workers, where the positions of the parties are not balanced, with workers or employees being the weaker party.[62] Therefore, the Constitutional Court recommended that fixed-term employment agreements should be regulated by law rather than by secondary regulations or agreements.[63]

[59]*Ibid.*
[60]Peter Mahmud Marzuki, *Op.cit*, Hlm.199.
[61]Dede Agus, *Loc.cit.*
[62]Putusan MK No: 168/PUU-XXI/2023 tentang Uji Materil Undang-undang Nomor 6 Tahun 2023 tentang Cipta Kerja, Pasal 56 ayat (3) dalam Pasal 81 angka 12 Lampiran UU No.6 Tahun 2023.
[63]Putusan MK, *Ibid.*

The creation of an employment contract often reflects an unequal position between the parties involved. On one side, the employee or worker is socially and economically disadvantaged, as they are in urgent need of employment. On the other side, the employer holds a stronger social and economic position, with the power to determine the terms of the contract. As a consequence, the employment agreement that emerges often disadvantages the employee and benefits the employer. According to Dwi Atmoko, the strong bargaining power of the employer, when juxtaposed with the weaker position of the employee, creates an imbalance in the agreement, where the weaker party feels compelled to accept all terms presented by the stronger party, which is obviously detrimental.[64] Fani Martiawan further explains that the dominant psychological position, authority, trust, and economic advantage of one party may be unfairly used to pressure or persuade the weaker party into agreeing to the contract terms.[65] This imbalance, coupled with the pressing needs of the weaker party, results in the absence of *good-faith bargaining*, a fundamental principle in contract law.[66] For this reason, there are limitations on the freedom to contract in employment agreements, designed to address the weaknesses inherent in such agreements and to elevate the employee's position to a more balanced one.

This imbalance in power dynamics is tied to a crucial element of employment contracts: the authority to command, which is central to the very nature of an employment relationship. Without this power dynamic — where one party gives orders and the other follows — the agreement would not be classified as an employment contract. Therefore, while employment contracts adhere to the principle of freedom of contract, they are also subject to limitations on this freedom. This is not unique to Indonesia; even in England, the birthplace of industrial revolution liberalism, the negative impacts of industrialization on workers led to the introduction of protections for employees. As Peter Mahmud Marzuki noted, to prevent the abuse of the principle of freedom of contract and to protect the weaker party, trade unions emerged in England, providing workers with a balanced position vis-à-vis employers. Furthermore, the government intervened through legislation to ensure the protection of workers' rights.[67] Similarly, in the United States, despite its strong adherence to the principle of freedom of contract, the government eventually recognized the need for intervention

[64]Dwi Atmoko, "Penerapan Asas Kebebasan Berkontrak Dalam Suatu Perjanjian Baku", *Jurnal Binamulia Hukum Vol. 11, No.1*, (Juli 2022): 82, DOI**:** https://doi.org/10.37893/jbh.v11i1.308.
[65]Fani Martiawan Kumara Putra, *Op.cit,* Hlm. 241 dan 243.
[66]*Ibid,* Hlm.243.
[67]Peter Mahmud Marzuki, *Op.cit,* Hlm. 204.

in contracts made between employers and employees to ensure fair treatment and protection of workers' rights.[68]

The limitation on the freedom of contract in the creation of an employment agreement does not mean that the agreement loses its meaning, benefits, or legal force, as the principle of freedom of contract does not imply an absolute freedom without recognizing limitations. Therefore, an employment agreement that meets the valid requirements as regulated in Article 1320 of the Civil Code in conjunction with Article 52 of Law No. 13 of 2003 on Manpower holds binding force, just like a law, for the parties who have entered into it. Article 55 of Law No. 13 of 2003 states that an employment agreement cannot be revoked or altered except by mutual consent of the parties involved. This meaning is in line with the provisions contained in Article 1338 of the Civil Code, which underpins the principle of *pacta sunt servanda*, essentially stating that: (1) a valid agreement shall have the force of law for those who make it; (2) an agreement cannot be revoked except by mutual consent of both parties, or for reasons deemed sufficient by law; and (3) the agreement must be performed in good faith.

5. Conclusion and Suggestion

A. Conlusion

As a form of agreement, the employment contract adheres to the principle of freedom of contract (*contractvrijheid*), similar to other agreements regulated under Book III of the Civil Code. However, this principle is constrained by the material requirements in the formation of employment contracts (Article 54, paragraph (2), Article 127, and Article 128) of Law No. 13 of 2003 on Manpower, as well as the formal requirements limitations (Article 54, paragraphs (1) and (3) of Law No. 13 of 2003 on Manpower, and Article 57 of Law No. 6 of 2023 on Job Creation). Thus, the principle of freedom of contract in employment agreements is no longer pure and intact.

Nevertheless, despite the limitations on freedom of contract in the creation of employment contracts, this does not mean that the agreement loses its meaning, benefits, or even its legal force, as long as it remains within reasonable boundaries. The principle of freedom of contract does not imply absolute freedom without restrictions, but rather freedom that recognizes its own limitations. The principle of freedom of contract functions effectively when the parties are in an equally strong or equal bargaining position. However, in the case of employment contracts, the parties are not in an equal or balanced position. On one side, workers are socially and economically weaker or under pressure due to their urgent need for employment, while on the other side, employers are in a stronger and more determining social and economic position. The legal consequence is that the employment contract formed may disadvantage the worker and benefit the employer. Therefore,

[68]*Ibid.*

within employment contracts, there are restrictions on the freedom of contract to address the inherent weaknesses of such agreements and to elevate the position of workers to a more balanced standing.

B. Suggestion

To address the imbalance in bargaining power between employers and workers, several measures should be considered:

1. Strengthen Worker Protections: Ensure that legal protections for workers are enforced, particularly regarding the material and formal requirements of employment contracts.
2. Support Trade Unions: Encourage the role of trade unions in representing workers and ensuring fair contract negotiations.
3. Enhance Government Oversight: Reinforce government intervention to prevent exploitation and ensure compliance with employment laws.
4. Promote Good-Faith Bargaining: Foster transparent and equitable negotiations between employers and employees.
5. Balance Flexibility with Protection: Ensure that flexibility for employers does not undermine basic worker rights.

These measures would help maintain a fairer balance in employment contracts, protecting workers while respecting the principle of freedom of contract.

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