



---

**IMPACT OF CHANGES TO ARTICLE 42 OF THE JOB CREATION  
LAW ON EMPLOYMENT DEVELOPMENT: ANALYSIS OF  
CONSTITUTIONAL COURT DECISION  
NUMBER 168/PUU-XXI/2023**

Raphael Bertrand Mayaka  
Universitas Negeri Semarang  
*e-mail*: raphaelbm@students.unnes.ac.id

### **ABSTRACT**

*This article analyzes the impact of changes to Article 42 of the Job Creation Law on employment in Indonesia following the Constitutional Court Decision No. 168/PUU-XXI/2023. This change makes it easier for employers to employ foreign workers through the ratification of the utilization plan by the central government. Although it aims to increase the attractiveness of foreign investment and encourage knowledge transfer, this policy poses challenges, such as limited job opportunities for local workers due to low levels of education and skills. The Constitutional Court Decision added a phrase that prioritizes the use of Indonesian workers to improve equal employment opportunities and protect the rights of local workers. This study uses a normative legal method with a statutory and conceptual approach to evaluate the policy. This article recommends improving the skills of local workers through training, education, and strict supervision of policy implementation, so as to create a balance between the need for foreign investment and strengthening national competitiveness.*

*Keywords: Constitutional Court Decision, Foreign Workers, Job Creation Law, Local Workers.*

### **INTRODUCTION**

In a workplace or in a company there are many sectors or commonly called work divisions. Of the many divisions, in order to achieve the goal of a company, namely profit, competent workers will be needed. However, if you look at the comparison of the competence, expertise and skill set of local workers with foreign workers, then of course foreign workers are the best choice. Therefore, the matter of the existence of foreign workers is regulated in Law Number 13 of 2003 concerning Manpower which was later amended by Law Number 11 of 2020 concerning Job Creation and followed by changes to the regulation in Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into a Law which will hereinafter be referred to as the Ciptaker Law. Looking at Article 42 paragraph (1) of the Ciptaker Law which states that every employer (except individual employers, because they are not allowed) who wants to employ foreign workers must make a plan for using the foreign workers which must then be approved by the central government.

If we look at the article, we also find that in paragraph (3) it is written that the provision does not apply to directors or commissioners with valid shares, diplomatic and consular employees at foreign representative offices, foreign workers needed by employers in types of production activities that are stopped due to emergencies, business visits, technology-based start-ups, vocations and research for a certain period of time. This indicates that a company is given the convenience of obtaining workers from abroad. This will certainly be very beneficial for the company considering the differences in the level of ability and competence of foreign workers and local workers. However, if this matter is left without clear criteria in the plan for using foreign workers, local workers will very rarely have the same abilities as them, and may even be non-existent. This also takes into account the habits of people in Indonesia who tend not to have a high fighting spirit to compete, followed by workers' mental health which is not very good due to lack of wages and other things.

By not using local workers, it will cause a problem for the country of Indonesia. This is because of the lack of competence of workers from Indonesia, so it will be increasingly difficult for workers from Indonesia to get jobs both domestically and abroad. If they get a job, they can easily be exploited by employers for their own benefit. Therefore, an application was filed with the Constitutional Court of the Republic of Indonesia with case number 168/PUU-XXI/2023, the application was filed by the Labor Party, the Federation of Indonesian Metal Workers Unions (FSPMI), the Confederation of All Indonesian Trade Unions (KSPSI), the Confederation of Indonesian Labor Unions (KPBI) and the Confederation of Indonesian Trade Unions (KSPI). All of the applicants filed a petition for judicial review of the Job Creation Law related to employment, where in their petition there are many articles being tested, including Article 42 of the Job Creation Law or if the law states Article 81 Number 4. Which has its own reasons for each paragraph, the result itself is that it is partially granted, but if we look at Article 81 Number 4 of the Job Creation Law (Article 42 of the Job Creation Law) alone, then there are two of the five paragraphs that have been changed from the submission of the petition or more precisely are considered constitutional as long as they are interpreted in accordance with that determined by the Constitutional Court. The changes are in Article 42 paragraph (1) and paragraph (4) of the Job Creation Law, where both paragraphs regulate the ratification of the plan to use foreign workers, which in the decision adds the sentence: **“menteri yang bertanggungjawab di bidang (urusan) ketenagakerjaan, in casu menteri Tenaga Kerja”** or in English it is written “the minister responsible for the field of employment (affairs), in casu the Minister of Manpower” whereas in verse (4) the sentence is added **“Tenaga Kerja Asing dapat dipekerjakan di Indonesia ..., dengan memerhatikan pengutamaan penggunaan tenaga kerja Indonesia”** or in English it is written: “Foreign workers may be employed in Indonesia..., with due regard to prioritizing the use of Indonesian workers.”

So, based on the background that has been described above, the author has formulated the problem as follows:

1. How Foreign Workers Have Better Competencies, Abilities and Skill set than Local Workers?
2. How Does the Change in Article 42 of the Job Creation Law Impact Employment Developments After the Constitutional Court Decision No. 168/PUU-XXI/2023?

## RESEARCH METHODS

The research method used in the research is a normative legal approach. The normative legal approach is implemented by examining legal principles, legal provisions, legislation and legal mechanisms (Simanjuntak, 2023). Based on the type of legal research which is normative, several normative approaches are also used, namely the Conceptual Approach and the Statute Approach. The conceptual approach is used to analyze the views and doctrines contained in legal science which are based on literature studies and secondary data (Prasetya et al., 2023). Then the legal approach is carried out by analyzing the norms and positive legal regulations related to the legal phenomena that occur. After the approaches are carried out by the author, the author will analyze the results of the approach using a qualitative approach method. In the field of legal science, a qualitative approach should be related to examining the entire legal event that is currently happening and examining it in depth, which in the procedure will be carried out by reducing or filtering, processing, presenting, and analyzing data which will ultimately draw conclusions from the analysis that has been carried out.

## DISCUSSION

### A. The Reasons Shy Foreign Workers Have Better Competencies, Abilities and Skill set than Local Workers

If you want to examine the reasons why overseas workers can have better competence, abilities and skill set than local workers, then it is necessary to have views from several sides, including (Randang, 2011):

#### 1. Educational Side

Based on data from Goodstats, it can be seen that the level of education in Indonesia cannot be said to be good. In 2022, of the population of 275.36 million, only 6.41% will be attending college (Aditiya, 2023). This indicates a lack of education in Indonesia, which in 2023 according to a report from the Badan Pusat Statistik, only 10.63% of the total number of people over 15 years old have graduated from college, then 30.52% for those who have graduated from high school/equivalent, then 22.74% for those who have graduated from junior high school/equivalent, then 24.6% for elementary school/equivalent, then 9.01% for those who did not graduate from elementary school and 3.25% for those who did not attend school at all (Badan Pusat Statistik, 2023).

The figures from the data show the low level of education in Indonesia which is inversely proportional to the workforce from developed countries. Workers from developed countries certainly have a higher level of education so that they can easily improve their abilities. This ultimately results in local workers who do not meet the qualifications needed for a job, in addition, developed countries also pay close attention to the level of education of their people;

#### 2. Skill Side (Skill Set)

Based on the education data above, it can also be concluded that local workers do not have high skills either, this ultimately makes it difficult for them when they have to be compared with foreign workers who already have higher skills. In addition, this low skill also results in jobs that can be achieved by local workers

being lower both in terms of position and job description. On the other hand, the skills of foreign workers have a much higher level followed by the experience they have, making the competence of foreign workers more visible and applicable in a job;

3. The Opportunity Side

What is meant by the opportunity side here is the low opportunity that local workers have when competing with foreign workers at the time of searching or determining job formation. This is because when there are foreign workers who want to enter or will be included, the employer already knows in advance who and what abilities the foreign workers have, in contrast to local workers who the employer does not necessarily know. In addition, the recruitment and job placement mechanism of a closed company also indicates favoritism or bias towards foreign workers over local workers, this favoritism can also arise because an employer considers that the wages he gives will be equivalent to the work done by the foreign worker. Then apart from favoritism in recruitment and placement, sometimes a company also places someone from their country of origin (a company with foreign origin) to work in their company in Indonesia without knowing whether or not the worker's work method is appropriate, this also results in reduced opportunities because the existing positions have been taken by the foreign worker.

In addition, on the side of employment opportunities, there can be three categories, including: (i) formal employment opportunities; (ii) informal employment opportunities; and (iii) additional employment opportunities. If we look at the conditions in Indonesia, it can certainly be concluded that local workers are more often absorbed in informal employment opportunities (Malik, 2018). Then followed by the perception of the size or not of employment opportunities in an area makes local workers look for work in that place only with an assumption without first finding out the truth, this finally results in differences in employment opportunities between local workers and foreign workers;

4. The Conclusion Side for Workers

What is meant on this side is the existence of a conclusion or assumption from employers or the community itself that the competence, ability or skill set of foreign workers is much higher than that of local workers, this ultimately results in the emergence of considerations and decisions subconsciously that when foreign workers come, they are definitely better than local workers, this results in foreign workers being able to have more work experience than local workers, this will ultimately result in low experience from local workers even though it is not certain that foreign workers are better and more appropriate than local workers when viewed from the perspective of work culture, communication and other aspects;

5. Treatment Side

It is undeniable that the treatment of foreign workers and the treatment of local workers are very different, this indicates favoritism from the employer to existing workers. This discrimination does not stop at the employer alone but also from workers who are already in a workplace or company. This will eventually result in differences in wages, job descriptions and the abilities of foreign workers and

local workers. This can affect the abilities of a local worker because they will feel unrecognized so that there will be a possibility of a lack of self-confidence from a local worker when competing with foreign workers; and

6. Quality/Competence Side

From the five aspects above, it will ultimately affect a local worker so that finally the quality possessed by the local worker cannot be as high as the quality possessed by the foreign worker. This ultimately results in the local worker not having the skills needed when they will get a job when compared to the foreign worker who has the skills and experience they have so that it shows signs that the foreign worker is much more competent than the local worker.

In the implications of searching for workers in a company, one thing that is prioritized is the competence, ability and skill set possessed by a worker. So in searching for workers, of course, companies will look for workers from abroad, this is then also facilitated by the existence of the Ciptaker Law. The Ciptaker Law facilitates the entry of foreign workers as well as one of the steps to facilitate the entry of investment from other countries into Indonesia. However, this will ultimately sacrifice the availability of jobs for local workers, with the reduced availability of these jobs, it will result in increased unemployment in Indonesia. Therefore, breakthroughs, socialization and training are needed by the government for the community so that people can have the competence, abilities and skill set needed in the world of work. In addition, people in Indonesia also need to add to and increase their intention to increase their own abilities. If they continue to wait for help from the government, the community will never progress either in terms of economy or ability. This change can be started by finding out what abilities you already have and then studying them more deeply so that better skills emerge. These abilities are not limited to abilities that are in job qualifications alone but also abilities that are needed outside of job qualifications. This rarely happens due to the low interest of Indonesian people in improving their abilities or learning new things.

Furthermore, when viewed from another side, there are differences in culture, language and speech in communication (choice of words, tone and manner of speaking) then foreign workers have major weaknesses that need to be considered by employers. Although they have been given assistance as referred to in Article 42 paragraph (3) of the Job Creation Law, according to the author, this is not enough to overcome these problems. This will ultimately slow down the performance of the foreign workers themselves and the performance of local workers. Many conflicts arise due to the above problems, such as local workers who do not understand the directions of foreign workers to foreign workers feeling frustrated themselves (Martias, 2022). This arises due to differences that ultimately lead to problems, besides that, economically, if this is allowed to continue, there will be many economic disparities in the local workforce caused by the large number of unemployed and the many conflicts that exist in the workplace or company.

## **B. The Impact of Changes to Article 42 of the Job Creation Law on Employment Developments Following Constitutional Court Decision No: 168/PUU-XXI/2023**

With the amendment to Article 42 of the Job Creation Law based on the Constitutional Court Decision No. 168/PUU-XXI/2023, it will trigger interesting changes. These changes include Article 42 paragraph (1) and paragraph (4) of the Job Creation Law, where both paragraphs regulate the ratification of plans to use foreign workers, which the decision adds the sentence “**menteri yang bertanggungjawab di bidang (urusan) ketenagakerjaan, in casu menteri Tenaga Kerja**” or in English it is written “the minister responsible for the field of employment (affairs), in casu the Minister of Manpower” whereas in verse (4) the sentence is added “**Tenaga Kerja Asing dapat dipekerjakan di Indonesia ..., dengan memerhatikan pengutamaan penggunaan tenaga kerja Indonesia**” or in English it is written: “Foreign workers may be employed in Indonesia..., with due regard to prioritizing the use of Indonesian workers.” Next, the author will analyze the impact of the changes to the two verses in terms of how big the impact is and whether the changes made by the Constitutional Court are correct or not.

First, Article 42 paragraph (1) of the Job Creation Law is a result of changes to the Manpower Law where Article 42 of the Manpower Law states that when an Employer wants to use foreign workers, they are required to have written permission from the Minister. This was then changed to only require a plan to use foreign workers with approval from the central government, although it caused a little legal uncertainty, this change had a big impact on employers and companies because they were given the convenience of employing workers from abroad. The reason for doing this was so that foreign workers could help increase the value of a company in the eyes of the world of work. In addition, foreign workers are also considered to be able to help provide something for local workers in this case, namely sharing knowledge related to knowledge and technology, especially in the industrial sector so that they can accelerate national development in the future. Then this convenience is also carried out due to the lack of competence, ability and skill set of local workers, with the presence of foreign workers, a job will become easier to complete because of the competence they have. And finally, with the ease of entry of foreign workers, the government hopes that investors will be more interested in entering Indonesia and investing in it (Jazuli, 2018).

All of these advantages are highly considered by the government, but having these advantages does not mean that there are no disadvantages. The disadvantage of the change in the article is that there is no legal certainty regarding the criteria for how the plan to use foreign workers as referred to in Article 42 of the Job Creation Law, this has resulted in a decrease in public trust, especially local workers, in laws and regulations because the Job Creation Law no longer explicitly states the criteria as stated in the Employment Law such as (i) reasons for use; (ii) the position or position of the foreign worker in the job formation at the related company; (iii) the period of use of the foreign worker; and (iv) the appointment of Indonesian workers as companions for the foreign workers concerned. However, these matters are written in

the Government Regulation in 2021 which according to the author is actually sufficient if written in the Job Creation Law, the public feels that the phrase central government should also be detailed. In addition, the government also does not consider the problematic aspects or disadvantages of the use of foreign workers as described above, such as differences in culture, language and communication methods. This is quite disturbing for local workers who feel that the process of recruiting foreign workers is quite easy but employers are still given the freedom to employ these foreign workers.

Then, with the Constitutional Court decision No. 168/PUU-XXI/2023, the article was again changed or more precisely, the addition of a sentence “**menteri yang bertanggungjawab di bidang (urusan) ketenagakerjaan, in casu menteri Tenaga Kerja**” Or in English it is written “the minister responsible for the field of employment (affairs), in casu the Minister of Manpower.” The addition of this sentence is intended to restore the clarity that existed before the ratification of the Job Creation Law, by returning clarity on which minister's delegation will ratify the plan to use the relevant foreign workers. Based on this addition, it can be concluded that the addition of the Minister of Manpower in the article makes the ratification of the plan to use foreign workers more transparent. With this transparency, it will certainly have a significant impact on the placement of foreign workers in a company's work formation. In addition, with the addition of the Minister of Manpower and the emergence of transparency, the public will also know what will be considered in ratifying a plan to use foreign workers. Furthermore, with this change, it can be a breakthrough for the government to balance the need for foreign investment and protection of local workers. Then the Minister of Manpower after the addition of the sentence as referred to above also becomes a supervisor of the implementation or sustainability of foreign worker employment in Indonesia.

The expansion of the role of the Minister of Manpower in approving plans for the use of foreign workers opens up opportunities to strengthen collaboration between the government and the private sector. With tighter supervision, companies are expected to be more active in formulating plans that not only benefit them in terms of business, but also consider the social and economic impacts on local communities. This step can encourage companies to invest more in training and skills development of local workers so that they are able to compete with foreign workers. In addition, this policy increases transparency, allowing the public to play an active role in supervision. The public can provide input or report suspected abuses related to the use of foreign workers. With public involvement, this process can create a sense of shared responsibility and ownership of employment policies in Indonesia. In addition, this step is in line with the government's efforts to strengthen national competitiveness at the international level.

Second, Article 42 paragraph (4) of the Job Creation Law is also the result of changes to Article 42 written in the Manpower Law, only in this context the Job Creation Law adds a sentence which the author thinks is very important. From the original foreign workers who could only be employed in a certain period of employment and certain positions, an addition was given at the end of the sentence, which reads: “**serta memiliki kompetensi sesuai dengan jabatan yang akan diduduki**” or in English it reads: “and have the competencies appropriate to the

position to be occupied.” This addition will ensure that foreign workers who will be brought in and/or employed will have the competencies that are truly needed in a work formation, not only because of networking or because of favoritism in the recruitment process as referred to above. Furthermore, with the guaranteed competence as referred to in the article, the foreign workers can be expected to have the nature or desire to adjust to the work needs in the place where they work, this is due to one of the characteristics of a competent person who will always be active in finding a solution when there is a problem. The problems referred to in this case are problems with differences in culture, language and communication methods. By resolving these problems, the company also expects the company to receive higher profits. This also provides legal certainty for the company because now the company no longer needs to implement a favoritism system from another country if the company is a type of branch company of a foreign company.

However, if we look at it from another side, we will find that the regulation continues to prioritize the side of the company and foreign workers, which results in a feeling of being sidelined by local workers. They can feel this way because the article discusses very little about the comparison of the likelihood of being accepted for a job between foreign workers and local workers. This is considering the differences in competence, ability and skill set between foreign workers and local workers. With the addition of this article, it has provided legal certainty for a company regarding the competence of a foreign worker, but on the other hand, it also provides an indirect loss for local workers, both those who are already in the company and for local workers who are in the recruitment process. This loss is that there will be an assumption that it is better to use foreign workers in larger numbers than to mix them with local workers. Furthermore, with this loss, it will result in unemployment and also the taking of jobs that should be given to local workers to be given to foreign workers. Then, this article also has the potential to be misused because it does not have clear criteria regarding the competence in question. If the competence in question is only limited to having an ability without any specific special skills, then the foreign worker does not have any difference with the local worker.

With the existence of various problems above followed by an application from the workers' union, the Constitutional Court made an additional sentence at the end of the sentence which reads: “..., **dengan memerhatikan pengutamaan penggunaan tenaga kerja Indonesia**” or in English it is written: “..., with due regard to prioritizing the use of Indonesian workers.” The addition of the sentence has reasons that are included in the consideration of the decision, namely that there needs to be a clear and regular measure regarding the continuation of Article 42 paragraph (4) of the Job Creation Law, and does not harm job opportunities for local workers. In addition, there also needs to be restrictions on norms so that the article is not misused by a company that wants to use a favoritism system. Therefore, there needs to be an emphasis on the article where now evidence is needed in the form of certification of an ability, educational certificates and other evidence. Therefore, if in fact the competence and abilities possessed by foreign workers are the same or equivalent to the competence and abilities possessed by local workers, local workers must be prioritized in a recruitment process or job placement formation.



With the addition of the sentence as referred to above in Article 42 paragraph (4) of the Job Creation Law, it certainly has a very big impact, including now local workers have the opportunity to compete in getting a job or position that can be said to be almost the same as foreign workers. Then now local workers can be prioritized in the recruitment process when there are foreign workers with the same abilities as local workers, with the prioritization of local workers, the unemployment rate in Indonesia will also decrease, although slowly. In addition, this can also be a breakthrough for the government in maintaining equality in the number and abilities between foreign workers and local workers, with equality in the number of foreign workers, but still sufficient according to what is needed. Companies on the other hand will also get long-term benefits because with the presence of foreign workers and local workers, both can work together to learn from each other so that both workers become even better which will ultimately provide much greater benefits for a company.

## CONCLUSION

In an increasingly competitive world of work, companies are required to have competent workers in order to achieve their goals, namely profit. However, a comparison between local and foreign workers shows that foreign workers are often considered superior in terms of competence, expertise, and skill set. This is a major concern in employment policy in Indonesia. The Job Creation Law, which is a revision of Law Number 13 of 2003 concerning Manpower, makes it easier for companies to employ foreign workers. Article 42 of the Job Creation Law requires employers to prepare a plan for the use of foreign workers that must be approved by the central government. However, there are exceptions for several categories of workers, such as diplomatic employees and commissioners. This policy shows the government's efforts to attract foreign investment and increase the competitiveness of companies in Indonesia.

However, there are concerns that this policy could result in the neglect of local workers. Many local workers do not have the same competency as foreign workers, which in turn could worsen the unemployment rate in Indonesia. This is exacerbated by the low level of education and skills among local workers. Data shows that only a small portion of the Indonesian population has completed higher education, affecting their ability to compete in the job market. In this context, it is important to understand several factors that cause foreign workers to have an advantage over local workers. First, in terms of education, the level of education in Indonesia is still low compared to developed countries. Only a small portion of the population has completed higher education, so many local workers do not meet the qualifications required by companies. Second, the skills possessed by local workers also tend to be lower. This makes it difficult for them to compete with foreign workers who usually have better experience and skills. Third, opportunities for local workers to get jobs are also limited. The recruitment process is often closed and there is favoritism towards foreign workers, making opportunities for local workers even slimmer. Fourth, the perception of the community and employers that foreign workers are more competent than local workers also contributes to this gap. As a result, many local workers feel unappreciated and lose confidence in competing in the job market.

However, the changes that occurred after the decision of the Constitutional Court of the Republic of Indonesia regarding the Job Creation Law provide new hope for local workers. The addition of a sentence in Article 42 paragraph (4) that emphasizes the priority

of using Indonesian workers is a positive step to protect the rights of local workers. With this provision, it is hoped that companies will consider using local workers more when their qualifications and competencies are equal to those of foreign workers. In addition, the emphasis on competency in using foreign workers can also encourage companies to be more selective in recruiting workers from abroad. This means that if there are local workers who have the same or better qualifications than foreign workers, they must be prioritized in the recruitment process. Thus, this policy not only protects the rights of local workers but also creates opportunities for them to develop. The government also needs to take active steps to improve the skills and competencies of local workers through training and education. Investment in human resource development is essential so that local workers can compete with more skilled foreign workers. In addition, socialization regarding the importance of improving self-ability must also be increased so that the community has the motivation to learn and develop.

Overall, while the presence of foreign workers can provide benefits to companies and the national economy, it is important for the government and other stakeholders to ensure that the rights of local workers are protected. By prioritizing the use of Indonesian workers and improving the quality of their education and skills, it is hoped that a balance will be created between the needs of companies for skilled workers and the protection of local workers. This will ultimately contribute to sustainable economic growth and the improvement of the welfare of society as a whole.

## REFERENCES

- Aditya, Lip M. (2023). Tingkat Pendidikan Masyarakat Indonesia.1. <https://goodstats.id/infographic/tingkat-pendidikan-masyarakat-indonesia-pSqsI>
- Badan Pusat Statistik. (2023). Statistik Pendidikan 2023.
- Jazuli, A. (2018). Eksistensi tenaga kerja asing di indonesia dalam perspektif hukum keimigrasian. *Jurnal Ilmiah Kebijakan Hukum*, 12(1), 89-105.
- Malik, N. (2018). *Dinamika Pasar Tenaga Kerja Indonesia (Vol. 1)*. UMMPress.
- Martias, F. M. (2022). Dampak Kebijakan Tenaga Kerja Asing Era Pemerintahan Joko Widodo (2014–2019) terhadap Tenaga Kerja Lokal di Indonesia. *Jurnal PolGov*, 4(1), 67-124.
- Prasetya, A., Sigalingging, Y. E., & Santoso, A. P. A. (2023). Peran Hukum Dalam Pembangunan Dengan Pendekatan Economic Analysis of Law. *JISIP (Jurnal Ilmu Sosial Dan Pendidikan)*, 7(1), 211–218.
- Putusan Mahkamah Konstitusi Republik Indonesia Perkara Nomor: 168/PUU-XXI/2023.
- Randang, F. B. (2011). Kesiapan tenaga kerja indonesia dalam menghadapi persaingan dengan tenaga kerja asing. *SERVANDA\_Jurnal Ilmiah Hukum*, 5(1), 66-73.
- Simanjuntak, S. (2023). Problematika Status Keberangkatan Pengungsi di Indonesia Secara Yuridis-Normatif. *Jurnal Dialektika Hukum*, 5(1).
- Undang-Undang Nomor 6 Tahun 2023 tentang Penetapan Peraturan Pemerintah Pengganti Undang-undang Nomor 2 Tahun 2022 tentang Cipta Kerja menjadi Undang-undang.