

## Interpretation of Freedom of Contract to the Decision of the Constitutional Court of the Republic of Indonesia

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### Abstract:

The principle of freedom of contract is a principle in the treaty law that cannot be understood absolutely for anyone who is involved in an agreement. In order to make a binding in the contract/agreement, the parties should still take into account the essence of the equilibrium value of the parties to an agreement to avoid the existence of contracts/standard agreements that would precisely eliminate the value of justice for the right that should be obtained for one of the contracting parties. For example, contracts/labour agreements made between employers and workers/labourers in the case of termination of employment due to the existence of inter-worker/labourer marriage ropes in one company as regulated in Article 153 paragraph (1) letter f of Law of the Republic of Indonesia Number 13 Year 2003 concerning Manpower. For the applicant a judicial review of the provisions of the article in the Constitutional Court of the Republic of Indonesia, to assess the provisions of that article is of constitutional harm if such provisions continue. The Constitutional Court of the Republic of Indonesia in its legal consideration of Decision Number 13/PUU-XV/2017 considers the principle of freedom of contract in the context of the article whose judicial review is no longer relevant because it does not meet the value of the balance in the process of contracting/agreement and eliminating the justice of one of the parties involved in the contract.

**Keywords:** Interpretation; Constitutional Court; Freedom of Contract

### INTRODUCTION

The Constitutional Court of the Republic of Indonesia as a judicial institution in Indonesia has authority under the provisions of Article 24C of the 1945 Constitution of the Republic of Indonesia. The authority of the Constitutional Court of the Republic of Indonesia includes: testing the law against the Constitution, deciding the dispute over the authority of state institutions whose authorities are granted by the Constitution, decide upon the dissolution of political parties, and decide upon disputes concerning election results.<sup>1</sup>In addition to these authorities, the Constitutional Court also has another duty of giving a decision on the opinion of the House of Representative of the Republic of Indonesia to the alleged violation by the President and/or Vice President in the process of impeachment of head of state/government.<sup>2</sup>The Constitutional Court of the Republic of Indonesia as a judicial institution acknowledged in the Constitution in exercising its powers shall still refer to the principle of judicial power, the principle

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<sup>1</sup>See Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

<sup>2</sup>See Article 24C Paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

of judicial power is a manifestation of an independent power to organize a constitutional court to enforce law and justice in accordance with the mandate of the constitution contained in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. As a judicial institution in which every decision is final and binding, then the interpretation of constitutional judges in every decision of the Constitutional Court of the Republic of Indonesia is considered as the final interpretation so that the Constitutional Court of the Republic of Indonesia is confirmed as a judicial institution that has a function as “the final interpreter of the constitution”.<sup>3</sup>

From the authority of the Constitutional Court of the Republic of Indonesia as mentioned above, the authority to test the law against the Constitution can be considered as the main authority, whether from the theoretical or historical dimension. For most expert opinions, testing the law against the Constitution is an authority that has an impact factor and has a major impact on the sustainability of the state. This is reasoned because the Constitutional Court's decision is final and binding and generally applicable so it must be obeyed and implemented by all parties. In addition, the law is the main legal product that became the basis of the implementation of the life of nation and state which furthermore the provisions of the law are described in the form of a lower set of laws and regulations.

Philosophically, the Constitutional Court of the Republic of Indonesia in deciding the case of judicial review of the law against the Constitution should be able to assess and interpret whether a provision in the tested law is contrary to the basic principles and norms in the Constitution. Therefore, in exercising this authority, constitutional justices must be able to explore the meaning of every norm in the Constitution to be used as the basis for the test of any provisions of the law petitioned for judicial review.

Throughout the year 2017, the Constitutional Court of the Republic of Indonesia passed several judicial review judgments against the constitution (judicial review) that seized the public's attention. One of them is the Constitutional Court of the Republic of Indonesia Decision Number 13/PUU-XV/2017. The essence of the ruling is the judicial review of Article 153 paragraph (1) letter f of Law of the Republic of Indonesia Number 13 Year 2003 concerning Manpower considered to accommodate the prohibition of marriage with inter-workers/labourers within a company. Previous Article 153 paragraph (1) letter f reads: “employers are prohibited from terminating employment on the grounds that workers have blood relation and/or marital relation with other workers in a company, unless otherwise provided for in employment agreements, company regulations or collective bargaining agreements”. In its ruling, the Constitutional Court of the Republic of Indonesia declares ‘phrase unless it has been regulated in a work agreement, company regulation, or collective labour agreement’ has no binding law. Thus, Article 153 paragraph (1) letter f as a whole: ‘employers are prohibited from termination of employment on the grounds of: f. workers/labourers have a blood relation and/or marital relation with other workers/labourers within a company’.

In the legal considerations in the decision, the nine constitutional justices unanimously declared the prohibition not in line with the norm of Article 28D paragraph 2 of the 1945 Constitution of the Republic of Indonesia. According to the constitutional justice,

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<sup>3</sup>Muchamad Ali Safaat, et.al..(2017). “Pola Penafsiran Konstitusi dalam Putusan Mahkamah Konstitusi Periode 2003-2008 dan 2009-2013”, *Jurnal Konstitusi*. 14 (2): 235.

marriage is a fate that cannot be planned. Therefore, the making of fate as a condition to override the fulfilment of human rights cannot be accepted as a legitimate and constitutional reason. Constitutional justices argue, there is no moral norm, religion, security, and public order that will be disrupted by the fact workers/married friends in one company. On the other hand, fears of a conflict of interest arise because of marrying a fellow worker/labourer in one company can be prevented by formulating strict company regulations. So as to enable the establishment of high integrity of workers for the realization of good working conditions, professional, and justice within a company.

However, from all legal considerations (*ratio decidendi*) on the decision of the Constitutional Court above, the authors focus on the interpretation of judges in interpreting the principle of 'freedom of contract' on the phrase "unless it has been regulated in employment agreements, company regulations, or collective agreements". Constitutional justices consider that the principle of 'freedom of contract' is an adoption of one of the basic principles of civil law/contract law. Such provisions can only be implemented if agreed upon by both parties through an employment agreement, company rules and collective labor agreements. In addition, in establishing a rule, the company is not allowed to enter any provision that is contrary to the applicable legal provisions in which the company is domiciled.

The provisions in contracting are regulated in Article 1320 of the Civil Code which is in the following terms: "in order for a valid consent, it is necessary to fulfil four conditions: 1). their binding agreements; 2) the ability to create an engagement; 3) a certain subject matter; 4) an unlawful cause ". Because the employment agreement is part of the agreement which is intended in the Civil Code, then also apply the general principles of an engagement which one of them is the principle of *pacta sun servoanda* which is regulated in Article 1338 of the Civil Code. The principle of *pacta sun servoanda* in essence means that the covenant is a law for those who make it. Where legislation is part of the law and as a state of law, every citizen must immediately comply with the treaty he makes because the agreement under Article 1338 of the Civil Code has equal equality with the law for which he made.

The employment agreement is also binding because it is the result of the agreement of the parties which should appear without coercion as regulated in Article 1320 of the Civil Code which regulates the terms of the validity of the agreement. Accordingly, such agreement shall not be withdrawn other than by agreement irrevocable other than by agreement of the parties, namely the employer and the recipient of work. Acceptance or rejection of such agreements or contracts will have different consequences.

From the description of the background, the authors formulate the focus of the problem is how the interpretation of constitutional justices contained in decision Number 13/PUU-XV/2017 on the principle of 'freedom of contract' in an employment agreement between employers and workers/labourers governing the termination of employment where there is a worker who has a marriage bond within a company.

## DISCUSSION

### Basic Philosophy of Freedom of Contract

Freedom of contract is a reflection of the development of free market understanding<sup>4</sup> which Adam Smith spearheaded with his classical economic theory that based his thoughts on the teachings of natural law. The same is the basis of Jeremy Bentham's idea of Utilitarianism. Utilitarianism and *laissez faire* classical economic theory are considered complementary and equally animating individualistic liberal thought.<sup>5</sup>

The principle of freedom of contract in English literature is set forth in terms of "Freedom of Contract" or "Liberty of Contract" or "Party Autonomy" which emerged in the late nineteenth century which asserts that the implementation of an agreement involves parties who have equal and balanced bargaining power.<sup>6</sup> The principle of freedom of contract is a universal principle, meaning it is followed by law in all countries in general.<sup>7</sup>

Under civil law applicable in Indonesia, freedom of contract may be inferred from the provisions of Article 1338 paragraph (1) of the Civil Code which states that "all legally made contracts (agreement) shall be valid as laws for those who make them". By emphasizing the word "all" the meaning of the chapter seems to be interpreted as a statement to society that we are allowed to enter into agreements in the form and contain anything (or of anything) and the agreement and will be binding on whoever makes it like laws.<sup>8</sup>

According to Mariam Darus Badrul Zaman, freedom of contract is one of the most important principles in the treaty law. This freedom is the embodiment of free will, the radiance of human rights". In line with that Abdul Kadir Muhammad also stated that this principle means that people may enter into agreements on anything, although not yet or not regulated in the law. This principle is often called "freedom of making contract".<sup>9</sup>

The source of freedom of contract is individual freedom so that the point of departure is individual interest as well. Thus, it can be understood that individual freedom gives him the freedom to contract. The principle of freedom of contract according to the treaty law of Indonesia covers the following scope: (1) freedom to make or not to enter into an agreement; (2) the freedom to choose the party with whom he wishes to enter into an agreement; (3) the freedom to determine or choose the *causa* of the contract to be made; (4) freedom to determine the object of the agreement; (5) the freedom to determine the form of an agreement; and (6) the freedom to accept or violate the optional law provisions (*aanvullen*, optional).<sup>10</sup>

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<sup>4</sup>Tedoradze Irakli. (2017). "The Principle of Freedom of Contract, Pre-Contractual Obligations Legal Review English, EU and US Law". *European Scientific Journal*. 13 (4): 63.

<sup>5</sup>Sutan Remy Sjahdeini.(1993).*Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit Bank*. Jakarta: Institut Bankir Indonesia. p. 17.

<sup>6</sup>Carolyn Edwards. (2009). "Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues". *UMKC Law Review*. 77 (3): 647.

<sup>7</sup>Sutan Remy Sjahdeini.*Op.Cit.*, p. 17.

<sup>8</sup>Subekti.(2008).*Hukum Perjanjian*.Jakarta: Intermasa.p. 47.

<sup>9</sup> Abdul Kadir Muhammad.(2010).*Perjanjian Baku dalam Praktek Perusahaan Perdagangan*. Bandung: Citra Aditya Bakti.p. 37.

<sup>10</sup>Subekti.*Loc.Cit.*,p. 47.

When confronted with the provisions of the articles containing the rules on "freedom of contract" in the Civil Code as described above, the author tries to further explore why such "constrained freedom of contract" conditions. So, in this case the author tries to approach the philosophy to examine the principle of 'freedom of contract'. The meaning of the philosophical approach here is to try to think deeply, systematically, radically, universally in order to seek the core truth or the essence of everything related to the principle of 'freedom of contract'. The description indicates clearly the characteristics of thinking philosophically. The point is a serious effort by using the mind as its main tool to discover the essence of something related to science.<sup>11</sup>

Furthermore, with the question of why the elements and terms of freedom of contract, configured as set forth in the Civil Code can be observed in the historical traces of modern-day cosmology in the 17th and 18th centuries which view society as an institution consisting of independent individuals, who are guided by reason, who voluntarily (has) chosen to keep good relationship through law and ready to keep promise (*pacta sunt servanda*).<sup>12</sup>

The teachers of natural law, beginning in the seventeenth and eighteenth centuries, claim that man is guided by a principle that he is a part of nature and a rational and intelligent being he acts according to his desires and movements (impulses). Man is a free agent, therefore it is natural to not be tied to the same value with the attachment itself (that is just as natural to be unbound as it is to be bound). Behavior based on this thinking creates the rules and conditions necessary for a good society. The moral principle and the principle of justice are above all the rule of law issued by the government. Therefore, the laws and decrees of kings who are inconsistent with the laws of nature are not valid. This ideology is a contradiction to a paternalistic system that oversees and regulates all affairs for the benefit of a king or ruler. One of the foremost thinkers of the flow of natural law is Hugo Grotius, who argues that, everyone has a tendency to live together. Not only that because it has a ratio, then the man also wants to live in peace. That's how Grotius made human sociability as the foundation of ontology and the foundation of all forms of law.<sup>13</sup>

Grotius also stated that the right to treat the treaty is one of human rights. It was Grotius who argued that there is a supreme body of law based on human reason which he calls natural law. He assumes that a contract is a voluntary act from someone in which he promises something to others in the sense that the other person will accept it. The contract is more than a promise, because a promise does not entitle the other party to the promise.<sup>14</sup>

From the philosophical view of the contract or the agreement was born the principle of 'freedom of contract' which contains four kinds of freedom: freedom to make or not to make an agreement, freedom to choose with which side will make the agreement, freedom to determine the contents of the agreement, and the freedom to decide how to make the agreement. Although based on the four forms of freedom, according to the authors the principle of 'freedom of contract' can not necessarily be interpreted in

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<sup>11</sup>Bakhtiar Amsal.(2004).*Filsafat Ilmu*.Jakarta: Raja Grafindo.p. 9.

<sup>12</sup>Bernard L. Tanya, et.al.(2010).*Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi*. Yogyakarta: Genta Publishing.p. 9.

<sup>13</sup>Bernard L. Tanya, Yoan N. Simanjuntak, Markus Y. Hage, *Ibid.*, p. 68.

<sup>14</sup>Sutan Remy Sjahdeini, *Op.Cit.*p. 1993.

absolute free. This is because that unlimited freedom is actually not known in the making of a covenant, but on the contrary in the freedom it contains limits that should not be exceeded in terms of making contracts or agreements.<sup>15</sup>

### **Interpretation of the Constitutional Court of the Republic of Indonesia on 'Freedom of Contract' Principle in Article 153 paragraph (1) letter f of Law of the Republic of Indonesia Number 13 Year 2003 concerning Manpower**

Interpretation is a manifestation of hermeneutical science which requires a method of expressing 'one's thoughts in words' for the next 'is interpreted, interpreted or translated' as acting as interpreter. The science of hermeneutics is actually a science that seeks to reveal a truth that was initially judged to be relatively obscure to something brighter.<sup>16</sup> Therefore, the judges of the constitution are also demanded for their ability in mastering hermeneutics science in carrying out their duties and authority as interpreters of the constitution and laws, including interpreting the principle of 'freedom of contract' related to the petition of the petitioners in case Number 13/PUU-XV/2017.

The principle of 'freedom of contract' is one of the main principles of the treaty law. Interpretation of this principle has the meaning that everyone has the freedom to bind himself for all matters of interest and necessity to others. In addition, no less important than the interpretation of the principle of 'freedom of contract' is the existence of a balanced bargaining position between contract makers who one with other contract makers in one agreement. In fact, it is often found that contracting parties are not in a balanced position, where contracting parties who have a stronger bargaining position will dictate and more determine the contents of the agreement. Under these conditions it cannot be said fully that this contract form has fulfilled the principle of 'freedom of contract' which is often encountered with the terms of contract/standard agreement.

The type of contract/standard agreement as described above is the basis of the petition of the judicial review applicants in the decision of the Constitutional Court of the Republic of Indonesia with Number 13/PUU-XV/2017. Working agreements, company regulations or collective labour agreements governing the prohibition of marriage bonds among workers in one company as reasons for termination of employment by the company, assessed by the applicant is not necessarily understood and associated with the basic principle of 'freedom of contract' or better known as the principle of *pacta sunt servanda* as regulated in Article 1338 of the Civil Code. With that stated: "all agreements made in accordance with the law shall apply as laws to those who make them. The Agreement shall not be withdrawn other than by agreement of both parties, or for reasons prescribed by law. Approval must be done in good faith".

According to the legal considerations of the Constitutional Court of the Republic of Indonesia that the legal argument on the principle of 'freedom of contract' under the provisions of Article 1338 of the Civil Code above is not always relevant to be applied without regard to the 'balance' of the positions of the parties which make such consent when the employment agreement, company regulations, or collective bargaining agreements. Added again according to the Constitutional Court of the Republic of

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<sup>15</sup>Johannes Gunawan. (2011). "Kajian Ilmu Hukum tentang Kebebasan Berkontrak" in Sri Rahayu Oktoberina, Niken Savitri (Eds.). *Butir-Butir Pemikiran dalam Hukum, Memperingati 70 Tahun Prof. Dr. B. Arief Sidharta, S.H.* Bandung: Refika Aditama. p. 257.

<sup>16</sup>Jazim Hamidi. (2006). *Revolusi Hukum Indonesia*. Yogyakarta: KonPress. p. 27.

Indonesia on the part of the legal considerations in the decision Number 13/PUU-XV/2017 that in relation to the above is sufficiently clear position between employers as the employer and the position of workers/labourers as the recipient of work in an unbalanced position. For workers/labourers are parties who are in a weak position because as a party who needs work. With such an unbalanced position, in this case the philosophy of the principle of 'freedom of contract' which is one of the conditions of the validity of the agreement becomes not fully fulfilled. Therefore, based on the above consideration, the word "has" contained in the formulation of Article 153 paragraph (1) letter f of Law of the Republic of Indonesia Number 13 Year 2003 concerning Manpower does not in itself mean that the fulfilment of the philosophy of the principle of 'freedom of contract'.

The basis of balance in the principle of 'freedom of contract' as the direction of thought and consideration of the above Constitutional Court of the Republic of Indonesia decision in line with the theory of justice developed by John Rawls known as "Justice as Fairness". The basic principle of this theory is to emphasize which principles of justice are the most "fair" then that must be followed.<sup>17</sup> John Rawls's theory of justice is in the opinion of the author is very relevant to be used as an analysis material in reviewing the decision of the Constitutional Court of the Republic of Indonesia with Number 13/PUU-XV/2017, where the constitutional judges considered the need for the principle of balance between employers and workers in making a contract in a company to ensure the principles of justice and balance in the workplace, including in the affairs of marriage with fellow workers/labourers in one company which is a human right for every person.

Although the principle of freedom of contract acknowledged by the Civil Code is essentially limited by the Civil Code itself, but its work is still very loose. This leeway has created imbalances and injustices when the parties that make the agreement are not equally strong or have the same bargaining position.

On the basis of legal considerations concerning the interpretation of the principle of 'freedom of contract' which does not contain the principle of 'equilibrium' in the creation of an employment agreement, company regulations, or collective labour agreements between employers and workers/labourers, the Constitutional Court of the Republic of Indonesia in its decision under Number 13/PUU-XV/2017 grants the applicant's petition in its entirety, and states the phrase "unless it has been provided for in employment agreements, company regulations or collective agreements in Article 153 paragraph (1) letter f of Law of the Republic of Indonesia Number 13 Year 2003 concerning Manpower is contradictory to the 1945 Constitution of the Republic of Indonesia and has no binding legal force.

## CONCLUSION

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<sup>17</sup>According to John Rawls, there are two principles from the base of the value of justice. The first principle, called the 'principle of freedom' which states that every person has the right to have the greatest freedom as long as he does not harm others. Furthermore, the second principle to be agreed upon by all fair people is that social and economic inequality is not a barrier or a barrier to helping all people. Or in other words, social and economic inequality is considered unfair unless that inequality can help many people. See Achmad Ali. (2002). *Mengungkap Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*. Jakarta: Toko Gunung Agung. p. 80-81.

The Constitutional Court of the Republic of Indonesia through Decision No. 13 / PUU-XV / 2017 interpreting the principle of 'freedom of contract' should contain the principle of equilibrium to achieve a sense of fairness in terms of making a contract. Moreover, if the parties involved in the agreement/contract do not have inequality of social and economic level as the essence of the theory of justice put forward John Rawls. The inequality of the social and economic level is reflected in the petition of the applicants to the above Constitutional Court's decision, the workers as workers/labourers consider their rights to be restricted to establishing the ropes of fellow workers in one company, after they have entered into a work agreement with the company where they work.

Workers/labourers placed as recipients of work assessed by the Constitutional Court of the Republic of Indonesia do not have a bargaining position that is balanced when compared with employers. This makes the workers seem forced to agree on the use of contracts/standard agreements made by the company, in the contract/agreement set the reason for the company to be able to terminate the employment relationship when there is a worker/labourer has a marriage relation in one company. On the other hand, the Constitutional Court of the Republic of Indonesia believes that the relationship of marriage is an inevitable fate even if it is limited by the terms of the contract to not have a marriage relation in one company.

Because the Constitutional Court of the Republic of Indonesia interpreted that the positions of workers and employers are 'unbalanced' in the context of the above contract, the principle of 'freedom of contract' which is defined in the formulation of Article 153 paragraph (1) letter f on the terms "unless otherwise provided for in employment agreements, company regulations or collective labour agreements" in Law of the Republic of Indonesia Number 13 Year 2003 concerning Manpower shall be considered contrary to the Constitution (the 1945 Constitution of the Republic of Indonesia) and shall have no binding legal force.

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