

## **The Implementation of *Prejudicieel Geschil* Principle in the Employment Termination Due to Grave Wrongdoing in the Indonesian Justice**

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**Abstract:** The dispute between worker and company about Employment Termination is often end up in court. In some case the dispute happened between the employee and the employer was not only a civil case, but the case has developed into a criminal case. This can be occurred since the Employment Termination which had been done by the company is considered as a grave wrongdoing. A major wrongdoing is a part of criminal act, therefore when the corporation intends to do the termination they have to register to the Police Force as stated in the Constitutional Court's Verdict Number: 12/PUU-I/2003 and then file a lawsuit of employment termination to the Industrial Relationship Court while the Circular Letter of the Supreme Court Number 3 year 2015 give precedence to the dispute settlement through the Industrial Relationship Court. The problems of this research are 1) how to find the just dispute settlement of the employment termination due to the grave wrongdoing according to the employees in Indonesia? 2) How to find a fair dispute settlement of the employment termination due to the grave wrongdoing? This research used juridical normative research method with the case study approach and it discovered that first, the Constitutional Court's Decision give precedence to the wrongdoing while the Industrial Relationship Court give precedence to the civil rights. Therefore, since it happened in the industrial relations then the rights inherent of each party should be settled first. If there are any other acts inherently public, it is regulated by the state since the state have the duty to uphold the civil law and to keep performing the liability of the criminal act, however the state cannot disregard the civil rights owned by each party. Second, the solution to settle the employment termination dispute due to the grave wrongdoing with the legal certainty and just is by solving the dispute fair, impartial, impersonal, and objective. The problem can be solved by performing deliberation and consensus between the two parties at the Bipartite Cooperation Institution and Institutional Arbitration to obtain the mutual consensus. Thereafter, the discussion result should be registered to the General Court to be implemented.

**Key words:** Major Offense, Circular Letter of the Supreme Court, Constitutional Court's Decision

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### **I. INTRODUCTION**

The Republic of Indonesia is a Rule of Law. It is stated in the Constitution of the Republic of Indonesia of 1945 article 1 paragraph (3). The nature of the rule of law is that the state organs can only act by the regulations which had been determined formerly by the state organs who had authority to enforce the regulation. In the other word, it is called the "rule of law"<sup>1</sup>.

The Indonesian constitutional system has been expressed in the amendment of the 1945 Constitution. The system adheres to the constitutional democratic state principle. It means that the state governance is based on the law. One of the fundamental principles which has been clearly stated in the amendment of the Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution is about the principle the rule of law. According to the founding fathers, the rule of law (*rechtsstaat*) is the ideal type of a government system as in the 1945 Constitution before the replacement of the state government system which mentioned that the Republic of Indonesia is the state based on law (*rechtsstaat*), and not based on the power (*Machtsstaat*)<sup>2</sup>.

The characteristic of a rule of law state is the existence of a judiciary that is independent and impartial and not influenced by any power or force. It can be seen in the Article 24 paragraph (1) of the 1945 Constitution which stated that the judicial power shall be independent power in order to perform the judiciary in order to

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<sup>1</sup>Moh. Kuasnardidan Harmaily Ibrahim, *Pengantar Hukum Tata Negara Indonesia*. FH Universitas Indonesia dan CV. SinarBakti, Jakarta, 1988, hlm. 82

<sup>2</sup>Mahkamah Konstitusi Republik Indonesia, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Mahkamah Konstitusi Republik Indonesia, Jakarta, 2008, hlm. 4

enforce law and justice<sup>3</sup>. To express and explain more about the meaning of the judicial power in the Article 24 of the 1945 Constitution, then the Article 1 Law number 14 of 1970 about The Power of the Judiciary which is related with the Law number 4 Year 2004 and amended into the Law number 48 Year 2009 said that “the Judicial Power is an independent power of the State to organize the judiciary to uphold law and justice based on Pancasila and the Constitution of the Republic of Indonesia 1945, for the sake of this Country the law of the Republic of Indonesia.”<sup>4</sup>

The important agenda which needs serious attention is the efforts to reform the law and judicial system. The fundamental aspect which determines whether the efforts will be succeeded or not depending on the problem management. Management is the human’s effort to achieve the organizational goals by working together with other human beings. In relation to the judicial activities, management can be seen as a cooperation of the judicial apparatus to achieve the court establishment, namely providing reliable justice service to the justice seekers. The national development is performed in order to develop the people of Indonesia and to realize secure, prosperous, just society in evenly manners in accordance with the Pancasila and the Constitution of the Republic of Indonesia of 1945.<sup>5</sup>

The development in the industrial sector requires a harmonious industrial relation in order to create the peace on working and business space which will have an impact on the productivity improvement for the private corporation and the welfare of workers. However, in the practice of the industrial relationship it is not easy to create harmonious industrial relations since there are different interests between the workers and the corporations. Therefore, in the reality there are still many disputes arise in the work relationship between workers and employers. The manpower development shall be based on a philosophical basis, namely Pancasila, and constitutional juridical basis, namely the Constitution of 1945 as the fundamental law, and the operational juridical basis, namely the laws and regulations which related with the field of manpower as the legal basis. The last but not least is the sociological basis, which is in accordance with the cultural values within the society so that it can accommodate all the life reality in the society in this present time. It is intended that the manpower development is performed in order to develop the society of Indonesia. Thus, the manpower development complied and to realize secure, prosperous, just society in evenly manners.<sup>6</sup>

The industrial relations between the workers and private corporation in a company is not always harmonious. There are disputes which occurs because of the different opinion regarding rights, interests, employment termination and also the disputes which occurs between the labor unions and another labor union in the same enterprise. Therefore, the Act of the Republic of Indonesia Number 21 Year 2000 concerning Trade Union/Labor Union, the law regarding the material provisions of manpower, namely Law Number 13 of 2003 concerning Manpower, and the formal Law, namely Law Number 2 Year 2004 concerning the Industrial Relation Disputes Settlement were drawn up.

There are pros and cons on the Law Number 13 Year 2003 concerning Manpower during the process of the amendment of the material law. As many as 37 officials of Labor Unions by their attorneys which was the Public Lawyer at LBH Jakarta, had filed a petition to do the judicial review on Law Number 13 Year 2003 concerning Manpower against the 1945 Constitution of the Republic of Indonesia to the Constitutional Court in accordance with the Article 10 of Law Number 24 Year 2003 concerning the Constitutional Court. One of the many substances which were filed to be reviewed against the 1945 Constitution of the Republic of Indonesia is the provision regarding employment termination with the grave wrongdoing as the reason as regulated in the Article 158 Law Number 13 Year 2003 concerning Manpower.<sup>7</sup>

Workers who have been terminated from employment are entitled to severance pay, but if the worker who has been terminated has committed to do a grave wrongdoing, based on the Constitutional Court’s decision canceling Article 158 of Law Number 13 of 2003 concerning Manpower, namely Constitutional Court Decision No.012 / PUU -I / 2003, dated 28 October 2004. Based on the Constitutional Court Decision, The Minister of Manpower and Transmigration issued a Circular Letter of the Minister of Manpower and Transmigration No. SE-13/MEN/SJ-HK/I/2005 dated 7 January 2005. In this Circular Letter of the Minister of Manpower and Transmigration figure 2 (two) explains that if the entrepreneur intends to do the Work Relation Termination because of the worker did a grave wrongdoing, then there should be a Res Judicata from the Criminal Court. Moreover, in the Circular Letter of the Minister of Manpower and Transmigration figure 3 (three) also stated

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<sup>3</sup> H. Muchsin, *Penyelesaian Perselisihan Hubungan Industrial*, Seminar Nasional Peradilan Perburuhan Masa Kinian Masa Mendatang-Fakultas Hukum Universitas Trisakti, Jakarta, 2003. hlm. 1

<sup>4</sup> Zaina Arifin Hoessein, *Kekuasaan Kehakiman Indonesia*, Setara Press, Malang, 2016, hlm. 18

<sup>5</sup> *Konsideran Undang-Undang Nomor 13 Tahun 2003 tentang Ketenagakerjaan*

<sup>6</sup> Ujang Charda S., *Mengenal Hukum Ketenagakerjaan Indonesia : Sejarah, Teori & Praktiknya di Indonesia*, Fakultas Hukum UNSUB, Subang, 2014, hlm. 25

<sup>7</sup> Muzni Tambusai, *Pelaksanaan Keputusan Mahkamah Konstitusi Terhadap Undang-Undang No. 13 Tahun 2003 Tentang Ketenagakerjaan*, Direktorat Jenderal Pembinaan Hubungan Industrial Departemen Tenaga Kerja dan Transmigrasi, Jakarta, 2005, hlm. iii

that, in this regard there is an “urgent needs” which resulted the work relations cannot be continued, then the corporation may make an official request to the institute for the settlement of industrial relation disputes. The different interpretations about “grave wrongdoing” have not yet been clear, the Ministry of Manpower and Transmigration made a new term “urgent needs” without a clear explanation. Based on the literature review, the term “urgent needs” is found in the book III Indonesian Civil Code Article 1603 o, which has almost the same content with the provisions in the Article 158 paragraph (1) Law Number 13 Year 2003 concerning on Manpower.<sup>8</sup>

In 2015 the Supreme Court issued a Circular Letter, namely a Circular Letter Number 3 of 2015 concerning the Enactment of the Result of the Plenary Meeting of the Supreme Court Room of 2015 as a Guideline for the Implementation of Tasks for the Courts on letter B figure 2 Special Civil Law letter e stated that “in the event of dismissal of employees/laborers for reasons of serious mistake ex Article 158 Law number 13 of 2003 concerning Manpower (Post-Decision of the Constitutional Court Number 012/PUU-I/2003, dated October 28, 2004), the dismissal can be performed without having to wait for a criminal law enforcement”.

In one case in a court, it is very possible that in the several cases, the case does not only contain of public matter, but it also contains of the private matter. On the serious mistakes which can be considered as a criminal case, but on the other side, the claimant and the respondent are in the serious conflict of the manpower in the Industrial Relationship Court. In that condition, the Judge can postpone the criminal court by waiting the claim preclusion or the Res Judicata from the civil case. This condition is called as *Prejudicieel Geschild*.

Based on the background stated, it can be concluded that the formula of this research problem are:

1. How to find the just dispute settlement of the employment termination due to the grave wrongdoing according to the workers in Indonesia?
2. How to find a fair dispute settlement of the employment termination due to the grave wrongdoing?

## II. RESEARCH METHOD

A research on law is a scientific activity which based on method, system, and knowledge on specific field with the purpose to analyze certain law symptoms<sup>9</sup>. The materials of this research are collected by using the normative juridical approach. This normative juridical approach<sup>10</sup> was conducted because the analysis of this research is a juridical science analysis, therefore this research had to be analyzed from the legal aspects by observing the applicable laws and regulations. The legal approach is used for analyzing the statutory regulations which are related with the focus of this study.<sup>11</sup>

Normative juridical research is also known as a doctrinal research. This research analyzes both the law as written in the book and the law as it is decided by the judge through judicial process. It means how the law is used as an instrument to solve the industrial relations disputes to try the grave wrongdoing case for the just settlement for the workers.

## III. RESULT

### A. The Settlement of Work Relations Termination Dispute Due to Grave Wrongdoing with Justice According to the Workers in Indonesia

The settlement of industrial relations dispute which related to the settlement of the Work Relation Termination due to the grave wrongdoing ex Article 158 Law Number 13 of 2003 concerning on Manpower which is connected with the Verdict of the Constitutional Court number: 12/PUU-I/2003 and the Circular Letter of the Ministry of Manpower and Transmigration Number 13 Year 2005 is explaining that the worker/laborer who committed the grave wrongdoing, his/her mistakes shall be proved prior in the Criminal Court. In case the worker violates the ex Article 158 aforementioned, which generally the corporation specified the provisions under the Collective Work Agreement or the enterprise’s Rules and Regulations. The corporation can make report to the Police Force of the Republic of Indonesia and wait for the process of the criminal case to be done investigating and making the decision. If the worker is declared guilty of committing the crime by the Criminal Court which has permanent legal force, the enterprise can issue the Letter of the Work Relation Termination which terminate the work relations between the corporation and the worker.

In case the worker caused the enterprise to incur losses confined how substantial it was conducted by the worker. The worker who is found guilty shall be terminated and not entitled to severance pay, reward pay

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<sup>8</sup> Surat Edaran Menteri Tenaga Kerja Dan Transmigrasi Republik Indonesia Nomor : Se-13/Men/Sj-Hk/I/2005 Tentang Putusan Mahkamah Konstitusi Atas Hak Uji Materi Undang-Undang Nomor 13 Tahun 2003 tentang Ketenagakerjaan Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

<sup>9</sup> Anselmus Strauss, dan Juliet Corbin, *Basic of Qualitative Research, Grounded Theory Procedure and Technique*, Newbury, Park London, New Delhi : Sage Publication, 1979, hlm. 7

<sup>10</sup> Roni Hanitjo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, Ghalia Indonesia, Semarang, 1988, hlm. 11

<sup>11</sup> Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*: Malang, Bayumedia. 2008, hlm.310

and the rights of the health insurance benefit for him/her and the family. The terminated worker has to carry out the penalty decided by the Criminal Court which cause him/her loss the freedom to find new job and earn a living for themselves and their family.

The verdict of the Constitutional Court Number 12/PUU-I/2003 concerning the Judicial Review, the Article 158 Law Number 13 Year 2003 concerning Manpower and the Circular Letter of the Minister of Manpower and Transmigration Number 13 Year 2015 figure 2 stated that the enterprise may terminate the worker after the Criminal Court has been handing down the ruling which has the permanent legal force. The verdict of the Constitutional Court put the criminal act as the main case, while in the industrial relationship shall prioritize the civil rights. Therefore, since the act occurred in the industrial relations place then the rights of each party should be solved first. If there are any other acts inherently public, it is regulated by the state since the state have the duty to uphold the civil law and to keep performing the liability of the criminal act, however the state cannot disregard the civil rights owned by each party. If we follow the provisions of the Verdict of the Constitutional Court and the Circular Letter of the Minister of Manpower and Transmigration figure 2, it will mislead the justice for the workers/laborers in obtaining their rights in the industrial relation. In the implementation the workers will not receive their civil rights as regulated in the collective work agreement such as rights of severance pay and the rights of the reward-for-years of service pay. Moreover, the terminated worker cannot earn living since the worker responsible for the criminal sanctions that he/she received from the court. It will be a disadvantage for the worker's life and the family, yet it will benefit the employer side only. This is not relevant with the second principle of Pancasila, namely just and civilized humanity. It is different from the Circular Letter of the Supreme Court Number 13 Year 2015 letter B figure 2 Special Civil Law letter e and the Circular Letter of the Minister of the Manpower Number 13 Year 2005 figure 3 about the settlement of the Work Relation Termination dispute which put the settlement of the worker's rights first, in accordance with the Law Number 2 Year 2004 concerning Industrial Relations Disputes Settlement mentioned that the institute which is assigned and authorized to investigate and adjudicate the dispute is the Industrial Relations Court. The worker still has rights to receive the severance pay and any other rights which he/she normally received which are required in the collective work agreement and the Enterprise's Rules and Regulations. If the wrongdoing which is done by the worker caused a major disadvantage to the corporation even after the process of the dispute settlement has achieve the permanent legal force, then it can be filed to the criminal court.

## **B. The Fair Solution of the Settlement of the Work Relations Termination Dispute Due to Grave Wrongdoing**

The different provisions between the Verdict of the Constitutional Court and the Circular Letter of the Supreme Court which the researcher mentioned above, the researcher has purpose to provide the legal solution on settling the Work Relations Termination Dispute due to the grave wrongdoing which build up a trial dispute between the Industrial Relationship Court and the Criminal Court. This trial dispute can be solved by implementing the *PrejudicieelGeschi* Principle which is regulated in the Circular Letter of the Supreme Court Number 4 Year 1980. This Circular Letter of the Supreme Court provide a suggestion to the Council of the Judges to do the settlement of the civil case first and to withhold the investigation on the criminal case if the case has not expired.

The object of this research about the Work Relations Termination due to the grave wrongdoing, the correct settlement of this dispute is following the principle of fair, impartial, impersonal, and objective and also finding the settlement by conducting deliberation to reach a consensus from both of the parties. The deliberation should be performed based on the Work Agreement signed by the two parties and the Enterprise's Regulation/the Collective Work Agreement should be the fundamental instrument for reaching the mutual consensus. First: the deliberation should be conducted in the Bipartite level. The Bipartite Institution is the organization formed by the enterprise as a communication mediator between the workers and the management. In the event that the bargaining reaches an agreement for settlement, then a Collective Agreement is drawn up and signed by the both parties. The collective Agreement then registered to the local District Court where the both parties conducted the Collective Agreement. In the event that the Collective Agreement is not implemented by one of the parties, then the party suffering injury can file a petition for execution to the local District Court. Second: in the event that the deliberations by the parties in disputes (bipartite) fail, then one party can register the dispute to the local Arbitration Institutional. Then Arbitration decision is registered to the local District Court where the company domiciled. The settlement deeds from the Bipartite Cooperation Institution and the Arbitration Institutional that have been registered will be provided with a proof of registration deed from the District Court. Third: the Collective Agreement and/or the Arbitration decision along with the registration proof from the District Court are the main requirements to file a petition for execution in the District Court if one of the parties does not implement the agreement.

If the settlement of the work relations dispute is done by performing deliberation to reach consensus based on Islamic Law the both parties will reach the win-win solution. Both the company and the worker will

get their rights as written in the Work Agreement they both signed before. And the remedy through the Arbitration Institutional on the local District level and the Arbitration decision is registered to the Work Relationship Court in accordance with the principle of the settlement of the work relations dispute, namely fair, impartial, impersonal, and objective.

If we observe from the Islamic thought, it always teaches about justice especially about the dispute between the employer and the worker. As the form of Islamic commitment to justice, therefore Islam also protects the employer by giving moral obligations to the workers. The Prophet Muhammad SAW said that:

“No miser, cheater, traitor or person who mistreats his slaves will enter Paradise. The first to knock at the gates of Paradise will be the Slaves, if they fulfill their duties towards Allah and towards their masters properly.” (HR. Ahmad)

In relation with this, Islam give a solution by providing a medium for the manpower dispute settlement. This medium can be a form of a person or an institution appointed by the two parties in dispute, or provided by the state institution which duties are to settle any manpower disputes. The decision made by the institution such as Arbitration Institution is expected to be the final decision. The men who sit in this institution are experts in the field of manpower matters. The experts are called as ‘*Khubara*’. They are expected to find the best solution and to settle the dispute between the worker and the employer.

Even though the work relationship is made with a collective work agreement which regulates about rights and responsibilities of each parties, and the work agreement does not violate laws in the implementation. One of the parties may violates the work agreement which will lead to the industrial relations dispute in a company. For instance, workers do a strike in a company because they want a raise on the regional minimum wage, while the minimum wage is regulated by the Governor. The fact that actually there is no problem in the work relation between the worker and the company. The company only follows the Governor’s decision. The strikes done by the workers can lead to the work relations termination, because the workers have done a grave wrongdoing which is regulated in the Enterprise’s Rules.

#### **IV. CONCLUSION**

The Verdict of the Constitutional Court Number: 12/PUU-I/2003 concerning judicial review Article 158 Law Number 13 Year 2003 concerning Manpower and the Circular Letter of the Minister of Manpower and Transmigration Number 13 Year 2005 figure 2 stated that the corporation may terminate the worker/laborer in the event that the criminal court decision has had a permanent legal force. The Verdict of the Constitutional Court put the criminal act as the priority, while in the industrial relations put the civil rights as the priority. Thus, since the dispute occurred in the industrial relation then the rights owned by each party should be settled prior. If there are any other acts inherently public, it is regulated by the state since the state have the duty to uphold the civil law and to keep performing the liability of the criminal act, however the state cannot disregard the civil rights owned by each party.

The appropriate method in settling the dispute of a Work Relations Termination due to a grave wrongdoing is by applying the fair, impartial, impersonal, and objective principle and by conducting a deliberation to reach consensus from both parties in dispute. It has to be based on the Collective Work Agreement both parties had signed and the Enterprise’s Rules as a fundamental on settling the dispute to reach mutual consensus. First, conducting a deliberation in a Bipartite level in the company. In the event that the bargaining reaches an agreement for settlement, then a Collective Agreement is drawn up and signed by both parties. The collective Agreement then registered to the local District Court where the both parties conducted the Collective Agreement. In the event that the Collective Agreement is not implemented by one of the parties, then the party suffering injury can file a petition for execution to the local District Court. Second, in the event that the deliberations by the parties in disputes (bipartite) fail, then one party can register the dispute to the local Arbitration Institutional. Then Arbitration decision is registered to the local District Court where the company domiciled. The settlement deeds from the Bipartite Cooperation Institution and the Arbitration Institutional that have been registered will be provided with a proof of registration deed from the District Court. Third, the Collective Agreement and/or the Arbitration decision along with the registration proof from the District Court are the main requirements to file a petition for execution in the District Court if one of the parties does not implement the agreement.

#### **V. SUGGESTION**

The different norms between the Verdict of the Constitutional Court Number: 12/PUU-I/2003 and the Circular Letter of the Minister of Manpower Number 13 Year 2005 figure 2 is focusing violating the industrial relations by committing a criminal act, while the Circular Letter of the Supreme Court Number 3 Year 2015 and the Circular Letter of the Minister of Manpower Number 13 Year 2005 figure 3 is focusing on violating the rules and agreements. The regulations made by the certain institutions, by the government for instance, are supposed to be clear that the laws are made as an instrument to solved the arising problems and disputes in the

society especially for the workers/laborers, so there will be no different perception in the implementation that will lead to the injustice to the one of the parties.

The mechanism in settling the just Industrial Relations Dispute which is suitable with the principle of fair, impartial, impersonal, and objective is by establishing a Bipartite Cooperation Institution and an Arbitration Institution. First: establishing a Bipartite Institution in every company whose membership consists of several elements such as employees, employers and academicians which total are 5 members.

The chairperson of the Bipartite Cooperation Institution is appointed by the Head of the Manpower Affairs in the Regency/City, the other 4 members are from the employees and company. The chairperson of this Bipartite Institution shall be borne by the State. Second: establishing an Arbitration Institution concerning Manpower in the Manpower Affairs of the Regency/City whose membership consists of 3 persons as members and 1 person of a Senior Arbiters the president of the council. The arbiters are appointed by the Minister of Manpower and Transmigration within 5 years in one period and can be prolong for another one period. Third: establishing special council of clerk for dispute registration of Collective Agreement and Arbitration decision in every District Court to perform industrial tasks which conducted by the representative of the Chairman of the Court.

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