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Exploring Termination of Employment Based on Serious Criminal Offences

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Abstract

There has not arisen any case laws post-Decision of the Constitutional Court No. 012/PUU-I/2003 and enactment of Article 52 paragraph (2) of Government Regulation No. 35 of 2021 to show how the Constitutional Court decision is being interpreted and applied by judges. The authors propose a future model for judges who will be adjudicating disputes in the Industrial Relations Court, that they may set aside rules which conflict with principles of law. The decision of the Constitutional Court stated that a reason for termination of employment due to serious violations pertaining to criminal acts perpetrated by workers as detailed in Article 158 of the Employment Law contradicting the 1945 Constitution having no binding force. Using normative legal research the authors argue that judges, based on several principles of law with independence of judiciary principle on their top, may disregard controversial regulation as the basis to justify the employment termination. It is argued as such, although the rule is still in full force as implementing law of a new Law on Job Creation. The new Law seemingly re-legalizes the right of employers to terminate employment due to acts of violation committed by workers as regulated in employment agreements, company regulations, or collective labor agreements. Based on the theory of Dignified Justice judges if any future disputes on termination of employment due to the controversial rule occurred may decide in favor of the employee based on important principles of law rather than the controversial rule. This will clarify the uncertainty of understanding among some circles that the Constitutional Court Decision could simply be annulled by Article 52 of Regulation No. 35 of 2021.

A. INTRODUCTION

In this article, the authors explored the future possibility of judges using the principle of an independent judiciary as an important legal principle that may be employed in justifying them if, in the future adjudicated case of conflict before the Industrial Relations Court to set aside any termination of employment made by employers based on their employees allegedly conducting serious criminal offenses according to Article 52 paragraph (2) of the Government Regulation No. 35 of 2021. It is the scope of this exploration that revolved around the future possibility of judges using the principle of the independent judiciary on top of and also accompanied with several legal principles to set aside the controversial Article 52

paragraph (2) of the Government Regulation No. 35 of 2021 which seemingly re-legalizing the right of employers to terminate employment due to acts of violation committed by workers as regulated in employment agreements, company regulations, or collective labor agreements. Despite the fact that previous similar rights conferred upon employers have been stated null and void by the Decision of the Constitutional Court No. 012/PUU-I/2003. Therefore it is stated at the outset that Article 52 paragraph (2) of the Government Regulation No. 35 of 2021 is clearly in conflict with the Decision of the Constitutional Court No. 012/PUU-I/2003.

We considered the formulated rule in Article 52 paragraph (2) of the Government Regulation No. 35 of 2021 as controversial. The rule re-conferred a sort of unfair and defunct legal rights or power for any employers to terminate an employment relation with their workers based on an unfair reason and it contradicts with principles of law. The reason or justification for the termination of employment by employers is that the employer has found or simply presumed that his or her employee has been conducting or perpetrating some sort of misconduct pertaining to or containing allegedly elements of certain criminal acts prohibited by the Criminal Code or other related criminal conducts stipulated outside the Criminal Code as elaborated below. This so-called rather clumsy power conferring rule, which seemed to try to mimic a jurisprudential term(Hart, 1994; Kramer, 2023; Waldron, 2013) is therefore problematic.

The rule has also been deemed to be detrimental to the interests of workers (G. Ramadhan & Diamantina, 2020). Most importantly it runs counter to several principles of laws (Skorobogatov & A, 2020). Therefore above all other principles of law, the legal principle that justifies judges must use to set aside the rule as stipulated in the legislation which seems to create unfair employers' rights or power to terminate employment relationships due to employees/workers committing serious violations which by nature are or pertaining to criminal conducts is the principle of independent judiciary (Huchaanavar, 2023; Kosar, 1567; Sipulova, 2022).

Judges may state their reason based on principles of law with the principle of independent judiciary at the top of, or above all of those principles of law to consider overruling the problematic legal rule or norm. Such as a rule that governs the basis or legitimacy for employers to undertake a termination of employment due to serious violations, which by nature contained or pertaining to criminal dimensions allegedly perpetrated by employees. The problematic norm or rule was a norm that particularly stemmed from, or shares similar "DNA" with defunct Article 158 of Law Number 13 of 2003 on Employment Law.

Article 158 of the Employment Law was declared unconstitutional and non-binding by the Constitutional Court. The unconstitutionality of Article 158 of the Employment Law was formulated in the Constitutional Court Decision No.

012/PUU-I/2003. In addition to being declared unconstitutional and non-binding by the Decision of the Constitutional Court, the article has also been repealed by new Law Number 11 of 2020 concerning Job Creation, the law that reformed the Employment Law. The new legislation has been very popular in Indonesia and is known as the first type of the Country's omnibus law.

Not very far after the existence of the legal principle regulating the basis for termination of employment as mentioned above was declared unconstitutional and non-binding by the Constitutional Court's Decision No. 012/PUU-I/2003 and was repealed by the omnibus law on Job Creation, which later on was again replaced by Government Regulation in Lieu of Law of the Republic of Indonesia No. 2 of 2022 concerning Job Creation in the framework of implementing Constitutional Court Decision No. 9 I/PUU-XVIII/2020 for the replacement of the Employment Law with Law Number 11 of 2020 concerning Job Creation, the problem as mentioned above, deepen.

After being declared unconstitutional and non-binding by the Constitutional Court and the repealed of Article 158 of the Employment Law by the Government Regulation in Lieu of Law of the Republic of Indonesia No. 2 of 2022 concerning Job Creation, an intrinsic technical legal mistake remains. The Government Regulation in Lieu of Law of the Republic of Indonesia No. 2 of 2022 concerning Job Creation seemed to justify a left-behind regulation which in its essence contains rules that is similar to the defunct Article 158 of the Employment Law. The problem is deepened since still existing other regulations, which in substance turned out to be the same, or as mentioned above share similar "DNA", as the legal rule that granted a sort of unfair legal rights to employers to use the basis for termination of employment previously regulated in the repealed Article 158 of the Employment Law. The problematic legislation is called Government Regulation No. 35 of 2021, specifically its Article 52 paragraph (2) and its Explanation section.

To put it more clearly, particular aspects of serious criminal offenses which are made up of the scope to be explored in this research concerning the utilization of the principle of the independent judiciary by judges, are all aspects of serious criminal offenses that might be used by employers to terminate employment with the employee as enlisted or categorized in the Article 52 paragraph (2) of the Government Regulation No. 35 of 2021. The Explanation section of Article 52 paragraph (2) of the Government Regulation No. 35 of 2021 reads that urgent acts of violation, or in this case acts of violation pertaining to crime could also be found in the employment agreement, company regulations, or collective labor agreement.

All of the enlisted or categorized examples of aspects of serious criminal offenses that can be used by employers as the legal basis to unilaterally terminate employment relationships with employees/workers are called "urgent acts of violation." These "urgent acts of violation" are acts pertaining to the crime that have been stipulated in the Explanation section of Article 52 paragraph (2) of the

controversial Government Regulation No. 35 0f 2021. To name but a few of the examples of aspects, among others, are employees/workers: (a) commit fraud, theft, or embezzlement of company property and/or money; (b) provide false information or forged documents that harm the company. Actions in (a) and (b) are, among others, included in the category of "urgent acts of violation" or actions of employees pertaining to crime as stipulated in the problematic Explanation section of Article 52 paragraph (2) of Government Regulation No. 35 of 2021.

Considering that there has also been a problem of conflicts between norms in the prevailing laws and regulations understood as rules of law governing the possibility of employers using reasons or bases their action to terminate employment relation with their workers/employees who allegedly commit serious violations to terminate employment; and efforts in this research to justify a solution to overcome this problem by utilizing or guided by the theory of Dignified Justice; the authors chose the title of this research article as 'Exploring Termination of Employment Based on Serious Criminal Offences (Utilizing Dignified Justice Theory)'. To explain how the Dignified Justice theory applies to judicial decisions made by judges in the industrial relation case, the authors will briefly elaborate on it and its relevance to this study. The theory of Dignified Justice postulates that every sovereign and independent system of law, such as Indonesia's Pancasila legal system is a perfect legal system. The system of law is self-sufficient. In case of any ambiguities, conflicts, and troubles occur, there have always been solutions within the system (Prasetyo, 2023, 2015, 2020b; Prasetyo & Mamangkey, 2024). The theory believes that there are always principles of law that exist in the legal system and are derived from Pancasila as the ultimate source of all sources of law to sustain the legal system (Prasetyo, 2023, 2015, 2020b; Prasetyo & Mamangkey, 2024). With the idea of a system in mind, the authors would argue that the theory of Dignified Justice is relevant to solving the problem in this study. Hence, the problem statement or overall scope of this research article is how from the perspective of Dignified Justice theory judges are justified to disregard or set aside rules regarding the conferring of employer power to terminate employees based on the conduct of their workers that pertaining to serious criminal violations.

B. RESEARCH METHOD

The research to find solutions to the legal issues as stated above utilizes the so-called legal research (Butarbutar, 2018; Marzuki, 2017; Prasetyo, 2019; Saifullah, 2018; Soekanto, 2015, 2018; Suteki & Taufani, 2022; Zainuddin, 2017). This type of research is commonly known as normative legal research (Auralita, 2023; Kornelius & Azhar, 2020). Relevant legal materials have been collected, analyzed, and discussed to find solutions to the legal issues by answering the question formulated in the above problem statement. These legal materials are classified as primary legal materials consisting of applicable legislation and final and binding court decisions,

such as the Decisions of the Constitutional Court. Although two cases were mentioned as the findings; apparently, no case laws on the conflict of industrial relations arising from employers terminating employment based on their employees allegedly conducted urgent acts pertaining to criminal offenses in which decisions have been made based on judges utilizing the principle of an independent judiciary to be collected and analyzed. In the science of finding the laws (*rechtsvinding*), court decisions that have obtained permanent legal force can be equated with, as long as they only have a persuasive force of precedent, not a binding force of precedent, referred to as judge-made law or the common law as understood in countries that adhere to the stare decisis or precedent system (Sitompul & Sinaga, 2021). Secondary legal materials such as books and various legal journals containing descriptions and discussions of the same focal concern of the study are also collected, examined, and analyzed. The analysis is conducted qualitatively, with conclusions generally drawn deductively.

C. RESULTS AND DISCUSSIONS

This research is different significantly from several research conducted previously. For instance, it is different from a research article entitled: 'Legal protection for workers in unilateral termination of employment (a review of Law Number 13 of 2003 concerning employment)' written by (Kelana, 2022). Kelana argued that the implementation of termination of employment is a right granted by the government to employers. However, the rights must be taken within the limits and conditions stipulated in Law No. 13 of 2003 concerning the Employment Law. Meanwhile, as mentioned above, the Article in the Employment Law, which governs the basis for termination of employment based on an alleged employee conducting any mischievous criminal acts (Kelana, 2022) is now defunct.

Relatively similar research was also conducted previously. In his research article entitled, 'Juridical Review Regarding the Settlement of Disputes on Termination of Employment,' Charda, also argued that Article 158 of Law No. 13 of 2003 on the Employment Law stipulates that employers can terminate employment relations with workers. The grounds for the termination of employment relations are based on serious mistakes such as theft, fraud, embezzlement, and immoral acts in the work environment. It has also been argued, that even after the decision of the Constitutional Court, there is still the right to make terminations of employment due to gross errors pertaining to criminal offenses.

However, the decision of the Constitutional Court is final and binding (Hadiati, 2022; Jamil & Sholahuddin, 2022; Muda, 2023; F. Ramadhan & Rafiqi, 2021); as a consequence, it must be understood that simultaneously with the pronouncement of the Constitutional Court's Decision, Article 158 which contains a rule with the power conferred upon the employer to terminate an employment

relationship lost its legal justification. If the law would then be considered as regained its power, it must pass all the legislative requirements to become a law again.

Alternatively, if immediately the law has to be restated, it must have been strengthened, via a revision of Law No. 13 of 2003 on the Employment Law, especially in terms of responding to termination of employment due to serious wrongdoing pertaining to criminal mischiefs. However, as immediately evident below, the difference between the argument developed by Charda and the argument developed by the authors of this research is that Charda, and also Kelana did not consider the dimension of some legal principles with independent judiciary principle on their top to be used by judges to solve the further conflict of rules arose after the decision of the Constitutional Court (Charda, 2022).

Different from research conducted previously, as listed above, the problem that would further be described below, although it has been briefly mentioned above arose since it is logic formally if a provision of law (an act of parliament) has been declared unconstitutional and non-binding by the Constitutional Court, then the provision of the law that has been declared unconstitutional and non-binding should be considered null and void (Bima & Saputra, 2022; Nemtoi, 2023). This, the null and void, would also mean that from the beginning (*ab initio*) eventually, all the regulations that followed the already declared unconstitutional and non-binding law, the defunct laws, should be considered as no longer existing and no longer having legal force.

Therefore, with the Constitutional Court Decision No. 012/PUU-I/2003, Article 158 of the Employment Law, it must be understood along with all regulations or legal principles and laws in regulations related to it, or which have content and formulations that have similar meanings or compounds with Article 158 of the Employment Law regulating the reasons for termination of employment due to employees commit serious violations, especially those violations with criminal dimensions, should also "blended" in the understanding according to the Constitutional Court's decision, namely all laws and regulations whose content contradicts the 1945 Constitution of the Republic of Indonesia and therefore are unconstitutional and do not have any binding legal force whatsoever.

As suggested below, After the decision of the Constitutional Court No. 012/PUU-I/2003, Article 158 of the Manpower Law (UUK), the Ministry of Manpower responded quickly by issuing a Circular Letter (SE) Menakertrans No. SE-13/MEN/SJ-HK/I/2005 concerning the Constitutional Court Decision on the Right to Material Test Law No. 13/2003 concerning Manpower against the 1945 Constitution. This Circular Letter affirms the decision of the Constitutional Court. In Point 3 letter a of SE Menakertrans No. SE-13/MEN/SJ-HK/I/2005 it is affirmed that for employers who will lay off on the grounds that workers make serious

mistakes, then layoffs can be carried out after a criminal judge decision that has permanent legal force.

It should be, as a consequence of the Constitutional Court Decision No. 012/PUU-I/2003 and also with the existence of the Government Regulation in Lieu of Law of the Republic of Indonesia No. 2 of 2022 concerning Job Creation, that the formulation of Article 158 of the Employment Law is not only declared in conflict with the 1945 Constitution and has no binding legal force. More than that, it should be understood that Article 158 of the Employment Law has been repealed by Perppu of the Republic of Indonesia No. 2 of 2022 concerning Job Creation.

As a result, employers should no longer have any rights and be able to conduct any termination of employment with reasons based on employees committing serious violations, especially those acts with criminal dimensions. However, in reality, there is still, an understanding in some circles, that a law, so-called Government Regulation No. 35 of 2021 still exists and is in effect. There is an assumption in those circles that this Government Regulation is considered as the regulation implementing further the Government Regulation in Lieu of Law of the Republic of Indonesia No. 2 of 2022 concerning Job Creation, or implementing regulations of the Job Creation; hence its existence and applicability follow the Government Regulation in Lieu of Law of the Republic of Indonesia No. 2 of 2022 concerning Job Creation.

Article 151 (1) Employment Law, which remains in force, did not firmly stipulate whether the employer should conduct positive activities before terminating the relation applies to all categories of reason or only those of specific reason justifying the termination. To put it another way, the Employment Law did not categorize the employer's reason for employment termination. The law only mentioned generally, the reasons for termination of employment are divided into three: firstly, reasons pertinent to the inability [incompetence] of the employee; secondly, reasons pertinent to the employee indiscipline, and third reasons pertinent to the company's operational interests (*Article 4, ILO Convention No. 158 of 1982 on Termination of Employment*, n.d.).

Analyze the legal implication of Article 52 of GR No. 35 of 2021 in the context of the Job Creation Law, however, as mentioned in relation to the understanding in some circle of experts, the Article 52 paragraph (2) of the Government Regulation No. 35 of 2021 contains the legal provision that seems to be conferring power to an employer, based on or with the reason of workers/employees "committing urgent violations", especially those perceived by the authors as serious violations with criminal dimensions to terminate a labor contractual relations. Meanwhile, analyzing the practical implication of the phenomenon, according to some other side circles of legal experts, and based on common reasoning, has raised legal issues as previously mentioned. In particular, the phrase "serious violations" or "urgent violations" are phrases essentially have the same

meaning. In both phrases, some actions can be categorized as criminal acts, which should, based on the presumption of innocence, be resolved or proven first with a legally binding decision before being declared as criminal acts.

Therefore, there is a need to take into account the principle of presumption of innocence as an integral part of the principle of due process of law, or subject to the rules of criminal procedures law stated in the Criminal Procedure Code contained in Law Number 8 of 1981. On the other hand, the other opinion or dissent proposal offered by the other side circle of legal experts understands that the existence of the Constitutional Court Decision No. 012/PUU-I/2003, as well as the repealing Article 158 of the Employment Law through the Government Regulation in Lieu of Law of the Republic of Indonesia No. 2 of 2022 concerning Job Creation, has been easily overturned by the presence of the formulation of Article 52 paragraph (2) of the Government Regulation No. 35 of 2021.

Formulated in Article 52 paragraph (2) of the Government Regulation No. 35 of 2021 which has been regarded as still in full force, employers can conduct termination of employment against employees/workers due to any urgent violations allegedly made by employees/workers, as stipulated in the employment agreement, company regulations, or collective labor agreement. In connection with this, as briefly mentioned above, there is also a supporting formulation in the Explanation section for Article 52 paragraph (2) of the Government Regulation No. 35 of 2021 regarding the meaning of "urgent violations".

The formulation of the meaning of the concept of "urgent violations" in the Explanation section of Article 52 paragraph (2) of Government Regulation No. 35 of 2021 is not much different if one has hesitated to declare as completely the same as the formulation of Article 158 paragraph (1) of the Employment Law which has been declared unconstitutional by the Constitutional Court and has been repealed by the Government Regulation in Lieu of Law of the Republic of Indonesia No. 2 of 2022 concerning Job Creation.

As briefly outlined above, it has been understood that there are legal provisions or norms in the Employment Law that not only contradict the constitution but go beyond that, containing legal provisions or norms, especially certain articles, that allow employers to terminate employment with the reason that the worker commits a serious, criminal violation, seems to violate the law or legal principles.

From the viewpoint of the Dignified Justice theory, Legal principles mean the principles of law that generally apply and are used to guide the process of proof, whether in civil cases, especially in this writing in criminal proceedings, including, among others, customary resolution through industrial relations dispute settlement processes. Panggabean, 2007 said, one of such principles is the presumption of innocence (Harahap, 2016). With this principle in mind, there should not be a termination of employment based on the reason that an employee

allegedly conducted serious mischief conduct pertaining to a criminal offense without a proper trial before a criminal court. The presumption of innocence, and the principle of "due process of law," are the principles of law within the framework of the Indonesian State of Law.

In the context of the legal life of Indonesian society, it is interpreted proportionately and in line with the paradigm shift regarding the character of the modern criminal law system, which has shifted from the old paradigm, "*Daad-Dader Strafrecht*" to the new paradigm, "*Daad-Dader-Victim Strafrecht*". The interpretation of the principle of presumption of innocence, which is in line with the paradigm shift mentioned above, is that the state is obliged to provide and facilitate the rights of a person who is suspected of having committed a criminal act since being arrested, detained and during the process of investigation, prosecution, and examination in court both at the first instance and at the appellate level.

Additionally, the provision that conferred the power to the employer to terminate a legal relation based only on the alleged assumption that the other party (employee) has conducted a criminal offense without a proper trial before a criminal court, also violates the principle of equality before the law. From the perspective of the Dignified Justice theory, all of these principles inherently embodied as the spirituality, universal spirit in nature/the soul of the law, as well as those recognized in positive Indonesian law (the inner morality of law), which is enshrined and guaranteed by the 1945 Constitution and various legislation, directly flowing or derivatives from Pancasila as the highest law, the source of all legal sources, and a manifestation of the nation's spirit (the Indonesian *Volkgeist*). Within the theory of Dignified Justice, it must be assumed that the aforementioned principles of law have been undergoing a legal evaluation or "screening" with Pancasila as the filter of morality of law (Fuller, 1969).

To make it clear, it is important to detail the contents of the defunct and problematic Article 158 of the Employment Law which on all of the detailed examples of acts of employees that pertain to criminal offenses and has been restated in Article 52 paragraph (2) and the Explanation section of the Government Regulation No. 35 of 2021. Those acts are as follows: employers can terminate employment relationships with workers/employees if workers: (a) committing fraud, theft, or embezzlement of company property and/or money; (b) providing false or forged information causing harm to the company; (c) being intoxicated, consuming intoxicating beverages, using and/or distributing narcotics, psychotropic substances, and other addictive substances in the workplace; (d) engaging in indecent acts or gambling in the workplace; (e) attacking, assaulting, threatening, or intimidating coworkers or employers in the workplace; (f) persuading coworkers or employers to commit acts contrary to laws and regulations; (g) carelessly or intentionally damaging or leaving company property in a dangerous condition causing loss to the company; (h) carelessly or

intentionally leaving coworkers or employers in a dangerous situation at the workplace; (i) disclosing or leaking company secrets that should be kept confidential except for the interests of the state; or (j) committing other acts in the company environment punishable by imprisonment of five years or more. Furthermore, Article 158(2) of the Employment Law stipulated that serious violations as referred to in paragraph (1) must be supported by evidence as follows: (a) the worker/employee is caught red-handed; (b) there is acknowledgment from the worker/employee concerned; or (c) other evidence in the form of an incident report made by the authorized party in the company concerned and supported by at least two witnesses. In connection with the formulation of Article 158 of the Employment Law above, Article 159 of the Employment Law also regulates that if workers/employees do not accept the termination of employment as referred to in Article 158(1) of the Employment Law, the worker/employee concerned may file a lawsuit with the industrial relations dispute settlement institution.

Reviewing the impact of the Constitutional Court's Decision No. 012/PUU-I/2003 on employment termination involving detailed serious criminal offenses as enlisted above, the authors would argue that the rule was worsened however, by one particular formulation, stipulated at the same time on Article 171 of the Employment Law. This rule might be used to control the use of employer power to terminate employment relations.

It has been stipulated in Article 171 of the Employment Law that workers/employees who experience termination of employment without the determination of the authorized industrial relations dispute settlement institution as referred to in Article 158(1), and the worker/employee concerned cannot accept the termination of employment, then the worker/employee may file a lawsuit with the industrial relations dispute settlement institution within one year from the date of termination of employment.

The list of reasons to terminate an employment relationship is also in conflict with the rules in the universal context, the ILO Convention. According to A. C. L Davies, Perspectives on Labour Law (Cambridge University Press 2004) on Termination on Employment based on the Employer Initiatives (further mentioned as, "Termination of Employment Convention") has been limited to regulated requirement that every employer must provide a valid reason to the employee and that the employee must have the right to defend his or herself;(Deakin & Njoya, n.d.; Surya, 2020) and it has been assumed that the defend should take a criminal route of procedure, in the criminal court, if the reason is based on an allegedly mischief criminal conduct perpetrated by employees.

Reviewing the impact of the Decision of the Constitutional Court, these authors argue that Article 158 of the Manpower Law *jo*. Article 170 of the Employment Law was annulled by the Constitutional Court No. 012/PUU-I/2003. The Constitutional Court opined that Article 158 of the Employment Law in

conjunction with Article 170 of the does not reflect legal protection for the worker/labor. It gives power to the employer to terminate unilaterally the employment relation without due process of law through an independent and impartial court decision. The qualification of action as a serious offense in Article 158 of the Employment Law, as examined above are criminal acts, and, therefore, the settlement must refer to the procedural law stipulated under the Criminal Procedure Code (Herdiana, 2018).

Apart from that, the Minister of Manpower and Transmigration enacted a circular letter Number: SE.13/MEN/SJ-KI/I//2005 to explain that termination due to worker/labor committing a criminal act can only be done after a legally binding criminal decision. Based on the explanation above, a worker/laborer who is suspected of a criminal act can only be terminated if there has been a legally final and binding criminal court decision stating that the worker/labor concerned is guilty.

In different places, if the Constitutional Court argument must also be reviewed, it has been argued against the list of conduct about criminal acts enlisted above as the basis for an employer terminating an employment relation. It has been stated in the Constitutional Court Decision that the rights and interests of the employee must be given legal protection (Ilyas, 2018). Accordingly, in Indonesia, such recognition is then must be understood as the implementation of Article 28D (2) of the 1945 Constitution.

It has been strictly stated in the 1945 Constitution that: every person is entitled to occupation as well as to get an income and fair and proper treatment in labor relations. The philosophical basis implies that the employee shall not be regarded only through the lens of economic benefits, in the sense that their utility was only to earn profits for the employer, but, it shall also be regarded through the lens of human rights. Labor is not the same with machines, goods, or money.

At this point of review of the Constitutional Court's Decision, the authors will argue from the perspective of the Dignified Justice theory, there has been a strong foundation laid in the Pancasila Legal System, particularly in regulating employment relations that employees must be treated humanely, or to make human beings (the employee) humane (*nguwongke uwong*). Hence, although the employer owns the right to terminate employment-relation unilaterally, such right must not be exercised arbitrarily, it must be limited. The law dictates that an employer must execute his or her intent justly. This justice requirement is a form of protection for the employee from arbitrary action. There are several indicators of a just treatment of an employee when the employers have to choose termination of employment.

The employer has to make sure that the termination is followed by an adequate and valid reason. In this indicator, there is nothing mentioned about the worker conducting criminal mischief conduct as the basis for the termination of

employment. The employer also must give the employee a severance payment. The employer has to make sure that the employee might be re-hired when the termination is found to be invalid by the Court.

As it has been mentioned above, there have never been any case laws made concerning industrial disputes arising from conflicts between employers and employees due to any termination of employment based on the alleged acts of criminal offenses conducted by employees. There have only been cases as instances that arose from the reasonable ground for a termination of employment ever made by an employer. It is shown in the dispute between Buntarmin and Tjatur Irianto v. PT Nestle Indonesia, the Court justified termination done by the employer as it had, previously, tried to conduct mediation to settle their dispute.

The termination was based on the reason that the employee had breached the company regulation and had ignored the first, second, and third letter of warning (*Supreme Court Decision No. 658 K/Pdt.Sus/2009.*, n.d.). This is following the law seated as the spirit of the nation, the idea in the Dignified Justice theory that the law is aimed at dignified human beings, in this case acting based on reasonable ground, as stipulated in the legislation, was struck down by the Court as indignified.

Further provision was reinforced within the Ministry for Labour Circulation Letter No. 907 of 2004 on the Prevention of Mass Employment Termination. The Legal document appealed that, to every company entangled with difficulties, in which the difficulties may negatively impact its labor, termination of employment shall only be the last resort. As the last resort, the Ministry for Labour Circulation Letter No. 907 of 2004 stated that it could be taken after means such as decreasing working days and working hours, decreasing or deleting over hours, decreasing the amount of payment and facilities for the manager and director, ceasing relation with an employee whose time is close to ending, and granting superannuation to the employee that has conducted to make sure that all of the requirements are fulfilled.

The solution that is needed to resolve or reconcile conflicts in the above regulations is a legal theory called the theory of Dignified Justice. As briefly described above, the theory holds, among other things, the postulate of the system. According to the theory of Dignified Justice, the law is a system that is open and perfect. In the legal system, there should be no contradictions. Even if contradictions arise in the legal system, there is a solution or way to reconcile the contradictions within the legal system itself.

Another important principle in the perspective of the Dignified Justice jurisprudence, which views the legal principles in the Indonesian legal system as derivations from Pancasila, as the source of all legal sources, and which the Constitutional Court considers to have been violated by the provisions of Article 158 of the Employment Law containing legal norms that allow for termination of employment based on serious violations by employees, is the principle of due

process of law. Under the principle of due process of law. The logical consequence of this presumption of innocence is that the suspect or defendant is given the right by law not to give incriminating / incriminating information before the court (the right of non-self-incrimination), and not to give answers both in the investigation process and in the trial process (the right to remain silent). As a result, it is understood that whether someone is guilty or not should be firstly determined by a court of law that has final and legally binding authority, especially through a criminal justice process, including the legal process of evidence according to the provisions of the Criminal Procedure Code contained in Law Number 8 of 1981 made perfect by Law Number 39 of 1999 on Human Rights.

Therefore, evidence created outside of the mechanisms and rules of law stipulated in the Criminal Procedure Code should be considered unable to prove any violations, let alone be used as grounds for termination of employment by employers. Similarly to the viewpoints presented in the sub-section Results of Research and Discussion in this research article, it is important to emphasize here that almost all are taken from the Constitutional Court's Decisions as outlined above and regarded as materials obtained from research on primary legal sources according to the legal research method established above. It needs to be stated here that unless the law allows for a process of proof through an alternative dispute resolution process, which has recently grown like mushrooms in the rainy season with the concept of a "restorative justice approach"(Sinaga & Et.al, 2023).

Explored from the perspective of the Dignified Justice theory, which upholds the philosophy that moral values exist within the prevailing laws and are derived from Pancasila as the source of all legal sources (Kameo & Prasetyo, 2021), such as those formulated or becoming the inner morality of law in Law No. 8 of 1981. Besides being behavioral norms for proving criminal acts in criminal court proceedings, it also prevents violations of other basic human rights derived from Pancasila, namely the presumption of innocence.

Based on all of the principles of law that have been analyzed above, the author of this research article would argue, also from the perspective of the Dignified Justice theory (the Indonesian Jurisprudence), that there should be no more legislation containing substance that allows employers to use the same reasons as those regulated in the defunct Article 158 of the Employment Law to conduct dismissals. This theory (the Dignified Justice theory) understands the ultimate goal of law as humanizing humans (*nguwongke uwong*), or to make human beings humane. (Prasetyo, 2019, 2020a, 2022; Prasetyo & Barkatullah, 2012)

Starting from the perspective of the Dignified Justice theory, and after conducting a deeper legal investigation, it was found that there should be a basis for implementing respect for the principles mentioned above, to humanize the Employment Law. In the Employment Law, there is a formulation of rules that seemingly avoid wrongful convictions. In this case, employers can not directly

terminate employment without giving the employee a chance to defend themselves or terminate employment without a specific decision, as in the case of termination for other reasons. This can be seen from the formulation of Article 159 of the Employment Law.

It is stated there that: if an employee does not accept termination as referred to in Article 158 paragraph (1) of the Employment Law the concerned employee can file a lawsuit with the institution to resolve industrial relations disputes. However, the formulation of Article 158 paragraph (1) of the Employment Law above seems to have diverted or confused, if not blurred or twisted the authority of the criminal court as part of the characteristics of criminal law as one instance within the ultimum remidium, after competent courts such as labor courts, to determine whether or not a serious violation has been committed by the employee.

In other words, Article 158 of the Employment Law has opened a "path" that deviates from the legal principle that proving someone committed a serious offense, such as a criminal offense, must go through the criminal justice process subject to the above criminal procedural principles, or other courts subject to specific procedural principles governing the settlement of disputes with regard to the industrial relations matters. The deviation opened by Article 158 of the Employment Law therefore, the authors would argue, could be regarded as creating injustice and degradation of human dignity. It is therefore, together with and above all of the legal principles analyzed above, judges can use the principle of judicial independence to set aside or disregard legal norms in any regulations that allow or justify employers to terminate employment for the reason that the employee committed a serious violation pertaining to criminal offenses.

The Ban on Arbitrary Actions

The authority of judges to set aside norms as mentioned above, based on the principle of independent judiciary, viewed from the perspective of the Dignified Justice theory is supported by the fact that, upon observing the background of the emergence of Article 158 of the Employment Law as part of the overall "package" of the Employment Law, it was found that even though the Employment Law provides the possibility of reasons for termination of employment that are of concern in this research article, the action of employers to terminate employees should not be done arbitrarily, or there is a prohibition against acting arbitrarily.

This can be evidenced by referring to the provisions in the Employment Law that termination of employment due to serious violations must be supported by sufficient evidence such as: (a). catching the employee red-handed; (b). there is a confession from the employee concerned; or c. other evidence in the form of a report of the incident made by the authorized party in the relevant company and supported by at least two witnesses.

As mentioned above, it is also regulated as a legal norm that if employees object to the termination of employment due to serious violations, they can complain to the institution to resolve industrial relations disputes. All of these factors underlie the Government and the Parliament in making the Employment Law, including Article 158 of the Employment Law. Referring to the principle of judicial independence as the basis for judges to set aside norms regarding termination of employment due to serious violations by employees is also supported by the need for government intervention through policies and regulations in the market economy, which can also be done by judges through their decisions, with the principle of proportionality. This is the aspiration contained in Article 33 of the 1945 Constitution, or it becomes the philosophy and system of norms in the 1945 Constitution, the source of a series of rules (including the possibility of setting aside norms like Article 158 of the Employment Law for the greatest prosperity of the people.

Proportionality in the authority of judges to set aside norms as mentioned above will eliminate distortions and weaknesses in the market and can be eliminated while still considering the risks that investors will face through balanced and reasonable incentives. With such a judicial step, norms or articles (including Article 158 of the Employment Law) and policies in the field of industrial relations will still appear to provide sufficient legal protection for workers and strive for welfare improvement.

The use of the principle of judicial independence to set aside norms as argued above is also in line with the principle of equality before the law, which is the spirit or spirituality in Pancasila as understood in the theory of Dignified Justice. In that principle, there is an order for all citizens to have equal positions in law and government and are obliged to uphold the law and government without exception as a form of anti-discrimination in law. Based on such a principle, it should not be possible for a provision to justify termination of employment due to serious violations, especially if it includes such actions as qualifying as criminal offenses.

Weighing and analyzing from the perspective of the theory of Dignified Justice, the controversial articles above are legal norms that need to be set aside by judges because they violate the principles of evidence, the presumption of innocence, and equality before the law, and thus are not in line with the axiological philosophy in the theory of Dignified Justice which directs the purpose of the law, among others, towards fair and civilized humanity or what is called "making human beings humane."

The Use of judicial authority to override the controversial norms above also does not contradict the principle that guilt or innocence is decided through court proceedings with the Established Rules of Evidence in Law No. 8 of 1981 on Criminal Procedure Law. The Employment Law, especially the Article that has been declared unconstitutional, thus seems to legalize criminal acts outside the

court. Furthermore, the formulation of Article 159 of the Employment Law, stipulates that if an employee does not accept termination of employment as stipulated in Article 158 paragraph (1), then the employee concerned may file a lawsuit with the industrial relations dispute settlement institution, has shifted/mixed the authority of criminal justice to civil justice. This also supports the argument for judges to set aside overlapping norms.

Ideally, the issue mentioned above should be resolved through criminal proceedings. Therefore, Article 158 of the Employment Law contradicts the 1945 Constitution, especially Article 27 paragraph (1) which states that all citizens have equal positions in law and government and are obliged to uphold the law and government without exception. Article 158 of the Employment Law grants employers the authority to terminate employment with the reason that the worker has committed a serious violation without due process of law or through a decision of an independent and impartial court, but merely based on the employer's decision supported by evidence that does not need to be tested for its validity, contrary to applicable procedural law.

Article 160 of the Employment Law should also be used as a guide in addressing the controversial norms above. Formulated in this article is that if a worker is detained by the authorities for alleged criminal acts but not at the complaint of the employer, they are treated according to the presumption of innocence. This means that until the sixth month, workers detained by the authorities for alleged criminal acts still receive some of their rights as workers. If the court finds that the worker is not guilty, the employer must re-employ the worker.

Therefore, from the perspective of the Dignified Justice theory, the authors can understand the understanding that the formulation of Article 158, which has been declared unconstitutional, can be seen as a means of discriminatory or differential treatment in law that contradicts the 1945 Constitution. As stipulated in Article 1 paragraph (3) of the 1945 Constitution, Indonesia is a constitutional state. Based on this, in this paper, the authors can accept the view that Article 158 of the Employment Law, which allows employers to use the reason of serious violations by workers to terminate employment, should be declared null and void, as it contradicts Indonesia as a constitutional state explicitly regulated in Article 1 paragraph (3) of the 1945 Constitution. The use of judicial authority based on the principle of judicial independence can be justified to set aside norms in the formulation of regulations that deviate (Cox, n.d.).

Solution to Conflict of Norms from the Perspective of the Dignified Justice Theory

The formulation of legal provisions governing industrial relations that are substantially similar to the formulation of Article 158 of the Employment Law,

which has been declared unconstitutional and non-binding by the Constitutional Court, and subsequently repealed by a Government Regulation in Lieu of Law for various reasons as described and discussed above. However, it re-emerged in Article 52 paragraph (2) of Government Regulation No. 35 of 2021. The reappearance of a policy-based norm regulating industrial relations in regulations that are hierarchically lower in the legal order has raised issues. As mentioned above, the problem is the conflict between norms within the legal system.

Therefore, to address the problematic (Kurniawan, 2020) norm conflicts, as part of the final discussion of this research article, it is necessary to present the understanding and position of the authors regarding the phenomenon. As mentioned above, the understanding and position of the authors are based on the perspective of the Dignified Justice theory, which views law as a system. Not only that, in the understanding of law as a system, it is known that what is meant by a system here is the Pancasila Legal System (Prasetyo, 2013, 2016; Prasetyo & Purnomosidi, 2014).

The Pancasila Legal System, like the legal systems of other civilized nations, in the perspective of the Dignified Justice theory, does not desire conflicts among the elements within the system. If conflicts occur, then in the perspective of the Dignified Justice theory, within the system, there should always be a solution to resolve the issues, in this case by harmonizing the conflicting elements within the system so that the system can continue to function towards its goals. If conflicts arise, such as conflicts between legal regulations as mentioned above, then within the legal system, including in the perspective of the Dignified Justice Theory, namely the Pancasila Legal System, there are legal principles. These legal principles, among other functions, are to reconcile or harmonize the conflicting elements within the legal system. In other words, a legal system, including the Pancasila Legal System, does not allow or tolerate ongoing conflicts among the elements within the system.

In connection with that, several legal principles, in this case, those relevant, can be used as a solution to the norm conflict regarding termination of employment due to serious violations from the perspective of the Dignified Justice theory. There are principles such as *lex posteriori derogate legi priori* (Mertokusumo, 1999). Similarly, there is the principle of *lex superior* derogate legi inferiori.

Based on the perspective of the system according to the Dignified Justice theory, the current conflict between the Constitutional Court Decision and the Omnibus Law, which on one hand has repealed Article 158 of the Employment Law with Article 52 paragraph (2) of Government Regulation No. 35 of 2021 and on the other hand seems to revive the grounds for termination of employment due to serious violations by workers, the author would argue that the conflict can be harmonized with the principle of *lex posteriori derogate legi priori*.

Therefore, since the existence of the Omnibus Law on Job Creation is newer or came later compared to the existence of Article 52 paragraph (2) of Government Regulation No. 35 of 2021, the conflict between the norm that came later with the norm that came earlier can be reconciled by not utilizing the norm that came earlier. It supports the principle of the rule of law which allows judges to use their judicial independence to set aside the norm that came earlier, namely Article 52 paragraph (2) of Government Regulation No. 35 of 2021. That provision, in the logic of legal principles, has been derogated by the Job Creation Law with a later effective date.

Additionally, the principle of *lex superior derogate legi inferiori* might also be used. In which norms (such as principles of law) contained in higher regulations can override norms formulated in lower regulations. Therefore, from the perspective of Dignified Justice theory as mentioned above, the existence of Article 52 paragraph (2) of the Government Regulation No. 35 of 2021 must have been considered null and void, defunct. The Regulation could also be overridden by judges in the industrial court due to the lower hierarchy of Article 52 paragraph (2) of Government Regulation No. 35 of 2021, apart from the fact that it has been declared null and void following the similar substance in the Employment Law which has previously also been declared unconstitutional and null and void.

D. CONCLUSION

To conclude this research article the authors would reiterate and argue for judges to utilize the principle of the independent judiciary on the top and accompanied with other principles of law to set aside conflicting legal norms that confer power to employers to terminate employment due to serious violations which are in nature criminal or pertaining to criminal acts, perpetrated by workers. It has been found that the regulation has been repealed and declared null and void by the Constitutional Court. Therefore, if in the future arisen such cases before the Industrial Court, judges may set aside the controversial and unfair rule. This is possible from the perspective of the Dignified Justice theory which aims to humanize humans (*nguwongke uwong*), within the system of law recognised by Pancasila as the manifestation of the Indonesian *Volkgeist*. In it, there has been the principle of judicial independence that above all can be used to override rules which blatantly contradict all the principles of law in the Pancasila Legal System. For lawmakers (the Parliament and President), it is suggested to take a law reform, by inserting a new provision to amend clauses of the Employment and Job Creation Law and any other implementation regulations to resolve ambiguities and improve the fairness and clarity of employment termination processes.

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