Constructive Termination of Employment by Indonesia Companies: A Comparative Study

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ABSTRACT

This research aims to identify the regulation and dispute resolution regarding constructive termination of employment by company in the perspective of Indonesian Labor Law. This research also compares the constructive termination of employment by company based on International Law and Japan Labor Law. This is a normative legal research with a statutory approach, conceptual approach, and also comparative law approach. The result shows that the constructive termination of employment has not been specifically regulated in the Indonesian Labor Law system, hence it becomes an exploitation gap that is used by companies to be able to terminate employment relations without protecting the worker’s right. The dispute resolution mechanism in terms of constructive termination of employments still refer to the provisions of the Industrial Relations Dispute Settlement Law, namely through bipartite negotiations, tripartite, and industrial relations courts. The constructive termination of employment has been substantively regulated in the ILO Convention C-158 concerning the Termination of Employment, which regulated in Article 4 to Article 6. Further in Japan, the constructive termination of employment is regulated in the Japan Labor Union Act, Act Number 174 of 1949 in Article 7 paragraph (i), (iii), and (iv) with its national enforcement.

Keywords: Termination; Employment; Exploitation; Labor;

INTRODUCTION

Referring to the 1945 Constitution of the Republic of Indonesia (hereinafter Indonesia Constitution), Indonesia can be classified as a welfare state. The characteristics of the welfare state are expressly stipulated in the fourth paragraph of the Preamble to the Indonesia Constitution, which states that the government of Indonesia shall protect all the people of Indonesia and its human resources as well as protecting the land and its resources.

In general, both labor and individual worker/labor are classified as human resources, which shall be protected by the government as stipulated by the constitution. Sociologically,
worker/labor need to be protected because they need a certain status and employment since their position is under the employer. Therefore, the limitation is caused by the employee’s weak bargaining position compared to the employer.\(^1\) In terms of economic perspective, worker/labor have a vulnerable position since they depend on the wages of salaries provided by the employer in order to fulfill their daily needs. Hence, it is necessary for the government to provide proper protection to the worker/labor so that they won’t be exploited and able to get their rights proportionally.

Protection for worker/labor has been implemented in various law and regulation. In Indonesia, the protection is given through the Law Number 13 of 2003 concerning Manpower (hereinafter Manpower Law), which aims to protect the worker/labor as well as ensuring the fulfillment of their basic rights, guarantee justice, and prevent discrimination.\(^2\) The Manpower Law regulates that all matters relating to labor not only during the work period, but also before and after the work period. Protection of labor has been accommodated by the government based on the provisions of Manpower Law as well as its derivative regulations. The protections are given in order to guarantee the rights of workers/laborer and equal opportunity as well as non-discriminatory treatment in the business communities. This regulation must be implemented by the employer. However, the company is allowed to implement any regulation for certain conduct that have not been regulated by the law and regulation in terms of manpower. Further, the enforcement shall provide better rights and benefit the workers/laborer. Therefore, the regulation applies in the company can be categorized as an autonomous company law that applies to workers/laborer and employers, which can be regulated in working agreements, corporate rules and collective working agreements.

Both the laws and regulations in terms of manpower and the company autonomy law basically regulate the relationship between workers/laborer and employers, which is known as employment relationship. This relationship is based on the existence of a working agreement, which is made between the workers/laborer and the employer, which regulates the terms of employment, rights and obligations of each party. Although the employment relationship has been regulated in the laws and regulations concerning manpower and company autonomy law, there might still any disputes arise between the workers and the employers.

The type of industrial relations disputes covers disputes of rights, disputes of interests, dispute over termination of employment, and dispute among trade unions within one company. One of the most often arises disputes is the dispute over termination of employment, which according to Article 1 point 25 of Manpower Law stated that “Labor dismissal shall be

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termination of working relations because of a certain matter that discontinues rights and obligations between workers/labor and entrepreneur”.

The dispute over termination of employment might arise from four different reasons, namely: first, layoffs by the employer, for example layoffs because workers/laborer violated work rules and layoffs due to company closure; second, layoffs from the worker itself, for example, workers resign; third, dismissal by the employer and the worker at a time that has been determined and agreed upon by both parties, for example, dismissal at the time of work is completed as agreed; and fourth, layoff due to certain or incidental circumstances, for example the death of a worker. The reasons for implementing layoffs have different consequences in relation to the rights of the workers/laborer receive. Workers/laborer who experience layoffs can be granted rights in the form of the severance pay, long service pays, compensation pay, as well as separation pay, each of which depends on the reason of the dismissal, then their duties and function represent the interests of the company and also years of service.

In work relations, where the element of subjectivity can be very decisive, the reasons for dismissal as stipulated in the Manpower Law are often ignored. It often happens that worker are “forced” to resign, where the desire to resign does not arise purely from the workers, but from the company. The encouragement is conditioned by the company in a systematic and planned manner (constructively), hence these layoffs are often referred to as constructive termination of employment or constructive layoffs. The constructive layoffs have a profound effect on the psychology or mentality of workers. In constructive layoffs, there are several ways that companies take to get workers to resign.

The constructive termination of employment is taken so that the employer does not have to pay severance pay, because workers/laborer are considered to have resigned on their own initiative. In such constructive termination because the workers/laborer “resigned”, the implication is on the rights they receive. Where there are differences in rights between workers who were laid off by the company and those who resigned. This constructive layoff constitutes a smuggling of law, because it takes advantages of the unclear regulations in the labor law, however on the other hand it harms the rights of workers and benefits companies that take advantage of the unclear regulations. Hence, the constructive termination of employment or constructive layoffs violate workers’ rights. Therefore, the Government should take an action to protect workers as vulnerable parties.

After the enactment of the Law Number 11 of 2020 concerning Job Creation (hereinafter Job Creation Law) and the Government Regulation Number 35 of 2021 concerning Fixed Time Work Agreement, Transfer, Working Time and Break Time, and Termination of Employment

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5 Law Number 11 of 2020. Loc.Cit
(hereinafter Government Regulation No. 35 of 2021, company may layoffs for several reasons, inter alia: merger, takeover, consolidation, company separation, company efficiency, company closure due to losses, companies closed due to force majeure, companies in a state of postponement of debt payment obligation (PKPU), bankrupt companies, and application for layoffs by the workers themselves.

Internationally, the practice of termination of employment often happens in the cross-country industrial sector, where “labor” workers hierarchically under the company receive unilateral treatment in term of termination of employment. Although each party can prohibit the other to avoid any action which only affect one party, at least it can be done temporarily in order to avoid the termination of employment. In fact, international legal instrument have established working agreement that are generally applicable to all companies in the world as the latest in the implementation of good working relationship based on applicable international customs. This is done as the fulfillment of basic human rights which stipulated in Article 27 paragraph (2) of the Indonesia Constitution. Internationally, the regulation regarding layoffs is regulated in the International Labor Organization (hereinafter ILO) C-158 concerning Termination of Employment Convention of 1982.

However, this is contrary to the facts that occur in the international business community. Constructive termination of employment or constructive layoff are often encountered in the business community between countries, where international companies also carry out this practice in such a systematic manner. Responding to the massive cases of constructive termination of employment in the international business community, as well as to ensure protection for workers/laborer in the world, the ILO regulates several reasons that are often used as the basis for companies to facilitate constructive termination of employment to be considered as invalid and internationally illegitimate, including a. Trade union membership outside working hours or during working hours with the consent of the employer; b. Holding a position as a work representative; c. Participation in filing lawsuit against entrepreneurs who are suspected of having violated the Law by utilizing the competent administrative authority; d. Differences in race, color, sex, marital status, family responsibilities, pregnancy, religion, political opinion, nationality or social status; e. Absence from work during marriage leave. This regulation becomes an important guideline for all employers in the world to respect the rights of workers/laborer.

This practice also happened in Japan, where many companies carried out constructive termination of employment by unilaterally cutting off working relations with affiliated workers/laborer and carrying out activities or meetings with trade unions, where this was considered to reduce the efficiency of company performance and this was also regulated in

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company autonomy law. Moreover, companies often do not pay workers/laborer who are laid off constructively with severance pay which is regulated by a monetary payment system named “back pay”, hence the Labor Relations Commission in Japan often reminds employers to immediately complete their obligation to pay severance pay in order to fulfill the company’s administrative obligations.

This research will examine the regulation related to constructive termination of employment based on Indonesia Labor Law system, including the dispute resolution can be taken over disputes arising from constructive termination of employment by companies. This research also conducts a study on regulation related to constructive termination of employment based on international law and Japan Labor Law. Moreover, this research is conducted to contribute wider legal perspective and can be used as guidelines for authorities in the formulation of future employment policies responding to massive constructive termination of employment practices that has tremendous urgency to be immediately followed up in the form of labor law reformation with strict enforcement.

METHOD

This is a normative legal system with secondary data collection which is carried out by tracing legal principles, examining the synchronization and systematics of legal products whose existence is categorized as valid data. This writing uses statute approach, associated with a conceptual approach that focuses on legal concepts and legal principles relevant to constructive termination of employment, and a comparative approach to examine the regulation relating to constructive termination of employment based on international law and Japan Labor Law.

ANALYSIS AND DISCUSSION

A. Constructive Termination of Employment Based on Indonesian Labor Law System

According to Article 1 point 25 of Manpower Law, “Labor dismissal shall be termination of working relations because of a certain matter that discontinues rights and obligations between workers/labor and entrepreneur”. The termination of employment happens for a reason, which is stipulated in the law and regulation, as well as Working Agreement, Corporate Rules, and also Collective Working Agreement. Given that termination of employment means a discontinue of a work relationship that has taken place within a certain period of time, it is necessary to give reward to the employee for their work ship. Bearing in mind that layoffs are the end of employers’ obligation to provide jobs, orders, and wages. It might cause stress to workers/laborer due to stopping income, decrease in physical strength, and also might cause


\[8\] Ibid.
loneliness, all of which change lives and requires adjustment to these new conditions.\textsuperscript{9} Hence, the termination of employment shall be avoid by regulating certain working time, improving work methods, making savings and fostering workers.\textsuperscript{10}

Knowing that the effect of termination of employment is not easy to bear, it is necessary to provide adequate compensation to the workers/laborer. According to Collins, there are two fundamental principles that underlie the rights of workers/laborer not to be arbitrarily terminated, namely the dignity principle and the autonomy principle.\textsuperscript{11} Dignity principle is the value of respect and recognition of the dignity of workers/laborer as humans, which requires the employer’s intention to terminate the work relationship must be based on rational reasons. Meanwhile, the autonomy principle recognizes the nature of work as an important way for workers/laborer to give meaning to their lives.\textsuperscript{12}

Layoffs for workers/laborer who have worked for a company for years must be taken differently from workers whose work periods are shorter. Based on Article 156 paragraph (1) and (2) of the Manpower Law. In addition to severance pay and reimbursement for years of service, workers who are laid off are also entitled to compensation pay for their entitlements which includes:

a. “Annual leaves not yet taken and null;

b. Expense or cost of workers/laborer and their family to return to place where the workers/labor are accepted to work;

c. Compensation for housing or medical treatment and care is set at 15\% (fifteen percent) of the severance pay and/or gratuity for those fulfilling requirement;

d. Others stipulated in working agreement, corporate rule or collective working agreement”.

The regulations in Article 156 paragraph (1), (2), and (3) of Manpower Law do not apply to workers who resign voluntarily, because for them compensation money applies as it applies to workers who have been laid off. For those who resign voluntarily but do not directly represent the interest of the employer in their duties and function are also entitled to separation money with the amount and implementation regulated in working agreement, corporate rules, and collective working agreement.\textsuperscript{13}

Provisions regarding workers’ rights related to termination of employment are not only regulated in the Manpower Law, but also in working agreement, corporate rules, and collective working agreement. After the enactment of the Job Creation Law, which was promulgated on

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November 2, 2020, now related to labor law, it must also refer to the Job Creation Law. The regulation of labor law in the Job Creation Law is not only related to the title of the law but also because the basic objective of the enforcement of the Job Creation Law is to fulfill the mandate of Article 27 paragraph (2) of Indonesia Constitution which stipulates that “every citizen shall have the right to work and to earn a humane livelihood”. To fulfill the mandate of the Indonesia Constitution, the government provides a regulation as an effort to create more job to absorb Indonesian workers called “Job Creation”. In order to support these job creation efforts, it is necessary to amend, revoke or stipulate new regulations on several regulation related to job creation, which also includes regulations in terms of labor law to improve the protection and welfare of the workers/laborer.14

In order to improve the protection and welfare of the workers/laborer, the Job Creation Law then revoke several articles in the Manpower Law. The articles that were revoked included those that regulated the reasons for dismissal and the compensation that workers/laborer were entitled to receive for the dismissal, namely Articles 161, 162, 163, 164, 165, 166, 167, 168, 169, and 172 of the Manpower Law. Hence, the Job Creation Law then stipulates a new regulation regarding the reasons for layoffs, namely by inserting Article 154A of the Manpower Law, which regulates that layoff can occur due to reasons:15

a. Companies carry out a merger, consolidation, acquisition, or separation companies and workers/laborer are not willing to continue the working relations or employers are not willing to accept workers/laborer.

b. The company carries out efficiency followed or not followed by company closure due to the company experiencing a loss;

c. The company is closed due to the company has suffered losses continuously for 2 (two) years;

d. The company is closed due to force majeure;

e. The company is in a state of postponement of debt payment obligations;

f. Bankruptcy;

g. There is an application for termination of employment that is submitted by the workers/laborer on the grounds that the entrepreneur has committed the following actions:
   1. to abuse, humiliate, or threaten workers/laborer;
   2. persuade and/or order workers/laborer to commit acts that are contrary to statutory regulations;
   3. does not pay wages on time at the stipulated time for 3 (three) consecutive months or more, even though the entrepreneur pays the wages on time thereafter;

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15 Law Number 11 of 2020. Loc.Cit
4. does not carry out the obligations that have been promised to the workers/laborer;
5. order workers/laborer to carry out work outside those that were agreed upon; or
6. provides a job that endanger the life, safety, health, and morality of the workers/laborer, while the job is not included in the working agreement.

h. There is a decision by an industrial relations dispute settlement institution stating that the entrepreneur has not committed the actions referred to in letter g regarding the application submitted by the workers/laborer and the entrepreneur decides to terminate the employment relationship;

i. The workers/laborer resign on his own and must meet the following requirement:
   1. Submit a resignation application in written form no later than 30 (thirty) days before the date of resignation;
   2. Not bound by official ties; and
   3. Continue to carry out its obligation until the date of resignation.

j. The workers/laborer absent for 5 (five) working days or more consecutively without written information, accompanied by valid evidence, and has been properly summoned by the entrepreneur 2 (two) times in a written form;

k. The workers/laborer violate the provisions stipulated in the working agreement, corporate rules, or collective working agreement and has previously been given the first, second, and third warning letters respectively valid for a maximum of 6 (six) month unless otherwise stipulated in working agreements, corporate rules, or collective working agreement.

l. Workers/laborer are unable to perform work for 6 (six) months as a result of being detained by the authorities for allegedly committing a criminal act;

m. The worker/labor experiences prolonged illness or disability due to a work accident and is unable to carry out his work after exceeding the 12 (twelve) month limit;

n. The worker/labor enter retirement age; or

o. The worker/labor dies.

Whereas for termination of employment carried out based on the reasons in the Article 154A of the Manpower Law, employers are obliged to pay severance pay and/or work period awards and compensation pay for their rights. Since the Article 169 and Article 172 of the Manpower Law are revoked, compensation for termination which is regulated differently in each of these articles also no longer applies.

In the practice, constructive termination of employment is generally motivated by the desire of employers to provide the lowest possible compensation, the amount of which is not in accordance with the reality that should be received by workers/laborer. It can also happen that employer do not want to pay for the rights of workers who are about to retire. To achieve this, the employers try to find ways to get the worker to submit resignation. The constructive termination of employment can occur because the compensation received by workers will differ
according to the reasons or causes of termination as stipulated in Article 161 to Article 169 and Article 172 of the Manpower Law. The most frequent abused as a basis for constructive termination of employment is Article 162 paragraph (1) of the Manpower Law. According to this article, it is stipulated that “workers/laborer tendering resignation on the basis of their will shall obtain right compensation”. In addition, Article 162 paragraph (2) of the Manpower Law regulates that “… separate money shall also be granted to workers/labor tendering resignation on the basis of their will that have tasks and functions not representing interests of entrepreneurs directly with the amount and implementation being regulated in working agreement, corporate rules, or collective working agreement.” Hence, workers/laborer who resign do not receive severance pay and period of service pay.

Based on Article 161 paragraph (3) of the Manpower Law, the workers/laborer who violate internal regulations or company autonomy laws receive severance pay, period of service pays and compensation for rights. In other words, workers/laborer who have been laid off due to their violations are entitled to better compensation than workers who resign. This is certainly unfair, especially if the employee who resigned has worked for a long period of time or is an outstanding worker who has contributed to the progress of the company.

The difference in terms of rights to compensation received by workers who have been laid off is due to the provision in Articles 161 to Articles 169, and Article 172 of the Manpower Law. The difference in compensation then changed after the promulgation of the Job Creation Law, hence employers can no longer take advantage of the differences in the reasons for layoffs and compensation, especially those regulated in Article 162 paragraph (1) of the Manpower Law. The Job Creation Law in this case actually equates the compensation that a worker receives if he is laid off for any reason. The Job Creation Law now regulates those employers are required to pay severance pay and/or service pay and compensation money in the event of termination of employment according to the provisions of Article 156 paragraph (2), paragraph (3), and paragraph (4) of the Job Creation Law regardless of reasons of the termination.

Therefore, the employers are no longer able to take advantage for loopholes related to differences in compensation arrangements for layoffs in the Manpower Law. According to Job Creation Law, the compensation received by workers are equal. Employers will not benefit in this case, namely paying lower compensation if they make constructive termination of employment by encouraging worker to resign. The exception is if in the working agreement, corporate rules or collective working agreement regulates a different compensation set, which shall be better than the Job Creation Law, for instance if the worker reaches retirement age or if the termination is made for certain reasons. Hence, even though the Job Creation Law does not regulate constructive termination of employment specifically, by generalizing compensation for termination, it implies that constructive termination of employment is not useful for entrepreneurs to be conduct in order to gain economic benefits.
B. Industrial Relations Disputes Settlement over Constructive Termination of Employment by Company

The relation between employers and workers/laborer in an industrial relations frame is one that is prone to disputes. Several cases handled by the Industrial Relations Court often intersect with a possibility of layoffs which are none other than the result of the work relationship between companies and workers/laborer, which is generally subordinate which always places workers/laborer in a weak position under employer. In addition, companies and workers/laborer also have different interests. Every dispute that arises often based on one-way action taken by the company which then cannot be accepted by workers/laborer because they are considered detrimental and not in accordance with the rights that should be obtained by workers/laborer. For workers/laborer, this condition certainly difficult, since it will affect their livelihoods, which will not only affect the workers/laborer but also their families. The issue of termination of employment is one of the most important issues in labor practice, especially in terms of the existence of human rights and the economic interest in an employment relationship between employers and workers/laborer. As human being, workers/laborer have the right to be treated fairly and properly in an employment relationship, including the right to be treated fairly by the employers in terms of termination of employment. Workers/laborer have the right to obtain protection against termination of employment that occurs arbitrarily.

The initial concept of settling labor dispute is carried out with state intermediaries, namely through “Panitia Penyelesaian Perselisihan Pusat/Daerah” or the Central/Regional Dispute Resolution Committee (hereinafter P4P/D). However, this effort is deemed ineffective in responding to the development of industrial relations disputes, which getting complex. The enactment of Law Number 2 of 2004 concerning Industrial Relations Dispute Settlement (hereinafter Industrial Relations Dispute Settlement Law) then revoked the labor dispute settlement system through P4P/D. Hence, P4P/D is considered no longer in accordance with the needs of the community and the dispute resolution mechanism which shall be fast, precise, fair, and inexpensive.

The Industrial Relation Dispute Settlement Law is the last promulgated law in the labor system reform program. This law focuses on the concept of dispute resolution. In the labor

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law system, any conflict and/or dispute that arise in industrial relations known as Industrial Relations Dispute Resolution. According to the Article 1 point 1 of the Industrial Relation Dispute Settlement Law, "an Industrial Relations Dispute is a difference of opinion resulting in a dispute between employers or an association of employers with workers/laborer or trade unions due to a disagreement on rights, conflicting interests, a dispute over termination of employment, or a dispute among trade unions within one company”.

Regarding the procedures on settlement of industrial relation dispute, the law has regulated the obligation to be resolved first through bipartite bargaining in deliberation to reach consensus. This provision is stipulated in Article 3 of the Industrial Relations Dispute Settlement Law. Hence, all industrial relation disputes are required to be resolved first through bipartite. Prevention of industrial relation disputes can be done by resolving differences in opinions, perceptions and interests before they turn into industrial relations dispute. Practically, bipartite negotiations can be carried out internally directly by the workers/laborer or labor unions with the company or through requests for facilitation at the relevant authorized manpower offices.

Taking into account the provisions of Article 3 paragraph (2) of Regulation of the Minister of Manpower and Transmigration of the Republic of Indonesia Number Per.31/MEN/XII/2008 concerning Guidelines for the Settlement of Industrial Relations Disputes through Bipartite Negotiations (hereinafter Permen 31 of 2008) it is stated that “in the event that one of the parties has requested a written negotiation 2 (two) times in a row and the other party refuses or does not respond to negotiations, then the dispute can be registered with the local authorized manpower office by attaching evidence of the request for negotiation.” This provision generally regulates one indicator (evidence) that can be used by either party to declare the failure of bipartite negotiations.

The process of resolving industrial relations dispute settlement including termination of employment, which is conditioned by the company in a systematic and planned manner (constructive termination of employment) based on the Industrial Relations Dispute Settlement Law must be resolved first through bipartite bargaining. If the bipartite bargaining failed, then it can proceed to the tripartite negotiation stage, where the relevant authorized manpower offices will then offer the parties other procedures, namely conciliation or arbitration. If the party decline those procedure, the dispute settlement will be delegated to the mediator or will be resolved through mediation. If the mediation is successful, the agreement will be written in the form of a Collective Agreement which must be registered at the Industrial Relations Court. However, if the mediation fails, the mediator will issue recommendations. If this recommendation is not implemented, the next step that can be taken is to file an industrial relations dispute lawsuit at the local Industrial Relations Court.

C. Constructive Termination of Employment based on International Law Perspective

Constructive termination of employment that happen at the international level has frightened workers/laborer in various corporate sectors around the world. Constructive termination of employment is a form of a one-way decision by the company, which results in workers/laborer often being disadvantaged because they lose the rights they are supposed to get. Thus, the sense of substance and procedural justice cannot be enjoyed by workers/laborer. Substantial justice in this case refers to rational reasons for termination, while procedural justice as providing opportunities for workers to defend themselves regarding termination committed by the employer is groundless.  

The massive practice of constructive termination of employment in the international business community is also influenced by the existence of the free market. A competitive free market will directly drive the international economy towards optimizing the use of resources, including human resources, as well as company efficiency in reducing “production expense”. As a result, demand and supply activities in a free market without intervention allow the economy to move to the limit of the highest possible production. On the other hand, when the circulation of the free-market economy is down, entrepreneurs can potentially hide the true reasons for termination by arguing that the termination that occur are due to a decrease in production demand, thus constructive termination of employment can be implemented properly.

Responding to the practice of constructive termination of employment, the International Labor Organization (hereinafter ILO) issued regulations regarding termination that apply internationally in the form of a convention, namely C-158, the Termination of Employment (hereinafter ILO Convention C-158) held in Geneva, Switzerland in 1982. The Convention does not explicitly regulate constructive termination of employment, but rather regulates the actions that companies have carried out as the basis for the imposition of constructive termination of employment.

In general, constructive termination of employment are implicitly regulated in the provisions of Article 4 to Article 6 of ILO Convention C-158, which stipulates “The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”. The provisions in Article 5 regulates concrete behavior, which so far has often been used as the basis for companies to conduct constructive termination of employment, which regulates as follow:

“The following, inter alia, shall not constitute valid reasons for termination: (a) union membership or participation in union activities outside working hours or, with the consent of

the employer, within working hours; (b) seeking office as, or acting or having acted in the
capacity of, a workers’ representative; (c) the filing of a complaint or the participation in
proceedings against an employer involving alleged violation of laws or regulations or
recourse to competent administrative authorities; (d) race, color, sex, marital status, family
responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (e)
absence from work during maternity leave.”

There are rights that should be obtained by workers/laborer fully, however companies often
reduce the portion and even terminate work relations because they are deemed no to reflect the
principle of efficiency, or are not in accordance with the company’s interests. Further, Article 6
regulates the provisions for the reasons for legal dismissal, namely:

1. “Temporary absence from work because of illness or injury shall not constitute a valid
reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical
certification shall be required and possible limitations to the application of paragraph 1 of
this Article shall be determined in accordance with the methods of implementation referred
to in Article 1 of this Convention”.

Further, the legal protection for workers/laborer are given through the ILO Convention C-158,
which also regulates the rights that must be received by workers/laborer who are laid off,
as stipulated in Article 12, as follows:

1. “A worker whose employment has been terminated shall be entitled, in accordance with
national law and practice, to:

   a. a severance allowance or other separation benefits, the amount of which shall be based
      inter alia on length of service and the level of wages, and paid directly by the employer
      or by a fund constituted by employers’ contributions; or
   b. benefits from unemployment insurance or assistance or other forms of social security,
      such as old-age or invalidity benefits, under the normal conditions to which such
      benefits are subject; or
   c. a combination of such allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or
assistance under a scheme of general scope need not be paid any allowance or benefit
referred to in paragraph 1, subparagraph (a), of this Article solely because he is not
receiving an unemployment benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this
Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1,
subparagraph (a), of this Article in the event of termination for serious misconduct”.

Thus, companies should be able to create a working climate that is full of trust by giving
workers/laborer the freedom to make considerations and provide input on company
performance and avoid any situations where workers/laborer might feel uncomfortable or being
under threat of layoffs.26

D. Comparative Study to Constructive Termination of Employment based on Japan Labor Law

Japan has been known as one of the developed countries in Asia. It has relied on the industrial sector as a major player in economic activity since the last few decades.27 In the 1960s, the Japanese economy performed quite well in terms of the domestic economic growth index, which grew rapidly through the industrial sector, this occurred as a result of transitory factors and massive industrialization after World War II.28 In addition, the rapid growth of Japanese industry is followed by the principle of equality that is still adhered to between companies and workers through an equal portion of rights and obligations.

In that era, companies were only allowed to employ their employees for a maximum of 5-6 hours per day.29 Thus, the rate of layoffs in Japan at that time was still very low, because industrial relations between companies and workers/laborer were quite good. This is in accordance with institutional economic theory, where the efficiency of working relationship arrangements including layoff arrangements will have a positive impact on the State in the domain of economic productivity.30

In accordance with the significant growth of the industrial sector in Japan, this is directly proportional to the increasing dynamics and problems of industrial relations between companies and workers/laborer, where the position of workers/laborer often placed under the position of companies. The dynamic of industrial relations between companies and workers/laborer that often occurs and increases periodically in Japan is layoffs.

Initially, termination occurred due to internal factors of workers/laborer as a result of long working hours that exceeded the physical capacity of workers/laborer, but recently, layoffs in Japan were seen as a result of companies’ systematic maneuvers to make efficiency in the context of work in order to ensure the interest of company without providing the proper condition to the workers/laborer, which can be categorized as constructive termination of employment. This practice is often inserted through company policies that lead to the exploitation of workers/laborer and a reduction in the company’s financial responsibility to workers/laborer, thus many workers/laborers feel unable to survive and are forced to resign from the company.

In fact, constructive termination of employment is prohibited in the labor law in Japan, however in the practice the constructive termination of employment can be carried out by exploiting legal loopholes. It can be said that there’s a possibility of legal smuggling, since constructive termination of employment are forced actions and are not explicitly regulated in statutory regulations, but are then conditioned as if there are regulations regarding these

actions, which are contradictory to the existing law, which tends to refer to violations and act against the law.

Labor regulations in Japan generally protect the workers/laborer from constructive termination of employment. Hence, regulations regarding constructive termination of employment in the labor law in Japan is regulated in the Japan Labor Contract Act, Japan Labor Standards Act, Japan Labor Union Act. Implicitly, constructive termination of employment can be seen in Article 7 paragraph (i), which stipulates:

“The employer shall not commit the acts listed in any of the following items: to discharge or otherwise treat in a disadvantageous manner a worker by reason of such worker's being a member of a labor union, having tried to join or organize a labor union, or having performed justifiable acts of a labor union; or to make it a condition of employment that the worker shall not join or shall withdraw from a labor union. However, where a labor union represents a majority of workers employed at a particular factory or workplace, this shall not preclude an employer from concluding a collective agreement which requires, as a condition of employment, that the workers shall be members of such labor union.”

Further, according to Article 7 paragraph (iii) which regulates the prohibition of companies from carrying out constructive termination of employment of workers who are committed through labor unions, which stipulates that:

“to control or interfere with the formation or management of a labor union by workers or to give financial assistance in paying the labor union's operational expenditures, provided, however, that this shall not preclude the employer from permitting workers to confer or negotiate with the employer during working hours without loss of time or wage, and this shall not apply to the employer's contributions for public welfare funds or welfare and other funds which are actually used for payments to prevent or relieve economic adversity or misfortunes, nor to the giving office of minimum space”.

Furthermore, the constructive termination of employment also stipulated in Article 7 paragraph (iv) where companies are prohibited from unilaterally terminating workers/labors who provide information or complain about company that violate the provisions of the Japan Labor Union Act, as follows:

“to discharge or otherwise treat in a disadvantageous manner a worker for such worker's having filed a motion with the Labor Relations Commission that the employer has violated the provisions of this Article; for such worker's having requested the Central Labor Relations Commission to review an order issued under the provisions of Article 27-12, paragraph 1; or for such worker's having presented evidence or having spoken at an investigation or hearing conducted by the Labor Relations Commission in regard to such a motion, or in connection with a recommendation of a settlement to those concerned, or at an adjustment of labor disputes as provided for under the Labor Relations Adjustment Act (No. 25 of 1946).”

Based on the explanation abovementioned, labor regulations in Japan tend to be more in favor of fulfilling workers/laborers’ rights and protecting work relations within companies, as stipulated in Article 16 of the Labor Contract Act, as follows:

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31 See: Article 7 point (i) of Japan Labor Union Act Number 174 of 1949
32 See: Article 7 point (iii) of Japan Labor Union Act Number 174 of 1949
33 See: Article 7 point (iv) of Japan Labor Union Act Number 174 of 1949
“A dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of right and be invalid.”

In accordance with several provisions abovementioned, the rights of workers/laborer also protected in an employment relationship in the Article 19 paragraph (1) of the Japan Labor Standards Act, which stipulates:

“An employer shall not dismiss a worker during a period of absence from work for medical treatment with respect to injuries or illnesses suffered in the course of employment nor within 30 days thereafter, and shall not dismiss a woman during a period of absence from work before and after childbirth in accordance with the provisions of Article 65 nor within 30 days thereafter; provided, however, that this shall not apply in the event that the employer pays compensation for discontinuance in accordance with Article 81 nor when the continuance of the enterprise has been made impossible by a natural disaster or other unavoidable reason.”

Hence, those provisions abovementioned clearly regulated constructive termination of employments, where the substance of the articles contained in several statutory instrument has provided protection to workers/laborer against the practice of constructive termination of employment that have occurred in Japan. In accordance with the enactment of those provisions, it is hoped that constructive termination of employment can be minimized with a proper and efficient law enforcement scheme.

CONCLUSION

Constructive termination of employment has not been specifically regulated in the Indonesian Labor Law System. Most recently, the Employment Cluster in the Job Creation Law also does not provide specific regulations regarding constructive termination of employment, but this regulation equalizing compensation for termination in the Job Creation Law, which indirectly have implication for the less usefulness of constructive termination of employment for employers to take economic benefits. The dispute resolution mechanism for constructive termination of employment still refer to the provisions of Industrial Relations Dispute Resolution Law, namely through bipartite, tripartite negotiations and the final steps if it fails is to file a lawsuit at the Industrial Relations Court. The arrangement regarding constructive termination of employment has been regulated as lex generale in international legal instrument as well as Japan Labor Law. In International Law perspective, it is regulated in Article 4 to Article 6 of the ILO Convention-158 concerning Termination of Employment Convention 1982. Article 4 regulates legal reasons by companies as the basis for termination, Article 5 regulates concrete behavior which so far has often been used as the basis for companies to conduct constructive termination of employment, and Article 6 is a provision that complements the provisions for the reasons for legal termination. Meanwhile in Japan, the constructive termination of employment regulation is regulated in one of the national legal instrument namely, the Japan Labor Union Act, Act Number 174 of 1949, especially in Article 7 paragraph (i), (iii) and (iv), which regulates
the concept of Constructive Termination of Employment, the prohibition of companies from carrying out constructive termination of employment through unions and companies are prohibited from unilaterally dismissing workers who provide information or complain about companies that violates the provisions of the Japan Labor Union Act.

REFERENCE


