INDUSTRIAL RELATIONS SERIES

SERI 4

IMPLEMENTATION OF CONSTITUTIONAL COURT DECISION TOWARDS THE ACT NO.13 OF 2003 CONCERNING MANPOWER

Muzni Tambusai

DIRECTORATE GENERAL OF
INDUSTRIAL RELATIONS
MINISTRY OF MANPOWER AND TRANSMIGRATION
2005

FOREWORD

The manpower development that we are doing today is for purpose to realize a sound, dynamic, fair and dignified industrial relations at the workplace. One of the efforts to achieve that goal is the availability of legal facilities that can give legal certainty for the relevant stakeholders in the implementation of industrial relations.

In light of the above, the government has enacted Act No.13 of 2003 regarding Manpower in the State Gazette No.39 of 2003. However, around 37 (thirty-seven) representatives of trade unions through their attorneys and public lawyers at the Law Aid Institution (LBH) Jakarta has filed application to review Constitution of the Republic of Indonesia of 1945 to the Constitutional Court. The Constitutional Court with its decision No:021/ PUU-I/2002 has decided that the making of Act No.13 of 2003 on Manpower formally and procedurally is not against the Constitution of 1945, while for the materials of it, there are some provisions declare null and void.

With the decision of the Constitutional Court which is binding in nature, it is deemed necessary to review the effect and the implementation toward Act No.13 of 2003 on Manpower. However, we admit that this book is not perfect yet, so we expect suggestion and advices for the improvement of this book.

Finally, we would like to convey our appreciation and gratitude to the ILO/USA Declaration project for making the publication of this book possible. May the good cooperation between ILO (especially ILO Jakarta) and the Government of the Republic of Indonesia (especially Ministry of Manpower and Transmigration) to promote sound industrial relations in Indonesia be further nurtured and enhanced.

I hope this book will be beneficial for the manpower laws development in Indonesia. Thank you.

Jakarta, Januari 2005

Muzni Tambusai

CONTENTS

CHAPTER I:
INTRODUCTION

The conflict on implementation of Manpower Act No. 13 of 2003 which was enacted on 25 March 2003 has ended through a decision of Indonesian Constitutional Court No. 012/PUU-I2003 issued on Thursday, 28 October 2004. If we see the past, the conflict arose since the discussion on Act No. 25 of 1997 on Manpower which its implementation was postponed. The postponement of Act No. 25 of 1997 effectively expressed a high government attention on manpower development.

The conflict is understandable due to the provisions to be regulated in the Manpower Act regulates two (2) different interests, which are worker and entrepreneur interests. The difference of interests as the consequences of industrial development resulted in the revolution on the sectors of social and economy. Industrialization has created huge economy progress, but in the other hand it also created various problems in the sectors of social and economy, the problems are indicated by the existence of labour/worker class as the power sales and or mind sales having different social and economy class with the entrepreneur class as the owner of capital and production tools. Competition among entrepreneurs to gain as much profit as possible made the entrepreneurs pressed their worker's wages, at the contrary workers as the party depending their living on the wage always fight to obtain high wage. Therefore, even though the legal position of worker is equal with entrepreneur, but sociologically entrepreneur's position is stronger than worker as the production factor.

In the globalization era identified by strong competition, transparency, and democratisation, it is required a legislation instrument, especially concerning manpower affairs which is capable to realize harmonious, dynamic and fair industrial relations, so entrepreneur can develop their business well,

and workers can improve their welfare and their family welfare.

Such condition may be realized if partnership between entrepreneur and worker based on democratisation in worker place can not be avoided in the business activity. In order to develop the principle of partnership between entrepreneur and worker, we need an institution functioning as a media for worker and entrepreneur in creating partnership.

In order to have harmonious, dynamic and fair industrial relations, the principles were included in the Act No. 13 of 2003, but many parties still objected to the alterations of such Act, with the reason that the drafting of Manpower Act was violating the principles and procedures of proper drafting and issuing of an Act such as : not through academic document, and its substance was inconsistent with the 1945 Indonesian Constitution especially article 27 paragraph (1) and (2), article 28 and article 33 and inconsistent with International Labour Standard, especially ILO Convention. The disagreement to the Manpower Act No. 13 of 2003 was showed by submitting a judicial review petition towards the 1945 Constitution through the Indonesian Constitutional Court.

The Constitutional Court is a state institution functioning to handle specific lawsuit, in order to keep the Constitution to be implemented in responsible and in appropriate pursuant to the 1945 Constitution. It has judicial power as the Supreme Court has; it is authorized to make a judicial review on Act towards the 1945 Constitution and has authority to decide on the first and final level.

Decision of the Constitutional Court as the first and final level means that the decision is final and binding, hence the decision of the Constitutional Court may not be requested for a judicial review. By the decision of the lawsuit No. 012/PUU-1/2003 on 28 October 2004 on Act No. 13 of 2003 on Manpower, then the conflict of Act No. 13 of 2003 is formally and procedurally not in contrary with the 1945 Indonesian Constitutions, therefore the enactment of the Act No. 13 of 2003 on Manpower has a legal power and binding. But, there are several substances of the Act No.13 of 2003 on Manpower are cancelled.

By the cancellation of some articles of Act No.13 of 2003 on Manpower, has impact to the Act and its implementing regulation. Therefore, it is necessary to make technical study on the Constitutional Court decision.

CHAPTER II:
SUBSTANCE OF
THE MANPOWER ACT

In making the judicial review on the Act No.13 of 2003 on Manpower against the 1945 Constitution, the Constitutional Court has made comprehensive review and it was not legal review. The Constitutional Court considered and used judgement and interpretation and viewed dynamical conditions changes together with developed strategic environment international industrial relations tendency which also influenced Indonesian economy, especially after the economic crisis with multi-dimension character. Therefore some provisions in the 1945 Constitution and laws and other regulations were influenced due to value and system changes in the world, demands on economy system tend to market economy emphasizing on efficient principle.

In facing such complex conditions in Indonesia, we could not take an action in "black and white" merely, but we have to interpret law and constitution on other sectors in more dynamically and contextually. Based on such condition, the Court suggested that in market economy the government participation through its policies and regulations of market economy have to be performed as proportional as possible so the idea contained in Article 33 of the Constitution 1945 is still being the philosophy and norm system in the Constitution as *the supreme law of the land*, so it is hoped that from those there will flow a series of regulations and policies which are suitable for most of Indonesians' welfare. It means that market law is influenced proportionally in omitting distortion and market weakness and it may be eliminated by still considering the risks borne by investors through a fair and proper incentive.

Therefore regulation and policies taken by government have to give proper legal protection for workers and make welfare improvement attempt.

Such constructive interpretation may be able to bring forward the composition and to release barrier. Legal argument may be only properly made if we can identify and difference various dimensions of interest and value which always overlapped each other, arranged in complex assessment which are hoped to make the Act interpreted better in a whole.

In light of the above, the Constitutional Court considered some materials of the Act No. 13 of 2003 on Manpower to be viewed based on its substances.

1. STRIKE

Strike as regulated in Articles 137-144 of Manpower Act No.13 of 2003 stated that strike as a basic right of workers/labours and worker/labour unions being executed legally, orderly, and peacefully as a consequence of failed negotiation.

According to the plaintiff the provisions violate international labour standard because limiting the reason of strike as the consequence of "failed negotiation" and constitutes a constraint to the strike as the fundamental right of workers/labours and worker/labour unions. The restriction on strike does not only limit the worker/labour freedom to use their strike right as part of freedom of association and to organize as well as to carry out workers/labours and worker/labour unions activities and it is a form of control on the role and function of worker/labour union as an official instrument to defend the worker welfare. The provision on workers/labours and worker/labour union intending to invite other workers/labours to strike during the strike is also considered as violating international labour standard and limiting the rights of worker or workers union/labour union.

Administration and bureaucracy procedures that shall be passed by worker/labour union in executing the right to strike as regulated in Articles 140-141 of Manpower Act stated that the plan to strike shall be informed within seven days before the strike, stating the starting time, place and reason of the strike; it caused the workers be impossible to execute the right to strike.

Article 186 of Manpower Act stated that any strike conducted illegally, not orderly, and not peacefully as the consequence of failed negotiation and

if worker/labour union invited other workers to strike by violating the law constitutes a criminal sanction with imprisonment for one (1) month at minimum and four (4) years at the maximum and/or a fine of Rp 10.000.000,- at minimum and Rp 400.000.000,- at maximum.

The considerations of the Constitutional Court to the provisions on conducting the right to strike, both the requirement of strike conducted legally, orderly and peacefully and as the consequence of failed negotiation (Article 137), invitation to strike by not violating the law (Article 138) and administrative requirement on the information of time period and others (Articles 140-141) are suitable with international labour standard, since the procedure is also -known in the practices agreed by ILO. Therefore, the standard and norm shall be viewed as part of applicable standard and norm in Indonesia, through parameter recognized in the 1945 Constitution. This is caused by a wrong opinion stating that human right is not absolute pursuant Article 28 J Paragraph 2 of the 1945 Constitution stipulating that in executing the rights and freedom, every person is obliged to follow the limitation defined by law merely with purpose to secure admission on rights and freedom of every person and fulfil a fair demand in accordance to consider moral, religious, public control in a democratic society.

But if the violations of Articles 137 and 138 of Manpower Act No. 13 of 2003 as mentioned in Article 186, the Constitutional Court considers that witness as stipulated in Article 186 is not proportional because reducing the right to strike as the basic rights of workers/labours secured by the 1945 Constitution in frame of freedom to express their will pursuant to Article 28 E paragraph (2), and paragraph (3) and the rights to have a fair and proper pay in working relations (Article 28 D paragraph 2).

Based on the considerations above, the Constitutional Court decides Article 186 as long as regarding with sub clause "Article 137 and Article 138 paragraph (1) Manpower Act No.13 of 2003" does not have binding legal power, and the Constitutional Court decides that the implementation of the strike that violates requirement to notify as stipulated in Article 137 and Article 138 paragraph (1) of Manpower Act No.13 of 2003 shall be regulated proportionally.

The decision of the Constitutional Court has changed the strike concept that previously consider as an action to stop working process in relation to a

dispute on claim of wage fulfilment and other working requirements, is categorized as a criminal conspiracy to hamper company development. Therefore the strike is prohibited with criminal sanction.

The strike concept as a criminal action was known since Deutschland Colonialism era, it was contained in Article 161 bis and Article 335 paragraph (3) Criminal Code stating that the strike in Indonesia is punished by criminal sanction, the provision of Article 161 bis as additional Article in the Criminal Code of 1921 was purposed to handle the strike on sugar cane plantation, sugar factory and train workers. But in beginning of Indonesian independency the provision threatening the workers who intends to make a strike with criminal lawsuit was cancelled with Act No. 1 of 1946. But next the provision regulating a criminal lawsuit for workers intending to strike was enacted by NICA through paragraph (3) on Article 335 of Criminal Code purposing that NICA had legal basis to punish a criminal sanction to Indonesian freedom fighters holding a strike.

But at beginning of Indonesian independency, Indonesian Government had reacted on the strike hence the Government stipulated a Regulation of State Defence Board No. 13 of 1948 as a form of prohibition for workers to strike in a vital company with a criminal sanction. Through the Regulation of State Defence Board, followed by Military Governor of West Java and Military Governor of Jakarta Raya, the workers were prohibited to strike in their territories.

The strike conducted in frame of implementation of employment relations in a company will disturb economy. Therefore in frame of carrying out economic problems that are potential to endanger the state, that a strike that continuously happened resulting disturbance on security and orderliness, so Act No. 22 of 1957 on Labour Dispute Settlement regulated requirement to conduct strike as the worker right in Article 6 of the Act, but if the workers conduct the strike not in accordance to the requirements described in the Article 6 of the Act, they may be punished by a criminal sanction for at maximum three (3) months in jail or fined at maximum ten thousand rupiahs (Rp. 10.000,-). The matter is also regulated in Act No 25 of 1997 on Manpower, for workers who make the strike not in accordance to the stipulated requirements; they may be punished by a criminal sanction.

The strike concept is categorized as a criminal lawsuit due to the collective

action made by the workers to claim their right to the entrepreneur is in contrary with the law. It is viewed from the following points: 1) a conspiracy is generally meant as a collection of two or more person who intend to damage other person's right or public right, so the strike is deemed will disturb economy and trading activities; 2) the conspiracy has a specific character hence if the strike is conducted by a person it is not in contrary with the law but if it is made collectively it is in contrary with the right; 3) there still opinion on the concept of employment relations although in the reality the working relations on compulsory work is changed; 4) the strike is deemed as a potential factor that will to disturb economic growth.

By using the strike concept categorized as a criminal action of the legislation, but still the strike can not be pressed. Many strikes violated the procedure, so they may be applied a criminal sanction, but there has never been any case of the strike carried to the State Court for processing.

By the decision of the Constitutional Court, the concept stating that the strike is a criminal action in Indonesia is left behind, by the reason is that the requirement of the strike as regulated in Article 137 and Article 138 paragraph (1) of Manpower Act is not a criminal lawsuit hence it can not be punished by a criminal lawsuit as regulated in Article 186 of Act No.13 year 2003.

By the decision of the Constitutional Court, the concept of the strike shall be viewed from employment relations who constitute a civil provision, as an illegal action or default of the work agreement. It is due to the workers conducted the strike do not carry out their duty as agreed in the work agreement, hence any damage generated by the strike may be claimed by the entrepreneur to the workers for indemnity.

Further, if we view the provision regulating a strike in Ministerial Decree of Manpower and Transmigration No. Kep. 232/Men/2003 stipulating on the Consequences of Illegal Strike, stated that if a strike is made illegally, the strike is qualified as an absent means that the striking worker is not entitled on the wage, it is in accordance to Article 93 of Act No.13 year 2003 stated that the worker wage shall not be paid for if the worker does not carry out his duty.

Furthermore, if the strike is continuously held, and the entrepreneur has made twice (2) summons consecutively in seven (7) days period, but the

worker does not pay any attention, so the worker is deemed to resign.

We assume that the provisions regulating a strike in the Ministerial Decree No. Kep. 232/Men/2003 on the Consequences of Illegal Strike is proportional if it is viewed from civil concept, i.e., the work agreement, and viewed from the criminal concept.

2. EMPLOYMENT TERMINATION

Working has many, wide and deep meaning in every person's life. Therefore perhaps the founder of the state in drafting and making Article 27 paragraph (2) of the 1945 Constitution regulated that "every citizen is entitled to decent work and life for humanity". Beside that, if we view from social and economic points, workers position is very weaker than the entrepreneurs.

In order to secure the implementation of Article 27 paragraph (2) of the 1945 Constitution and to protect the workers, Act No. 12 of 1964 on Employment termination in Private Company was enacted. The Act stated that the entrepreneur shall attempt to prevent any employment termination, and to ensure the implementation of Article 1 paragraph (1) of Act No. 12 of 1964, stipulated that an employment termination without any approval (from the Central /Regional Committee) is null and void (Article 10 of Act No. 12 of 1964). By such provision every and each employment termination by an entrepreneur shall be approved by the government institution functioning as preventive monitoring. The preventive monitoring is performed by the Regional Committee for employment termination on less than 10 persons and performed by the Central Committee for employment termination on 10 people or more (mass).

The principle or concept of employment termination as regulated in Act No. 12 of 1964, in drafting Act No. 13 of 2003 on Manpower is accommodated in Article 151, but responsibility to prevent employment termination is given to the entrepreneur, workers, labour union and the government to attempt their best in preventing employment termination. Beside that, the implementation of preventive monitoring which was performed by the Regional /Central Committee, based on Act No.13 year 2003, the monitoring of employment termination is given to the Institution of Dispute Settlement of Industrial Relations.

The Institution of Dispute Settlement of Industrial Relations is in accordance to the Act No.2 of 2004 on Dispute Settlement of Industrial Relations held in the General Court. The purpose and aim are to realize a fast, precise, fair and inexpensive dispute settlement of industrial relations.

Further, if we view Act No. 12 year 1964 on employment termination, only regulates prohibition of employment termination which does not need any approval. The prohibition regulation on employment termination is in effect of: a) during the worker is hindered to carry out his duty due to illness under a physician recommendation for non-exceeding period of twelve (12) months consecutively; b) The worker is hindered to carry out his duty due to fulfilling his obligation to the state which is determined by the Laws or the Government. Meanwhile the employment termination which does not need approval is employment termination against the workers in their trial period.

The above regulation is interpreted that entrepreneur may propose a permit of employment termination beyond the provision of employment termination as mentioned above. Refusal or acceptance statement shall be decided by the Regional / Central Committee. The same applied to the right on termination pay, service pay/award pay of working period and indemnity that are met with the consideration of the Regional / Central Committee in issuing the employment termination permit.

The prohibition on employment termination and the reasons of employment termination and rights of the worker on a permitted employment termination are regulated in details in the Manpower Minister Letter No. 362/67 dated February 8, 1967 addressed to the Ministry of Manpower and Heads of Central and Regional P4 in Indonesia regarding the implementation of Act on employment termination in Private Companies. The Minister Letter regulated that employment termination is not permitted if it is based on:

a. Matters relating with membership of worker/labour union which are not in or beyond working time with a permit from the employer in working time.
b. Worker complaint to the authorized officer on the entrepreneur attitude which is proven violating the state regulations.
c. Concept, religion, racial, tribe and gender.

Technical Officer of the Regional / Central Committee shall investigate whether there is any reason as described above was hided in handling the employment termination.

The reasons used for a permit application on the employment termination due to the worker has violated the law or damaged the company, parameter or assessment used to decide whether the worker has violated or damaged the company are as follows :

a. Serious mistake:
   - Stealing and smuggling;
   - Oppression to the entrepreneur, entrepreneur's family or working mate;
   - Threaten to the entrepreneur, entrepreneur's family or working mate;
   - Damaging in deliberately or in carelessly the company's asset;
   - Give a fake information;
   - Drunk in working place;
   - Humiliating or threatening the entrepreneur, entrepreneur's family or working mate;
   - Disclosing the company secret or the company household matters.
b. Mistakes that can be given the last warning ;
   - Refusing a normal order although having been warned;
   - Carrying out duty carelessly.
c. Mistakes that can be given warning, not capable in carrying out the duty although having been tried in some places.

Beside the above matters, pension matter is also regulated, stated that the worker who has completed his working time or has been in the pension age shall be pensioned without any permit of the Region/Central Committee.

Based on a Minister Decree No. 362/67 dated on February 8, 1967 we can conclude that the reasons of permitted employment termination are that the worker has violated the law and damaged the company, they are grouped in the three (3) groups, i.e., first, for a mistake which is deemed to

be serious, it processed without any warning letter, if such mistake is ratified by the Regional/Central Committee, the employment termination may be implemented without any termination pay and service pay; second, for mistakes may be given the last warning (according to the writer, without first and third warnings), and if the worker still make mistakes, he may be punished by employment termination with a termination pay (but not service pay/award pay of working period); third, for mistakes which have been warned but the worker neglects it (in practice the worker has been warned for the first, second and third) after being given the first, the second and the third warnings the worker may be punished by employment termination, with termination pay in accordance to usual termination. (In the writer opinion, the usual employment termination is that the worker is entitled on termination pay, service pay/working period award pay and indemnity pay, this purposed to differ the reason of employment termination with the last warning).

More than twenty-two (22) years ago since the Act No.12 of 1964 on employment termination in private company was enacted, implementing regulations and stipulation of sum of termination pay and service pay/working period award pay and indemnity as mandated by Article 7 paragraph (3) Article 13 of Act No. 13 of 1964, was stipulated by Regulation of Manpower Minister No. Per. 04/Men/1986. The regulation was actually as perfection of Regulation of Labour Minister No.9 of 1964.

The perfection is regulated by further regulation on employment termination without permit if: the worker is in probation period; employment relations based on work agreement for a specified time, and the work agreement has expired; the worker submit written resignation; and the worker has reached pension age.

Meanwhile if we see from the reason of employment termination, the employment termination may be grouped into three (3) namely: employment termination due to serious mistake; employment termination due to wrongdoing; employment termination not due to the worker's mistake.

Especially for employment termination due to serious mistake, the criteria are:

a. Fake information given in the work agreement;

b. Drunk, consumed narcotics and other addictive substances in the work place;
c. Conducting immoral behaviour at the work place;
d. Conducting criminal action such as : stealing, smuggling, cheating, drugs selling internal or external of the company;
e. Humiliating or threatening the entrepreneur, entrepreneur's family or working mate;
f. Persuaded the entrepreneur or working mate to do something violating the law or morality;
g. Deliberately or carelessly damaging or allowing the company assets in dangerous condition.

Such serious mistakes are part of criminal action, hence if the entrepreneur intends to terminate employment relations, the entrepreneur shall submit a permit of employment termination to the Regional or Central Committee, and the employment termination due to a serious mistake is without termination pay and service pay.

After more than ten (10) years of the enactment of Pemenaker No. 04/ Men/1986 as the implementation of Act No. 12 of 1964, the Government issues the Regulation of Manpower Minister No. 03/ Men/96 on Settlement of Employment Termination and Stipulation on Termination Pay, Service Pay and Indemnity in Private Company as the substitution of Pemenaker No.04/Men/1986.

The regulation on employment termination based on Pemenaker No.03/Men/1996 regulated the basis of employment termination develop according to the economic condition that can influence the company in conducting employment termination. The bases are as follows:

a. The employment termination due to the worker committed serious mistake;
b. The employment termination after given the first, the second and the third warning;
c. The employment termination through the last warning letter (means without the first and the second warning);
d. The employment termination due to the worker is arrested by the authorized officer minimal sixty (60) calendar days;

e. The individual employment termination not due to the worker's mistake;
f. The mass employment termination due to the company closing;
g. The mass employment termination due to the company efficiency;
h. The employment termination due to a status changing, the company owner is changed or the company location is moved;
i. The employment termination due to the worker reached pension age.

The regulation on employment termination is more detail than the previous regulation; moreover the reason of employment termination beyond the regulation of Manpower Minister No.3/Men/1996 is permitted to be regulated into the work agreement, the company regulations and in collective labour agreement.

The criminal actions or serious mistakes resulting employment termination are:

a. Cheating, stealing and smuggling on the belongings of the company, the co-workers or the entrepreneur's friend;
b. Giving false or falsified information that incur loss to the company or the State;
c. Drunk, drunken intoxicating alcoholic drinks, consume psychotropic or addictive substances in the work place which are prohibited the law;
d. Committed immoral action or gambling at the work place;
e. Committed criminal action such as intimidation or fraud the entrepreneur or working mate and selling forbidden goods internal or external the company;
f. Oppression or threatening physically or mentally, humiliating crudely against the entrepreneur, entrepreneur's family or working mate;
g. persuaded the entrepreneur or working mate to practice an action which is in contrary with the law and moral and violating the governing legislation;
h. Deliberately or carelessly let himself or working mate in a dangerous condition;

i. Deliberately or carelessly making a damage or allowing the company assets in dangerous condition;
j. Conducting the equivalent mistake after given last warning;
k. Matters that are regulated in the work agreement or the company regulations or Collective Labour Agreement.

The actions categorized as serious mistakes is generally deemed as criminal action, hence if the entrepreneur intends to terminate the employment relations, he shall submit employment termination permit accompany with evidence of the mistake/violation. Without any valid evidence, the Regional/ Central Committee shall not give the permit.

It is faster than usual; the perfection of the implementing regulations of Act No.12 of 1964 has been made from PMP No.9 of 1964 for the period of 36 years. The prompt renewal on the PMTK No. 03/Men/96 was started from banking crisis era when the value of termination pay, service pay/working period award pay and indemnity were not sufficient to fulfil the worker's fairness that had employment termination not due to the worker's mistakes.

Based on such condition, there was an intention to perfect the PMTK No.03 /Men/96 especially on the sum of termination pay at maximum total amount of seven (7) monthly wages, that previously it was five (5) monthly wages, and the sum of service pay / working period award pay being given on the basis of working period in triple years, that previously it was five years, and the value is started from two (2) monthly wages until ten (10) monthly wages, that previously it was until six (6) monthly wages.

The perfection is made through the Decision of Manpower Minister No. 150/Men/2000 dated on June 20, 2000. Beside the perfection on the termination pay, service pay/working period award pay, also on the reasons of employment termination by viewing principle of equality between workers and entrepreneur. The equality principle in the employment termination stated that the worker may submit employment termination to the Regional/ Central Committee. Previously the employment termination was only submitted by the entrepreneur.

The worker right to submit employment termination is implemented if the entrepreneur:

a. Oppress, humiliates crudely, or threatens the worker;
b. persuades and or orders the worker/labour to commit an action contrary with the governing legislation;
c. Three (3) times or more consecutively does not pay the worker's wage on the determined time.
d. Not fulfil his obligation being promised to the workers.
e. Not give proper work to the worker that has wages being based on the work.
f. Orders the workers to do their work beyond the promised work.
g. Orders a dangerous work threatening to the worker's soul, health and moral while the worker does not aware when the agreement is made.

In those cases if the worker can prove, the Regional/Central Committee may give a permit for the worker to terminate the employment relations, and the entrepreneur is obligated to pay termination pay, service pay/working period award pay and indemnity to the worker.

The other reasons for employment termination based on Kepmenaker No. 150/Men/2000 are regulated in detail as well as the worker rights as the consequences of the employment termination.

The other reasons for employment termination as regulated in Kepmenaker No. 150/Men/2000 are as follows:

1. The employment termination after given oral warning and then the first, the second and the third written warnings;
2. The employment termination after the last written warning (without passing the first and the second written warnings);
3. The employment termination with reason of at least five (5) times absent consecutively and the worker has been summoned twice in written letters by the entrepreneur;
4. The employment termination due to the worker has conducted serious mistake;
5. The employment termination due to outside the serious mistake reason;
6. The employment termination due to the worker is arrested by the authorized officer;

7. The employment termination due to the worker's request;
8. The employment termination due to the worker resigns;
9. The individual employment termination not due to the worker mistake;
10. The mass employment termination due to the company closing as consequence of a continuously suffering financial lost or a forced condition;
11. The mass employment termination due to the company closing not as the consequences of suffering financial lost or efficiency;
12. The employment termination due to a status change, the company's owner is changed or the company location is moved;
13. The employment termination due to the worker reached pension age;
14. The employment termination due to the worker passed away.

If we view the reason of employment termination due to serious mistake, the entrepreneur may submit the employment termination permit accompany with the evidence of the serious mistake to the Regional/Central Committee. The regulation on serious mistakes in Kepmenaker No.150/Men/2000 principally is the same as being regulated in Permenaker No.3/Men/1996. The difference is the reason of "*Conducting serious mistake having an equal weight after having the valid last warning"* which in the Kepmenaker No.150/Men/2000, it is not regulated anymore.

Regulation on employment termination as a part of the implementation of Manpower development through the law instrument, in order to place the implementation the employment termination is mentioned in Chapter XII Article 150 until Article 172 of Act No.13 of 2003 on Manpower. The substance of employment termination as regulated in the Manpower Act basically the substance excerpted from the Kepmenaker No. 150/Men/2000 due to the substance of employment termination regulated in Kepmenaker No.150/Men/2000 is the spirit growing and developing in the practice for thirty-six (36) years since the enactment of Act No.12 of 1964.

However, during its effectivity, there are thirty-seven (37) worker/labour unions through their proxy, Legal Aid Institution (LBH) Jakarta, have submit petition of a judicial review on Act No.13 year 2003 on Manpower against

the 1945 Constitution to the Constitutional Court pursuant to Article 10 of Act No 24 of 2003 on the Constitutional Court.

One of the substances proposed for a judicial review against the 1945 Constitution is a stipulation on employment termination with reason of serious mistake as regulated in Article 158 of Act No.13 of 2003 on Manpower, the stipulation is in contrary with Article 27 paragraph (1) of the 1945 Constitution stated that "all Indonesian citizen has the equality before the law and government and is obliged to highly respect the law and government without exception", hence the stipulation on Article 158 of the Act No.13 of 2003 on Manpower has a discriminative character under the law , conducting serious mistake is qualified as a criminal action which according to Article 170 of the Manpower Act the procedure shall not follow the stipulation on Article 151 paragraph (3) stated that the entrepreneur may directly terminate the employment relations without obtaining a stipulation on the institution of dispute settlement of industrial relation, hence the stipulation violates the evidence principle, especially principle of presumption of innocent and the equality before the law as guaranteed in the 1945 Constitution. A person whether is guilty or not-guilty shall be decided by court with the evident law being stipulated in the Act No.8 of 1981 on Criminal Code, and the Manpower Act legalizing the criminal lawsuit beyond the court. Further the stipulation on Article 159 of the Manpower Act stated that "if the worker/labour not receives the employment termination as meant in Article 158 paragraph (1), such worker/labour may propose a claim to the Institution of Dispute Settlement of Industrial Relation", therefore it assigns/gets involved the authority of a criminal court into a civil court that it should be settled in the criminal court firstly.

The reason conveyed by the petitioner stating that Article 158 of Manpower Act is in contrary with the 1945 Constitution especially Article 27 paragraph (1), because the Article 158 gives an authority to the entrepreneur to terminate employment relations due to reason that the worker / labour has made a serious mistake without *due process of law* through an independent and impartial court, but just with the entrepreneur's decision being supported by evidences unnecessarily to be checked for their validity pursuant to the governing law. In the other hand, Article 160 of the Manpower Act stipulates differently that the worker/labour being prosecuted by the authorized officer due to be assumed to make a criminal lawsuit, but not

based on the entrepreneur's information, it is applied the principle of presumption of innocence constitutes apart of the worker's rights, and if the court decides that the worker/labour is not guilty, the entrepreneur is obliged to re-employ the worker/labour. It is deemed as a discriminative treatment and contrary with the 1945 Constitution, Article 1 paragraph (3) stating that Indonesia is a Legal State therefore Article 158 shall be stated not to have a binding law.

The Constitutional Court decided Article 159 stated that if the worker/labour experiences employment termination due to a serious mistake according with Article 158 disagree with the decision, the worker/labour may appeal such decision to the institution of Dispute Settlement of Industrial Relation, hence beside the provision generates unfairness and evidence burden for workers/labours in proving not guilty, the workers/labours whose economy condition is weaker than the entrepreneurs should get legal protection better than the entrepreneurs. Therefore Article 159 regarding this case also arise confusion by mixing criminal lawsuit process and private lawsuit process.

Observing the changing of regulation on employment termination in the Act No. 13 of 2003 especially employment termination due to serious mistake, there has been a change in principle of employment termination. The regulation regarding employment termination due to serious mistake previously stated that the entrepreneur may terminate the employment relations after obtained permit or stipulation from Regional/Central Committee. But as mentioned Article 170 of the Manpower Act, the entrepreneur is not necessary to obtain a permit to terminate the employment relations due to serious mistake provided that it is supported by the following evidences:

a. workers/labours are caught in red-handed;
b. admission of workers/labours;
c. other evidences in form of report made by the authorized officer and supported by at least two witnesses.

By such provision, there is a shifting on assessing whether a worker is guilty or not guilty, especially regarding with criminal lawsuit (serious mistake accused to the worker basically is a criminal lawsuit) constitutes the court authority, but if it meets with one of the evidences above the entrepreneur may terminate the employment without obtained Regional/Central

Committee permit or stipulation. In this case the entrepreneur has executed the court authority.

Therefore if we view the regulation on the employment termination due to serious mistake, the entrepreneur before terminate the employment relations shall convey an application in order to obtain a permit for employment termination to the Regional/Central Committee. The working relation between the entrepreneur and worker constituting a civil relation being based of the agreement hence to terminate a working relation and in view of worker position which is weaker than the entrepreneur in economic social it is demanded an approval issued by Regional/Central Committee.

The Regional/Central Committee in case of permission request to terminate the employment relations based on serious mistake (containing criminal lawsuit element) does not assess whether it meets with criminal lawsuit element or not, but in view of employment termination based on civil law stated that any agreement shall be made in good faith (Article 1338 Civil Code) therefore form of the evidence conveyed by the entrepreneur may be assessed by the Regional/Central Committee whether the worker has good faith or not. The Regional/Central Committee shall not assess the reason of the entrepreneur whether it meets with criminal lawsuit element or not, due to the case is beyond the authority of the Regional/Central Committee or the entrepreneur.

The Constitutional Court through its consideration has assessed the employment termination due to serious mistake (basically is a criminal lawsuit) which is made through due process of law, with an independent court decision and it is not the entrepreneur's authority to decide whether the worker has made a serious mistake. Therefore in our opinion, the process of employment termination due to serious mistake reason may still be effective. Yet in order to state employment termination, the Regional/Central Committee or Institution shall receive a permit petition of employment termination from the entrepreneur accompanied with the evidence, and then the Regional/Central Committee or Institution of Dispute Settlement of Industrial Relation makes an investigation in frame of a working relation of civil character.

If the working relations is viewed in frame of a criminal lawsuit, the law instrument may be used for this case is Article 160 of the Manpower

Act, in which the entrepreneur may conduct employment termination without a permit, after six months the worker can not do his work properly or before the six months ending, the Court states that the worker is guilty but if before the six months ending the worker is stated not guilty, the entrepreneur should reemploy the worker.

Therefore by the law instrument of Article 160 of The Manpower Act No. 13 of 2003, actually the entrepreneur is not necessary to use instrument of Article 158 in employment termination due to the reasons in Article 158 of the Manpower Act No. 13 are only determined as criminal lawsuit.

By the decision of the Constitutional Court especially about employment termination due to serious mistake determined that Article 158; Article 159; Article 170 as long regarding sub-clause "except Article 158 paragraph (1)"; Article 171 as long related with sub-clause "……Article 158 paragraph (1)…" ; are not binding legal power. It causes that the Manpower Act especially on employment termination not introduce employment termination due to serious mistake, or in other words based on historical interpretation that employment termination due to serious mistake as regulated in Article 158 still exist, but in performing employment termination the entrepreneur must obtain a permit from Regional/Central Committee or industrial relation court by enclosing serious mistake evidences. With the provision stating to have permission and according with Article 159 of the Manpower Act, it is not necessary anymore, due to while the entrepreneur proposed the permission, the worker may appeal to Regional/ Central Committee. Articles 170 and 171 as long related with sub-clause "……Article 158 paragraph (1)…" of the Manpower Act Number 13 of 2003 are not binding legal power.

The decision of the Constitutional Court influences the Act No 2 of 2004 on Dispute Settlement of Industrial Relations, especially on Article 82 as long as regarding with ……"Article 159". It does not have binding legal power. And the sub clause stating "article 17" not included Article 158 (1) of the Manpower Act No.13 year 2003.

But, if we use the interpretation that the Manpower Act No. 13 of 2003 especially unemployment termination, does not introduced employment termination due to serious mistake, so the provision also effect to the working requirement stipulated in the work agreement, company

regulations or Collective Labour Agreement regulating the reasons of the serious mistake as regulated in Article 158 of the Manpower Act No.13 of 2003 does not have any legal power anymore, in accordance to the decision of the employment termination.

3. WORKER ARRESTED BY THE AUTHORIZED OFFICER

Regulation on workers arrested by the authorized officer hence disable to perform their obligation, at first was regulated in the Decree of Manpower Minister No.362 of 1967 dated on February 8, 1967 as implementation of the Act on Employment termination in private company, stipulated that"if in a company, there is a regulation on suspension or payment during the arresting time, hence by the obligation as mentioned in Article 11 of the Act No. 12. of 1964, it is interpreted as an obligation being based on the regulation on the suspension or wage payment during the arresting time". Moreover if we view the Article 11 of the Act No. 12 of 1964 stated that during the employment termination permit has not been given yet, and there is an appeal demand , and the Central committee has not decided yet, the entrepreneur and the worker have to fulfil their obligation respectively.

From the above provision, we conclude that especially on regulation of suspension stated that the company may deviate from the provision of Article 11 of the Act No. 12 of 1964. In regulating the suspension in the work agreement, company regulations or Collective Labour Agreement, the entrepreneur may suspend, so that the workers do not have to work normally, while awaiting the permit of employment termination. In the other hand the entrepreneur is still obligated to pay the worker's wage. Therefore, if it is not regulated previously, hence the provision of Article 11 of the Act No.12 of 1964 is applied; it means that the workers do not work so they are not entitled on their wages.

As well as the workers arrested (not described whether the workers are arrested upon the entrepreneur's report or not) can not do their work so that such workers are not entitled on their wages, unless otherwise regulated in the work agreement, company regulations and Collective Labour Agreement, namely the payment made during the workers are arrested.

In case of such workers free from the claim of the entrepreneur's report and they are not proven to make any mistake the entrepreneur is obligated to reemploy the workers with full payment as well as other rights properly received by the workers since the workers arrested.

The provision on workers arrested by authorized officer at the time of drafting Decree of Minister of Manpower Number KEP 150/Men/2000 is still accommodated although there is a change on wage value of worker arrested by authorized officer based on the entrepreneur's report that previously based on Permenaker No. 3/Men/1996 was 50% and through Kepmenaker No. 150/Men/2000 is 75% of monthly wage.

The same thing applied in the Manpower Act No. 13 of 2003 for workers arrested by authorized officer, but there are some principles differ with the previous provisions:

1. Manpower Act No.13 of 2003 Article 160 only regulates workers arrested due to assumption of making criminal action not based on the entrepreneur's report. Meanwhile provision on the entrepreneur's report is not regulated, so may be interpreted that the provision used for the worker arrested by the authorized officer is Article 19 of Kepmenaker No. 15/Men/2000 with its legal consideration, pursuant to Article 191 of Transition Provision of the Manpower Act No.13 of 2003 stated that "all implementing regulation that regulates manpower affairs is still effective as long as not inconsistent with and/or has not been changed with new regulation pursuant to the Act."
2. As a consequence of not being regulated the workers arrested by the authorized officer based on the entrepreneur's report, wage of the workers during arresting period is not regulated.
3. The entrepreneur may terminate the employment relations without any stipulation from the institution of dispute settlement of industrial relations (permission of Regional/Central Committee) after 6 months period the workers are not doing their works. Meanwhile at the previous provision, the entrepreneur may propose a permission to employment termination after sixty (60) calendar days commenced since the workers arrested by the authorized officer.
4. The regulation on rights of the workers being terminated with reason

the workers arrested by authorized officer identified to be only paid one (1) monthly wage pursuant to provision of Article 156 paragraph 3 Laws of the Manpower Act No.13 of 2003 and substitution pay pursuant to the provision Article 156 paragraph 4. In the previous provision it was not regulated, so the workers whether entitled or not entitled depends on the Regional/Central Committee at the time of issuing the employment termination permit.

The Constitutional Court, in its considerations on provision of workers arrested by authorized officer (Article 160) relates with Article 158 on employment termination due to serious mistake. If we read the petitioner's claim that Article 160 is not constituted essence of judicial review against the 1945 Constitution. According to our opinion that the Constitutional Court considered that Article 158 that regulates serious mistake made by workers is not criminal action. Therefore it is compared with Article 160 that regulates the workers arrested by the authorized officer as consequence of criminal action.

Meanwhile the provision of Article 160 is treated in accordance with the principle of presumption of innocence, which until the sixth month the workers still enjoy a part of their rights as workers, and if the court decides that the workers/labours not guilty the entrepreneur is obligated to reemploy the workers/labours. It is viewed as a discriminative treatment or inequality before the law due to it is inconsistent against the 1945 Constitution.

Apart from the consideration of the Constitutional Court, it decides that Article 160 paragraph (1) as long regarding sub-clause "…. Not on basis of report of entrepreneur ……" is not binding legal power. By that decision we conclude that the workers arrested by the authorized officer whether upon the entrepreneur's report or not, the rights and obligations of the workers in working relations between the entrepreneur and workers as regulated in Article 160 without sub-clause stating "not on basis of report of the entrepreneur".

Based on the corrections to the provision of Article 160 the Constitutional Court stipulates that Article 158 and the Articles related it are stated not have binding legal power.

It implies that the Manpower Act No. 13 of 2003 does not regulate any employment termination due to serious mistake. Therefore if the workers

make mistakes as regulated in Article 158 of the Manpower Act No.13 of 2003, the entrepreneur may use any institution regulated in Article 160 of the Manpower Act.

Therefore if we view from legal protection, the workers with employment termination due to the workers arrested by the authorized officer get more protection compared with the provision of Article 158. Article 160 obligated the entrepreneur to pay the workers the appreciation money of working period in one (1) monthly wage of provision Article 156 paragraph (3) and right substitution pay pursuant to Article 156 paragraph (4). If the workers are terminated based on Article 158 the workers are only entitled on separation money as regulated in the Work Agreement, Company Regulations or the Collective Labour Agreement and right substitution pay pursuant to provision of Article 156 paragraph (4).

CHAPTER III:
CLOSING

The Constitutional Court as one of the actors of judiciary authority has an important role in attempt to enforce the Constitution and principle of a legal state in according with its duty and function as determined in the Act No.24 of 2003.

In relation to such conditions, especially the Manpower Act, since the drafting until the enactment of the Act No. 13 of 2003, there is a different interpretation on its effctivity both formally and substantially.

In formal, that the Act No. 13 of 2003 on Manpower drafted by violating the principles of drafting procedures of a proper Laws, it is proven by not having "Academic Document" as the consideration basis of the necessary of the Manpower Act.

From the substance, the Manpower Act is not consistent with Article 27 paragraph (1) and paragraph (2) of Article 28 and Article 33 of the 1945 Constitution. The Article of the Manpower Act which is not consistent is:

a. Implementation of workers/labours union rights to collective bargaining for making a Collective Labour Agreement regulated in Article 119, Article 120 and Article 121.
b. Obligation of the company employing 50 workers to form a Bipartite Cooperative Institution, as regulated in Article 106, which basically takes over the role and responsibility of worker/labour union.
c. Regulation of work contractor as regulated in Article 64 and Article 66 placing labour as merely a production factor.
d. Employment termination due to serious mistake as regulated in Article 158 having a discriminative character. Legally, due to the Article legalized employment termination due to serious mistake. So the

provision disturbs the evidencing principle, especially principle of presumption of innocence and equality before the law as spirited by the 1945 Constitution.

e. Strike provisions as regulated in Article 137 – Article 145 are inconsistent with ILO Convention regarding with Labour Fundamental Right and Freedom of association and to organize and to collective bargaining covered in the ILO Convention No 87 and 98.

f. Female workers whose work at evening shift as regulated in Article 76, the worker shall not be in pregnancy and under 18 years old, shall be provided transportation equipment and extra food, and the entrepreneur is obligated to keep moral and security in the working place, it is inconsistent with the ILO Convention due to the reality of female workers may not have the same capability with male workers, and it tends to generate a gender bias due to relating the female workers as the main party in generating an amoral action that shall be avoided/ prevented.

Such contradictive opinion is realized through a petition of judicial review on the Act No. 13 year 2003 on Manpower against the 1945 Constitution to the Constitutional Court. The Constitutional Court in accordance its authority has made a deep study on the 1945 Constitution as described in its legal considerations. One of the considerations in view of the Manpower Act and its relation with the 1945 Constitution, it considers the harmonization of many interests, especially the worker's interest and the entrepreneur's interest in market economy mechanism. The entrepreneur's interest shall be accommodated due to the investment absence will cause a lack of job opportunity and improving the quantity of unemployment, that will make the workers suffer. Therefore the Constitutional Court suggested that Article 33 of the 1945 Constitution can not be understood fully as a refusal against the market economy system. It means that the state shall involve in the market economy mechanism that experience distortion.

Through such consideration, the Constitutional Court decided to refuse a part of the petitioner's claim and approves a part of claim and makes correction on Article 160 as described above.

The decision of the Constitutional Court No.012/PUU-1/2003is the

first and final stages decision which such decision has a final character pursuant to Article 24 C paragraph (1) of the 1945 Constitution and Article 10 of the Act No.24 of 2003, so that the decision of the employment termination constitutes an integral part of the Manpower Act No.13 of 2003 until the perfection or addendum is made against the Manpower Act, and the pro and contra opinions against the Manpower Act are settled.

Now, how to make the Act optimal, so the purposes and aims of the Manpower development as hoped in the Manpower Act No.13 which is a harmonious, dynamic and fair industrial relation can be realized well.

If it is viewed from the substance of the Act No.13 of 2003 that stated not having a binding legal power, will implicate against other provisions such as in:

a. Decree of Manpower and Transmigration Minister No. Kep/232/ Men/2003 on legal consequence of illegal strike, especially Article 7 paragraph (2) on serious mistakes.
b. Regulation on working qualification stipulated in form of a work agreement, company regulations and Collective Labour Agreement regarding employment termination due to serious mistakes.
c. Employment termination of workers arrested by the authorized officer, which not differ whether the worker reported by the entrepreneur or other.
d. Act No. 2 year 2004 on Dispute Settlement of Industrial Relations especially Article 82 stating that the claim made by workers/labours on employment termination as meant in Article 159 may be proposed within one (1) year period commencing since the decision from the entrepreneur is received /informed.

Based on the above, it is necessary to arrange the following steps:

1. Issuing a technical guidance circular letter, as the consequence of the issuing of the decision of the Constitutional Court against the Manpower Act.
2. Socialization to the technical officials, worker/labour union and entrepreneur.
3. Issuing the Manpower Act No.13 of 2003 accompanied with notes on Articles being stated not having a binding legal power.

ATTACHMENT

DECISION
OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

LAWSUIT NUMBER: 012/PUU-I/2003

LEGAL CONSIDERATION

Considering that purpose and objective of the Petitioners in the Petition are as mentioned above; _____

Considering that before entering the main substance of the lawsuit, the Court at first must consider the following:

1. Whether the Court is authorized to judge and decide the Petition of judicial review on Manpower Act; _____
2. Whether the Petitioners have adverse constitutional rights by the enactment of the Act, so the Petitioners have a legal standing to act as the Petitioners before the Court; _____

Against both intensions above, the Court states its opinion as follows:

1. Authority of the Court

Considering that Article 24C subsection (1) of the Constitution 1945 stating that the Constitutional Court is authorized to judge at the first and final stage whose decision shall be final to review laws against the Constitution, it is reconfirmed in Article 10 of Act Number 24 Year 2003 concerning Constitutional Court which inter alia also states that the Court reviews at the first and final stage which its decision shall be final to review laws against the Constitution; _____

Considering that Article 50 of Act Number 24 Year 2003 concerning

Constitutional Court and its Elucidation states that act might be reviewed is act which issued after the first amendment of the Constitution 1945, i.e., shall be after October 19, 1999; _____

Considering that Manpower Act which proposed to be review is the Act issued after the first amendment of the Constitution 1945, therefore the Court shall be authorized to judge and decide the petition of judicial review of the Manpower Act against the Constitution 1945.

2. Legal Standing of the Petitioners

Considering that Article 51 subsection (1) of Act Number 24 Year 2003 concerning Constitutional Court states that who may propose petition of judicial review of laws against the Constitution is party assuming its rights and/or its constitutional authority become lost by enactment of laws. The party may be Indonesian personnel, traditional law society units as existing according to developing of community and principle of the Union State of the Republic of Indonesia as stipulated by laws, political or private legal entity, or state institution;

Considering that intension of constitutional right pursuant to elucidation of Article 51 subsection (1) Act Number 24 Year 2003 is rights as stipulated in the Constitution 1945.

Considering that therefore a person or party in order to be a legal standing Petitioner before the Court, so in the petition of judicial review of laws should firstly explain: _____

The first, position in the proposed petition should be appropriate to qualification required in Article 51 subsection (1) Laws Number 24 Year 2003; _____

The second, constitutional loss being suffered in the qualification, as the impact of the laws enactment proposed to be reviewed; _____

Considering that the Petitioners in their petition states that the Petitioners consist of 37 persons who are leaders and activists of labours/ workers unions growing and developing independently on their own will in a mobile society, and are established on awareness with intension to give protection and enforcement on fairness, law and human rights in Indonesia,

especially for labours/workers who are often in poor position; _____

Considering that from the proposed evidences in form of articles of association of associations, federations or labours/workers organizations, in fact that they are not legal entity according with the governing laws, while at the other side in fact that the Manpower Act does not give them position or standing to propose petition before the Court in order to defend legal interest and basic rights for workers as it is known in the Environmental Act. However, as personnel or community of personnel's acting for himself/themselves or labours being associated in organizations led by the Petitioners, so the Petitioners meet with qualification as meant in Article 51 subsection (1) i.e. as personnel or community of personnel having similar interest; _____

Considering that the Petitioners stated that the Manpower Act is the main Act of labour which organize all affairs concerning labour and employment relationship in Indonesia, which directly or indirectly produces impacts through subordinate regulations to all labours/workers in Indonesia because there is direct interest on implementation of the Manpower Act, which in a view of the Petitioners damages the constitutional rights of labours or workers as stipulated in the Constitution 1945 inter alia right to be in united, right to strike and right to achieve equal protection before the law;

Considering that base on the description above and concerning to Article 51 subsection (1) of Act Number 24 Year 2003 concerning the Constitutional Court, the Court is in the opinion that the Petitioners have legal standing to propose the petition. Therefore the Court must consider the substantial of lawsuit as described herein below:

Substance of Lawsuit

Considering that before considering the whole Petitioners' petition, at first we should pay attention that although stated not firmly, in fact the Petitioners have proposed the petition to perform a judicial review on its formal and substantial, and then after describing the substantial review on several articles of the Manpower Act, at the end in closing part (petitum) the Petitioners request to the Court in order to state the Act being inconsistent to the Constitution 1945 and therefore it does not have legal binding power;

Considering that general reasons proposed by the Petitioners regarding with a point of view in making legislation of the Act tends to accommodate the interest of national and international investors, and the Act insufficiently considers its negative impact to Indonesian labours/workers, such trends is deeply influenced by new-liberalism concept emphasizing on freedom and efficiency market. Such efficiency is achieved by strategy of cheap wage for labour in flexible labour market, but resulting a job security loss on labour/worker, and resulting labour/worker who just become contracted labour/worker for long life, it is popular known as modern form of slavery or modern slavery, and there is international pressure through IMF resulting the Laws. Although it gets opposition from labour community, and other statements being quoted incompletely shall be consider by the Court in general; _____

Considering that in examining the Manpower Act against the Constitution 1945 proposed by the Petitioners the Court must asses, interpret, and harmonize in order to get the most social welfare condition. It means that market rule will be influenced proportionally to delete market distortion and leak, and the Court must consider risks to be taken by the investors through a balance and feasible incentive; _____

Considering that at the other side, the regulation and policies must still give legal protection sufficiently for labours and there must be attempts to increase their welfare. The constructive interpretation giving priority to legal construction and to delete any barrier on legal opinion in balance, just can be applied if there is able to identify and distinct various interest dimension and conflict of values that secured in complex assessment and to make the interpreted Act better; _____

Formal Examination

Considering that as mentioned above, the Petitioners also have proposed a formal examination with substance of opinions as follows; _____

1. The Manpower Act have been arranged by inconsistence to the feasible arranging and making on principles and procedures, it appears through facts as follows: _____
   a. There was no "academic analysis" that gave scientific consideration on necessary of theAct; _____

b. Drafting of the Act was backed up with public falsehood by Parliament; _____

2. The Manpower Act, as one of "Package of 3 Labour Laws", was issued through interest pressure of foreign investment rather than real need of Indonesian labours/workers; _____

Considering that even though the academic analysis is important as a scientific basis and consideration for a bill in order to avid miss-calculation and miss-logic, the existence of an academic document is not a constitutional compulsory in making legislation process. Therefore the non-existence of academic analysis of the Act is not legal requirement resulting the Act to be null and avoid as a reason of the Petitioners; _____

Considering that the reason of the Petitioners regarding public falsehood made by a member of Parliament, i.e. there is a Small Team pretending as representative of labour organizations taking a part in making legislation consultation of the Act. In the case it is true, it just shows that the legislation drafting process of the Act is not aspired, but it does not mean it is inconsistent with a legislation drafting procedure pursuant to the Constitution. Moreover, the participation of stakeholder in giving input to the Parliament functioned as facility to absorb public aspirations is considered to be exist by submitting opinion through demonstration done by labours as legislation process of the Act. It was considered as absorber of labour's aspiration; _____

Considering that involving of foreign interest in making legislation of a country through persuasion in order to balance economic interest of parties affected by an act enactment can not be assumed as an intervention into sovereignty of a country, as long the legislators are able to implement their authority in making legislation freely and independently, without any force, cheating and a direct power intervention. The interest of foreign investors is reasonable to be considered freely and independently by legislators with giving attention to national interest; _____

Considering that the reasons of the considerations above, the Court is in the opinion that there are not any illegal procedures that caused the Act becomes null and avoid and not having legal binding power. Therefore a request of formal review proposed by the Petitioners must be refused; ____

Substance Examination

Considering that the Petitioners have interpreted that the Manpower Act is inconsistent to the Constitution 1945, especially Article 27 subsection (1), Article 28, and Article 33, and substantially, it is worse than the previous act, with essence of arguments as follows:

1. Main essence of the Manpower Act is to create market mechanism works freely in context of manpower affairs, which labour is assumed merely as commodity or commercial goods in labour market that will be used as needed and will be thrown away if not more profitable. Protective sphere and protection standard of worker in labour law is lessen and labour is let to face the cruelty of market and capital force alone. All of them are inconsistent to Article 27 subsection (2) of the Constitution 1945 stating that "every citizen is entitled to get job and worthiness living as human".
2. Several articles of the Manpower Act seal fundamental rights of labour/worker and labour/worker union. They are inconsistent to Article 28 of the Constitution 1945 which secures freedom of association and to gather, to give opinion orally or in writing. They are:
    a. Article 119 of the Manpower Act requires that to negotiate in the Collective Labour Agreement (CLA), a labour/worker union must prove that it has total members for more than 50 % of total labours/workers in the relevant company, if not it must get support from more than 50 % of total labours/workers in the relevant company. It means that Article 119 of the Act gives a quo opportunity to entrepreneur/employer to associate and to gather in the relevant company; _____
    b. Article 120 of the Manpower Act requires that if in a company there are more than one labour/worker union, the labour/worker union that is authorized to represent the workers in the CLA negotiation must have total members of more than 50 % of all labours/workers in the company, if not, such labour/worker union may make coalition with the other, so they are more than 50 %. And if not, all labour/worker unions join to make a team that members of team determined in proportionally based on number of their members respectively; _____

c. Article 21 of the Manpower Act determines that membership of labour/worker union is proved by membership card. It caused disadvantage for the new developing labour/worker union, it limits flexibility of labour/worker union to have activity including CLA negotiation; _____

d. Article 106 of the Manpower Act requires any company employing 50 labours/workers or more to establish "Bipartite Cooperation Institution" consisting of representative from entrepreneur and labours/workers to be functioned as a "Communication and Consultation Forum" on manpower matters in the company. In fact, it assumed role and responsibility of labour/worker union in doing anything related to the rights and interest of its labours and members in the company. It is inconsistent with Article 28 of the Constitution 1945, and the compulsory existing of the Forum will significantly decrease the role and function of labour/worker union and will impact in decreasing a lot of members of labour/worker union; _____

e. Articles 64 – 65 of the Manpower Act regulate "working contract" system that known as "outsourcing", has placed labour as a merely production factor that can be employed if needed and to be terminated if not needed any more easily, so wage component as one of costs can be spent as minimum as possible. Even though Article 33 subsection (1) of the Constitution 1945 states "Economic is arranged as attempt of cooperation based on family principles that means our economic is based on economic democracy where production is done by all, for all, with giving a priority to prosperity of people". Herein "modern slavery" and degradation of human values, labour as commodity or commercial goods will happen officially and valid by laws; _____

3. Article 158 subsection (1), (2), Article 170 of the Act are inconsistent with Article 27 subsection (1) of the Constitution 1945 stating: "All citizen have equal position before the law and government and obligated to respect the law and government without any exception". The Articles are discriminative legally because they legitimate to terminate working relations with reason of having done serious mistake in qualification as criminal act, that pursuant to Article 170

of the Act, the procedure is not necessary to follow provision of Article 151 subsection (3) that means without any stipulation of institution being authorized to settle industrial relations dispute. This provision violates evidence principle, especially principle of presumption of innocence and equality before the law as secured in the Constitution 1945. In fact whether a person guilty or not, it should be decided by court with evidence rule as regulated in Act Number 8 Year 1981 on Criminal Proceeding Act. The Act legalizes a quo criminal act beyond a court. Further, provision of Article 159 regulates that "in the case of worker/labor is not accepting the termination as meant in Article 158 subsection (1), the said worker/labour can object to the industrial relations dispute settlement institution", therefore there is confusion of authority of criminal court into private court, actually it should be settled by criminal court; _____

Substantially, the Manpower Act is also inconsistent with the international labour standard (Convention and Recommendation of ILO), as shown as follows: _____

a. Regulation on strike in Articles 137 – 145 of the Manpower Act is inconsistent with ILO Convention on fundamental rights of labour related to the basic rights of freedom of association and to organize and to collective bargaining as meant in ILO Convention No. 87 and 98 that having been ratified by Indonesia. ILO strictly states "the right to strike" is an integral part with right to organize being secured by ILO Convention, and by ratification on the Convention it means an integral part with right to organize of labours/workers, and government may not create any barrier in administrative or bureaucracy forms that caused labours/ workers can not enjoy their right to strike. The right to strike is an essential right for labours and their organization in struggling and protecting economic interest and working condition and collective demand in a working relation; _____

Violation against the right to strike which secured by the international convention shown in articles of the Act as follows: _____

a. Article 137 of the Act states "the right to strike as basic rights of labour/worker and labour/worker union should implement validly and orderly and peaceful as consequence of the failure of bargaining".

This article violates international labour standard because restriction of reasons to strike just as a result from "failure of bargaining", and means restriction to strike as fundamental rights for labour/worker and labour/worker union. Restriction to strike in Article 137 of the Manpower Act not only limits the freedom of labour/worker and/or labour/worker union to use the right to strike as a part of freedom of association and to organized and to run labour union and its organization but it means a form of control against role and function of labour/worker union as official instrument of labours/workers in order to struggle for increasing of their welfare; _____

b. Article 138 subsection (1) the Manpower Act states that "labour/ labour and/or labour/worker union planning to invite labours/workers to stage labour strike shall be done by means not violating the law." This article violates international labour standard through restriction of rights of labour/worker and labour/worker union plan to invite other labour/worker to strike when the labour strike is happening not violating the law; _____

c. Article 186 of the Manpower Act regulates a criminal sanction against violation of Article 138 subsection (1) with imprisonment for four (4) years at the maximum and/or a fine of Rp 400 million is very heavy and it means attempts to prevent the right strike being implemented; _____

d. Article 140 – 141of the Manpower Act, also violates international labour standard because such articles stipulating phases of administrative and bureaucracy procedures that should be passed by labour/worker union to use the right to strike by notification at least 7 days before the strike implemented with mentioning starting time, place and reason to strike, that makes labours/workers impossible to implement the right to strike; _____

e. Article 76 of the Manpower Act regarding female labour employed at night (between 23.00 and 05.00) is not permitted while the worker is pregnant and her age is below 18 years old, com[any should provide transportation and additional meal and the entrepreneur shall be obliged to maintain morality and security at the workplace, is inconsistent to ILO Convention No. 111. It is causing female labour not having similar opportunity with the male labour, and it is gender

confusing because involves female as main factor to stimulate amoral-act that should be maintained by the entrepreneur not to happen; __

f. Such regulations give more authority to the executive, that means the fate of labours/workers depends on political policies of the governing executive with condition that subordinate regulations under the Act are changeable pursuant to the political policies. More over, Ministerial Decree is not included in hierarchy of legislation pursuant to the Stipulation of MPR RI Number III Year 2000, therefore Ministerial Decree does not have legal binding power in general matter; _____

g. The Manpower Act from arrangement system is tend to be inconsistent and contravent among its articles one to the other, so becoming confusing; _____

h. The Manpower Act Number 13 Year 2003 that promulgated on March 25, 2003 different with Manpower Act draft that approved by Plenary Session of Parliament on February 25, 2003; _____

Considering that after observing information from the Government, Parliament, Experts and witnesses and proposed evidences, the Court will give opinion as mentioned in considerations s below : _____

The Petitioners have quoted Article 27 subsection (2) of the Constitution 1945 as one of examination norms against to the Manpower Act which is considered having been treated labour/worker merely as commodity or commercial goods that is able to be thrown away if it is not profitable any more without any protection and function of state as protector; _____

Considering that as admitted also by the Petitioners that the Constitution 1945 means normative ideal, direction and basic of policy. Therefore the Manpower Act should refer to the Constitution 1945 by implementing role of state as protector, but it is not clear in the Act. It means that the Act should consider a balance of various interests, specially interest of labours and interest of entrepreneur in market economical system. The interest of entrepreneur must also be accommodated because without any investment will just make decreasing job opportunities and increasing unemployment and then it will disadvantage labours. In this condition, the Court is in the opinion that Article 33 of the Constitution 1945 can not be considered as refusal against market economic system, that means the state must intervenes while market economic mechanism incurring distortion; _____

Considering that assumption of the Petitioners that the Manpower Act sees labours as commodity because of tendency of outsourcing system in working patron which is also considered as modern slavery, the Court is in the opinion that the Petitioners can not prove the reasons of their consideration. The act as whole, does not contain provisions as meant in theconsideration, although it is true there is outsourcing patron which is regulated specially in Articles 64 – 66; _____

Considering that outsourcing regulation in Article 64 – 66 describes existing and restriction of the outsourcing as part of work separated from main activities and it means wholly supporting activities of company and it is not barrier production process directly. Implementing of the job is subcontracted by a company to other company through an agreement of working contract or providing of worker/labour service in writing. The said labour/worker may not be used by job provider to undertake main activities or activities directly related to the production, therefore working relation is between labour/worker and company providing worker/labour service; ___

Considering that protection given to outsourced labour as shown in Article 66 subsection (1), (2) a, c and subsection (4):

(1) Worker/labour of companies rendering worker/labour services can not be employed by job providers for undertaking the main activities or activities directly related to the production, except activities of supporting services or activities not related directly to the production;

(2) Provider of worker/labour services for activities of supporting services or activities not related directly to the production shall meet the following requirements: _____

   a). working relation between worker/labour and company providing worker/labour service exist; _____

   b). Wage protection and welfare, occupational requirements as well as the arising disputes are responsibility of company providing worker/labour service; and _____

(3) In the case of the provisions as meant in subsection (1), subsection (2) letters a, b and d as well as subsection (3) are not fulfilled, the status of working relation between worker/labour and companies providing worker/labour service shall shift to working relation between worker/labour and company providing the job by law; _____

Considering that based on the provisions mentioned above, in the case the said labour is employed to undertake the main activities, there is not any working relation to company providing worker/labour services, and if the company providing worker/labour services is not a legal entity, so by law the status of working relation between worker/labour and company provider worker/labour services shifts to working relation between worker/labour and company of job provider. Therefore, by observing a necessary balance in protection against entrepreneur, labour/worker and society in harmony, the reasons of the Petitioners are not sufficient. Working relation between labour and company providing labour service which undertakes the job in other company as stipulated in Article 64 – 66 of the Act, receives job protection and similar working requirement with job protection and working requirement in company of job provider or according to effective legislation. Therefore beyond the definite period that possibly to be the requirement of the working agreement in available opportunity, protection of rights of labour according to the Manpower Act is not proven that it concludes of outsourcing system meaning modern slavery in production process; _____

Considering that beyond the explanation mentioned above, based on description from two (2) witnesses proposed by the Petitioners, it is clear for the Court that practices undertaken by entrepreneurs in the case of business change and in other situation as the entrepreneurs want to save in any way to urge labour/worker resigning by company locking-out with obligation to pay minimum severance fee, and then opening job opportunity on base of working agreement for a specified period that mentioned by witness as contracting labour with conditions very damaged for worker/labour. It seems that controlling and law enforcement from the competent authorities is not able to protect labour/worker from inconsistent practices to the Manpower Act, however, any violation of entrepreneurs against Article 55, Article 59 subsection (1), Article 61 subsection (1) and subsection (3), Article 62, Article 65 subsection (2) can not be given criminal sanction as legal protection form in balance that force entrepreneurs to give rights of labour that loosing an opportunity to treat labour as it should be. At the other side in Article 186 regulated a sanction for labour violating Articles 137 and 138, threaten with minimum imprisoned for one (1) month and maximum for four (4) years in prison and/or a minimum fine amounting Rp 10,000,000.-, maximum fine Rp 400,000,000.- therefore the Court is in the opinion that Article 186

of the Manpower Act is inconsistent with the Constitution 1945 due to criminal sanction in the Act for labour/worker is assumed not proportional and excessive; _____

Considering that Article 119, 120 and Article 121 of the Manpower Act are under Chapter Seventh regulates Collective Labour Agreement (CLA) that in Article 118 regulates logically that in a company can be only made one (1) Collective Labour Agreement (CLA) that subject to all worker/labour in company, therefore it is reasonable if meeting partner of company in arranging the Collective Labour Agreement (CLA) at least representing majority of labours/workers which their rights and interest regulated into the Collective Labour Agreement, so the Court is in the opinion that the provision that requires one labour/worker union in company has authority to represent workers/labours in negotiating the Collective Labour Agreement should have members more than 50 % of all workers/labours in related company, and in the case the amounting of 50 % is not reached, the worker/labour union must get support from more than 50 % of all labours/workers where it can be reached through meeting among labours/workers, while in the case existing labour/worker unions more than one and not reaching more than 50 %, coalition may be done among the existing labour/worker unions in the company to represent labours in the negotiation with the entrepreneur, and in the case it is still not reached, negotiating team determined in proportion based on amounting of members of labour/worker union respectively. Such provision is viewed reasonable and not inconsistent with the Constitution 1945, specially Article 28E subsection (3). Therefore requirement of membership card as an evidence for membership sign of labour in a labour/worker union is reasonable in order to be able to claim representing members, and it is not sufficient to be considered inconsistent with the Constitution 1945; _____

Considering that provision of Article 106 of the Manpower Act requires to establish Bipartite Cooperative Institution in company employing 50 labours or more, having function as communication and consultation forum on manpower matters in the said company, is unnecessary to be interpreted to omit right of labour/worker organization in struggling right and interest of labour/worker, because it shows labour/worker element who sitting in such forum undertaken in democracy way, which it may be terminated any time in the case not interest of labour is maintained in the forum. Therefore

the Court does not think Article 106 of the Laws inconsistent with the Constitution 1945; _____

Considering that the Court may agree on the reason of the Petitioners that Article 158 of the Manpower Act is inconsistent with the Constitution 1945, specially Article 27 subsection (1) that states that all citizens are equal before the law and government and obliged to obey the law and government without any exemption, because Article 158 giving authority to entrepreneur to discontinue working relation with reason labour/worker having serious mistake without due process of law through court award which is independent and impartial, but it is sufficient by decision of entrepreneurs which supported by evidences not necessary to be examined its validity pursuant to positive procedure law. At the other side, Article 160 regulates a different that labour/worker is arrested by competent authority because accused undertaking criminal act but not reported by the entrepreneur, treated according to principle of presumption of innocence until the sixth month still receives a part of rights as labour, and in the case court states that the said labour is not guilty, the entrepreneur is obliged to reemploy the said labour/worker. It is viewed as discriminative treatment or different in rule of law and it is inconsistent to the Constitution 1945, and provision Article 1 subsection (3) states that Indonesia is a law state, therefore Article 158 must be stated not having legal binding force; _____

Considering that although Article 159 regulates, in the case labour/worker having been discontinued working relation because of undertaking serious mistake pursuant to Article 158, not accepts such discontinuation of working relation, the said labour/worker can raise objection to the industrial-relation dispute settlement institution, beside such provision bearing evidence burden which is not fair and burden for labour/worker to prove his/her not-guilty, as a poorer economical party, labour should get legal protection better than entrepreneur, Article 159 regarding this case is also arising a confusion by mixture criminal lawsuit process with private lawsuit process inappropriately; _____

Considering that conditions determined to implement right to strike, either conditions that strike must be undertaken validly and orderly and peaceful as a result of failure of bargaining (Article 137), strike invitation to labour on the strike going on without any violation against the law (Article 138) or administrative conditions on the notification period etceteras (Articles

140 – 141), pursuant to the Petitioners is considered inconsistent with the international labour standard (ILO). The Court is in the opinion that is not inconsistency with the international labour standard. It is caused there are some restrictions introduced in practices and approved by ILO. In the case it is inconsistent to –quod non-ILO standard, such standard and norms must be considered as part of standard and norms are validated in Indonesia by measurement introduced in the Constitution 1945. Therefore the human rights are not considered valid absolutely. Article 28J subsection (2) of the Constitution 1945 states that in undertaking the rights and freedom, every person shall be subject to restrictions stipulated by laws with intention solely to secure admission and respect to the rights and freedom from other persons and to meet a fair claim according to consideration of moral, religion values, security and public order in democracy community; _____

Considering that however, if it is related with sanction upon violation against Articles 137 and 138 as stipulated in Article 185 of the Manpower Act as also considered above, the Court is in the opinion that sanction in Article 186 is not proportional because it reduces right to strike that means basic right for labour secured by the Constitution 1945 in a frame of freedom to state an attitude (Article 28E subsection (2) and subsection (3) and right to accept fair and worthy reward in working relation (Article 28D subsection (2)). Implementation of right to strike violating the conditions determined in Article 137 and Article 138 subsection (1) of the Manpower Act must be regulated in proportional; _____

Considering that provision of Article 76 of the Manpower Act gives specified conditions for female labour works at night, according to the Court it is necessary to protect female labour which is viewed appropriate with the living values in Indonesian community. It does not have to view there is gender bias which making female as main factor of stimulation to amoral act, but it should be considered that there are necessary acts pursuant to values believed in society, it is not relevant to relate with discriminative attitude and treatment against female labour; _____

Considering that reasons of the Petitioners stating that from systematic and procedure sides there are confusion among articles of the Manpower Act, the Court is in the opinion that it is merely interpretation from the Petitioners which the Court views that it is not principle containing inconsistent to one each other and there is not inconsistent to the Constitution

1945. Although the Petitioners admits that the Manpower Act gives authority to the executive to implement the Act by laws, 12 Government Regulations, 5 Presidential Decrees and 30 Ministerial Decrees, that means the Act is not complete. Such condition does not have to conclude as executive heavy, because each regulation may be examined its validity against higher regulation. Although the Stipulation MPR Number III Year 2000 expresses that Ministerial Decree is not in hierarchy of Indonesian legislation, but Article 4 subsection (2) of the Stipulation of MPR Number III Year 2000 and practices of constitution in Indonesia, in frame of governmental task to implement a laws, the existing of Ministerial Decree having legal binding force in general is accepted and admitted. Although the Stipulation of MPR No. III Year 2000 is not effective any more since enactment of Act Number 10 Year 2004 on Formation of Legislation promulgated on June 22, 2004. Article 56 of such Act states, "all Presidential Decree, Ministerial Decree, Decree of Governor, Decree of Regent/Mayor, or Decree of other Officers as meant Article 54 with its character to regulate having been existing before the laws effective should be read regulation as long not inconsistent to the Act herein;

Considering that there is a reason stating that the Manpower Act is promulgated on March 25, 2003 is different with draft of Manpower Act as approved by Plenary Session of Parliament of the Republic of Indonesia on February 25, 2003, the Court is in the opinion that it can not be proven validly by the Petitioners, therefore it must be set aside; _____

Considering that based on consideration mentioned above, the Court is in the opinion that petition of the Petitioners can be approved for a part, that is as mentioned in decision award below herein, and the Court refuses the rest of petition of the Petitioners because it is not sufficient reason; ____

In view of Article 56 subsection (2), subsection (3) and subsection (5) of Act Number 24 Year 2003 on the Constitutional Court: _____

ADJUDICATE:

Approve petition of the Petitioners for a part; _____

Declare Act Number 13 Year 2003 concerning Manpower Act: ____

- **Article 158; _____**
- **Article 159; _____**
- **Article 160 subsection (1) as long regarding sub-clause "……Not on the basis of entrepreneur's report …." ; _____**
- **Article 170 as long regarding sub-clause "..... except Article 158 subsection (1), …"; _____**
- **Article 171 as long related with sub-clause " …Article 158 subsection (1) …" _____**
- **Article 186 as long regarding sub-clause "……. Article 137 and Article 138 subsection (1) ……" _____**

Inconsistent with the Constitution of State of the Republic of Indonesia Year 1945; _____

Declare Article 158; Article 159; Article 160 subsection (1) as long regarding sub-clause "…. Not on basis of entrepreneur's report …."; Article 170 as long regarding sub-clause "… except Article 158 subsection (1) …"; Article 171 as long related with sub-clause "……Article 158 subsection (1)…" ; Article 186 as long regarding sub-clause "….Article 137 and Article 138 subsection (1)…" of the Act Number 13 Year 2003 concerning Manpower Act do not have legal binding force; _____

Refuse petition of the Petitioners for the rest; _____

Considering that based on consideration mentioned above on the substance of lawsuit in Plenary Session of Meeting of Constitutional Judges, have taken decision against petition of the Petitioners with two (2) Constitutional Judges giving dissenting opinion; _____

DISSENTING OPINION

Constitution Judges : Prof. H. Abdul Mukhtie Fadjar, S.H., M.S. and
Prof. Dr. H.M. Laica Marzuki, S.H.

1. As a matter in fact, after amendment to the Constitution 1945 (1999-2002), Constitution of State of Unity of the Republic of Indonesia is really constitution based on the Human Rights (HR) through ten (10) articles of HR as stipulated in Article 28 A until Article 28 J, so it is more strengthen paradigm of state as intended in the Preamble of the Constitution 1945; _____
2. Although it is very regretful that manpower act reform through Act Number 13 Year 2003 on Manpower Act (hereinafter called as the Manpower Act) is less human friendly and giving less of protection. Specially against labour/worker, as shown in various policies as stipulated in the Act, inter alia : _____
   - "Outsourcing" policy as stipulated in Articles64 – 66 of the Manpower Act has troubled peaceful working for labours/workers that at any time can be threaten of discontinuation of working relation and down-grading them as a commodity, so its character is less of protection against labours/workers. It means, the Manpower Act is not appropriate to human protection paradigm as stipulated in the Preamble of the Constitution 1945 and inconsistent to Article 27 subsection (2) of the Constitution 1945; _____
   - Policies as stipulated in Article 119, Article 120, Article 121 and Article 106 of the Laws of Manpower Affairs make heavier conditions to negotiate a Collective Labour Agreement (CLA) for labour/worker union. It is implied policy in order to decrease right of labours/workers to struggle their right and to reduce principle of freedom to be united/organized for labours/workers as secured by Article 28 of the Constitution 1945; _____
   - Administrative procedural policy regarding working strike tends to reduce the meaning of working strike as basic right of labour/

worker as stipulated in Articles 137 until 140 of the Manpower Act. Such as provision regarding compulsory notification in writing for labours/workers in period at least for seven (7) days before working strike is undertaken. Basically it is restriction against universal basic right of struggle of labours/workers and labour/worker union (vide Article 140 of the Manpower Act);

---

3. Beside substantial matters as mentioned above (substantial examination of the Manpower Act), formal examination it is necessary to consider possibilities to be approved. The Constitution 1945 is not consisting of procedure detail (order) of formation of any act, because it will be regulated further by laws (vide Article 22A of the Constitution 1945). It means Act Number 10 Year 2004 on Formation of Legislation which promulgated on June 22, 2004 (State Gazette of the Republic of Indonesia Year 2004 Number 4389), can not be a basis for law formation procedure of the Manpower Act promulgated in Year 2003. But it should appraise whether formation procedure of the Manpower Act is appropriate or not to the provision of the Constitution 1945, it is necessary to observe various provisions of existing legislation at that time, such as provision Algemene Bepalingen van Wetgeving voor Indonesia (AB, Stb. 1847: 23). Act Number 2 Year 1999 concerning Composition and Position of MPR, DPR, DPRD was born upon command of the Constitution 1945 and then it commands furthermore in Order Regulation of DPR (containing provision about academic analysis), and Presidential Decree Number 188 Year 1998 juncto Presidential Decree Number 44 Year 1999. Beside that, we must concern general principles about good legislation, they are clear purpose principle, right institutional principle, regulation necessary principle, and applicable principle, then in fact the principles are adopted by Act Number 10 Year 2004 and even with addition inter alia fair and protection principle (vide Article 5 and Article 6); ____
4. In accordance with the explanation mentioned above, petition of the Petitioners should be approved more than merely mentioned in decision award of the Court; _____

Therefore, it decided in the Plenary Session of Meeting of the Constitutional Judges on **Tuesday, October 26, 2004**, spoken in the Plenary Session of the Constitutional Court opened for public today, **Thursday October 28, 2004**, by us **Prof. Dr. Jimly Asshiddiqie, S.H., as Head as well as member and assisted by Prof. Dr. H. M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M., Prof. H. Abdul Mukthie Fadjar, S.H., M.S., H. Achmad Roestandi, S.H., Dr. Harjono, S.H., MCL., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., Soedarsono, S.H., respectively as member and assisted by Triyono Edy Budhiarto, S.H.,** as Substitution Registrar, and presented by the Petitioners/ its Proxy, and representative of the Government; _____

H e a d

sgd.

Prof. Dr. Jimly Asshiddqie, S.H.

Members,

sgd.	**sgd.**
Prof. Dr.H.M.Laica Marzuki, S,H	**Prof.H.A.S. Natabaya, S.H.,LLM**
sgd.	**sgd.**
Prof. H.A.Mukthie Fadjar, S,H.,MS.	**H. Achmad Roestandi, S.H**
sgd.	**sgd.**
Dr. Harjono, S.H., MCL	**I Dewa Gede Palguna, S.H.,M.H**
sgd.	**sgd.**
Maruarar Siahaan, S.H	**Soedarsono, S.H**

Substitution Registrar,

sgd.

Triyono Edy Budhiarto, S.H.

CURRICULUM VITAE

Name	: Dr. Muzni Tambusai, MSc
Employee No.(NIP)	: 140058574
Grade Position	: Main Advisor (IV/e)
Place and Date of Birthday	: Sedinginan (Riau Prov.), 18 December 1946
Position	: Director General of Industrial Relations Ministry of Manpower and Transmigration

I. EDUCATION BACKGROUND

1. Year 1967 until 1973	: Medical Faculty UGM in Yogyakarta
2. Year 1974	: Public Health Faculty UI Majoring at Hygiene
3. Year 1998	: Master of Science on Management Curtin University

I. WORKING EXPERIENCES

1. Year 1973	: Inspector of Work Health at Manpower Office Riau Province
2. Year 1982 – 1987	: Member of Parliament of the Republic of Indonesia in Jakarta
3. Year 1994 – 1997	: Head of Manpower Office Riau Province
4. Year 1997 – 2001	: Head of Manpower Office East Java Province, Surabaya

5. Year 2001 – 2003 : Director General of Inspection, MOMT

6. Year 2003 - Now : Director General of Industrial Relations, MOMT

III. TRAININGS AND COURSES

1. Year 1986 : Planning Course at National Level

2. Year 1989 : 1) Course on Chemical Safety and Major Hazard Inspection in School of Community Health, Curtin University of Technology, Perth, Australia;

   2) Symposium on Government Controls in Occupational Health and Safety and Welfare of Western Australian in Perth.

3. Year 1995 : 1) Symposium on Tripartism by ILO in Penang, Malaysia;

   2) Comparative Study on Dual System on Vocational Training in Austria and German.

4. Year 2001 : 1) Comparative Study on Implementation of Industrial Relations in Japan;

   2) Some International Seminars in Various Countries.

IV. ORGANIZATIONAL EXPERIENCES

1. IPR Chairman in Yogyakarta
2. KODEMA Chairman of Medical Faculty UGM
3. KNPI Chairman of Riau Province
4. Vice Chairman of IDI Riau
5. Member of Advisory Council of GOLKAR Riau

REFERENCES

1. Abdul Kadir Muhamamd, 2000. Hukum Acara Perdata Indonesia, Bandung, Penerbit PT. Citra Aditya Bakti.
2. Batubara Cosmos, 2000. "Hubungan Industrial di Indonesia Aspek Politik dari Perubahan di Tempat Kerja Dekade Sembilan Puluhan dan Awal Dua Ribu," Dis Depok, niversitas Indonesia.
3. Djunaedi, 1992. Hukum Perburuhan Perjanjian Kerja. Jakarta, Rajawali Pers.
4. F.J.H.M. Vannden Van 1969. Persyaratan Hukum kerja. Terjemahan Sridadi, Yogyakarta. Penerbit Yayasan Kanisius.
5. Rajagukguk Erman, 1997. "Peranan Hukum dalam Pembangunan Pada Era Globalisasi Implikasinya Bagi Pendidikan ukum di Indonesia." Pidato pengukuhan diucapkan pada Fakultas Hukum Universitas Indonesia, Jakarta 4 Juni 1947.
6. Rajagukguk Humal Pandamean, 1993. "Perlindungan Terhadap Pemutusan Hubungan Kerja ditinjau dari sudut Sejarah Hukum." Dis Jakarta Universitas Indonesia.
7. Soepomo Imam, 1985. Pengaturan Hukum Perburuhan. jakarta. Penerbit Jakarta.
8. ____1982. Hukum Perburuhan Bidang Hubungan Kerja, Jakarta. Penerbit Jakarta.
9. ____1978. Hukum Perburuhan Bidang Aneka utusan (P4), Jakarta Pradya Paramita.
10. Suwarto, 2003. Hubungan Industrial dalam Praktek, Jakarta. penerbit Asosiasi Hubungan Industrial Indonesia.
11. Tambusai Muzni, 2004. Penyelesaian Perselisihan Hubungan Industrial di Indonesia, Jakarta. DPP IPHII kerjasama dengan Karya Unggul Persada.
12. Uwiyono Aloysius, 2001. Hak Mogok di Indonesia, Jakarta, Universitas Indonesia Fakultas Hukum Program Pasca Sarjana.
13. ____2003. "Peranan Hukum Perburuhan Dalam pemulihan Ekonomi dan Peningkatan Kesejahteraan Buruh." Orasi pada Upacara Pengukuhan Guru Besar Tetap dalam Bidang Ilmu ukum Perburuhan Fakultas Hukum Universitas Indonesia di Balai Sidang UI Depok 11 Juni 2003.
14. Warr Peter, 1984. Psikologi Perburuhan dan Perundingan Kolektif, Jakarta. PT. Pustaka Binaman Pressindo.