



DECISION

Number 58/PUU-IX/2011

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final levels, has passed a decision in the case of Review of Law Number 13 Year 2003 concerning Manpower against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] Name : **Andriyani**
Occupation : Labor of PT. Megahbuana Citramasindo
Address : Jalan Mawar II Number 22, Neighborhood Ward
006, Neighborhood Block 011, Tugu Utara, Koja,
North Jakarta

Hereinafter referred to as ----- the **Petitioner**;

[1.3] Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard verbal statement and read written statement of the
Government;

Having heard the statements of Expert and Witness of the Petitioner;

Having read the written conclusion of the Petitioner;

2. THE FACTS OF THE CASE

[2.1] Considering whereas the Petitioner has filed a petition dated August 19, 2011, which was received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the "Registrar's Office of the Court") on Tuesday, August 19, 2011 under Deed of Receipt of Petition File Number 311/PAN.MK/2011 and recorded in the Registry of Constitutional Cases under Number 58/PUU-IX/2011 on September 6, 2011, revised and received at the Registrar's Office of the Court on September 29, 2011, substantially describing matters as follows:

I. AUTHORITY OF THE CONSTITUTIONAL COURT

1. Whereas the provisions of Article 24 paragraph (2) of the 1945 Constitution read, "Judicial power shall be exercised by a Supreme Court and its subordinate courts within the general judicature, religious judicature, military judicature, state administration judicature, and by a Constitutional Court".
2. Whereas the provisions of Article 24C paragraph (1) of the 1945 Constitution state that, "The Constitutional Court shall have the authority to hear at the first and final levels, the decision of which shall be final to review laws against the Constitution, to decide disputes concerning the authority of state institutions granted by the Constitution, to make decisions on the dissolution of political

parties, and to decide disputes concerning the results of general elections”

3. Whereas the provisions of Article 10 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (*vide* Exhibit P-3), as amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 (hereinafter referred to as the “Constitutional Court Law”, *vide* Exhibit P-3A), read, “The Constitutional Court shall have the authority to hear at the first and final levels, the decision of which shall be final:
 1. to review laws against the 1945 Constitution of the State of the Republic of Indonesia.
 2. to decide disputes concerning to the authority of state institutions granted by the 1945 Constitution of the State of the Republic of Indonesia.
 3. to make decisions on the dissolution of political parties, and
 4. to decide disputes concerning the results of general elections.”
4. Whereas since the object of this petition for review is the material substance of the Manpower Law against the 1945 Constitution, the

Petitioner is of the opinion that the Constitutional Court is authorized to review the Law against the 1945 Constitution.

II. LEGAL STANDING OF THE PETITIONER

1. Whereas the provisions of Article 51 paragraph (1) of the Constitutional Court Law state that, "The Petitioner shall be a party who and/or whose constitutional obligations are impaired by the coming into effect of the Law, namely:
 - a. individual Indonesian citizens;
 - b. customary law community groups insofar as they are still in existence, and along with the development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated in Law;
 - c. public or private legal entities;
 - d. state institutions."
2. Whereas the Petitioner is an individual Indonesian citizen (*vide* Exhibit P-4), working as a labor at PT. Megahbuana Citramasindo.
3. Whereas under the provisions of Article 26 paragraph (1) and Article 28C paragraph (2) of the 1945 Constitution, it can be said

that the Petitioner is an Indonesian citizen granted a constitutional right to improve herself for building the society, nation and state.

4. Whereas the Constitutional Court has provided a definition and cumulative restriction concerning the impairment of constitutional rights and/or authority caused by the coming into effect of a Law pursuant to Decision of the Constitutional Court Number 006/PUU-III/2005, which must meet requirements as follows:
 - a. the existence of constitutional rights of the Petitioner granted by the 1945 Constitution of the State of the Republic of Indonesia, namely the right to legal certainty and remuneration as well as fair and proper treatment in employment under Article 28D paragraphs (1) and (2) of the 1945 Constitution;
 - b. whereas the constitutional rights of the Petitioner to obtain legal certainty and remuneration as well as fair and proper treatment in employment, had been impaired by the coming into effect of the provisions of Article 169 paragraph (1) subparagraph c of Manpower Law, regulating the right of the Petitioner to be able to file a petition for the termination of employment due to an employer action of not paying her salary in a timely manner for 3 (three) or more consecutive months without accompanied by explanation on the

worker/labor's rights to file a petition for the termination of employment due to the reason *a quo*, in the event that the employer pays salary used to paid late in a timely manner.

5. Based on the description mentioned above, the Petitioner is of the opinion that the Petitioner has legal standing as a Petitioner in a petition for review against the 1945 Constitution.

III. REASONS OF THE PETITION FOR REVIEW OF LAW

1. Whereas the provisions of Article 28D paragraphs (1) and (2) of the 1945 Constitution affirm that, "Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law. Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment."
2. Whereas legal certainty constitutes a rule regulating clearly (*not creating ambiguity*) and logically (*not arising the conflict of norms*). Legal certainty of the rights of worker/labor in industrial relations is a normative right spelled out in Manpower Law, including right to receive proper remuneration (wage), which not only regulates the provision of the amount of salary, but also regulates the date of salary payment regulated in CHAPTER X, Section Two, Article 88 paragraph (3) sub-paragraph f of Manpower Law, to prevent

arbitrary action on salary payment which can be taken by an employer, to make it consistent with propriety principle.

3. Whereas in general, the salary (remuneration) is paid to workers/labors by an employer at least 1 (once) in a month, given at the end of the month or at the beginning of the subsequent month. The late payment for salary to workers/labors may give legal consequence of punishment to the employer in the form of penalty in proportion to the percentage of employers/labors salary, as intended in Article 95 paragraph (2) of Manpower Law.
4. Whereas under the Manpower Law, an employer is legally entitled to terminate employment with workers/labors due to as follows:
 - a. the workers/labors commit gross error *in casu* Article 158 paragraph (1);
 - b. the workers/labors violate work agreement or company regulation or joint cooperation agreement *in casu* Article 161 paragraph (1);
 - c. there is a change in status, merger, consolidation or company ownership *in casu* Article 163 paragraphs (1) and (2);

- d. the company is closed due to losses or force majeure *in casu* Article 164 paragraph (1);
- e. the company is closed due to efficiency *in casu* Article 164 paragraph (3);
- f. the company is bankrupt *in casu* Article 165;
- g. workers/labors enter pension age *in casu* Article 167 paragraph (1);
- h. workers/labors are absent for 5 (five) or more consecutive days without valid information *in casu* Article 168;

Meanwhile, workers/labors are legally entitled to terminate employment with the employer due to as follows:

- a. the employer maltreats, insults, threatens, solicits and/or orders to take an action contradictory to legislation, fails to pay salary in a timely manner for 3 (three) or more consecutive months, fails to comply with obligations undertaken to the workers/labors, orders workers/labors to perform a task out of contract, assigns a task endangering life, security, health and ethics *in casu* Article 169 paragraph (1);

- b. workers/employers suffered from prolonged sickness and disabled condition as a result of occupational accident and unable to work after exceeding a limit of 12 (twelve) months *in casu* Article 172;
5. Whereas the Petitioner is a worker/labor working at PT. Megahbuana Citramasindo, an Indonesian Migrant Workers Agency (*Perusahaan Jasa Tenaga Kerja Indonesia/PJTKI*) as of January 2, 1998, as a member of manpower recruiting staff who will be sent abroad, with the most recent salary of Rp2,500,000.- per month. Since June 2009, the Petitioner's salary have been paid late, namely instead of being paid in the 1st day of the subsequent month, however, it was paid in 2-3 times installments between the 10th and the 20th day of the subsequent month, constantly occurred every month up to November 2010 or for 18 months. With respect to the occurrence, the Petitioner is of the opinion that there is a dispute between the Petitioner as a worker/labor and the employer, PT. Megahubana Citramasindo. Accordingly, based on the authority provided by the provisions of Article 169 paragraph (1) sub-paragraph c of Manpower Law, the Petitioner filed a petition for the resolution of industrial relations dispute through the mechanism of the resolution of industrial relations dispute. After the Petitioner filed the petition for the resolution of industrial relations dispute through the mechanism of the resolution of industrial relations

dispute, PT. Megahbuana Citramasindo paid her salary in a timely manner after it failed to pay the Petitioner's salary in a timely manner for 18 (*eighteen*) months. However, the Industrial Relations Court in Central Jakarta District Court issued a Decision Number 61/PHI.G/2011/PN.JKT.PST rejecting the Petitioner's claim on June 13, 2011, with the injunction of consideration as follows, namely the Petitioner's salary used to be paid late have in fact been paid in a timely manner (*vide* Exhibit P-5).

6. Whereas the provisions of Article 169 paragraph (1) sub-paragraph c of Manpower Law completely read, "Workers/labors may file a petition for the termination of employment to the agency for the settlement of industrial relation disputes (ISIRD) in the event that the employer takes the following action: (c) not paying the salary in a timely manner at the date set out for 3 (three) or more consecutive months."

The provision *a quo* contains ambiguity due to its implementation, as to whether the application for the Termination of Employment submitted by workers/labors can be granted immediately after an employer pays salary previously paid late in a timely manner, upon the application for the Termination of Employment submitted through the mechanism of the resolution of industrial relations dispute? Or does the timely payment for the salary previously paid

late nullify the right of workers/labors to file a petition for the Termination of Employment?

The provisions of Article 169 paragraph (1) sub-paragraph c of Manpower Law have provided legal protection and certainty for workers/labors by granting right to the workers/laborers to file a petition for the termination of employment due to an employer action of not paying salary in a timely manner for 3 (three) or more consecutive months.

However, in practice, the legal uncertainty unexpectedly occurred when the worker/labor exercised her right to file a petition for the termination of employment for the reason that worker/labor's salary which used to be paid late for more than 3 (three) consecutive months was paid again in a timely manner by the employer, after the worker/labor submitted the application for the termination of employment through the mechanism of the resolution of industrial relations dispute.

The ambiguous interpretation of the provisions of Article 169 paragraph (1) sub-paragraph c of Manpower Law creating legal uncertainty for the Petitioner, had automatically created injustice to the Petitioner as she did not receive fair and proper treatment in employment, as a result of the nullification of her right to file a petition for the Termination of Employment, since her salary which

used to be paid late was paid again in a timely manner to in a timely manner upon the filing of settlement through the mechanism of the resolution of industrial relations dispute.

7. Whereas to establish legal certainty to the provisions of Article 169 paragraph (1) sub-paragraph c of Manpower Law, throughout the sentence, “Workers/labors may file a petition for the termination of employment to the agency for the settlement of industrial relation disputes in the event that the employer takes the following actions: (c) not paying salary in a timely manner at the date set out for 3 (three) or more consecutive months shall be interpreted as follows, workers/labors may file a petition for the termination of employment due to an employer action of not paying salary in a timely manner at the date set out for 3 (three) or more consecutive months, the late payment for the salary concerned had once occurred before the workers/labors file the petition for the termination of employment to the agency for the settlement of industrial relation disputes.”

IV. PETITUM

Based on the whole description and rationales provided by law and supported by the instruments of evidence presented to the Constitutional Court, the Petitioner petitions the Constitutional Court to kindly *decide* as follows:

1. To grant the Petitioner's petition.
2. To state that Article 169 paragraph (1) sub-paragraph c of Law Number 13 Year 2003 concerning Manpower is contradictory to the 1945 Constitution of the State of the Republic of Indonesia insofar as it is not interpreted that workers/labors may file a petition for the termination of employment due to an employer action of not paying salary in a timely manner at the date set out for 3 (three) or more consecutive months, the late payment for the salary concerned had once occurred before the workers/labors filed the petition for the termination of employment to the agency for the settlement of industrial relation disputes.”
3. To state that Article 169 paragraph (1) sub-paragraph c of Law Number 13 Year 2003 concerning Manpower does not have permanent legal force, insofar as it is not interpreted that workers/labors may file a petition for the termination of employment due to an employer action of not paying salary in a timely manner at the date set out for 3 (three) or more consecutive months, the late payment for the salary concerned had once occurred before the workers/labors filed the petition for the termination of employment to the agency for the settlement of industrial relation disputes.”

4. To order that this decision is duly set forth in the Official Gazette of the Republic of Indonesia.

Or in the event that the Panel of Constitutional Justices has a different opinion, we request a decision made by principles of what is fair and just.

[2.2] Considering whereas to substantiate her arguments, the Petitioner has presented instruments of evidence in the form of letters/articles marked as Exhibits P-1 through P-5 as follows:

1. Exhibit P-1 : A photocopy of Law Number 13 Year 2003 concerning Manpower;
2. Exhibit P-2 : A photocopy of the 1945 Constitution of the State of the Republic of Indonesia;
3. Exhibit P-3 : A photocopy of Law of the Republic of Indonesia Number 24 Year 2003 concerning the Constitutional Court;
4. Exhibit P-4 : A photocopy of the Petitioner's Identity Card;
5. Exhibit P-5 : A photocopy of Decision of Industrial Relations Court in Central Jakarta District Court Number 61/PHI.G/2011/PN.JKT.PST dated June 13, 2011.

In addition, the Petitioner also presented an expert and a witness, their statements were heard under oath in hearing on November 3, 2011, stating as follows:

EXPERT OF THE PETITIONER

Aloysius Uwiyono

- Whereas according to the Expert, Article 169 paragraph (1) of Law *a quo* regulates the right of workers to file a petition for the termination of employment to the agency for the settlement of industrial relation disputes;
- Whereas the agency for the settlement of industrial relation disputes basically consists of several agencies, for example, mediation, conciliation, arbitration and industrial relations court. Accordingly, Article 169 paragraph (1) of the Law *a quo* basically regulates the right of workers to file a petition for the termination of employment to the agencies, namely mediation, conciliation, arbitration and industrial relations court;
- Whereas in relation to the rationales presented by the Petitioner to file a petition for the termination of employment, mentioned from points a up to f which basically are actions taken by the employer impairing the worker, so that Article 169 later gives the right to the worker, who is treated unfairly, to file a petition for the termination of employment to the four agencies;

- Whereas in the event that the employer fails to pay salary properly within three months, the agency for the settlement of industrial relation disputes should grant the claim from the claimant to terminate the employment. This is due to the fact that following the promulgation of Law Number 13 Year 2003 concerning Manpower, the regulation of the termination of employment is no longer subject to State Administration Law, but rather Civil Law. It means that both labors and employer shall have the right to claim to a court or the agency for the settlement of industrial relation disputes for the termination of employment.

- Whereas it is different before the promulgation of Law Number 13 Year 2003 concerning Manpower, namely during the effectiveness of Law Number 12 Year 1964 *juncto* Law Number 22 Year 1957, the termination of employment is valid upon the receipt of permission from the Committee for Regional Labor Dispute Resolution and the Committee for Central Labor Dispute Resolution, which also play a role as the Government as the Head of the Committee for Central Labor Dispute Resolution is the Minister of Manpower *ex officio*, so that the validity of the Termination of Employment was vested in the Committee for Regional Labor Dispute Resolution and the Committee for Central Labor Dispute Resolution, which would not involve the process of claiming but application for a permission submitted by the employer;

- Whereas following the promulgation of Law Number 13 Year 2003 concerning Manpower, there is a shift in the manpower law, especially one regulating the termination of employment, which is no longer subject to state administration law, but rather civil law. Therefore, the right to terminate employment is later granted to each party.
- Whereas Article 169 of Law *a quo* is to balance both parties, by which employers or labors are entitled to file a petition for the termination of employment in the event that criteria a, b, c, d, e, f and g are fulfilled. So that, according to the expert, in the event that there is a worker not paid in a timely manner for three months, the worker should have the right to file a petition for the termination to the industrial relations court;
- Whereas the judge should decide or grant the worker's claim, so that it does not decide as if what has occurred was disregarded or deleted.
- Whereas as a violation has occurred, for which a sanction should be imposed, in this case to give the right to the worker to terminate the employment under Article 169 paragraph (1) sub-paragraph c of Law *a quo*.
- Whereas in the event that the worker can prove that she is not paid in a timely manner within three consecutive months, the worker has the right to terminate the employment. Therefore, in the event of filing a petition to a court, the court should grant the petition or the worker's claim.

- Whereas in the event that the claim is not filed, automatically, the right shall be optional, so that in the event that it is filed in the future day, it must be granted;
- Whereas according to the expert, the process of payment in a timely manner following the claim shall not waive the right of the worker to file a petition for the Termination of Employment in three months ago as the action of not paying in a timely manner has occurred.
- Whereas the action of not paying in a timely manner has occurred and has been felt harmful to the worker. Since it is harmful, the Law *a quo* shall give protection to the worker to file a petition for the termination of employment.
- Whereas essentially, in the event that the company has no longer been able to pay salary in a timely manner, the employment with the worker should be just terminated.

WITNESS OF THE PETITIONER

Ngadiono

- Whereas the witness knows about the late payment of salary made by PT Mega Buana since June 2009 up to November 2010.

- Whereas the Petitioner had reported the late payment to the Department of Manpower and the Industrial Relations Court and after the Petitioner made the report, the salary was paid in a timely manner;
- Whereas although the company is still active until now, since 2009 the company has been unable to engage in its activities in its maximum capacity and the witness knows what the company had done to the Petitioner after the Petitioner reported her right to the Industrial Relations Court;
- Whereas the relationship between the Petitioner and the company is no longer harmonious, consequently the Petitioner is not given a task while her room must be emptied and the equipment for working is also removed;
- Whereas it is true that at this moment the salary is paid in a timely manner, however, the rights of the Petitioner and the witness as security guard to meal allowance have not been paid in a timely manner for almost two months;
- In addition, Religious Holiday Allowance in 2009 which must be paid in part according to the decision of the Industrial Relations Court has not been paid until this moment;
- Whereas the Petitioner filed a petition for the Termination of Employment to the Industrial Relations Court, however, the Petitioner's claim was rejected, therefore the Petitioner continues to fight for her rights until now.

[2.3] Considering whereas with regard to the petition of the Petitioner, the Government provides statements as follows:

- Whereas according to the Government, the Petitioner is requested to prove first as to whether she is the party considering her constitutional rights and/or obligations are impaired following the coming into effect of the provisions of Article 169 paragraph (1) sub-paragraph c of Law number 13 Year 2003 concerning Manpower, as provided for in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 and the previous decisions of the Constitutional Court since Decision Number 006/PUU-III/2005 and Decision Number 11/PUU-IV/2007.
- Whereas according to the Government, the norms of the provision of the law *a quo* keep a balance between workers and an employee. Meanwhile, the argumentation of the Petitioner is more related to the implementation of provision *a quo* in the agency for the settlement of industrial relation disputes and does not constitute the constitutionality issues of the coming into effect of a norm.
- Whereas with regard to the assumption of the Petitioner that the provisions of Article 169 paragraph (1) sub-paragraph c of Manpower Law are contradictory to Article 28D paragraphs (1) and (2) of the 1945

Constitution of the State of the Republic of Indonesia, the government may give explanation as follows:

1. The material substance of Law Number 13 Year 2003 regulates various interests, either the interests of manpower before, during and after working or the interests of employer, government and community. The various interests are related each other.
2. Manpower Law encourages an employer, workers/labors, workers union, labors union and the government with all their efforts to try to prevent a conflict among the parties, so that the termination of employment can be avoided.
3. Manpower Law keeps a balance between rights and obligations, either for workers or an employer. The balance can be seen from the provision of Article 158 of Manpower Law, namely regarding the reasons of the termination of employment by the employer. On the other hand, the workers may also file a petition for the termination of employment as regulated in Article 169 of Manpower Law.
4. The provisions of Article 169 of Manpower Law keep a balance between workers and an employer, in this case, in the termination of employment, whereby Article 169 paragraph (1) of Manpower Law states that workers/labors may file a petition for the termination

of employment to the agency for the settlement of industrial relation disputes in the event that the employer takes the following actions:

- a. Maltreating, insulting or threatening workers/labors
- b. Soliciting and/or ordering workers/labors to take an action contradictory to the laws and regulations
- c. Failing to pay salary in a timely manner at the date set out for 3 (three) or more consecutive months
- d. Failing to comply with obligations undertaken to workers/labors
- e. Ordering workers/labors to perform a task out of contract, or
- f. Assigning a task endangering the lives, security, health and ethics of workers/labors while the task is not included in the work contract.

With regard to the termination of employment with reasons as specified above, workers/labors shall be entitled to receive twice severance payment as provided for in the provisions of Article 156 paragraph (2) of Law Number 13 Year 2003, once gratuity as provided for in the provisions of Article 156 paragraph (3) of Law Number 13 Year 2003 and compensation for rights as regulated in Article 156 paragraph (4) of Law Number 13 Year 2003. On the

contrary, in the event that the employer is declared as not taking action as regulated in Article 169 paragraph (1) of Manpower Law, the employer may terminate the employment without the stipulation of the agency for the settlement of industrial relation disputes and the workers/labors shall not be entitled to the severance payment, gratuity and compensation for rights according to the applicable provisions (*vide* Article 169 paragraph (3) of Manpower Law).

5. The provisions of Article 169 paragraph (1) sub-paragraph c of Manpower Law are basically intended to provide protection for workers/labors in the event that the employer fails to perform its obligation to pay salary in a timely manner at the date set out, as provided for in work contract or under Manpower Law.
6. According to the Government, the action of the Petitioner who files the problems that she undergoes with the agency for the settlement of industrial relation disputes through the mechanism of industrial relations court as she thinks that her salary is not paid in a timely manner at the date set out is consistent with Article 169 paragraph (1) of Manpower Law.
7. With regard to the decision of industrial relations court which finally rejects the Petitioner's claim, the Government is of the opinion that it largely constitutes the implementation issues of the existence and the coming into effect of the provision of the norms being reviewed

rather than the constitutional issues of the coming into effect of norm.

8. Accordingly, the Petitioner must take legal action against the decision of the industrial relations court with the Supreme Court accompanied by existing evidence or file a claim for penalty for the late payment of salary under Government Regulation Number 8 Year 1981 concerning Salary Protection rather than to file a petition for Review of Law *a quo* with the Constitutional Court.
9. Whereas the provisions of Article 169 paragraph (1) sub-paragraph c of Manpower Law are clear norms and do not require other interpretation from what is printed on the text.
10. In addition, in the event that the provisions of the Article *a quo* are granted by the Constitutional Court, the Government is of the opinion that it will in contrast incur losses for the workers/labors due to the absence of legal certainty with regard to how long the workers/labors must wait for their rights or salary to be paid by the company.

Based on the explanations above, the Government petitions Your Excellency the Panel of Justices of the Constitutional Court examining, deciding and hearing the petition for Review of Law Number 13 Year 2003 concerning Manpower against the 1945 Constitution of the State of the Republic of Indonesia to be able to

make decisions as follows:

- 1) Rejecting the Petitioner's petition for review of law in its entirety or at least declaring that the Petitioner's petition for review of law is not acceptable.
- 2) Accepting the statement of the Government in its entirety.
- 3) Declaring that Article 169 paragraph (1) sub-paragraph c of Law Number 13 Year 2003 concerning Manpower is consistent with Article 28D paragraphs (1) and (2) of the 1945 Constitution of the State of the Republic of Indonesia.

[2.4] Considering whereas with regard to the petition of the Petitioner, the People's Legislative Assembly does not given either verbal or written statement;

[2.5] Considering whereas the Petitioner submitted a conclusion on Wednesday, November 9, 2011, the substance of which is to remain firm with her opinion;

[2.6] Considering whereas to make the explanations in this decision brief, all matters occurred in the court hearing are referred to in the minutes of the court hearing, constituting an inseparable part of this decision:

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the petition of the Petitioner is about judicial review of Article 169 paragraph (1) sub-paragraph c of Law Number 13 Year 2003

concerning Manpower (State Gazette of the Republic of Indonesia Year 2003 Number 39, Supplement to the State Gazette of the Republic of Indonesia Number 4279, hereinafter referred to as “Law No. 13/2003”) against Article 28D paragraphs (1) and (2) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the “1945 Constitution”);

[3.2] Considering whereas before taking into account the substance of the petition, the Constitutional Court (hereinafter referred to as the “Court”) shall first consider matters as follows:

- a. The Court's Authority to hear the petition *a quo*;
- b. The Legal standing of the Petitioner;

With regard to both matters, the Court is of the opinion as follows:

Authority of the Court

[3.3] Considering whereas under Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law) and Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning

Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076, hereinafter referred to as Law No. 48/2009), one of the Court's authority is to hear cases at the first and final levels the decisions of which shall be final to review Law against the 1945 Constitution;

[3.4] Considering whereas as the petition of the Petitioner is about judicial review of Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003 against the 1945 Constitution, the Court shall be authorized to hear the petition *a quo*;

Legal Standing of the Petitioner

[3.5] Considering whereas under Article 51 paragraph (1) of the Constitutional Court Law, the parties who may act as the Petitioner in review of Law against the 1945 Constitution shall be those who consider that their constitutional rights and/or authority are impaired by the coming into effect of the Law petitioned for review, namely:

- a. individual Indonesia citizens (including group of people having a common interest);
- b. customary law community groups insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia regulated in Law;
- c. public or private legal entities; or

- d. state institutions;

Therefore, in the Review of Law against the 1945 Constitution, the Petitioner must first explain and prove the following:

- a. her legal standing as Petitioner as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. the impairment of constitutional rights and/or authority granted by the 1945 Constitution caused by the coming into effect of the Law petitioned for review;

[3.6] Whereas following decision of the Constitutional Court Number 006/PUU-III/ 2005, dated May 31, 2005 and decision of the Constitutional Court Number 11/PUU-V/2007, dated September 20, 2007, as well as the subsequent decisions, the Court is of the opinion that the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law must meet five requirements, namely:

- a. the existence of constitutional rights and/or authority of the Petitioner granted by the 1945 Constitution;
- b. the Petitioner considers that the constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;

- c. the impairment of the constitutional rights and/or authority must be specific and actual or at least potential in nature which, according to logical reasoning, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioner and the law petitioned for review;
- e. the possibility that with the granting of the Petitioner's petition, the impairment of the constitutional rights and/or authority argued by the Petitioner will not or will no longer occur;

[3.7] Considering whereas the Petitioner is an individual Indonesian citizen whose constitutional rights are impaired by the coming into effect of Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003.

Whereas the Petitioner believes that her constitutional right to obtain legal protection and certainty, as well as fair treatment before the law and right to work as well as to receive fair and proper remuneration and treatment in employment as guaranteed in Article 28D paragraphs (1) and (2) of the 1945 Constitution. In concrete terms, the impairment is due to the reason that the Petitioner as a worker did not receive salary in a timely manner for 3 or more consecutive months from the company in which the Petitioner works. On the aforementioned basis, the Petitioner filed a petition for the termination of employment to the industrial relations court pursuant to the article *a quo*, however, the petition was

rejected, because the employer continued to pay salary in a timely manner after failing to pay salary in a timely manner for more than 3 consecutive months (namely for 18 months). According to the employer, under Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003, there is no reason for the Termination of Employment. Based on the aforementioned fact, the Petitioner believes that her constitutional rights to receive fair legal treatment and the right to work as well as to receive fair and proper remuneration and treatment in employment pursuant to Article 28D paragraphs (1) and (2) of the 1945 Constitution are impaired;

[3.8] Considering whereas based on the aforementioned arguments of the Petitioner, according to the Court, the Petitioner meets the legal standing requirements, and thus the Petitioner may file the petition *a quo*;

[3.9] Considering whereas since the Court has authority to hear the petition *a quo* and the Petitioner has legal standing, the Court shall consider the substance of the petition;

Substance of the Petition

[3.10] Considering whereas the Petitioner substantially petitions for the constitutionality review of Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003 stating:

“Workers/Labors may file a petition for the termination of employment to the agency for the settlement of industrial relation disputes in the event that the employer conducts the following actions:

...

c. failing to pay salary in a timely manner at the specified time for 3 (three) or more consecutive months;”

under Article 28D paragraphs (1) and (2) of the 1945 Constitution stating:

Article 28D paragraphs (1)

“Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law;”

Article 28D paragraphs (2)

“Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment relationships.”

[3.11] Considering whereas the Petitioner substantially argues that Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003 contains legal uncertainty impairing the Petitioner’s constitutional rights and is inconsistent with the 1945 Constitution. The Petitioner as the employee of PT. Megahbuana Citramasindo did not receive salary from the company for more than 3 consecutive months, namely 18 months (from June 2009 up to November 2010). Therefore, it should

have served as adequate grounds for the Petitioner to file a petition for the Termination of Employment. However, after the Petitioner filed a petition for the Termination of Employment to the Industrial Relations Court (*Pengadilan Hubungan Industrial*/hereinafter briefly referred to as “PHI”), the petition was rejected by PHI, because the company continued to regularly pay the Petitioner’s salary. According to the Petitioner, Article 169 paragraph (1) sub-paragraph c does not provide legal certainty with regard to whether the regular payment of salary by the employer, after the employer fails to pay salary in a timely manner for more than three months, shall nullify the right of the Petitioner to file a petition for the Termination of Employment, or the fact that the employer fails to pay salary in a timely manner for more than three months, despite the regular payment made by the employer thereafter, shall serve as adequate grounds for the Petitioner to file a petition for the Termination of Employment, for that reason according to the Petitioner, Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003 is inconsistent with the 1945 Constitution.

[3.12] Considering whereas in order to substantiate her arguments, the Petitioner presented instruments of evidence in the form of letters or articles marked as exhibits P-1 through P-5, and the witness Ngadiono as well as the expert Prof. Dr. Aloysius Uwiyono, S.H., M.H. giving statements under oath at the hearing on November 3, 2011, further set out in Facts of the Case section, which substantially state as follows:

Witness Ngadiono

- Knowing about the late payment of salary made by PT. Megahbuana Citramasindo since June 2009 up to November 2010;
- The Petitioner had reported the late payment to the Department of Manpower and the Industrial Relations Court, however, after the Petitioner made the report, the payment of salary continued to be paid in a timely manner;
- Although the company is still active until now, since 2009 the company has been unable to engage in its activities in its maximum capacity and the witness knows what the company had done to the Petitioner after the Petitioner reported her right to the Industrial Relations Court;
- The Petitioner had filed a petition for the Termination of Employment to the Industrial Relations Court, however, the Petitioner's claim was rejected, therefore the Petitioner continues to fight for her rights until now.

Expert Prof. Dr. Aloysius Uwiyono, S.H., M.H.

- Article 169 paragraph (1) of Law *a quo* is basically to regulate the right of workers to file a petition for the termination of employment to the industrial relations dispute resolution agencies, namely mediation, conciliation, arbitration and industrial relations court. The article grants a right to the workers who have been unfairly treated by their employer to file a petition for the termination of employment to the four agencies;

- In the event that the employer fails to pay salary in a timely manner for three months, and it is substantiated at the hearing, the agency for the settlement of industrial relation disputes should grant the claim of the claimant to terminate the employment. It is due to the reason that following the promulgation of Law No. 13/2003, the regulation of the termination of employment is no longer subject to State Administration Law as provided for in Law Number 12 Year 1964, but rather the Civil Law. It means that both the labors and employer shall have the right to file a claim to a court or the agency for the settlement of industrial relation disputes for the termination of employment;

[3.13] Considering, with regard to the petition of the Petitioner, the Government gave oral statements on November 3, 2011 and written statements received at the Registrar's Office of the Court on November 29, 2011 (further set out in Facts of the Case section) substantially stating that the article *a quo* is consistent with the 1945 Constitution as the provision *a quo* in fact provides balance to the workers and the employer. In addition, the argumentation of the Petitioner is more related to the implementation of the provision *a quo* in the agency for the settlement of industrial relation disputes and is not a constitutionality issue of the applicability of a norm. Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003 is basically intended to provide protection for workers/labors in the event that the employer fails to perform its obligation to pay salary in a timely manner at the specified time, as provided for in work contract or under Law No. 13/2003.

According to the Government, Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003 constitutes a clear norm and does not require any interpretation other than those provided on the text. Moreover, according to the Government, in the event that the provision *a quo* is granted by the Court, it would otherwise harm the workers/labors due to the absence of legal certainty with regard to how long the workers/labors must wait for their rights or salary to be paid by the company.

Opinion of the Court

[3.14] Considering whereas the constitutional issue in the petition *a quo* is does Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003 contain legal uncertainty impairing the constitutional rights of workers to obtain fair legal certainty and receive fair and proper remuneration and treatment in employment as set out in Article 28D paragraphs (1) and (2) of the 1945 Constitution?

[3.15] Considering whereas according to the Court, to pay salary to the workers is the legal obligation of the employer. Salary constitutes compensation for the achievement of workers/labors proportionally paid by the employer which constitutes the obligation of the employer to pay it. The failure of the employer to pay salary to the workers/labors may create a right for the workers/labors to ask the employer to fulfill its obligation, and failing this, the workers/labors may request the Termination of Employment as regulated by the article *a quo*. A failure to pay salary to the workers for three consecutive months is a serious violation of the rights of workers/labors which carries wide implications for the life

of a worker, particularly his/her constitutional rights to receive fair and reasonable remuneration and treatment in employment [*vide* Article 28D paragraph (2) of the 1945 Constitution]. For workers, salary is the support for their lives and the lives of their families. According to the Court, by the lapse of three consecutive months in which the employer fails to pay salary in a timely manner, the worker shall have adequate legal grounds to request the Termination of Employment. This right shall not be eliminated as the employer continues to pay salary in a timely manner after the violation occurs.

[3.16] Considering whereas in the manpower law, a worker's right to terminate employment for a particular justifiable reason is what commonly known as constructive dismissal, which is used in a situation when a worker is forced to leave his/her job due to the behavior of the employer itself which is unacceptable to the worker. Constructive dismissal also includes the resignation of a worker due to a serious violation of the provisions of work contract committed by the employer. The reason to leave the job must be a fundamental violation of work contract between the worker and the employer, such as:

- Failing to pay salary to the worker or suddenly and unfairly holding and reducing the worker's salary without the approval of the worker;
- Forcing the worker to approve the change in working conditions not determined in the work contract, such as suddenly notifying that the worker concerned must work in another city or requiring the worker to

have night shifts while under the contract the workers should only have day shifts;

- There is intimidation, oppression and assault from other people in the workplace;
- Requiring the worker to work in a dangerous site unspecified in the work contract;
- Making an unwarranted accusation against the worker.

Based on the principle of constructive dismissal, workers shall have the right to leave their job immediately without any obligation to notify the employer and the action (if it is legally proven) shall be deemed as termination by the employer provided that the workers must prove these three elements, namely: 1) The employer commits a serious violation of the work contract, 2) The violation should be the reason why the workers are forced to resign, 3) The workers do not do anything which indicates the acceptance of the violation or change in working conditions, which means that they do not do anything which leads to the violation of the contract by the employer through the implicit or explicit acceptance of the violation of the contract;

[3.17] Considering whereas by referring to the manpower case of the Petitioner and practice in the manpower law as described above, the Court is of the opinion that a timely payment of salary is a very serious matter for Indonesian labors/workers since the salary is often the sole income used as support to fulfill

their own daily life needs and their families' daily life needs. Law should provide certainty for the workers of the payment of their salary. In the event that the certainty of paying salary fails to be materialized by the employer, in this case the employer fails to pay salary in a timely manner at the specified time for three or more consecutive months, the workers/labors may file a petition for the termination of employment in accordance with the provisions of Article 169 paragraph (1) sub-paragraph c of Law No. 13/2003 and the workers shall be entitled to receive their rights as regulated in Article 169 paragraph (2) of Law No. 13/2003.

According to the Court, the right of a worker to terminate the employment should not be obstructed by the employer's action, namely to continue to pay salary in a timely manner to the worker following the petition for the termination of employment by the worker to the Court, provided that the worker have made necessary efforts to obtain his/her right so that the salary is paid in a timely manner, but the employer fails to fulfill this. It is intended to protect the rights of workers to obtain legal certainty and fair legal treatment and the right of workers to receive fair and proper remuneration and treatment in employment as stipulated in Article 28D paragraphs (1) and (2) of the 1945 Constitution. The Court considers that the provisions of Article 169 paragraph (1) sub-paragraph c of Law *a quo* do not provide certainty with regard to does a timely payment of salary by the employer to the workers, after the employer fails to pay salary in a timely manner for more than three consecutive months, invalidate the reason of the workers to terminate the employment? In the case of the Petitioner as proved

in the Industrial Relations Court, the petition of the Petitioner for the termination of employment is rejected by the court, because the employer pays salary used to be paid late for more than three consecutive months in a timely manner. Based on the fact, although the Court does not hear a concrete case, there is sufficient evidence that the provisions of the article *a quo* have created the uncertainty of just laws and the loss of the constitutional rights of workers to receive fair and proper remuneration in employment [*vide* Article 28D paragraph (2) of the 1945 Constitution] which are inconsistent with the constitutional principles.

[3.18] Considering whereas based on all of the above-mentioned legal considerations, the Court is of the opinion that the arguments of the petition of the Petitioner are legally founded;

4. CONCLUSIONS

Based on the aforementioned considerations of facts and laws, the Court has come to the following conclusions:

[4.1] The Court has authority to hear the petition *a quo*;

[4.2] The Petitioner has legal standing to file the petition *a quo*;

[4.3] The arguments of the Petitioner are legally founded;

Based on the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 concerning the Constitutional Court as amended by

Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226), and Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. INJUNCTION OF DECISION

Passing the Decision,

Declaring:

- To grant the Petitioner's petition in whole;
- Article 169 paragraph (1) sub-paragraph c of Law Number 13 Year 2003 concerning Manpower (State Gazette of the Republic of Indonesia Year 2003 Number 39, Supplement to the State Gazette of the Republic of Indonesia Number 4279) is inconsistent with the 1945 Constitution of the State of the Republic of Indonesia insofar as it is not interpreted as follows: *“Workers/labors may file a petition for the termination of employment to the agency for the settlement of industrial relation disputes in the event that the employer fails to pay salary in a timely manner at the specified time for 3 (three) or more consecutive months although the employer pays the salary in a timely manner thereafter;”*

- Article 169 paragraph (1) sub-paragraph c of Law Number 13 Year 2003 concerning Manpower (State Gazette of the Republic of Indonesia Year 2003 Number 39, Supplement to the State Gazette of the Republic of Indonesia Number 4279) does not have binding legal force insofar as it is not interpreted as follows: *“Workers/labors may file a petition for the termination of employment to the agency for the settlement of industrial relation disputes in the event that the employer fails to pay salary in a timely manner at the specified time for 3 (three) or more consecutive months although the employer pays the salary in a timely manner thereafter;”*
- To order the publication of this decision properly in the Official Gazette of the Republic of Indonesia;

In witness whereof, this decision was made in the Consultative Meeting of Justices by nine Justices of the Constitutional Court, namely Moh. Mahfud MD., as the Chairperson and concurrent Member, Achmad Sodiki, Hamdan Zoelva, Anwar Usman, M. Akil Mochtar, Harjono, Maria Farida Indrati, Muhammad Alim and Ahmad Fadlil Sumadi, respectively as Members, on **Monday**, the **ninth** of **July two thousand and twelve**, and was pronounced in the Plenary Session of the Constitutional Court open for the public on **Monday**, the **sixteenth** of **July two thousand and twelve**, by seven Justices of the Constitutional Court, namely Moh. Mahfud MD., as the Chairperson and concurrent Member, Achmad Sodiki, Hamdan Zoelva, Anwar Usman, M. Akil Mochtar, Maria Farida Indrati and Ahmad

Fadlil Sumadi, respectively as Members, assisted by Hani Adhani as Substitute Registrar, in the presence of the Petitioner, the Government or its representative and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

MEMBERS,

Sgd.

Achmad Sodiki

Sgd.

Hamdan Zoelva

Sgd.

Anwar Usman

Sgd.

M. Akil Mochtar

Sgd.

Maria Farida Indrati

Sgd.

Ahmad Fadlil Sumadi

SUBSTITUTE REGISTRAR,

Sgd.

Hani Adhani