

Rethinking the Application of the Difference Principle in Arrangements for the Distribution of Job Loss Benefits

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Abstract

The philosophy of organizing labor social security aims to protect workers from socio-economic risks resulting from involuntary loss of income. This includes providing protection during and after the employment relationship. Job Loss Insurance (JKP) under the National Social Security System (SJSN) is designed to offer protection to workers experiencing Termination of Employment (PHK), but workers who resign voluntarily are not entitled to benefits under Article 19 in conjunction with Article 20 of Permenaker No. 37/2021. This paper proposes reinterpreting the concept of termination and applying the Difference Principle to extend JKP benefits to workers who resign involuntarily (Constructive Dismissal) in line with the principles of organizing social security.

I. Introduction

The issue of the right to work has become a complex dilemma for governments, employers, and workers because it directly impacts the progress of companies and the economy. Balancing workers' rights to fair and meaningful work with a company's need to maintain competitiveness is a significant challenge for all stakeholders involved.¹ The interests of employers who want maximum profits with the lowest production costs and the interests of workers who expect the highest income (wages) with a healthy and comfortable working environment influence the sustainability of the business world. In that condition, statutory regulations in the field of employment are required to be able to reconcile these two interests to create harmonious industrial relations.

When conflicting interests between employers and employees cannot be resolved, this can lead to disputes leading to the termination of employment. This can occur when employers are dissatisfied with employee performance or when employees feel they are not receiving their rights.² The increase in the number of unemployed workers, as shown by the Open Unemployment Rate (TPT) of 5.83% in February 2022 and the average monthly wage of 2.89 million rupiah, represents a significant threat to the country's economic stability.³ If these workers do not find new job opportunities soon, this could worsen the unemployment situation and have a negative impact on the overall economy.⁴

The legal basis for the right to work is found in Article 28D, Paragraph 2 of the 1945 Constitution (hereinafter referred to as the 1945 Constitution), which is embodied in Article 151 of Law Number 13 of 2003 regulating Employment (hereinafter referred to as UUK). This article states that employers, workers, labor unions, and the government must make every effort to prevent termination. According to these requirements, "all efforts" refers to all good acts that can help avoid termination, such as regulating working time, saving, developing work practices, and providing direction to employees.

¹Budi Santoso, "Justifikasi Efisiensi sebagai Alasan Pemutusan Hubungan Kerja", *Mimbar Hukum*, Vol. 25, No. 3, Oktober 2013, h. 403, diakses melalui <https://media.neliti.com/media/publications/40755-ID-justifikasi-efisiensi-sebagai-alasan-pemutusan-hubungan-kerja.pdf>

² Muh. Muslim, "Dilema Pemutusan Hubungan Kerja bagi Karyawan", *Esensi*, Vol. 18, No 3 [2015], h. 100, diakses melalui <https://ibn.e-journal.id/index.php/ESENSI/article/download/100/78>

³ Diakses melalui <https://www.bps.go.id/pressrelease/2022/05/09/1915/februari-2022--tingkat-pengangguran-terbuka--tpt--sebesar-5-83-persen.html>

⁴ Eri Hariyanto, *Pengangguran dan Krisis Ekonomi*, h. 2, diakses melalui https://klc2.kemenkeu.go.id/document/2020/10/6/1601946778481gdi/pengangguran_dan_krisis_e_konomi_-_edit_anes.pdf

Termination lead to the termination of workers' rights and duties to their employers. In other words, after a termination, companies are no longer obligated to pay workers and have no right to labor or services from them, and vice versa. Every worker will attempt to avoid losing his job, because termination for workers signal the beginning of pain. Although it is undeniable, termination will have an impact on the organization.⁵ If termination are unavoidable, material and formal (procedural) requirements must be addressed. The material criterion for carrying out termination is that there be a legally justifiable basis (*termination just cause/justa causa demissionis*). Unreasonable termination can harm workers' dignity and therefore be prohibited. Meanwhile, formal requirements for termination refer to the procedures that must be followed for termination to occur. In essence, Labor legislation divides termination into three types: termination by employers, termination by workers (also known as resignations), and termination by legislation.⁶ Employer termination are classified into three types: disciplinary terminations, capability terminations, and economic terminations.

According to article 156 UUK and article 40 paragraph (1) PP No. 35/2021, workers are entitled to compensation in the form of (a) severance pay, (b) service pay, and (c) replacement money rights as a form of protection following termination. The exact amounts of these benefits depend on several circumstances. The causes behind the termination have an impact on the amount of compensation that affected personnel get. Workers are not entitled to severance pay if their layoff is due to resignation.

A certain kind of legal protection, known as Job Loss Guarantee (JKP), was added following the enactment of Law No. 11 of 2020 concerning Job Creation (also known as the Job Creation Law). JKP can take the form of (a) cash, (b) job market access, or (c) job training. PP 37/2021 contains the implementing regulations for the application of JKP. Several parties, including the President of the Confederation of All Indonesian Trade Unions (KSBSI),⁷ the Director of the ILO

⁵ Sri Zuharti, "Pengaruh Pemutusan Hubungan Kerja terhadap Karyawan Perusahaan", Jurnal Pendidikan Sosiologi dan Humaniora, Vol. 1, No 1., April 2010, h. 88, diakses melalui <https://jurnal.untan.ac.id/index.php/JPSH/article/view/382/385>

⁶ Lihat Adrian Sutedi, Hukum Perburuhan (Jakarta: Sinar Grafika, 2009), h. 68-69. Lalu Husni, Pengantar Hukum Ketenagakerjaan Indonesia, Edisi Revisi (Jakarta: RajaGrafindo Persada, 2003), h. 173. Abdul Khakim, Pengantar Hukum Ketenagakerjaan Indonesia: Berdasarkan Undang-undang No 13 Tahun 2003 (Bandung: Citra Aditya Bakti, 2003), h. 109. Asri Wijayanti, Hukum Ketenagakerjaan Pasca Reformasi, Cetakan ke-8 (Jakarta: Sinar Grafika, 2018), h. 167

⁷ Ratih Waseso, Serikat Pekerja Minta Ada Kejelasan Jaminan Kehilangan Pekerjaan di UU Cipta Kerja, diakses melalui <https://nasional.kontan.co.id/news/serikat-pekerja-minta-ada-kejelasan-jaminan-kehilangan-pekerjaan-di-uu-cipta-kerja>

for Indonesia,⁸ and the Confederation of Indonesian Trade Unions (KSPI),⁹ have different opinions about the inception of the laws pertaining to JKP. Aside from the advantages and disadvantages, Article 19 in conjunction with Article 20 PP 37/2021 presents the most significant issue. According to this article, JKP benefits are only available to employees who have experienced an employer-initiated layoff. Employees who quit, are fired for a permanent total disability, or pass away are not eligible for JKP compensation. As a result, employees who resign will not be eligible for JKP benefits. Although this is conceivable, the worker's resignation was not voluntary; rather, it was compelled by circumstances beyond his control (constructive dismissal).

For instance, due to the acts of employers, which is typical given the subordinate nature of the connection between employers and employees, workers may be forced to terminate their employment relationship. In the cases of *Jonifa Mandalu vs. PT. Grafindo Media Pratama*, *Rudi vs. PT. Internusa Tribuana Citra Multifinance*, and *Jefri vs. PT. Sumber Cipta Multinaga*.¹⁰ For instance, employees are compelled to sign a resignation letter by their employers. Employers typically take this action to avoid having to pay severance pay. If this is the case, it would be unjust if employees who are compelled to terminate their employment relationship were not entitled to JKP payments. Based on the foregoing, this study seeks to examine how the distribution of JKP benefits should be structured so that it provides a sense of justice, particularly for workers who lose their positions because of employers' acts that force them to resign. Keeping in mind that social security is a human right as mentioned in Article 28H paragraphs (2) and (3), as well as Article 34 of the Constitution, and that the SJSN Law, in implementing the social security system, is based on social fairness for all Indonesians [article 2 of the SJSN Law].

2. Research Method

This study The legislation must reflect the value of justice. If legislation lacks the value of justice, it is not law. This article is based on the failure to provide job loss benefits to workers who are 'forced to leave' as specified in articles 19 and 20 of the

⁸ *ILO bahas Jaminan Kehilangan Pekerjaan dengan Serikat Pekerja*, diakses melalui, https://www.ilo.org/jakarta/info/public/pr/WCMS_764853/lang--en/index.htm

⁹ Abdul Basith Bardan, *KSPI Sebut Jaminan Sosial Kehilangan Pekerjaan JKP Tidak Bisa Dijalankan Ini Sebabnya*, diakses melalui, <https://nasional.kontan.co.id/news/kspi-sebut-jaminan-kehilangan-pekerjaan-jkp-tak-bisa-dijalankan-ini-sebabnya>

¹⁰ Patricia Cindy Andriani dan Melania Kiswandari, "Faktor Kesukarelaan Dalam Pengunduran Diri Pekerja/Buruh: Studi Putusan Pengadilan Hubungan Industrial di Medan No. 262/Pdt.Sus-PHI/2017/Pn.Mdn, di Banda Aceh No 5/Pdt.Sus-PHI/2016/PN.Bns, dan di Palu No 18/Pdt.Sus-PHI/2015/PN.Pal", *Jurnal Hukum dan Pembangunan* 49, No 3 [2019], h. 564-567, diakses melalui <http://jhp.ui.ac.id/index.php/home/article/viewFile/2209/1556>

PP JKP. As normative research, the subject matter applies a statute approach, conceptual approach, and philosophical approach. Grammatical interpretation, teleological interpretation, and legal argumentation are the analytical tools used.

3. Results and Discussion

Justa Causa Demissionis and Constructive Dismissal in Termination of Employment Relations

The basic condition of labor law termination is that there be a justification for the layoff (*justa causa demissionis*). If the employer schemes to terminate the employment relationship with the employee, the employer must present a legally justifiable cause. This is consistent with the idea "labor is not a commodity" expressed in the ILO Constitution and is based on Article 28D paragraph (2) of the 1945 Constitution, which states that everyone has the right to fair treatment in employment relations.

Articles 3 and 4 of the ILO convention No. 158 of 1982 concerning the Termination of Employment Convention, as well as Article 7 of recommendation No. 166 of 1982 concerning the Termination of Employment Recommendation, govern the requirement for a reason to carry out termination. According to the regulation in question, termination are not forbidden if the process clearly indicates the reason for the dismissal. This explanation must be stated clearly because it determines workers' compensation and rights following termination. The justification must be one allowed by statutory regulations.

These causes can include a change in corporate status, employees violating or unable to satisfy the conditions of their employment agreement, the firm closing, or the company going bankrupt.¹¹ Indeed, the restrictions forbidding termination for some concerns, as mentioned in article 153 paragraph (1), emphasize the importance of authorized causes. The legal effects of termination carried out for the reasons mentioned in the article are null and invalid, and so termination are considered to have never occurred (Article 153 paragraph 2).

Under Employment Law, termination can be caused in three ways, namely: termination because of initiative of the employer, termination because of initiative of the employee, and termination by law. Regulation PP 35/2021 provides the legislative basis for layoff regulations in Indonesia. Provisions governing the causes for termination initiated by the employer might arise because of (a) the company's condition (Article 36 letters a to e) and (b) the workers' condition (Article 36 letters k, l, and m).

Justa causa demissionis is not required if the termination is due to the employee's initiative (resignation) and the termination is lawful. PP 35/2021 determines termination at the initiative of workers in article 36 letter i, however termination by

¹¹ Yudhi Priyo Amboro dan Jemmy Edi, "Penerapan Pemutusan Hubungan Kerja terhadap Karyawan pada Perusahaan yang Dinyatakan Pailit", h. 93, diakses melalui <https://journal.uib.ac.id/index.php/jjr/article/download/141/108/>

legislation are contained in articles 36 letters n and o. The PP governs termination caused by workers' resignations because of the employer's activities in article 36 letter g. This article examines the concept of constructive dismissal in Indonesian employment law.

In Indonesian employment law, there is no standard definition for what constitutes constructive dismissal. This is because the term "constructive dismissal" does not or hardly appear in Indonesian employment legal literature. Constructive dismissal is a type of termination carried out by employees once the employer is found to have breached the work agreement (breach of contract).

Constructive dismissal can be defined as follows:¹²

"When an employer unilaterally decides to make substantial modifications to the essential provisions of an employee's contract of employment and the employee refuses to consent to the changes and leaves his or her work, the employee has been dismissed, not resigned. Because the company did not formally fire the employee, this is referred to as "constructive dismissal". By unilaterally attempting to make significant modifications to the essential provisions of the employment contract, the employer fails to meet its duties and thereby terminates the relationship. The employee can then treat the contract as breached and leave. In such instances, the employee is entitled to compensation in lieu of notice and, if applicable, damages."

Constructive dismissal can occur because of unhealthy working conditions caused by the employer's activities, causing the employee to feel agitated and eventually decide to resign.¹³ However, not all actions taken by employers can be used as reasons for constructive dismissal; only actions directly related to the worker's working conditions can be used as a justification.

Ashar offered an explanation:¹⁴

"Constructive dismissal does not mean that an employee can automatically terminate the contract when his employer had acted or behaved unreasonably towards him. The employer's wrongful conduct must be serious, amounting to a fundamental breach of contract any longer. The employer's conduct has to be looked at as a whole and its cumulative impact to be assessed. A single act or a series of acts may, according to the particular and peculiar circumstances amount to constructive dismissal".

Ashar provided examples of employer behaviours that may result in forced resignations, which are:¹⁵ harassing or humiliating employees, especially in front of others; making significant changes to an employee's work location within a short period of time, such as a redeployment directive; falsely accusing workers of theft or

¹² Ernes A. Schirru dan Jody Brown, *Constructive Dismissal – A Primer*, h. 1, diakses melalui https://kmlaw.ca/wp-content/uploads/2015/09/EAS_ConstructiveDismissalAPrimer_6feb12.pdf

¹³ Estie Smit, *Constructive Dismissal and Resignation Due to Work*, Tesis, NWU, 2011, h. 1, diakses melalui https://repository.nwu.ac.za/bitstream/handle/10394/8425/Smit_E.pdf?sequence=1

¹⁴ Ashgar Ali Ali Mohamed, *Dismissal from Employment and the Remedies* (Kuala Lumpur: Lexis Nexis, 2004), h. 118

¹⁵ Ibid, h. 119

inability to perform their jobs; employees may be forced to resign for a variety of reasons, including a fundamental reduction in position, a reduction in responsibility, or a position that targets specific workers. Additionally, content or work items may be changed without consultation.

Employers' activities that can be used as a foundation for 'forced' resignation by workers and fulfil the idea of constructive dismissal in Indonesian Labor Law, as stated in article 36 letter g, include: a. Abusing, insulting, or threatening workers/laborers. b. Persuading or ordering workers/laborers to violate statutory regulations. c. Failure to pay wages on time for three months or more, even if the employer pays wages on time after that. d. Failure to fulfill promised obligations. e. Ordering workers/laborers to perform work other than agreed upon, f. Providing work that entails a risk to workers' lives, safety, health, or morale that is not specified in the work agreement.

Employers' activities that can be used as a foundation for 'forced' resignation by workers and fulfill the idea of constructive dismissal in Indonesian Labor Law, as stated in article 36 letter g, include: a. Abusing, rudely insulting, or threatening workers/laborers; b. Persuading and/or ordering workers/laborers to carry out acts that are contrary to statutory regulations; c. Failure to pay wages at the specified time for 3 (three) consecutive months or more, even though the employer pays wages on time after that; d. Failure to carry out obligations that have been promised to workers/laborers; e. Ordering workers/laborers to carry out work other than what was agreed upon; or f. Providing work that endangers the lives, safety, health and morals of workers/laborers while the work is not stated in the work agreement.

It can be concluded that constructive dismissal is a special condition in which a worker ends his employment relationship not because he wishes to do so, but because of very strong external factors resulting from the employer's attitude, as stated in Article 36 letter g PP 35/2021, and the worker decides to resign. As a result, the constructive dismissal legal structure should be included in employer termination rather than worker termination.

The Application of Social Justice Principles in the National Social Security System

The law serves as a means of achieving justice. As a result, the law must have rules that reflect the value of justice. In the workplace, the value of justice can be accomplished by safeguarding workers against unbounded authority on the side of employers due to subordinate relationships, using current legal tools. Workers' rights are protected in the fourth paragraph of the 1945 Constitution's preamble, as well as in Article 27 paragraph 2, Article 28 D paragraphs 1 and 2. This protection can be fulfilled by offering direction, compensation, or improving the acknowledgment of human rights, as well as physical and socioeconomic protection.¹⁶

Social security is a form of worker protection that is closely tied to economic protection. Social security is a state program designed to ensure that everyone has

¹⁶ Niru Anita Sinaga dan Tiberius Zaluchu, "Perlindungan Hukum Hak-hak Pekerja dalam Hubungan Ketenagakerjaan di Indonesia", h. 57, diakses melalui <https://journal.universitassuryadarma.ac.id/index.php/jti/article/viewFile/754/737>

enough money to cover their fundamental necessities. Social security is the pillar of the welfare state system, based on the idea that the state must be able to provide the presence of a financial safety net for individuals who lack a source of income to meet their basic necessities.¹⁷ Hotbonar Sinaga believes that social security is a policy that is widely supported in all countries, regardless of ideology.¹⁸ The ultimate purpose of the social security idea is to protect people's purchasing power in the face of economic insecurity.¹⁹

The word "social security" first originated in the United States in 1935, when the Social Security Act was enacted to address the problems of unemployment, the elderly, the sick, and children caused by the economic crisis.²⁰ In addition, social security is described as giving public protection against various losses or loss of income caused by disease, pregnancy, work accidents, job loss, disability, old age, and death.²¹ Other words commonly used are Social Protection, Social Assistance, and Social Insurance.²² According to Zaeni Asyhadie, social security can be understood widely or narrowly. Social security in its broadest sense comprises different measures that can be carried out by the community and/or the government.²³

According to Article 1 point 1 of the SJSN Law, social security is a type of social protection that ensures that all people have access to the basic necessities of life. This means that social security is a form of social protection. According to Law No. 11 of 2009 concerning Social Welfare, social security is defined as an institutional framework that ensures that every person acquire the necessities of a decent existence (article 1 number 11).

The SJSN Law states that the social security system's implementation strives to ensure that each participant and/or their family members have access to the fundamental necessities of a decent existence. With this goal in mind, the social security system's implementation is determined to be based on humanity, benefit, and social justice for all Indonesians (article 2 of the SJSN Law), and it must be carried out in accordance with the implementation principles outlined in articles 4 and 19, respectively. Aside from that, the requirement to pay payments for members based on a percentage of wages or a fixed amount, as specified in article 17, demonstrates the choice of social insurance system.

The National Social Security System (hence referred to as SJSN) is organized around

¹⁷ Artikel ilmiah Edi Suharto disampaikan pada Diklat Jabatan Fungsional Pekerja Sosial Tingkat Ahli, Jenjang Madya, BBPPKS, Lembang 14 November 2006, dengan judul "Kebijakan Sosial", h. 10, diakses melalui <http://www.policy.hu/suharto/Naskah%20PDF/KebijakanSosialLembang2006.pdf>.

¹⁸ Hotbonar Sinaga dalam Vladimir Rys, *Merumuskan Ulang Jaminan Sosial: Kembali ke Prinsip-prinsip Dasar* [terjemahan], Cet. ke-1, Pustaka Alfabet, Jakarta, 2011, h. viii

¹⁹ Adrian Sutedi, Op. Cit, h. 180

²⁰ Mudiyo, "Jaminan Sosial di Indonesia: Relevansi Pendekatan Informal", *Jurnal Ilmu Sosial dan Ilmu Politik*, Vol. 6, No. 1, Juli 2002, h. 68 diakses melalui <https://jurnal.ugm.ac.id/jsp/article/view/11094>

²¹ Michael Raper, *Negara Tanpa Jaminan Sosial (Tiga Pilar Jaminan Sosial di Australia dan Indonesia)*, (Jakarta: Trade Union Rights Centre, 2008) h. 17

²² Ibid, h.18

²³ Zaeni Asyhadie, *Aspek-aspek Hukum Jaminan Sosial Tenaga Kerja di Indonesia* (Jakarta: PT. RajaGrafindo Persada, 2008), h. 26

the principle of social justice for all Indonesians. Furthermore, the explanation of Article 2 of the SJSN Act states that the basis of social security is meant to ensure the program's longevity and participants' rights, and that the foundation of social justice is an illogical one. Social justice, in its broadest definition, refers to justice that applies in society in all realms of life, both material and spiritual, encompassing justice in the fields of law, economy, politics, social, and cultural. The concept of social justice encompasses a sense of fairness and prosperity, which is the goal of the Indonesian government.²⁴

In social justice, the term "social" refers to society, including the state, in some situations as the subject, and in others as the object or target, which must be treated equitably. In other words, social justice requires people, including the state, to distribute burdens and benefits proportionately to their citizens for the sake of the common good, while assisting the weak, and it also requires citizens to give to the people, including the state, what is their rights.²⁵ Pancasila's ideology defines social justice as a balanced and orderly society/state structure in which all citizens have the ability to build a decent life and the weak receive assistance.²⁶

The requirement to include the principle of social justice stems from the enactment of the provisions of Article 6 paragraph (1) of Law No. 10 of 2004 concerning the Formation of Legislative Regulations, which states that the content of the law must be based on the principle of justice (which was repealed by Law No. 12 of 2011).²⁷ In this regulation, social justice principle is defined as that any material containing legal regulations must reflect proportional justice for every citizen.

In the absence of more explanation, the principle of social fairness determines the meaning and construction of implementing legislation for the execution of social security. Bruggink believes that legal concepts will only supply arguments for behavioral norms that must be followed, rather than providing guidelines themselves.²⁸ According to Bruggink, legal principles have a role in interpreting legal regulations and determining their scope of applicability.²⁹

Essentially, a legislative regulation must contain norms that contain good values, and therefore at least legislators must pay attention to three (three) things: first, the law must not conflict with generally accepted legal principles, second, the law must be clear (semantic clarity), and third, the rules between one law must be coherent with other laws.³⁰ The drafting of statutory regulations is essentially a system, as it

²⁴ M. Agus Santoso, *Hukum, Moral dan Keadilan: Sebuah Kajian Filsafat Hukum*, Cet. ke-2, (Jakarta: Kencana, 2014), h. 87

²⁵ Surajiyo, "Refleksi Filosofis Mengenai Keadilan dalam Sistem Hukum Pancasila", *Indonesia yang Berkeadilan Sosial tanpa Diskriminasi*, h. 275, diakses melalui <http://repository.ut.ac.id/7998/1/FISIP201601-17.pdf>, pada Juni 2022

²⁶ Ibid, h. 278

²⁷ Dalam istilah A.A. Oka Mahendra, pencantuman asas keadilan sosial hanyalah merupakan 'etalase' belaka. A.A. Oka Mahendra, *Asas atau Nilai Keadilan dalam Undang-undang Hanya Etalase*, diakses melalui https://www.jamsosindonesia.com/identitas/asas_atau_nilai_keadilan_dalam_undang-undang_hanya_etalase

²⁸ JJ.H. Bruggink, *Refleksi tentang Hukum: Pengertian-pengertian Dasar dalam Teori Hukum*, terjemahan oleh B. Arief Sidharta, Cet. ke-4, (Bandung: Citra Aditya Bakti, 2015), h. 120

²⁹ Ibid

³⁰ Peter Mahmud Marzuki, *Teori Hukum* (Jakarta: Kencana Prenada Media Group, 2020), h. 124

involves numerous events/stages that are inextricably linked in a series. The stages are as follows: planning, preparation, discussion, ratification, invitation, and dissemination.³¹ In this regard, Jimly Asshiddiqie, as quoted by Abdul Basyir, stated that the legal norms intended to be outlined in draft laws and regulations should have been prepared with careful thought and deep reflection, solely for the public interest, not personal or group interests. As a result, legislation serves as a source of law and a tool for justice.

For society, justice is interpreted as an extensive principle, implying that every individual should receive what they deserve, also known as legal justice or legal justice, which refers to the application of the law in accordance with the principles established by the rule of law. According to Salamudin Daeng in Rudy Hendra Pakpahan and Eka N.A.M. Sihombing, the SJSN Law's social security philosophy is rooted in the capitalist system because social security is interpreted as a strategy for providing reserve funds to overcome economic risks that arise systemically during the capitalist economic cycle [crisis].³²

According to Agusmidah, the rationale behind implementing Workers' Social Security [hence referred to as Jamsostek] is that the Jamsostek program is meant to give workers with basic protection to meet their and their families' basic requirements. The program in question is designed to provide certainty about the ongoing flow of family income as a replacement for some or all the income lost due to social risks³³, such as JKP, which aims to provide workers with benefits to compensate for the loss of income caused by the termination of their employment relationship.

Job Loss Insurance [JKP] as a Part of Worker Protection: State Responsibility vs Employer Responsibility

In principle, social security is a component of social protection policy. In a wider perspective, social protection refers to a set of policies and programs meant to decrease poverty, vulnerability, and inequality, such as social insurance, social assistance, and social services, as well as labor market policies.³⁴

According to the ILO in 'Social Security and Coverage for All', the social protection system can be divided into three [three] pillars: [1] as social safety network that is fully funded by the government, [2] as social insurance scheme that is funded by contributors' contributions, work, and workers, and [3] as supplementary provision that is fully managed by the private sector. The stacking of social protection programs

³¹ Abdul Nasyir, "Pentingnya Naskah Akademik dalam Pembentukan Peraturan Perundang-undangan untuk Mewujudkan Hukum Aspiratif dan Responsif", *Kajian Hukum dan Keadilan, Jurnal IUS*, Vol. 11, Nomor 5, Agustus 2014, h. 286, diakses melalui <https://jurnalius.ac.id/ojs/index.php/jurnalIUS/article/download/171/147>

³² Rudy Hendra Pakpahan dan Eka N.A.M Sihombing, "Tanggung Jawab Negara dalam Pelaksanaan Jaminan Sosial", *Jurnal Legislasi Indonesia*, Vol. 9, No. 2, Juli 2011, h. 169, diakses melalui <https://e-jurnal.peraturan.go.id/index.php/jli/article/viewFile/383/263>

³³ Agusmidah, *Hukum Ketenagakerjaan Indonesia: Dinamika dan Kajian Teori* (Bogor: Ghalia Indonesia, 2010), h. 128

³⁴ Abu Huraerah, *Kebijakan Perlindungan Sosial: Teori dan Aplikasi Dynamic Governance* (Bandung: Nuansa Cendekia, 2019), h. 62

appears to be dependent on the funding mechanism. JKP is included in the second tier; hence, the system used is social insurance, which is a contribution between employers and employees made up of JKK and JKM participant contributions as well as funds from the government budget.

JKP, as part of social security, is a form of social protection that is the responsibility of the state in its implementation. It is an embodiment of the concept of a welfare state promoted by the constitution through article 28H paragraph [3] and article 34 paragraph [2], which respectively read "every person has the right to social security that enables his/her full development as a useful human being" and "the state develops a social security system for all people."

Based on these principles, it may be stated that the state's obligation in administering social security is to build an acceptable social security system for all people. Through the SJSN Law, the state establishes a nationwide social security system. The SJSN Law establishes principles and guidelines for implementation. Some of the primary ideas accepted include social insurance, forced participation, non-profit status, and the elimination of the opt-out system.

Although the state is in responsibility for administering social security in general, employers are also responsible for managing employment social security. This is mentioned in Article 99 of the UUK, which states that every worker and their family has the right to labor social security that is administered in compliance with applicable laws and regulations. This means that workers have a right to social security, and companies have an obligation to provide it. Social security is a form of protection for workers.

The philosophy of Labor Law is to provide protection to workers as parties who have a position below employers in a sub-ordinate legal relationship.³⁵ Therefore, the norms regulated in the legislation are regulations that emphasize the provision of legal protection for workers. One of the provisions related to the form of legal protection for workers is employment social security, with programs including Health Maintenance Insurance [JPK], Work Accident Insurance [JKK], Old Age Insurance [JHT], Pension Insurance [JP] and Job Loss Insurance [JKP].

The JKP program as one of the new policies aims to accommodate the high flexibility of the labor market that allows workers to enter and exit the labor market. According to Zellius and Beni,³⁶ although JKP was born out of controversy

³⁵ Baca Brian Langille, *Labour Law's Theory of Justice*, diakses melalui <https://www.iea-nantes.fr/rtefiles/File/brian-langille.pdf>, pada Juni 2022 dan Huge Collins, *Does Labour Law Need Philosophical Foundation? [Introduction]*, diakses melalui https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3538&context=faculty_scholarship

³⁶ Zellius Ragiliawan dan Beni Teguh Gunawan, "Jaminan Kehilangan Pekerjaan [JKP] dalam Perspektif Belanja Negara", *Jurnal Ketenagakerjaan*, Vol. 15, No 1, Edisi Januari-Juni 2021, h. 54, diakses melalui <http://journals.kemnaker.go.id/index.php/naker/article/view/89>

over the enactment of the Job Creation Law, the JKP policy as one of the new policies aimed at eliminating workers' fear of losing their jobs is able to accommodate living allowances and training costs in the context of reskilling, upskilling and skilling. Based on article 2 paragraph 1 of the PP JKP, employers are required to include their workers as participants in the JKP program.

In fact, the obligation to register their workers in the JKP program is also imposed on employers if workers work in more than 1 [one] company [articles 7 and 8 of the JKP PP]. In the event that employers do not include workers in the JKP program and in the event of layoffs, employers are obliged to fulfill workers' rights in the form of: cash benefits and job training benefits [article 37 paragraph 1]. This provision is exempted for employers in micro businesses [paragraph 2].

PP JKP stipulates that JKP participants are workers or laborers who have an employment relationship with an entrepreneur and have been registered and paid contributions [article 1, point 6]. JKP program contributions must be paid every month, the amount of which is 0.46% [zero point forty-six percent] of a month's wages, which comes from contributions paid by the Central Government and JKP funding sources. The contribution paid by the Central Government is 0.22% [zero point twenty-two percent] of a month's wages. Meanwhile, the JKP funding source is a recomposition of JKK and JKM contributions [article 11, paragraph 5].

As stated in Article 1 Number 1 of the PP JKP, JKP is social security offered to workers/laborers who are laid off in the form of monetary payments, access to job market information, and training. Termination is the termination of an employment relation for certain reasons, resulting in the termination of the rights and obligations between the worker/laborer and the employer [article 1 point 5]. However, not every termination of an employment relationship qualifies as a termination under this PP JKP.

According to article 20 of the PP JKP, termination due to resignation, permanent total disability, retirement, or death do not qualify for JKP compensation. 2. JKP benefits for participants whose work relation is based on PKWT shall be paid only if the employer is laid off before the completion of the PKWT period. 3. To verify the intended termination, the worker/laborer must provide proof of receipt of the termination, as well as a report from the district/city employment sector's government relations office. b) A registered collective agreement with a deed as proof of registration; or c) Legally binding rulings from industrial relations courts.

From the article above it can be concluded that workers who receive JKP benefits are workers who have been laid off by employers, if the worker resigns then they will not receive JPK benefits. Apart from that, based on the information required by the requirements above, it is possible to establish that the termination in question have legal certainty and binding legal effect. Workers who are still during a termination dispute are therefore ineligible for payments under the JPK program.

To emphasize that JPK is a type of worker protection, it is governed by sanctions

for employers that violate or fail to perform their obligations as indicated in article 46 PP JKP, which include [a] written warnings and [b] refusal to provide certain services. These sanctions will be imposed for violations of:

- a) the obligation to participate in the JKP program (article 2 paragraph 1);
- b) the obligation to submit a registration form that has been filled in completely and correctly to BPJS Ketenagakerjaan no later than 30 [thirty] days from the date the worker starts working (article 6 paragraph 1);
- c) the obligation of each employer to include their workers in the JKP program in the event that workers work in more than 1 [one] company (article 8 paragraph 1);
- d) the obligation of employers to submit changes in company name, office address, business scale, wage data, worker data and other changes to BPJS Ketenagakerjaan related to JKP program participation within a maximum of 7 [seven] working days after the change occurs (article 9)
- e) the obligation to pay the shortage of cash benefits to workers in a lump sum if in the event of layoffs, the workers' wages reported do not match the actual wages so that there is a shortage of cash benefit payments (article 23)
- f) the obligation of employers to fulfill workers' rights in the form of cash benefits and job training benefits if employers do not include their workers in the JKP program (Article 37 paragraph 1);
- g) the obligation to pay cash benefits to participants in advance if the employer has arrears of JKK and JKM as a source of funding for JPK for 3 [three] consecutive months (article 39 paragraph 3).

Extending the Difference Principle to Optimize the Distribution of Job Loss Benefits.

Law is a guideline that contains values. Law as a rule is more than just a pragmatic rule to govern and or control. Law contains normative properties in its form, because it involves rationality of values. Therefore, the rule of law must be justified by common sense, whether it is valuable to humans, both as individuals and groups.³⁷ Law can be said to be the art of values, and therefore law is seen as an instrument of justice. Therefore, the law must adhere to the norms of justice, without it, the law will not be sensitive, which will lead to injustice.³⁸ As stated by Gustav Radburch that the ideal of law is nothing but justice.³⁹

In order to realize justice for workers who experience termination of employment, the state provides protection in the form of cash benefits, skills improvement and opportunities to get re-employment which are manifested in the JKP program. Unfortunately, the above benefits can only be accessed by workers who are laid off by employers. As for workers who resign, these benefits will not be accessible. This includes if the reason for their resignation is not based on voluntariness, but because they are forced to resign. The exception provisions can be seen in Article 19 and Article 20 of the JKP Regulation. These provisions

³⁷ Yovita A. Mangesti dan Bernard L. Tanya, Op. Cit., h. 16

³⁸ Ibid, h. 23

³⁹ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Cet. ke-3 (Jakarta: Kencana Prenada Media Group, 2009), h. 139

are considered to leave the ratio legis of the existence of the JKP program, which in essence is to provide protection to workers from the negative impact of the end of the employment relationship between workers and employers, namely in the form of loss of income.

The implementation of the JKP program is based on the principle of social justice, as stated in Article 2 of the SJSN Law. Social justice as referred to in the explanation of the SJSN Law is an ideal principle, meaning that this principle is the basic foundation in the overall implementation of social security. Therefore, the implementation of JKP, which basically aims to provide protection to workers, is also based on the principle of social justice. Interestingly, in the Academic Paper of the SJSN Bill, social justice is more interpreted as a percentage of the use of the state budget, as quoted below:

"In addition, it is not fair that state budget funds derived from taxes will be siphoned off in large amounts for funding the pensions of civil servants, soldiers and police officers alone. The implementation of a fair and adequate pension fund that is jointly funded [bipartite] between the workers themselves and their employers, regardless of their status as civil servants or private or self employed, is a more equitable and more sustainable system."

It is unfortunate that the value of justice as intended to be promoted by the principle of social justice in article 2 of the SJSN Law, is not accompanied by justice towards the distribution of benefits from the implementation of social security, as previously discussed, based on article 19 and article 20 of the JKP PP, workers who resign, including workers who experience layoffs due to the actions of employers, do not receive JKP benefits. In fact, the purpose of implementing JKP is to provide a decent life for laid-off workers and prepare them to get new jobs. This can be seen from the benefits of JKP which are not only in the form of cash but also access to information and job training programs, which are very important for workers who have lost their jobs, regardless of the reasons for the loss of work, especially for workers who are 'forced' to lose their jobs due to the actions of employers, forced resignation/ constructive dismissal. This, according to the author, contradicts the principle of social justice adopted in the implementation of social security.

According to Rawls, social justice is not only interpreted as simply ensuring that all equal or equal freedoms of each person are protected, but also primarily that basic freedoms are implemented effectively by all parties in the society concerned, to the level of a comfortable atmosphere of freedom. feels optimal for those who are less fortunate.⁴⁰ As is the Difference Principle offered by Rawls in his concept of justice known as justice as fairness, namely that justice does not mean absolute equality in a society by leveling it out by a fully sovereign authority. Justice as fairness Rawls raised the idea of the concept of 'original position' which is based on conditions based on reflective equilibrium, which is influenced by rationality, freedom, equality and the concept of 'veil of ignorance' which is translated as everyone faced with the closure of all facts and

⁴⁰ Koerniatmanto Soetoprawiro, "Keadilan sebagai Keadilan [*Justice as Fairness*]", *Jurnal Hukum Pro Justitia*, Oktober 2010, Vol. 28, No. 2, h. 232, diakses melalui <https://media.neliti.com/media/publications/13069-ID-keadilan-sebagai-keadilan.pdf>

circumstances about himself, including social positions and certain doctrines, thus blinding the concept or knowledge about justice that is currently developing.⁴¹

Justice as fairness for Rawls is a way of combining 'liberty' with 'equality' in one principle of justice, namely that everyone has the same rights to basic freedoms, and if injustice occurs, then the disadvantaged must benefit from it. If social institutions are to truly realize social justice, Rawls aims to instill this principle. In other words, Rawls does not provide a definition of what social justice is, but rather he provides principles for how social justice can be achieved.

In the Theory of Justice and Political Liberalism, Rawls' view of justice adjustments, with an adjustment from the principle of equal rights to equal claims. Equal rights imply that everyone has the same basic freedoms, which are the broadest and most compatible with similar freedoms enjoyed by others. Meanwhile, equal claim indicates that everyone has the same right to exercise their essential rights and freedoms, which are compatible and of the same sort. The above-mentioned principles are sometimes known as substantive and procedural justice. According to Bruce Anzward and Ratna Hidayanti, these two ideas are particularly relevant in the context of employment issues.⁴²

Rawls believes that the primary goals of justice are to [1] ensure the stability of human life and [2] balance private and collective life. An ideal, just society has the original basic framework, which includes basic rights, freedom, power, authority, opportunity, money, and welfare. The concept of ideal societal structure is used to [1] analyze the fairness of existing social institutions and [2] address social injustice.⁴³ Injustices are corrected by returning people to their original positions. In this basic position, an original agreement is then reached between members of society as equals. In the constitutional context, the constitution is conceived as the highest agreement, or even a social contract, between all people for and within the structure and process of the state.⁴⁴ As a result, in the framework of administering social security, this is mentioned in Article 34 and 28H paragraph [3]. Which is then validated by the SJSN Law.

According to John Rawls, social justice is "the difference principle of fair equality of opportunity," which means that socioeconomic differences must be regulated in order to provide the greatest benefits to those who are most disadvantaged, ensuring that these groups continue to receive basic elements of welfare, income, and authority. In the Indonesian context, Fadhilah's formulation of John Rawls' concept of justice as fairness leads to legislators explicitly establishing social justice as a state representation in the SJSN Law as an ideal principle.⁴⁵

⁴¹ Pan Mohamad Faiz, "Teori Keadilan John Rawls", *Jurnal Konstitusi*, Vol. 6, No 1, April 2009, h. 140, diakses melalui https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847573

⁴² Bruce Anzward dan Ratna Hidayanti, "Perlindungan Hukum bagi Pekerja terhadap Jenis dan Sifat Pekerjaan dalam Mewujudkan Keadilan", *Jurnal de Jure*, Vol. 12, No. 1, April 2020, h. 12, diakses melalui <https://jurnal.law.uniba-bpn.ac.id/index.php/jurnaldejure/article/download/364/pdf>

⁴³ RH. Wiwoho, *Keadilan Berkontrak* (Jakarta: Penaku, 2017), h. 142

⁴⁴ Jimly Asshiddiqie, *Konstitusi Sosial: Serial Gagasan Konstitusi Sosial dan Negara Kesejahteraan Sosial Indonesia* (Jakarta: JSLG, Universitas Indonesia, 2017), h. 6

⁴⁵ Fadhilah, "Refleksi terhadap Makna Keadilan sebagai Fairness Menurut John Rawls dalam

As a result, Rawls' Difference Principle, which states that in different socioeconomic conditions, the law must be directed toward norms that result in the greatest benefits for society's least advantaged members, can be applied to the implementation of social security, particularly the distribution of JKP benefits. The difference principle states that social and economic inequalities must be organized in such a way that the most disadvantaged people benefit the most. In the difference principle, the word "socioeconomic differences" refers to the inequality in a person's opportunities to achieve the fundamental aspects of welfare, money, and authority. Meanwhile, the term 'the most disadvantaged' refers to individuals who have the least chances to realize prospects of success, money, and authority.⁴⁶

According to Rawls, the difference principle is the core substance of justice. According to this principle, it is said to be fair if someone is given compensation according to their contribution, meaning that social values are distributed equally with values that bring benefits to everyone.⁴⁷ This is also in accordance with the provisions in JKP administration, where JKP contributions are a recomposition of JKK and JKm administration fees. To become a JKP participant, workers must be registered as JKK and JKm participants. The difference principle is applied to the choice of the basic structure of society, namely the way in which basic rights and obligations are distributed by social institutions,⁴⁸ in this case the state, through statutory regulations. More specifically, the right to social security benefits for participants is protected by the SJSN Law, whose authority is given to the Employment Social Security Administering Body [BPJS Ketenagakerjaan].

Perspektif Ke-Indonesiaan", *Jurnal Kybernan*, Vol, 3, No. 1, Maret 2012, h. 33, diakses melalui <https://jurnal.unismabekasi.ac.id/index.php/kybernan/article/download/552/445>

⁴⁶ Damanhuri Fattah, "Teori Keadilan Menurut John Rawls", *Jurnal TAPIS*, Vol, 9, No.2, Juli-Desember 2013, h. 35, diakses melalui <https://core.ac.uk/download/pdf/267855963.pdf>

⁴⁷ Amran Suadi, *Filsafat Keadilan: Biological Justice dan Praktiknya dalam Putusan Hakim* (Jakarta: Kencana Prenada Media Group, 2020), h. 90

⁴⁸ Johan E. Gustafsson, "The Difference Principle Would Not Be Chosen Behind the Veil of Ignorance", *Journal of Philosophy*, h. 4, diakses melalui <https://eprints.whiterose.ac.uk/136838/>

4. Conclusion

In general, the norms in the implementation of JKP have realized the protection of workers who experience layoffs. This is in accordance with the purpose of the JKP program. However, in the condition of workers who are forced to resign [constructive dismissal], who are excluded from receiving JKP benefits, the regulation does not reflect social justice, which is the ideal principle in the implementation of SJSN. Therefore, by expanding the meaning of layoffs to include loss of employment due to certain causes, and based on Rawls' theory of justice, every worker affected by layoffs should receive JKP benefits, including those who resign due to constructive dismissal. This is in accordance with the application of the difference principle, which teaches that in different economic and social conditions, legal norms should be aimed at providing the greatest benefit to the least advantaged party.

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