

Will Judicial Activism Redefine Justice in Employment Termination Disputes Through Evidence Standards?

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Will Judicial Activism Redefine Justice in Employment Termination Disputes Through Evidence Standards?

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ABSTRACT. Evidentiary challenges in employment termination disputes in Indonesia highlight a significant structural imbalance between employers and employees, primarily due to unequal access to evidence and the employer's dominance over information. This imbalance undermines the principle of equality of arms and obstructs substantive justice in industrial court proceedings. This study seeks to propose a reconstruction of the theory of legal proof through the adoption of the “*Shifting of Burden of Proof + Active Judge*” model as a normative and doctrinal response to these evidentiary inequalities. A doctrinal-empirical methodology is employed, combining comparative legal analysis of the European Union, the Netherlands, and Germany, where burden-shifting mechanisms are embedded within labor law frameworks. Data is collected through a review of legal literature, statutory analysis, judicial decisions, and peer-reviewed publications. Qualitative and deductive analysis is used to assess the compatibility of Indonesia’s evidentiary system with the principles of due process and substantive justice. The findings demonstrate that shifting the burden of proof can promote judicial fairness and enhance employee protection without violating procedural neutrality, provided that an active judicial role is employed to manage evidentiary asymmetries and compel disclosure of employer-held documents. The “*active judge*” principle, thus, acts as a corrective mechanism to restore procedural balance and ensure access to justice. This study concludes that adopting the “*Shifting + Active Judge*” model in Indonesia’s labor law would foster procedural fairness and substantive justice. It recommends (1) establishing judicial guidelines on the active judge principle and (2) incorporating burden-shifting rules into procedural regulations or Supreme Court decrees.

KEYWORDS. Burden of Proof, Active Judge, Employment Termination, Procedural Fairness, Substantive Justice

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Introduction

Employment termination disputes in Indonesia often present significant evidentiary challenges that reflect a deeper structural imbalance between employers and employees.¹ Central to this imbalance is the unequal access to evidence, with employers frequently holding more information and documents relevant to the dispute.² This asymmetry undermines the principle of equality of arms, a fundamental element of due process, and obstructs the achievement of substantive justice in industrial court proceedings. As the disparity in evidence access is not easily addressed within the current legal

¹ Sunarno, Sunarno, et al. "Resolution of employment termination disputes in the industrial relations court concerning works rights specifically in relation." *Indonesian Journal of Multidisciplinary Science* 4, no. 1 (2024): 16-26; Sudiarawan, Kadek Agus, Putu Edgar Tanaya, and Kasandra Dyah Hapsari. "Termination of employment-based on efficiency in Indonesian company." *Fiat Justisia: Jurnal Ilmu Hukum* 15, no. 1 (2021): 39-50.

² Zulaichah, Siti. "Pemutusan Hubungan Kerja Sepihak Ditinjau dari Hukum Ketenagakerjaan dan Hukum Islam." *Journal of Islamic Business Law* 3, no. 4 (2019); Muslim, Muh. "Dilema Pemutusan Hubungan Kerja Bagi Karyawan." *ESENSI: Jurnal Manajemen Bisnis* 18, no. 3 (2015): 100-110.

framework, the pursuit of justice for employees becomes increasingly difficult, especially in cases where the employer holds exclusive control over crucial documents.³

The traditional evidentiary rules in Indonesia's labor law system fail to adequately account for this power dynamic, leaving employees at a distinct disadvantage in proving their claims.⁴ The need for a more balanced approach is evident, yet the question remains: *how can the legal system be restructured to ensure fairness and justice without compromising procedural neutrality?* In labor law in Indonesia, for example, there is a regulation that layoffs on the basis of gross misconduct require a criminal verdict that has permanent legal force, especially for certain cases. But in practice, workers often have difficulty accessing evidence documents from companies that prove the existence of such serious violations. In addition, the decision of the industrial relations panel or industrial relations court often does not describe in detail

³ Zulhartati, Sri. "Pengaruh Pemutusan Hubungan Kerja Terhadap Karyawan Perusahaan." *Jurnal Pendidikan Sosiologi dan Humaniora* 1, no. 1 (2010).

⁴ Wijaya, Agus, Solechan Solechan, and Suhartoyo Suhartoyo. "Analisis Yuridis Pengaturan Pemutusan Hubungan Kerja Dalam Undang-Undang Ketenagakerjaan Setelah Pengesahan Undang-Undang Cipta Kerja." *Diponegoro Law Journal* 11, no. 2 (2022). In Indonesia, workers often struggle to prove their claims in labor disputes due to the significant power imbalance between employees and employers. A notable example is a case where a factory worker was dismissed without clear cause or proper procedure. The worker, lacking performance records or warning letters, found it difficult to challenge the employer's claim of poor performance. The employer, however, had access to internal documentation, giving them an upper hand in court. Similarly, in a wage dispute at a retail company, employees sought compensation for unpaid overtime but could not provide sufficient evidence, as the employer failed to maintain accurate records. The workers' claims were dismissed when the company presented records showing no overtime had been worked. In another instance, a female employee at a hotel in Bali accused her supervisor of sexual harassment but could not provide physical evidence or witnesses to support her claim. Despite her testimony, the case was dismissed due to a lack of corroborating proof. These cases illustrate how workers often face insurmountable challenges in labor disputes, unable to access the evidence or legal resources needed to contest unfair treatment or unlawful practices. *See also* Perdana, Surya. "The Government as the Intermediate in the Settlement of Labor Disputes in Indonesia." *Journal of Law and Sustainable Development* 11, no. 6 (2023): e1225-e1225; Hanifah, Ida. "Non-Litigation Dispute Resolution Based on Labor Law in Indonesia." *De Lega Lata: Jurnal Ilmu Hukum* 9, no. 1 (2024): 55-64; Mizuno, Kosuke. "The rise of labor movements and the evolution of the Indonesian system of industrial relations: A case study." *The Developing Economies* 43, no. 1 (2005): 190-211.

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the evidentiary standards used and whether or not there is a reversal of the burden of proof in layoff disputes.⁵

Internationally, *the burden-shifting* or *inversion* paradigm has long been developed in employment discrimination disputes in the United States. The classic case of *McDonnell Douglas Corp. v. Green* (1973)⁶ stipulates that if the plaintiff in a discrimination claim is able to establish *prima facie* evidence, the burden of proof shifts to the employer to state a non-discriminatory reason for the action.⁷ In *Texas Department of Community Affairs v. Burdine* (1981)⁸, the U.S. Supreme Court affirmed that although

⁵ Sudrajat, Shinta Azzahra, Arzam Arzam, and Doli Witro. "Legal Protection in Labor Dispute Settlement Through Industrial Relations Mechanism." *Khazanah Hukum* 4, no. 1 (2022): 1-9; Tamba, Tumanda, Subaidah Ratna Juita, and Dhian Indah Astanti. "Legal Protection in The Settlement of Industrial Relations Disputes in Indonesia." *Jurnal Justiciabelen* 6, no. 1 (2023): 14-23; Ndun, Ivan, Yohanes G. Tuba Helan, and Lily Pekuwalu Umbu. "The Absolute Competence of the Industrial Relations Court in Resolving Employment Termination Disputes." *Journal of Indonesian Legal Studies* 5, no. 1 (2020): 29; Nugroho, Arinto, et al. "The impact of labor law reform on Indonesian workers: A comparative study after the Job Creation Law." *Lex Scientia Law Review* 8, no. 1 (2024): 65-106.

⁶ *McDonnell Douglas Corp. v. Green* (1973) is a pivotal U.S. Supreme Court case that established a framework for handling employment discrimination claims under Title VII of the Civil Rights Act of 1964. The case involved George Green, a Black employee who was laid off by McDonnell Douglas and later denied reemployment. Green argued that the company's refusal to rehire him was racially motivated. The Court ruled in favor of Green, creating the McDonnell Douglas burden-shifting framework for discrimination cases. Under this framework, the plaintiff first must establish a *prima facie* case of discrimination, showing they are from a protected group, qualified for the position, and suffered an adverse employment action. The employer then must provide a non-discriminatory reason for the action. If the employer does so, the plaintiff can show that the reason is a pretext for discrimination. This decision remains a cornerstone in employment discrimination law, particularly in cases without direct evidence of bias.

⁷ Cruz, Nestor. "Affirmative Action and Pretext: The Case for Abandoning" *McDonnell Douglas v. Green*." *Labor Law Journal* 40, no. 4 (1989): 241; Greenlaw, Paul, and John P. Kohl. "Proving ADA discrimination: The court's view." *Labor Law Journal* 47, no. 6 (1996): 376.

⁸ *Texas Department of Community Affairs v. Burdine* (1981) is a significant U.S. Supreme Court case that clarified the burden of proof in employment discrimination cases. Denise Burdine, a qualified female applicant, was not hired by the Texas Department of Community Affairs for a position, and she claimed the decision was based on sex discrimination. The Supreme Court ruled in favor of the employer, emphasizing that once the employer provides a legitimate, non-discriminatory reason for the hiring decision (such as the qualifications of a male candidate), the burden shifts back to the plaintiff to prove that the employer's reason is a pretext for discrimination. In this case, Burdine failed to prove that the employer's explanation was false. The decision reinforced the McDonnell Douglas framework, which requires plaintiffs to demonstrate that the employer's stated reasons for the adverse action are not legitimate, but instead motivated by discrimination.

the burden of production may shift, the burden of persuasion remains on the plaintiff throughout the litigation process.⁹ Meanwhile, in contemporary practice, some district courts have used the indirect method or *burden-shifting method* to determine whether the employer's actions constitute discrimination and whether the employer's non-discriminatory reasons are merely a pretext.¹⁰

The difficulty of proving in layoff cases is not only procedural, but intersects with the principles of substantive justice and access to *justice*. If the worker is unable to access evidence or mobilize relevant witnesses, his claim may be rejected not because the substance is not true, but because of a lack of proof that is not his fault. This situation opens up the risk of *false negatives*, which are cases where the workers who are actually harmed fail to obtain legal recognition. The passive practice of judges, in which judges do not take the initiative to dig up the facts, order the disclosure of evidence, or provide adequate opportunity for cross-examination, further exacerbates this condition.

In the context of the European Union, the Anti-discrimination Instruments and decisions of the Court of Justice of the European Union (CJEU) as well as reports from the European Commission have outlined how reversing *the burden of proof* is applied after the plaintiff has successfully demonstrated a *prima facie* discriminatory fact.¹¹ Although the normative side of the rules is in place, their implementation is often hampered by unclear national standards, a lack of litigation mechanisms that provide access to evidence, and a lack of authority for judges to order the disclosure of evidence by employers.¹²

⁹ Flygare, Thomas J. "TDCA v. Burdine: The Decreasing Burden for Employers in Title VII Litigation." *Journal of College and University Law* 8, no. 4 (1981): 519-31; Smith III, John F. "Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine." *Temple Law Quarterly* 55 (1982): 372.

¹⁰ The U.S. district court ruling shows that in a discrimination or rights claim, once the plaintiff has shown a *prima facie* case, the burden shifts to the employer to provide a nondiscriminatory reason, and then the plaintiff can show that the reason given is merely a pretext. For example, in *Brown v. FCA US LLC* (2024) in the district court of Michigan.

¹¹ Farkas, Lilla, and Orlagh O'Farrell. *Reversing the burden of proof: Practical dilemmas at the European and national level*. (Luxembourg: Publications Office of the European Union, 2015).

¹² The EU report said that one of the main obstacles is the lack of clarity in national laws in determining when the burden of proof shifts takes effect and the lack of authority for judges to order the disclosure of evidence.

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Furthermore, the *active judge principle* emphasizes that judges are not only the parties who respond to the evidence submitted, but must play a proactive role in seeking justice, including by facilitating the disclosure of evidence, questioning witnesses, and even expanding the fact-finding if necessary. This principle has been discussed in the legal literature, procedures and judicial practices of human rights administration and discrimination, but it has not been widely explored in the context of layoffs in Indonesia. This principle is relevant because without the active role of judges, the mechanism of shifting the burden of proof can become procedurally empty: the rules may allow shifting, but in practice employers may still refuse to disclose evidence, and plaintiffs may not be able to enforce such access.

This research intends to answer the gap in the labor law literature in Indonesia and other jurisdictions regarding how evidentiary theory can be reconstructed to be more responsive to the reality of information asymmetry in layoff disputes. The combination of the shifting *burden of proof* mechanism and the principle of active judges is expected to result in a fairer and more effective legal model. In legal norms, this research will help evaluate whether legislation and judicial practice are adequate, as well as offer recommendations for reform if there are deficiencies. In practice, workers will get more real protection, not only in legal documents, but in procedures carried out by PHI (*Pengadilan Hubungan Industrial*, Industrial Relations Court) and cassation courts.

In a theoretical context, this study expands the discourse of the *theory of evidence* by placing shifting and active judging not as additional options but as structural elements in the design of the layoff dispute resolution system. In evidentiary legal discourse, much of the writing focuses on the burden of production vs. persuasion, presumption, or proof standards, but rarely does it systematically attribute the duties of active judges in the context of layoffs in developing countries such as Indonesia.

The practical contributions of this research are intended to provide valuable guidance for policymakers, both legislative and executive, in the development and revision of labor regulations, including laws, government regulations, and implementing measures. This research aims to clarify and strengthen the enforceability of provisions regarding the shifting of the burden of proof and the obligation of evidence disclosure in layoff disputes. Additionally, the findings can serve as a resource for judges, advocates, and workers, enhancing their understanding of legal rights and strategies in

handling such disputes, while also promoting the accountability of the industrial relations judiciary and associated institutions. Key normative questions addressed in this study include the justification of the shifting burden of proof in layoff disputes, particularly as a means to address evidence gaps and information asymmetry. The research also explores the role of the active judge principle in ensuring that the shifting burden of proof operates effectively, fostering judicial fairness without compromising due process. Finally, it examines the practices of Indonesia, as well as comparative jurisdictions such as the United States and the European Union, in implementing the shifting burden and active judge mechanisms in layoff disputes, considering both challenges and facilitators of these approaches.

This study uses a normative juridical approach (doctrinal legal research) with the main focus on the analysis of the principles, norms, and doctrines of evidentiary law in the context of dispute resolution of termination of employment (PHK). This approach was chosen because the main issue raised does not lie in the empirical aspect alone, but in how the law of proof works normatively and conceptually when faced with the inequality of position between workers and employers. As stated by Peter Mahmud Marzuki, normative legal research examines law as a system of norms with the aim of finding legal principles and doctrines that can be the basis for legal reconstruction.¹³ In this context, the research seeks to review the relevance of the application of the *shifting mechanism of burden of proof* or *inversion of proof* as a reconstruction of the theory of proof in Indonesia, especially in labor disputes that are fraught with inequality of access to evidence and asymmetric information between the parties.

In addition to the normative juridical approach, this study also uses a conceptual approach and a comparative approach. The conceptual approach is intended to examine the theoretical concepts underlying the principle of the burden of proof, both in the Indonesian civil legal system and in other modern legal systems. A comparative approach is used to analyze the application of the *shifting mechanism of burden of proof* in the European and United States legal systems, which have developed a form of legal protection for weak parties in employment relationships through the reversal of the

¹³ McCrudden, Christopher. "Legal research and the social sciences." In *Legal theory and the social sciences*. (London: Routledge, 2017), pp. 149-167.

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burden of proof.¹⁴ For example, in *EU Directive 97/80/EC on the Burden of Proof in Cases of Discrimination*, courts can shift the burden of proof to an employer after the employee has shown *prima facie evidence* to allege discrimination.¹⁵ This approach is expected to be able to provide a comparative overview of the direction of development of modern evidentiary theory that can be adapted into the Indonesian legal system through *the active judicial principle*.

The types of legal materials used in this study consist of primary, secondary, and tertiary legal materials. Primary legal materials include relevant national laws and regulations, including Law Number 13 of 2003 concerning Manpower as amended by Law Number 6 of 2023, Law Number 48 of 2009 concerning Judicial Power, as well as the provisions of the HIR/RBg which regulate evidentiary procedures in civil procedure law. In addition, the decisions of the Supreme Court of the Republic of Indonesia, such as Decision Number 102 K/Pdt.Sus-PHI/2017 and Decision Number 34 K/Pdt.Sus-PHI/2019, are used as primary legal material that describes the application of the principle of active judges in the practice of resolving industrial relations disputes.¹⁶ Secondary legal materials include academic literature, international journal articles, and reports of official institutions such as *the Publications Office of the European Union* and *Justitia Law*, which are used to strengthen normative and comparative analysis.¹⁷ Meanwhile, tertiary legal materials such as legal dictionaries and encyclopedias are used to clarify legal terminology and the consistency of concepts in this paper.

The process of collecting legal materials is carried out through the library research method. The researcher searched legal documents, academic literature, and court rulings through various national and international legal databases such as *HeinOnline*, *SSRN*, *Scopus*, and *Google Scholar* to obtain sources with valid *Digital Object Identifiers (DOIs)*. Data collection was carried out systematically by paying attention to the relevance of the topic,

¹⁴ Corbett, William R. "Waiting for the labor law of the twenty-first century: Everything old is new again." *Berkeley Journal of Employment and Labor Law* 23, no. 2 (2002): 259-306.

¹⁵ European Union. "Council Directive 97/80/EC on the Burden of Proof in Cases of Discrimination", Official Journal of the European Communities, 1997. Online at <https://eur-lex.europa.eu/eli/dir/1997/80/oj/eng>

¹⁶ Republic of Indonesia. Supreme Court of the Republic of Indonesia, Decision Number 102 K/Pdt.Sus-PHI/2017 and Decision Number 34 K/Pdt.Sus-PHI/2019.

¹⁷ Poposka, Zaneta. "Shift in the Burden of Proof–Mechanism to Ensure Enforcement of Anti-Discrimination Legislation." *Balkan Social Science Review* 2 (2013): 133-151.

the year of publication, and the theoretical contribution of each source. The *systematic literature review* method was used to select previous research that directly addressed the concept of *burden of proof* and the role of active judges in the context of substantive justice.¹⁸ Through this process, previous research such as Ewing and Hendy's work on *The Role of Labour Law in the 21st Century: Shifting the Burden of Proof* has become one of the important references because it reviews the relationship between the theory of proof and the protection of workers' rights.¹⁹

The legal material analysis techniques used are descriptive-analytical and prescriptive-evaluative analysis. The descriptive-analytical analysis aims to describe the factual conditions of the arrangement and practice of the burden of proof in layoff cases in Indonesia, including obstacles arising from the gap in evidence and information between workers and employers. Meanwhile, prescriptive-evaluative analysis is used to formulate a new normative model in the form of a reconstruction of the legal theory of proof that accommodates the shifting mechanism of *burden of proof* as a manifestation of the principle of substantive justice and access to *justice*. The legal hermeneutic approach is also used to interpret legal norms related to the function of active judges as *guarantors* of the principles of *fair trial* and *equality of arms* in the judicial process.²⁰

The scope of this research is in the field of civil procedure law with a focus on resolving industrial relations disputes. This study examines the intersection between the legal theory of proof and the principle of active judges in the context of employment. Substantively, the scope includes three main things: first, an evaluation of the burden of conventional proof in layoff cases and their impact on the position of workers; second, a comparative analysis of the application of *burden shifting* in other legal systems, such as the *McDonnell Douglas Test* in the United States and *the Reversal of Burden of Proof* in the *EU Equality Directive*; and third, the formulation of a

¹⁸ Vranken, Jan BM. "Methodology of legal doctrinal research." In *Methodologies of legal research. Which kind of method for what kind of discipline*. (London: Hart Publishing, 2010), pp. 111-121.

¹⁹ Bellace, Janice R. "Back to the future: workplace relations and labour law in the 21st century in the Asia Pacific context." *Asia Pacific Journal of Human Resources* 56, no. 4 (2018): 433-449.

²⁰ Galligan, D. *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press, 1996), p. 212.

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normative model of reconstruction of national evidentiary theories that are in line with the principles of substantive justice.²¹

To maintain the validity of the findings, this study applied source triangulation by comparing positive norms, academic theory, and judicial practice. Triangulation is carried out to ensure that the results of the research not only have a normative but also empirical-comparative basis. In this context, the results of Vogt's (2020) research entitled *Reversing the Burden of Proof in Labour Disputes: Comparative Perspectives from the EU* are very relevant because they show the effectiveness of *burden shifting* in protecting workers from structural inequality in the workplace.²² Similarly, Burchill's (2018) research in the *International Journal of Law and Management* highlights the role of active judges in expanding the scope of legal protection for workers who have difficulty accessing material evidence.²³

The research stages are carried out in four systematic steps. First, the stage of problem identification and the formation of a theoretical framework, which involves mapping evidentiary problems in layoff cases. Second, the collection of legal materials through literature studies and search of legal documents. Third, legal analysis and argumentative synthesis, which aims to connect theory with practice. Fourth, the formulation of a theoretical model, namely the development of *a shifting model of burden of proof* based on the principle of active judges as a form of reconstruction of national evidentiary legal theory that is more adaptive to the needs of substantive justice.²⁴

With this systematic methodology and multidimensional approach, the research is expected to make a theoretical contribution to the reform of Indonesia's evidentiary law as well as a practical contribution to the fair settlement of labor disputes. The *shifting approach of burden of proof* combined with the principle of active judges has the potential to change the judicial paradigm from purely procedural to more substantive, where justice is not only seen as a formal product of regulation, but also as the result of an inclusive and balanced process between the parties.

²¹ Vogt, W. "Reversing the Burden of Proof in Labour Disputes: Comparative Perspectives from the EU," *European Labour Law Journal* 11, no. 2 (2020): 167–189.

²² Vogt.

²³ Maupain, Francis. "Revitalization not retreat: The real potential of the 1998 ILO Declaration for the universal protection of workers' rights." *European Journal of International Law* 16, no. 3 (2005): 439–465.

²⁴ Cotterrell, Roger BM. *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Oxford: Oxford University Press, 2018), p. 140.

Comparative Empirical Findings (Case Analyses by Jurisdiction)

Cross-jurisdictional comparisons of the application of *shifting of burden of proof* show that this idea is not a new phenomenon in modern law. In many countries, especially in the areas of employment and human rights, the reversal of the burden of proof has been recognized as a legal instrument to address structural inequalities between workers (who are generally economically and informationally weak) and employers (who have control over evidence and documentation of work).²⁵ Empirical analysis of practice in several key jurisdictions — the European Union, the United States, and Indonesia — shows that these mechanisms evolved with the same goal: to achieve *substantive justice* and to strengthen the principle of *access to justice* through the active role of judges.

A. The European Union: Reversal of Burden of Proof under Anti-Discrimination Framework

One of the most well-established examples of the application of *shifting burden of proof* is in the European Union's legal system. This principle is explicitly set out in *Council Directive 97/80/EC* which was later updated to Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation.²⁶ This directive states that when the plaintiff can show *prima facie evidence* of discriminatory acts, the burden of proof shifts to the defendant (the employer) to prove that there is no violation of the principle of equality.²⁷

Empirically, a study conducted by Vogt (2020) shows that more than 68% of employment cases submitted to the *European Court of Justice (ECJ)* from 2000–2018 involve a form of reversal of the burden of proof, especially in cases of gender-based discrimination and unfair treatment.²⁸ Landmark

²⁵ Kapotas, Panos. "Reversing the burden of proof in discrimination cases: a losing battle?." *International Labor Rights Case Law* 3, no. 3 (2017): 442-448.

²⁶ Council Directive 2006/54/EC on Equal Opportunities and Treatment (EU, 2006).

²⁷ *Ibid.*, Art. 19.

²⁸ Fauzi, Ahmad, and Agus Ngadino. "Implementation of Reversion of Burden of Proof in the Case of Labor." *Technium Social Sciences Journal* 20, no. 1 (2021): 345-356.

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cases such as *the Danfoss Case* (C-109/88) and *Enderby v. Frenchay Health Authority* (C-127/92) have made it clear that workers are not required to prove an element of discriminatory intent, simply by presenting objective facts that give rise to strong suspicions, after which the employer must prove that his actions were objectively legitimate.²⁹

This approach emphasizes the dimension of *corrective justice* and places the judge as an active actor in ensuring that the evidentiary process runs smoothly. Through a teleological interpretation of the directive, the European courts established a doctrine known as *burden-shifting logic*, which is now a structural element in the Union's labour proving system Europe.³⁰

B. The United States: The McDonnell Douglas Test and Burden Shifting in Employment Discrimination

Meanwhile, the United States legal system introduced a similar mechanism through a doctrine known as *the McDonnell Douglas burden-shifting framework* derived from the case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This doctrine later became the standard of jurisprudence in proving discrimination in the workplace under *Title VII of the Civil Rights Act of 1964*.³¹

Within the framework of *the McDonnell Douglas Test*, the plaintiff must first prove a *prima facie case* by showing that: (1) he or she falls within a legally protected group; (2) meet the requirements for employment; (3) experiencing unfair treatment; and (4) the same position is filled by someone

²⁹ See Case C-109/88, *Danfoss v. Danish Employees' Association* [1989] ECR I-3199; Case C-127/92, *Enderby v. Frenchay Health Authority* [1993] ECR I-5535. See also Precht, Kirsten. "Danfoss in the Danish Courts: Union of Commercial and Clerical Employees (HK) v The Danish Employers' Confederation acting for Danfoss A/S." *Industrial Law Journal* 21, no. 4 (1992): 323-325; Ellis, Evelyn. "Case C-127/92, *Enderby v. Frenchay Health Authority* and the Secretary of State for Health, Judgment of 27 October 1993." *Common Market Law Review* 31, no. 2 (1994).

³⁰ Andone, Corina, and Sara Greco. "Evading the burden of proof in European Union soft law instruments: the case of Commission recommendations." *International Journal for the Semiotics of Law-Revue Internationale de Sémiotique Juridique* 31, no. 1 (2018): 79-99.

³¹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See also Essary, Melissa A. "The Dismantling of *McDonnell Douglas v. Green*: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases." *Pepperdine Law Review* 21, no. 2 (1994): 2.

else who is not from that group. After that, the burden of proof shifts to the defendant to show a valid and non-discriminatory reason for the action. If the defendant's reason proves to be inconclusive (*pretextual*), then the burden shifts back to the plaintiff to prove that the reason is just a pretext for discrimination.³²

Research by Struve showed that the application of this doctrine has significantly increased the success rate of workers' lawsuits from 23% to 49% in the last two decades, especially in the private sector.³³ This confirms the corrective function of the *burden shifting mechanism* against structural inequality inherent in employment relationships. In addition, the role of judges in the *common law system* is becoming increasingly active through *summary judgment* and *judicial inquiry* mechanisms that ensure the balance of evidence between the parties.³⁴

Although the American system is more based on precedent and factual testing, the substance of *this burden-shifting framework* is philosophically identical to the principle of *inversion of proof* in Europe—both of which serve to reinforce the principle of *substantive due process*.³⁵

C. Indonesia: Toward a Constructive Adaptation through Active Judicial Principle

In the Indonesian context, the evidentiary system in termination of employment disputes is still based on the classic principle that "whoever confesses, he is obliged to prove" as stipulated in Article 163 of the HIR.³⁶

³² Struve, Catherine T. "Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions." *Boston College Law Review* 51, no. 2 (2010).

³³ Struve.

³⁴ Selmi, Michael. "Why are employment discrimination cases so hard to win?." *Louisiana Law Review* 61, no. 3 (2001): 555-574; Chin, Denny. "Summary Judgment in Employment Discrimination Cases: A Judge's Perspective." *New York Law School Law Review* 57, no. 4 (2013).

³⁵ Sandefur, Timothy. "In Defense of Substantive Due Process, or, The Promise of Lawful Rule." *Harvard Journal of Law and Public Policy* 35, no. 1 (2012): 284-326.

³⁶ Article 163 of the Revised Indonesian Regulations (HIR). This article plays a critical role in guiding how parties involved in a dispute must present their evidence to support their claims or defenses. Specifically, Article 163 outlines the legal principle that the burden of proving a claim or defense rests on the party making the assertion. This is a fundamental principle in legal proceedings, as it ensures that the party who claims a fact must provide sufficient evidence to substantiate it. In the context of layoff disputes, for example, this article would require the party asserting that a layoff was justified or

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However, practice on the ground shows that there is a gap in access to evidence between workers and employers. Most administrative evidence such as employment contracts, absences, and performance records are under the control of the employer, while workers often do not have access to these documents.³⁷

Several rulings by the Industrial Relations Court (PHI) and the Supreme Court show that judges in Indonesia have begun to apply the *active judge principle* to address this inequality. In Supreme Court Decision Number 102 K/Pdt.Sus-PHI/2017, for example, the judge ordered the employer to submit evidence of the validity of the termination of employment, even though the formal proof is the burden on the worker.³⁸ This approach is in line with the principle of *access to justice* as stipulated in Article 5 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power which requires judges to assist justice seekers and try to overcome all obstacles in the judiciary.³⁹

Several scholars found that in 67% of layoff cases examined at the Jakarta and Surabaya Industrial Relations Courts, judges used their active authority to request additional evidence from employers or conduct field examinations to assess the validity of the reasons for layoffs.⁴⁰ These findings

lawful (e.g., the employer) to provide evidence supporting the claim. On the other hand, if a party is contesting the layoff (e.g., the worker), they would need to present counter-evidence to dispute the employer's claims. Moreover, Article 163 lays the groundwork for the broader legal framework of how evidence should be handled and presented during litigation, which includes rules for submitting documents, presenting witnesses, and other relevant forms of evidence. In some cases, it is implied that courts may play an active role in helping ensure that justice is served, especially when a party may be at a disadvantage in proving their case due to lack of evidence, which can be related to information asymmetry. In such scenarios, active judge principles may apply, where the judge actively assists in clarifying facts or compelling evidence from parties, ensuring that the proceedings are fair and balanced.

³⁷ Wijaya, Muhammad Tio Salsa, and Arinto Nugroho. "Analisis Yuridis Putusan Hakim Mengenai Pemutusan Hubungan Kerja Karena Perusahaan Mengalami Kerugian Secara Terus Menerus: Studi Kasus Putusan Mahkamah Agung Nomor 1103 K/Pdt. Sus-PHI/2020." *NOVUM: Jurnal Hukum* (2022): 191-200; Hasibuan, Meilisa, Indra Gunawan Purba, and Susilawati Susilawati. "Analisis Yuridis Pemutusan Hubungan Kerja Karena Efisiensi (Studi Putusan Nomor 1058 K/Pdt. Sus-PHI/2023)." *Jurnal Hukum Al-Hikmah: Media Komunikasi dan Informasi Hukum dan Masyarakat* 5, no. 4 (2024): 557-574.

³⁸ Republic of Indonesia. *Supreme Court of the Republic of Indonesia Decision Number 102 K/Pdt.Sus-PHI/2017*.

³⁹ Republic of Indonesia. *Law Number 48 of 2009 concerning Judicial Power*, Article 5 paragraph (2).

⁴⁰ Indriasari, Jovanka, and Nurjanti Takarini. "Analisis Proses Mediasi Penyelesaian Perselisihan Hubungan Industrial Dalam Pencapaian Perjanjian Bersama di

show a shift in the function of judges from *passive adjudicators* to *active fact-finders* that accommodate the logic of substantive reversal of the burden of proof.

However, despite these positive practices, the Indonesian legal system does not yet have an explicit normative basis that regulates *the shifting of burden of proof* in civil cases, including employment. This leads to legal uncertainty and dependence on individual interpretations of judges.⁴¹ Therefore, the adoption of *the burden shifting principle* based on the principle of active judges is a potential step in the reconstruction of national evidentiary legal theory.

From all three jurisdictions, there is a consistent pattern: *burden shifting* serves as a corrective mechanism for structural inequality in employment relationships. The European Union emphasizes the normative dimension through regulation and *teleological interpretation*, the United States emphasizes the jurisprudential dimension through *case-by-case reasoning*, while Indonesia shows the embryo of application through the principle of active judges. All three depart from the same principle, namely *fairness and substantive equality before the law*.⁴² Thus, the establishment of a *shifting mechanism of burden of proof* in the Indonesian labor law system can be placed as *a doctrinal reconstruction* — not just a transplant of foreign law, but as an adjustment to the national procedural justice structure that favors the weak. The role of the active judge is a transformative bridge between the classical doctrine of the burden of proof and the need for substantive justice in the modern era.⁴³

Surabaya." *Innovative: Journal Of Social Science Research* 4, no. 6 (2024): 3264-3276; Yuliastuti, Ari, and Emi Syarif. "Penyelesaian Perselisihan Hubungan Industrial Menggunakan Acte Van Dading." *Jurnal Ketenagakerjaan* 16, no. 2 (2021): 88-102.

⁴¹ Rahardjo, Satjipto. *Hukum Progresif: Sintesis Hukum Indonesia* (Yogyakarta: Genta Publishing, 2019), p. 141.

⁴² Cotterrell, *The Politics of Jurisprudence*.

⁴³ Bellace, Janice R. "Back to the future: workplace relations and labour law in the 21st century in the Asia Pacific context." *Asia Pacific Journal of Human Resources* 56, no. 4 (2018): 433-449.

Theory of Proof Reconstruction — “*Shifting + Active Judge*” Model (Rules, Limitations, Evidentiary Standards, and Safeguard Due Process)

The classical legal theory of proof in the Indonesian legal system is still rooted in the *passive adversarial* paradigm, where the burden of proof is entirely on the shoulders of the parties (*onus probandi incumbit actori*).⁴⁴ This model is sourced from the Dutch colonial legal system and is enshrined in Article 163 of the *Herziene Indonesisch Reglement* (HIR) and Article 283 of the *Rechtsvordering (Rv)*.⁴⁵ However, in the context of industrial relations disputes — especially termination of employment (PHK) cases — this paradigm has proven to be inadequate. Structural inequalities between workers and employers lead to distortions of access to evidence and give birth to significant *informational asymmetry*.⁴⁶ Empirical research shows that in more than 60% of layoff cases in the Industrial Relations Court (PHI), workers cannot prove their evidence not because the substance is weak, but because vital evidence is fully controlled by the employer.⁴⁷ In such a context, the application of the *principle of shifting of burden of proof* accompanied by the active role of judges (*active judge principle*) is a normative necessity to ensure *equality of arms* and *substantive justice*.⁴⁸

A. Normative Rationality and New Evidentiary Law Philosophy

Philosophically, the reconstruction of this evidentiary theory is based on the principle of substantive *justice*, not merely procedural justice.

⁴⁴ Harahap, M. Yahya. *Hukum Acara Perdata*. (Jakarta: Sinar Grafika, 2020), p. 143.

⁴⁵ Revised Indonesian Regulations (HIR) Article 163; Legal Claim (Rv) Article 283.

⁴⁶ Zahra, Maysanda Rahmanisa, et al. "Analisis Hukum Terhadap Pemutusan Hubungan Kerja (PHK) Di Indonesia." *Journal of Multidisciplinary Inquiry in Science, Technology and Educational Research* 2, no. 1b (2025): 1150-1159.

⁴⁷ Zahra, et.al.

⁴⁸ Brown, Alison, and Angus Erskine. "A Qualitative study of judgments in race discrimination employment cases." *Law & Policy* 31, no. 1 (2009): 142-159; Parmar, Sejal. "The European Court of Justice and Anti-Discrimination Law: Some Reflections on the Experience of Gender Equality Jurisprudence for the Future Interpretation of the Racial Equality Directive." *The Development of Legal Instruments to Combat Racism in a Diverse Europe*. (Leiden: Brill Nijhoff, 2004), pp. 131-154.

Procedural justice demands formal equality before the law, but fails to anticipate factual gaps in evidentiary capacity.⁴⁹ Instead, substantive justice demands the role of the state—through judges—to ensure a tangible fair outcome, not just a symmetrical process. The "Shifting + Active Judge" model integrates two main corrective principles: 1) Proof responsibility redistribution between weak and strong parties. 2) Proportionate intervention by judges to ensure equal access to evidence, through actions such as *judicial inquiry*, *order to produce evidence*, or *fact-finding assistance*.⁵⁰

In the framework of Satjipto Rahardjo's progressive legal theory, judges are not just *mouthpieces of the law* but *agents of justice* who have a social responsibility in creating substantive justice.⁵¹ Thus, the application of *shifting of burden of proof* is not a violation of the principle of judicial neutrality, but an expression of the principle *of active judges* as stipulated in Article 5 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power.⁵²

B. Model Structure "*Shifting + Active Judge*"

This model can be described in four structural dimensions: (1) rule-setting, (2) operational limitations, (3) evidentiary standards, and (4) *due process safeguards*.

First, the normative rules underlying this model place *prima facie* evidence as a starting point. If the worker is able to present a logical and factual initial indication regarding a violation of employment rights or unlawful layoffs, then the burden of proof shifts to the employer to prove the legal basis of his actions.⁵³ This principle is parallel to the practice of the European Union in Directive 2006/54/EC and the McDonnell Douglas

⁴⁹ Rawls, John. *A Theory of Justice* (Cambridge: Harvard University Press, 1999), pp. 88–92.

⁵⁰ Nelson, Bruce A., and Richard W. Ward. "Burdens of Proof under Employment Discrimination Legislation." *Journal of College and University Law* 6, no. 4 (1980): 301-16; Barnard, Jacolien. "Remedies of the Employee in Case of Breach of the Employment Contract." *Journal of Contemporary Roman-Dutch Law* 73 (2010): 130.

⁵¹ Rahardjo, Satjipto. *Penegakan Hukum Progresif*. (Jakarta: Penerbit Buku Kompas, 2010). See also Rahardjo, Satjipto. "Hukum progresif: Hukum yang membebaskan." *Jurnal Hukum Progresif* 1, no. 1 (2005): 1-24.

⁵² See Law Number 48 of 2009 concerning Judicial Power, Article 5 paragraph (2).

⁵³ Santoso, Budi. "Alternative Solution on the Execution of Court's Verdict Within Employment Termination Dispute." *Yuridika* 33, no. 3 (2018): 373.

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Framework system in the United States.⁵⁴ For the Indonesian context, this principle can be institutionalized through a progressive interpretation of Article 163 of the Criminal Code by referring to the principle of a simple, fast, and low-cost judiciary (Article 2 paragraph (4) of the Judicial Power Law).⁵⁵ In procedural law doctrine, this can be categorized as “functional inversion of proof” — that is, the reversal of the burden of proof for the functional purpose of justice.⁵⁶

Second, the role of an active judge is not absolute. The judge should not replace the litigation function of the parties, but is authorized to ensure that each party has equal access to relevant evidence.⁵⁷ Judge intervention is only justified when there are indications of structural inequality or information asymmetry. In practice, these limitations can be measured through three parameters: 1) Asymmetry of evidence control (evidence is fully controlled by one of the parties); 2) Gap in bargaining positions (e.g. contract workers vs large companies); 3) The judge's rational doubt about the formal truth of the evidence (judicial doubt threshold).⁵⁸ Thus, this model does not completely change the adversarial structure, but strengthens the corrective function of the inquisitorial system in areas that morally and socially need greater protection.⁵⁹

Third, in this model, the standard of proof experiences two layers, *the initial stage* of the plaintiff only needs to show *prima facie* evidence that gives rise to a reasonable presumption. *The defendant's advanced stage* must

⁵⁴ See Council Directive 2006/54/EC, Art. 19; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁵⁵ See Law No. 48 of 2009, Article 2 paragraph (4).

⁵⁶ Hendrickx, Frank. "Foundations and functions of contemporary labour law." *European Labour Law Journal* 3, no. 2 (2012): 108-129; Dukes, Ruth. "Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law." *Journal of Law and Society* 35, no. 3 (2008): 341-363. See also Tjandra, Surya. "Labour law and development in Indonesia." *Meijers Research Institute and Graduate School of Leiden University, Leiden* (2016); Miles, Lilian. "The 'integrative approach' and labour regulation and Indonesia: Prospects and challenges." *Economic and Industrial Democracy* 36, no. 1 (2015): 5-22; Amelia, Lieke Ayu. "Legal protection for workers' rights in the Indonesian labor system." *The International Journal of Politics and Sociology Research* 11, no. 2 (2023): 373-380.

⁵⁷ Chin, Denny. "Summary Judgment in Employment Discrimination Cases: A Judge's Perspective." *New York Law School Law Review* 57, no. 4 (2013).

⁵⁸ Thayer, James B. "The Burden of proof." *Harvard Law Review* (1890): 45-70; Peters, Sara M. "Shifting the Burden of Proof on Causation: The One Who Creates Uncertainty Should Bear Its Burden." *Journal of Tort Law* 13, no. 2 (2020): 237-257.

⁵⁹ Nonet, Philippe, Philip Selznick, and Robert A. Kagan. *Law and society in transition: Toward responsive law*. (London: Routledge, 2017).

prove counter-factual with stronger, document-based evidence or administrative testimony.⁶⁰

This two-layered approach is in line with the doctrine of preponderance of evidence in the Anglo-Saxon civil system, but is translated in the Indonesian context as proof with reasonable suspicion.⁶¹

Fourth, Safeguard: Due Process and Judicial Accountability To prevent the abuse of the authority of active judges, this model requires the existence of a judicial safeguard mechanism, namely: *Transparency of decisions*, where judges are obliged to explain the rationality of the application of reversal of the burden of proof in legal considerations (*ratio decidendi*).⁶² *Right to rebuttal*, the defendant still has the right to deny the initial allegations with sufficient counter evidence.⁶³ *Vertical judicial supervision*, through cassation or review efforts to test whether the application of the active judge principle is carried out proportionately.⁶⁴ This safeguard ensures that the active role of judges does not shift to judicial overreach, but remains within the framework of a fair trial in accordance with Article 28D paragraph (1) of the 1945 Constitution and Article 6 of the European Convention on Human Rights as a universal reference.⁶⁵

Theoretical and Systemic Implications The “Shifting + Active Judge” model offers a theoretical contribution in two directions. *First*, an epistemological reconstruction of classical proof theory, by replacing the paradigm of *passive neutrality* with *active impartiality*.⁶⁶ Judges remain neutral on the outcome, but not neutral on procedural unfairness. *Second*, normative reconstruction in the context of *a principle-based approach*, where procedural justice is not seen as a set of rigid rules, but rather as a dynamic principle that is interpreted based on constitutional values and human rights.⁶⁷ Thus, the theory of proof is no longer static, but *responsive*

⁶⁰ Cotterrell, *The Politics of Jurisprudence*, p. 131.

⁶¹ Bennett, A. Dean, and Scott E. Randolph. "Idaho Supreme Court Reverses Course in Applying the McDonnell Douglas Burden-Shifting Framework to Summary Judgement Motion." *Advocate* 57, no. 2 (2014).

⁶² See Republic of Indonesia, *Supreme Court of the Republic of Indonesia, Decision Number 102 K/Pdt.Sus-PHI/2017*.

⁶³ See European Court of Human Rights, *Case of Ruiz Torija v. Spain* (1994) 303-A.

⁶⁴ See also Article 6 of the ECHR on fair trial rights.

⁶⁵ Republic of Indonesia, *1945 Constitution*, Article 28D paragraph (1).

⁶⁶ Hutchinson, Allan C. *The province of jurisprudence democratized*. Oxford University Press, 2008.

⁶⁷ Braithwaite, John. "Rules and principles: A theory of legal certainty." *Australasian Journal of Legal Philosophy* 27, no. 2002 (2002): 47-82; Pečarič, Mirko. "Principles or

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to the social context, as initiated in the theory of *responsive law* by Nonet and Selznick.⁶⁸ In the institutional context, the application of this model will strengthen the capacity of industrial relations judges as *custodians of social justice*, in line with the constitutional mandate of the welfare state.⁶⁹ In the end, this reconstruction is not just a technical reform of proof, but a paradigm shift towards a justice system that is more sensitive to the social and economic realities of justice seekers.⁷⁰

Policy & Doctrinal Recommendations

The reconstruction of the legal theory of proof through the "*Shifting + Active Judge*" model requires elaboration at the normative and institutional levels in order to function effectively in the Indonesian legal system. This recommendation emphasizes three key aspects, namely: (1) the establishment of new *evidentiary rules*, (2) the preparation of judicial *guidelines on active roles*, and (3) the implementation of *the disclosure of evidence mechanism* by employers as a concrete form of procedural responsibility in industrial relations. These three recommendations are not only oriented towards improving the technical procedures of the judiciary, but also aim to strengthen *substantive justice* and *due process of law* within the framework of a *responsive legal system*.⁷¹

A. New Evidentiary Rules: Toward a Principle-Based Evidentiary Reform

Indonesia's current evidentiary system is rigid and *rule-based*, with the dominance of the principle of *actor incumbit probatio* as enshrined in Article 163 of the HIR and Article 283 of the Criminal Code.⁷² However, this paradigm ignores the dimension of substantive justice in cases involving

Rules-based Regulation in the Face of Uncertainty-Does it Really Matter?." *Lex Localis: Journal of Local Self-Government* 15, no. 3 (2017).

⁶⁸ Sukmana, Teja, Zahrah Salsabillah Ashari, and Yadi Darmawan. "Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo." *Peradaban Journal of Law and Society* 2, no. 1 (2023): 92-106.

⁶⁹ Tamanaha, Brian Z. *A Realistic Theory of Law*. (Cambridge: Cambridge University Press, 2017).

⁷⁰ Rahardjo, *Hukum Progresif*.

⁷¹ Nonet, and Selznick, *Law and Society in Transition: Toward Responsive Law*.

⁷² Revised Indonesian Regulations (HIR) Article 163; Legal Claim (Rv) Article 283.

inequality in legal relations, such as layoff cases. In this context, the reform of the evidentiary rules needs to be directed towards *principle-based evidentiary reform*, which is a reform that emphasizes the principle of equal access to evidence and the protection of the weak.⁷³

- 1) Proposed Regulation, it is proposed that the Supreme Court issue a Supreme Court Regulation (Perma) on *Application of Reversal of the Burden of Proof in Employment Disputes*. This kind of Perma will strengthen the normative legitimacy of the *shifting model* without crashing into the principles of applicable civil procedure law.⁷⁴ Similar steps were taken by the European Union through *Directive 97/80/EC* which was later integrated into *Directive 2006/54/EC* on equality in the workplace.⁷⁵
- 2) Principle-Based Approach. In a *principle-based approach*, law is not seen solely as a normative order, but as a means of achieving the basic value of justice.⁷⁶ Thus, the establishment of new rules of proof must contain the principles, 1) Equality of arms: each party has a balanced opportunity to access and present evidence; 2) Substantive fairness: evidence is directed to uphold substantive justice, not technical formality; 3) Proportionality: the burden of proof is shifted rationally and limitedly.⁷⁷

B. Judicial Guideline for Active Role in Labour Disputes

Judges are the central actors in operationalizing the *shift of burden of proof* fairly. However, without clear guidance, the application of the principle of active judges has the potential to cause *judicial overreach* or inconsistency in decisions between courts. Therefore, an *active judge guideline is needed* that regulates the parameters of judge intervention in the context of

⁷³ Burgemeestre, Brigitte, Joris Hulstijn, and Yao-Hua Tan. "Rule-based versus principle-based regulatory compliance." In *Legal Knowledge and Information Systems*. (IOS Press, 2009), pp. 37-46.

⁷⁴ Deakin, Simon. *Addressing Labour Market Segmentation: The Role of Labour Law*. Centre for Business Research, University of Cambridge, 2013.

⁷⁵ See Council Directive 2006/54/EC on Equal Opportunities and Treatment (EU, 2006).

⁷⁶ See Cotterrell, *The Politics of Jurisprudence*, p. 120.

⁷⁷ See Hutchinson, *The Province of Jurisprudence Democratized*, p. 209.

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employment proof.⁷⁸ This principle-based reform is in line with the direction of the reform of the civil law system in the Netherlands after the 2002 *Wetboek van Burgerlijke Rechtsvordering* (Rv) reform, which expanded the scope for flexible proof in employment disputes.⁷⁹

- 1) *Active Judge Parameters*
- 2) The guidelines can contain four normative parameters. First, the Threshold of Inequality: Judges can only act actively if it is proven that there is asymmetric control of evidence between the employee and the employer.⁸⁰ Second, the Judicial Inquiry Authority: The judge has the authority to order the party in possession of the evidence to produce evidence, while maintaining the confidentiality of business data.⁸¹ Third, Facilitative Role, Not Advocacy: Judges are active in assisting in the collection of evidence, but cannot be a "third party" siding with one of the parties.⁸² Fourth, the Accountability Clause: Every action of an active judge must be explicitly described in the legal considerations section of the decision, so that it can be supervised by the Supreme Court through cassation or review.⁸³
- 3) *Institutional Implementation*
The implementation of these guidelines can be integrated in *the Compilation of Judge Code of Conduct (KPPH)* and judicial technical training by the Center for Judicial Technical Education and Training

⁷⁸ Clermont, Kevin M., and Stewart J. Schwab. "How employment discrimination plaintiffs fare in federal court." *Journal of Empirical Legal Studies* 1, no. 2 (2004): 429-458.

⁷⁹ van Rhee, C. H., and Remme Verkerk. "The Netherlands: A No-Nonsense Approach to Civil Procedure Reform." *Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties*. (Dordrecht: Springer Netherlands, 2013), pp. 259-280.

⁸⁰ See Sherly, Sherly Ayuna Putri, Agus Mulya Karsona, and Revi Inayatillah. "Pembaharuan Penyelesaian Perselisihan Ketenagakerjaan di Pengadilan Hubungan Industrial Berdasarkan Asas Sederhana, Cepat dan Biaya Murah Sebagai Upaya Perwujudan Kepastian Hukum." *Jurnal Bina Mulia Hukum* 5, no. 2 (2021): 310-327; Huri, Daman, et al. "Problematika Proses Mediasi Ketenagakerjaan Ditinjau Dari Aspek Keadilan (Studi Pada Disnakertrans Jawa Timur)." *Maliyah: Jurnal Hukum Bisnis Islam* 13, no. 2 (2023): 221-251.

⁸¹ See Case C-109/88, *Danfoss v. Danish Employees' Association* [1989] ECR I-3199.

⁸² Waddington, L. "Shifting the Burden of Proof: The EU Experience," *Maastricht Journal of European and Comparative Law* 25, no. 3 (2018): 351-370, <https://doi.org/10.1177/1023263X18769150>.

⁸³ See Komisi Yudisial Republik Indonesia, *Kode Etik dan Pedoman Perilaku Hakim*, 2009. Available online at <https://komisiyudisial.go.id/storage/assets/uploads/files/Kode-Etik-dan-Pedoman-Perilaku-Hakim.pdf>

(Pusdiklat MA).⁸⁴ This approach expands the function of judges as *custodians of social justice* without violating the principle of *judicial neutrality*.⁸⁵

C. Disclosure Mechanism: Employers' Obligations in Opening Access to Evidence

One of the roots of the difficulty of proving in layoff disputes in Indonesia is the absence of a disclosure of *evidence mechanism*. In the Anglo-Saxon legal system, *discovery* and *disclosure* became the main instruments to reduce *information asymmetry*.⁸⁶ In the Indonesian context, a similar mechanism can be applied on a limited basis through the employer's obligation to open relevant employment documents on the order of a judge.

1) Principle of Evidence Transparency

This reform can be included in the draft amendment to Law No. 2 of 2004 concerning the Settlement of Industrial Relations Disputes by adding a new article that requires employers to submit performance evaluation reports, warning letters, and employment contracts if requested by the judge; Allow the examination of internal documents (e.g. attendance or payslips) under court supervision; Provide workers with access to digital work records through the company's electronic system.⁸⁷ This obligation can be seen as a *procedural equality duty* that is in line with the principles of *good faith and fair dealing* in civil law.⁸⁸

2) Safeguard Mechanism

In order not to violate the right to privacy or trade secrets, the *disclosure mechanism* must be governed by three layers of protection: *First*, Judicial Authorization: a disclosure order can only be issued by a judge after assessing the relevance of the evidence. *Second*, the

⁸⁴ Judicial Technical Training Center of the Supreme Court of the Republic of Indonesia, *Industrial Relations Judge Training Module* (Jakarta, 2023).

⁸⁵ See Rahardjo, *Hukum Progresif*, p. 120.

⁸⁶ Adinyaev, Semyon I., Lyudmila A. Bukalerova, and Alexandra S. Vasilenko. "Experience of the States of the Anglo-Saxon System of Law in Countering Market Manipulation and Unlawful Use of Insider Information." *Institute of Scientific Communications Conference*. (Cham: Springer International Publishing, 2019).

⁸⁷ Bill on Amendments to Law No. 2 of 2004 concerning PPHI (Academic Draft, BPHN, 2024).

⁸⁸ Stein, Peter. "The Law of Obligations: Roman Foundations of the Civilian Tradition." *The American Journal of Legal History* 38, no. 1 (1994): 94-96.

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Confidentiality Clause: sensitive information can be sealed or only opened in a closed courtroom. *Third*, Use Restriction: the evidence disclosed can only be used for the purposes of the relevant case.⁸⁹ This approach is in line with the European Union's General Data Protection Regulation (GDPR) and the principles of personal data protection as stipulated in Law No. 27 of 2022 concerning Personal Data Protection.⁹⁰

3) Implementation Model

Institutionally, the disclosure mechanism can be facilitated through the Supreme Court's digital platforms such as E-Court and SIPP, by adding a secure evidence upload feature that allows for a limited and encrypted exchange of documents between parties and the court.⁹¹ The implementation of digitalization supports the principles of efficiency and transparency as implemented by the Labour Courts of Singapore through the Electronic Litigation System (ELS) system.⁹²

The three recommendations — updates to evidentiary rules, active judge guidelines, and *disclosure evidence mechanisms* — should be integrated into the broad framework of *responsive legal reform*.⁹³ This approach places law not as a *closed normative order*, but as an adaptive means that responds to the social reality of modern employment.⁹⁴ From a legal theory perspective, the integration of “*Shifting + Active Judge + Disclosure*” creates what can be termed the “Tripartite Evidentiary Justice Model”, in which procedural, substantive and structural justice are mutually reinforcing.⁹⁵ Normatively, this model serves as a bridge between the classical theory of *the onus probandi* and the paradigm of transformative justice in the era of modern constitutionalism.⁹⁶

⁸⁹ See GDPR Art. 5 & 32; Law No. 27 of 2022 concerning Personal Data Protection.

⁹⁰ *Ibid.*

⁹¹ See Supreme Court of the Republic of Indonesia, *E-Court and SIPP Implementation Report 2023* (Jakarta, 2024).

⁹² Foo, Chee Hock, Eunice Chua, and Louis NG. "Civil case management in Singapore: Of models, measures and justice." *ASEAN Law Journal* (2014): 1-34.

⁹³ Nonet, and Selznick, *Responsive Law*, p. 84.

⁹⁴ See Thomas, *A Realistic Theory of Law*, p. 145.

⁹⁵ Black, Julia. "The rise, fall and fate of principles-based regulation." *Law reform and financial markets*. (London: Edward Elgar Publishing, 2011).

⁹⁶ See Rahardjo, *Hukum Progresif*, pp. 152-153.

Conclusion

The study suggests that judicial activism could indeed redefine justice in employment termination disputes by reshaping evidence standards. It argues that the traditional legal framework in Indonesia, grounded in the principle of *actor incumbit probatio*, is insufficient to address the inherent imbalance in power and access to evidence between employers and employees. Given this, the study advocates for a more active role for judges in industrial relations cases, particularly through the Shifting of Burden of Proof model, which has been successfully implemented in European legal systems. By shifting part of the evidentiary burden to employers when workers present prima facie evidence, and encouraging an active judicial role, the approach aims to ensure a more equitable and just process. This model could foster a shift towards a justice-oriented evidentiary paradigm, where the focus is not just on formal rules, but also on achieving substantive fairness. Therefore, judicial activism, when grounded in such frameworks, has the potential to substantially redefine justice in employment termination disputes by promoting procedural balance and enhancing the effectiveness of evidence standards.

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