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Judicial Discretion and *Ultra Petita* in Employment Termination Cases: Lessons from Dutch Arbitration System

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Abstract: The principle of ex aequo et bono occupies a unique position within Indonesia's legal landscape: although not expressly codified, it is increasingly invoked by judges to pursue substantive justice in employment termination disputes. This judicial practice, however, raises concerns regarding legal certainty and the boundaries of judicial authority, especially when decisions extend beyond the parties' claims and risk violating the *ultra petita* doctrine. This article examines the application of ex aequo et bono in Indonesian labor courts through a normative legal analysis, using both comparative and conceptual approaches. A focal point of the study is Supreme Court Decision No. 223 K/Pdt.Sus-PHI/2017, in which the court terminated an employment relationship despite neither party explicitly requesting such relief. By comparing Indonesia's judicial approach with the Netherlands, where *ex aequo et bono* is permitted exclusively within arbitration and only with explicit party consent. This article highlights the structural safeguards embedded in Dutch law that preserve both fairness and legal certainty. The results show that Indonesia's unregulated use of ex aequo et bono creates inconsistencies and risks judicial overreach, underscoring the urgent need for statutory guidance. This study argues that incorporating explicit party consent and clearer procedural boundaries into Indonesia's labor dispute resolution framework would better harmonize equity-based reasoning with the principles of legal certainty and judicial accountability.

Keywords: Ex Aequo Et Bono; Contract; Employment Termination; Labor; Industrial Relations

1. Introduction

The principle of *ex aequo et bono* occupies a distinctive role within Indonesia's legal system, as it lacks explicit regulation in statutory law but is utilized in judicial practice (law in process).[1] This lack of legal codification has led to debates regarding its proper use, particularly in cases where judicial discretion might conflict with procedural fairness and legal certainty. Considering the potential for inconsistent usage, examining how countries with analogous legal frameworks, such as the Netherlands, adopt the principle becomes crucial. Through a comparative analysis, this article aims to provide a clearer understanding of how ex aequo et bono can be effectively and fairly utilized to resolve disputes in Indonesia, ensuring that justice and equity are achieved for all parties involved.

The legal relationship between employers and employees in Indonesia is established based on either a Fixed-Term Employment Agreement for contract employees or an Indefinite-

[1] Huda, Arsha Nurul. "Ex Aequo et Bono as a Manifestation of Legal Justice for Society." *Damhil Law Journal* 1, no. 2 (2021): 116-129.

Term Employment Agreement for permanent employees.[2] A Fixed-Term Employment Agreement applies to non-permanent work, seasonal jobs, or new product-related tasks. Court rulings based on the principle of ex aequo et bono reflect judicial discretion, enabling judges to decide cases deemed fair and equitable, provided both parties agree.

Albertas Sekstelo,[3] underscores this necessity, stating, "although the examples above use slightly different terminology when to use the amiable *compositeur* or *ex aequo et bono*, e.g., to apply principles deriving therefrom, or assume the powers to decide, or right to decide, all mentioned rules unanimously said that the parties' express permission or authorization is required." Hence, the importance of express party consent in granting arbitrators the authority to decide disputes ex aequo et bono or as an amiable compositeur, underscoring that such powers cannot be assumed without clear authorization from the parties involved.

The requirement for parties' prior consent to apply ex aequo et bono is stipulated in international legal frameworks such as the Statute of the International Court of Justice (ICJ) and the UNCITRAL Arbitration Rules. Article 38(2) of the ICJ Statute provides that the court may decide cases based on ex aequo et bono only with the parties' agreement. Similarly, Article 33 of the UNCITRAL Arbitration Rules (1976) states that arbitrators shall apply applicable law unless the arbitration agreement explicitly authorizes them to decide based on ex aequo et bono or as an amiable *compositeur*.

This study examines a case of employment termination (Case Number 223 K/Pdt.Sus-PHI/2017), in which an employer terminated six contract workers after they requested to be converted to permanent employees. Despite bipartite negotiations and mediation efforts through the Office of Manpower, no agreement was reached. Subsequently, the workers filed a lawsuit at the Bandung Industrial Relations Court, seeking reinstatement as their primary claim and requesting a decision based on ex aequo et bono as their subsidiary claim. On the other hand, the employer requested the dismissal of the workers' claims in its primary response while also seeking a fair judgment (*ex aequo et bono*) as a subsidiary response, without filing a counterclaim for employment termination. In this case, neither the workers (plaintiffs) nor the employer (defendant) explicitly requested employment termination. This research aims to provide an in-depth analysis of the principle of ex aequo et bono, its legal application in Indonesia and international contexts, and its implications for achieving justice and equitable outcomes in employment disputes.

The judge, in this case, ruled based on the principle of ex aequo et bono, declaring the employment relationship between the plaintiffs (workers) and the defendant (employer)

[2] Mustofa, Muhamad Dela Dwi, and Hufron Hufron. "Perlindungan Hukum Bagi Pekerja Kontrak Apabila Di Phk Pada Masa Kontrak Berlangsung." *Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance* 2, no. 1 (2022): 155-170

[3] Sekstelo, Albertas. "Why ex aequo et bono cannot be used without parties' express agreement: a comparative analysis," Jurnal Arbitrazaz 2, 4 (2021): 61

as terminated. The decision also transformed the workers' employment status from Fixed-Term Employment Agreements to Indefinite-Term Employment Agreements and mandated the employer to pay severance compensation equivalent to twice the amount stipulated in Article 156 of Law No. 13 of 2003 on Manpower, implying termination without cause. However, this decision raises significant concerns regarding the principle of *ultra petita*,[4] which prohibits judges from granting claims not expressly requested in the lawsuit or exceeding the relief sought. This principle is enshrined in Article 178(3) of the *Herzien Inlandsch Reglement* (HIR), which explicitly states that "judges are not permitted to issue rulings on matters not requested or to grant more than what is sought."

The employer, as the defendant, objected to the judge's decision, arguing that the *judex facti* exceeded its authority by violating the *ultra petita* principle. This article aims to analyze the application of the ex aequo et bono principle in resolving employment termination disputes in Indonesia, specifically focusing on the scope of judicial competence in adjudicating disputes between the workers of PT. BMMI and PT. BMMI as the defendant under the ex aequo et bono principle. This research is particularly significant because it addresses a critical gap in Indonesia's legal framework, where the ex aequo et bono principle lacks codified regulation but is practiced in courts. By examining this principle's application and exploring the boundaries of judicial authority, this study highlights the need for clear guidelines to ensure fair, consistent, and equitable outcomes in employment disputes.

2. Method

This study utilizes a normative legal research method, incorporating comparative and conceptual approaches to analyze the application of the ex aequo et bono principle. The research begins by examining statutory regulations in Indonesia, such as Law No. 13 of 2003 on Manpower and procedural provisions under the *Herzien Inlandsch Reglement* (HIR), as well as international frameworks like the Statute of the International Court of Justice and the UNCITRAL Arbitration Rules. A comparative approach is employed to evaluate how the Netherlands applies ex aequo et bono within its legal system, offering insights into best practices and safeguards for judicial consistency. The study also conducts an in-depth analysis of relevant case law, focusing on Case Number 223 K/Pdt.Sus-PHI/2017, to assess judicial reasoning and the implications of decisions based on ex aequo et bono. Furthermore, the research adopts a conceptual approach to explore the theoretical foundations of the principle,[5] emphasizing its role in ensuring justice and equity while respecting judicial boundaries.

[4] Ramiyanto, Ramiyanto. "Ultra Petita Decisions In The Context Of Criminal Law Enforcement In Indonesia." *Jurnal Hukum dan Peradilan* 10, no. 1 (2021): 173-196.

[5] Irwansyah. "Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel." *Yogyakarta: Mirra Buana Media*, 2020, p. 117.

3. The Principle of *Ex Aequo et Bono*: A Path to Justice or Legal Overreach in Indonesian Labor Courts?

Law in practice, particularly in disputes over employment termination, it has been noted that judges in Indonesia's Industrial Relations Court (frequently grant claims based on *subsidair* requests or counterclaims (*reconventie*) outlined in lawsuits, which seek decisions that are "just and equitable" (*ex aequo et bono*).[6] The principle of ex aequo et bono empowers judges to deliver rulings rooted in fairness and substantive justice, rather than adhering strictly to statutory provisions. This approach demonstrates an effort by the judiciary to reconcile legal certainty with the need for equitable resolutions, especially in the nuanced context of labor disputes. However, this practice also prompts discussion about its consistency with principles of judicial accountability.

The judiciary operates on two fundamental principles: judicial independence and judicial impartiality, both recognized as essential prerequisites in the judicial systems of all nations adhering to modern constitutional law. Judicial independence ensures that judges have the freedom to decide cases without external influence, while judicial impartiality requires that judges remain unbiased and neutral toward the parties involved. These principles form the cornerstone of any fair judicial system.

Indonesia's judicial system is rooted in legal positivism, which emphasizes that judges must decide cases strictly based on statutory law. Prominent legal positivists include John Austin and Hans Kelsen. Austin, known for his empirical positivism, defined law as a command issued by a sovereign authority that must be obeyed. Kelsen, on the other hand, adhered to idealistic positivism, viewing law as a normative system derived from human values, which are shaped by internal experiences and empirical facts. Kelsen's stufenbau theory,[7] describes the legal system as hierarchical, where lower norms derive their validity from higher norms.

The authority of judges differs from their power. Judicial authority refers to the state-mandated responsibility to examine, adjudicate, and resolve cases in pursuit of justice based on divine principles. Judges are tasked with assisting those seeking justice while overcoming obstacles to ensure proceedings are simple, efficient, and cost-effective. In contrast, judicial power pertains to a judge's right to adjudicate a case independently, free from external interference that could compromise their judgment.

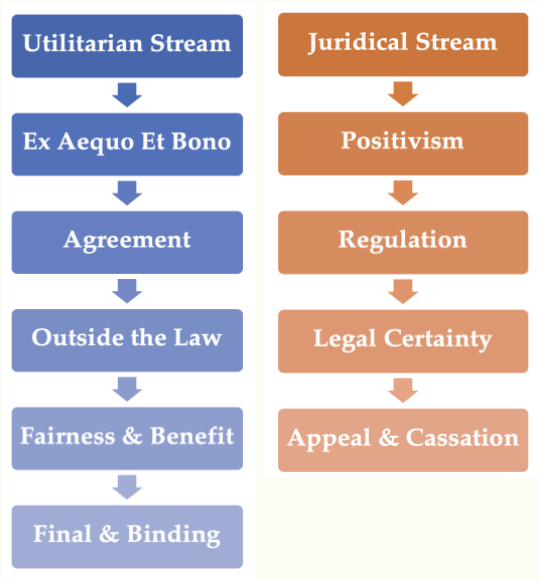
Judicial freedom includes the liberty to examine and decide cases based on a judge's conviction, without extrajudicial influence. Judges have the autonomy to utilize evidence,

[6] Hanifah, Ida. "Government policy against unemployment due to termination of employment." *International Journal Reglement & Society* 2, no. 2 (2021): 77-86.

[7] Asshiddiqie, Jimly, and Muchamad Ali Safa'at. *teori Hans Kelsen tentang hukum*. Jakarta: Mahkamah Konstitusi RI, Sekretariat Jenderal dan Kenpaniteraan, 2006.

assess its validity, and determine whether a concrete event has been proven. They also have discretion over the type of sanctions to impose. However, this independence is bounded by accountability and moral standards. A judge's decision must reflect objectivity and accountability, upholding principles of balance and impartiality. Judicial rulings should demonstrate rational reasoning, transparency, and independence from external influence, as evidenced in the well-founded and justifiable considerations outlined in the judgment.

Chart 1. Judicial Authority in Deciding Employment Termination Cases



Henceforth, Indonesia's legal system adheres to positivism, which dictates that judges must base their decisions on the law, as articulated by legal theorists such as John Austin and Hans Kelsen. While judges in Indonesia are expected to apply the law objectively and without bias, there is a tension between legal positivism and the need for judges to account for the evolving societal values. The judicial authority is distinct from judicial power; the former refers to the judge's duty to resolve cases in accordance with the law, while the latter denotes their freedom from external interference. Judges are expected to exercise their autonomy in evaluating cases, but they must operate within the confines of the law, ensuring accountability and fairness.

Critics argue that strict adherence to positivist principles, as exemplified by figures like Montesquieu and Beccaria, reduces judges to mere instruments of the law, preventing them from exercising discretion that could lead to a more just and evolving interpretation of the law.[8] Thus, there is an inherent limitation in the judicial process when judges

[8] Firjatullah, Muhamad Sulthan, Wasis, and Nur Putri Hidayah. "Legal Protection for Workers from Direct Termination of Employment by Employers: Legal Vagueness and Its Strengthening." *Audito Comparative Law Journal* 6, no. 1 (2025): 14-28.

cannot adapt the law in line with societal changes. While judicial independence and impartiality are key to ensuring justice, the rigid application of positivist legal principles in Indonesia limits the ability of judges to interpret the law dynamically and according to evolving social values. This tension between legal formalism and the need for judicial discretion continues to shape the discourse on the role of judges in achieving true justice.

The perspectives of *Judex Factie* and *Judex Juris* often diverge when deciding cases based on subsidair claims invoking the principle of ex aequo et bono.[9] While some view such rulings as consistent with legal principles, others argue they constitute *ultra petita*. In some cases, the courts have gone beyond this limit, as illustrated by Supreme Court Decision No. 556 K/Sip/1971, where a ruling exceeded the plaintiff's request, provided it aligned with the material facts of the case. However, such applications are highly situational and require careful deliberation.

A controversial decision reflecting these complexities is the Industrial Relations Court Decision No. 223 K/Pdt.Sus-PHI/2017, dated March 16, 2017. This case involved PT Bekasi Metal Inti Megah (PT BMIM) as the defendant/petitioner for cassation and six employees as the plaintiffs/respondents to cassation. The dispute revolved around the termination of employment (PHK) initiated by PT BMIM after the workers refused to sign daily employment contracts offered by the company. The workers argued that they had been employed as fixed-term employees for over three years, which, by law, entitled them to permanent employment status.

The plaintiffs sought reinstatement in their claims, while the defendant did not file a counterclaim for termination. Nevertheless, both judex factie and judex juris ruled to terminate the employment relationship, effectively deciding on an issue neither party explicitly requested. This decision raises questions about whether it qualifies as ultra petita, as it went beyond the claims made by both parties.[10] The principle of *ex aequo et bono* is outlined in Article 38(2) of the Statute of the International Court of Justice and Article 33 of the UNCITRAL Arbitration Rules, which stipulate that judgments based on ex aequo et bono require the explicit consent of both parties. Without such consent, the ruling becomes invalid.[11]

In the author's view, the essence of ex aequo et bono lies in the mutual agreement of the parties to allow the judge to render a decision based on fairness and utility, even if it goes beyond the initial claims. Such consent grants judges the authority to issue rulings deemed

[9] Harahap, Muhammad Kholis Mujaiyyin Ahda. "Masa Depan Sistem Peradilan Terbuka Untuk Umum Ditingkat Mahkamah Agung." *Jurnal Beleidsregel* 1, no. 1 (2022): 47-51.

[10] Amelia, Sonia, Ega Permatadani, Ida Ayu Rosida, Rifda Ayu Akmaliya, and Anang Dony Irawan. "Legal Protection for Workers who Have Harmed Employers: Case Study of Supreme Court Verdict Number 702K/Pdt. Sus-Phi/2021." *Indonesia Law Reform Journal* 3, no. 1 (2023): 56-68.

[11] Rupidara, Neil Semuel, and Peter McGraw. "Institutional change, continuity and decoupling in the Indonesian industrial relations system." *Journal of Industrial Relations* 52, no. 5 (2010): 613-630.

just, equitable, and beneficial within the context of the dispute. The authority of judges to adjudicate and decide a case based on the principle of ex aequo et bono must first be based on the mutual consent of the parties involved in the dispute. By applying this principle, the judge is empowered to render a decision that may not align with the law (*contra legem*), with the aim of achieving justice and benefiting the parties. This approach allows for resolving cases fairly and appropriately, ensuring that the decision is accepted by all parties involved.

The key distinction between equitable principles recognized as "general principles of law" and *ex aequo et bono* is that decisions based on traditional equitable rules are still considered to be made within the framework of the law (*infra legem*). In contrast, decisions made ex aequo et bono are regarded as operating outside or even contrary to legal principles and reasoning (*contra legem*). In this context, ex aequo et bono is not intended to fill gaps in the law (*lacunae*) or to interpret existing legal rules (*praeter legem*).[12] Instead, it is invoked to grant the judge broad discretion to administer "equity" in any manner deemed just, regardless of the strict boundaries set by legal norms.

However, as it turns out into practice, the principle of ex aequo et bono, while empowering judges to render decisions based on fairness and equity, raises significant concerns in the context of Indonesian labor law, especially in employment termination disputes.[13] On one hand, it serves as an important tool for ensuring just and equitable outcomes when strict application of the law may not fully address the unique circumstances of each case. This principle allows judges to act with discretion, ensuring that justice is not solely confined to the letter of the law but considers the substantive needs of the parties involved, particularly in complex labor disputes.

For this reason, the implementation of ex aequo et bono can also lead to legal overreach, especially when judges exceed the bounds of the claims presented by the parties (*ultra petita*), potentially undermining the predictability and consistency that the legal system strives to maintain. While some judicial decisions based on this principle can be seen as necessary for achieving fairness, others risk encroaching on legal certainty, as they may go beyond what was sought by either party. Furthermore, the lack of clear statutory guidance on the application of ex aequo et bono in Indonesian courts leaves room for interpretation, making the principle's application inconsistent and potentially contentious.

As results, while ex aequo et bono can be a valuable mechanism for achieving justice in labor disputes, must be carefully balanced to prevent judicial overreach and maintain legal certainty. For it to be effectively integrated into the Indonesian judicial system, there needs to be clearer guidelines and a more structured framework that ensures its use aligns with

[12] Silver, Charles. "The Responsibilities of Lead Lawyers and Judges in the Multidistrict Litigations." *Fordham Law Review* 79 (2010): 1985.

[13] Izzati, Nabiyla Risfa. "Deregulation in Job Creation Law: The Future of Indonesian Labor Law." *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 9, no. 2 (2022): 191-209.

both legal principles and the pursuit of equitable outcomes. The principle should only be invoked with the explicit consent of the parties, ensuring that any decision made under this principle is perceived as fair and legitimate by all involved.

4. *Ex Aequo et Bono* in Employment Terminations: Insights from Indonesia and the Netherlands

In conducting a comparative legal study, the researcher will explore the application of the principle ex aequo et bono in labor law, particularly in the resolution of termination of employment disputes, in both Indonesia and the Netherlands. The Dutch legal system allows for the resolution of termination of employment cases through arbitration, where the arbitrator may decide the case based on ex aequo et bono (or amiable compositeur), provided that both the employer and employee agree to the application of this principle in their dispute resolution.[14]

Under Article 1054, paragraph 3 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), arbitration in the Netherlands is permitted to resolve disputes based on ex aequo et bono (as wise men in accordance with reasonableness and fairness) if the parties have agreed to authorize the arbitrator to do so. This provision allows the parties involved to choose arbitration as the forum for resolving termination of employment cases, providing a flexible and equitable alternative to traditional court procedures.

In the Netherlands, employers and employees can select arbitration as their legal forum for resolving termination of employment disputes. As outlined in the article "Understand dispute resolution mechanisms and legal compliance in Netherlands" on Rivermate's website, arbitration can offer a more tailored and efficient approach to resolving disputes, ensuring outcomes that prioritize fairness and benefit for both parties, provided both sides consent to the process.

> *Arbitration is an alternative dispute resolution mechanism in labor matters that parties can choose. Both parties must have a prior agreement in place opting for arbitration. Several arbitration institutions exist in the Netherlands, specializing in different sectors or types of disputes. The arbitration process involves parties mutually selecting one or more arbitrators. The proceedings are more flexible than court procedures but adhere to principles of fairness and due process. The arbitrator's decision is final and binding.*[15]

[14] Blair, Cherie, Ema Vidak-Gojkovic, and Marie-Anais Meudic-Role. "The médium is the message: establishing a system of business and human rights through contract law and arbitration." *Journal of International Arbitration.* 35 (2018): 379.

[15] Rivermate. "Understand dispute resolution mechanisms and legal compliance in Netherlands Rivermate," (https://www.rivermate.com/guides/netherlands/dispute-resolution)

In contrast, the Indonesian legal system, particularly in the resolution of industrial relations disputes, provides for mediation, conciliation, or arbitration as mechanisms for resolving conflicts. However, in this context, arbitration does not have the competence to resolve termination of employment disputes; it is limited to resolving industrial relations disputes such as disputes of interests and disputes between trade unions within a single company. Article 39 of the Indonesian Industrial Relations Court Law stipulates: *"The resolution of industrial relations disputes through arbitration covers disputes of interests and disputes between trade unions/labor unions within the same company."* This indicates that arbitration in Indonesia is restricted to certain types of industrial disputes and does not extend to cases involving the termination of employment, which are generally handled through other legal procedures such as litigation or mediation.[16]

The dispute resolution procedure before the judge was initially intended to be swift, simple, and cost-effective. The Civil Procedure Code made certain exceptions, especially for first-instance labor law cases. For instance, the use of lawyers was not mandatory, administrative costs were low, and the procedure was simplified, often beginning with an informal petition. However, in 2002, reforms were introduced that eliminated some of these facilities, only for some of them to be restored in the 2015 reforms. Despite these changes, the speed of resolution is still guaranteed, particularly in cases related to sick leave payments, and also for termination of employment disputes, which continue to be initiated with a lawsuit. Other labor law cases, however, still take the same amount of time as the normal procedure. Additionally, facts such as court decisions being subject to appeals and cassation often make labor disputes even more prolonged and costly.

Labor dispute resolution follows the civil procedural law, such as the burden of proof rule: the party initiating the case must prove their claims, unless the law stipulates otherwise or the court shifts the burden of proof based on good faith. However, in some labor disputes, the court (and sometimes the lawmakers) has slightly adjusted these rules to achieve a fairer distribution of the burden of proof between the parties. Lawsuits are generally filed in the jurisdiction where the plaintiff is located or where the work is carried out. The court's magistrates or special judges (*voorzieningenrechter*) can issue summary decisions if needed. In principle, these decisions can be appealed and subjected to cassation, but in practice, these rulings often become final as the parties choose not to pursue further legal recourse and proceed with the substantive process.[17] This procedure plays a critical role in strike disputes, which, of course, usually need to be decided swiftly.

[16] Yaroshenko, Oleg, Nataliia Melnychuk, Sergiy Moroz, Olena Havrylova, and Yelyzaveta Yaryhina. "Features of remote work in Ukraine and the European Union: Comparative legal aspect." *Hasanuddin Law Review* 7, no. 3 (2021): 136-149.

[17] Bartley, Tim, and Niklas Egels-Zandén. "Beyond decoupling: Unions and the leveraging of corporate social responsibility in Indonesia." *Socio-Economic Review* 14, no. 2 (2016): 231-255.

The employment relationship between workers and employers is based on an employment contract (contract of employment). This contract can be canceled (rescinded) or terminated (dissolved) (German: Auflösung) through litigation procedures with the intervention of a district court magistrate.[18] According to the general principles of contract law, a court can always annul a contract if one party fails to perform their obligations (breach of contract). Unfortunately, this method is rarely used in the context of employment contracts because the Dutch Civil Code (DCC) provides a special procedure for canceling such agreements.

Since the 2015 reforms, the special procedure for canceling an employment contract has been divided into two categories based on the subject of the cancellation: first, where the cancellation is initiated by the employer, and second, where the cancellation is initiated by the employee. The court may annul an employment contract, whether it is a permanent employment contract or a fixed-term contract, which can be terminated before its expiration date or upon the expiration of the agreed term, provided that regular notice of termination has been given.

As long as the termination is not due to a serious fault (serious culpable act or omissions to act) by the employer, the notice period is reduced by the time between the annulment lawsuit and the decision, as long as the remaining notice period is not less than one month. The court may deviate from this rule and set an earlier termination date if the serious fault originates from the employee. If the termination is due to significant fault by the employer, the court will award fair compensation to the employee.[19] Additionally, if the termination is based on reasonable grounds by the employer, the court may grant compensation to the employee, up to a maximum of half of the transition allowance.

The court may determine the end date of a fixed-term employment contract that cannot be terminated prematurely when the contract is annulled. In such cases, the court may grant compensation to the employee, up to the amount of the salary for the remaining period that should have been fulfilled under the fixed-term contract, if the termination occurs due to legal reasons. In addition to this compensation, the court may award fair compensation if the termination is due to significant fault by the employer.[20] Conversely, if significant fault originates from the employee, the court may grant compensation to the employer, up to the salary amount for the remaining period that should have been fulfilled under the fixed-term contract, if it ends due to legal reasons.

[18] Jacobs, Antoine. T. J. M. *Guide to European Labour Law*. Open Press Tilburg University, 2022.

[19] Kuruvilla, Sarosh, and Christopher L. Erickson. "Change and transformation in Asian industrial relations." *Industrial Relations: A Journal of Economy and Society* 41, no. 2 (2002): 171-227.

[20] Kasih, Desak Putu Dewi, Made Suksma Prijandhini Devi Salain, Kadek Agus Sudiarawan, Putri Triari Dwijayanthi, Dewa Ayu Dian Sawitri, and Alvyn Chaisar Perwira Nanggala Pratama. "Classification of Industrial Relations Disputes Settlement in Indonesia: Is It Necessary?." *Hasanuddin Law Review* 8, no. 1 (2022): 79-94.

Court decisions regarding the termination of employment can be appealed to the Gerechtshof and further appealed to the Hoge Raad. However, regarding decisions on the annulment of an employment contract filed by an employee based on Article 7:671c of the Dutch Civil Code (DCC), appeals and cassations are limited to the compensation amount. The appeal and cassation procedures do not suspend the execution of the decision.[21]

In the appeal and cassation process, the court has the authority to correct the previous decision regarding the termination of employment, either by reinstating the employment relationship or awarding compensation to the aggrieved employee. When reinstating the employment relationship, the court not only determines a specific time for the reinstatement but also addresses the legal consequences arising from the contract termination during that period. The court will also determine the termination date of the employment contract and apply compensation provisions as outlined in Article 7:671b and Article 7:671c of the DCC when concluding that the previous decision rejecting the annulment of the employment contract was incorrect. Additionally, the court will set a specific time for the end of the employment contract if the previous decision on the termination notice was ruled incorrectly.

In the Netherlands, courts do not resolve employment termination cases based on the principle of ex aequo et bono or amiable compositeur, but rather in accordance with applicable legal provisions. This is due to two main reasons: the legal system followed and normative provisions. The Netherlands operates under a civil law system, which is characterized by abstract reasoning and the supremacy of written statutes. Civil law, including labor law, is codified in legal codes, which are comprehensive, authoritative, and systematically organized collections of general clauses and legal principles.[22] These codes are divided into books or sections that logically cover the related areas of law. As such, the legal code is regarded as the primary source of law, referenced for resolving specific legal issues.

This legal system has implications for the judiciary, where judges do not create new laws but apply the law as it stands. Judges are very cautious when handling cases, and the provisions set forth in the legal codes serve as the basis for their decisions. Judges interpret, fill legal gaps, and develop the law based on these established norms. Additionally, a "reasonable interpretation of the statute" is acknowledged, wherein the Hoge Raad may hesitate to fill legal gaps, believing that the issue can be resolved in other ways. In such cases, the court explicitly defers the resolution to lawmakers, arguing that the matter is beyond the judiciary's law-developing role (referred to as "*rechtsvormende*

[21] Jacobs, Antoine, *Loc.Cit.*

[22] Riza, Marwati, and Zulkifli Aspan. "Legal Protection Of Certain Time Workers In Companies." *Awang Long Law Review* 5, no. 2 (2023): 638-653.

taak" in Dutch and "law-developing task of the judiciary" in English). In this context, the judge is seen as "*le bouche de la loi*," meaning the mouthpiece of the law.[23]

Principles of civil procedure position judges as passive actors. The guiding principles are judicial passivity (*lijdelijkheid or lijde-lijkheid van de rechter*) and party autonomy (*partijautonomie*). As "*le bouche de la loi*," judges are expected to apply binding law when deciding cases.[24] While the parties can bring claims based on certain legal provisions, the judge still has the authority to apply the appropriate legal basis ex officio (on their own initiative), including in cases involving international law. This principle illustrates that judges are passive in discovering facts (they do not actively seek evidence or facts that the parties do not submit), but they are active in applying the law. In other words, even if the parties present claims based on specific legal provisions, the judge still has the duty to evaluate and choose the correct legal basis for the case, regardless of whether the legal basis has been presented by the parties. If a judge fails to present the correct legal foundation, the decision is likely to be overturned by a higher court.

The court also does not resolve termination of employment disputes based on the principle of amiable compositeur, as it is not within its jurisdiction. By attribution, the Civil Code (DCC) grants the authority to adjudicate based on amiable compositeur solely to Arbitration Bodies.[25] This provision is outlined in Article 4:1054, which states:

> *(1) The arbitral tribunal shall render its award in accordance with the rules of law.*
>
> *(2) If the parties have decided upon a choice of law, the arbitral tribunal shall render its award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall render its award in accordance with the rules of law which it considers appropriate.*
>
> *(3) The arbitral tribunal shall decide as amiable compositeur, if the parties by agreement have authorised it to do so.*
>
> *(4) In all cases the arbitral tribunal shall take into account any applicable trade usages.*

The provision above shows that the Arbitration Body is authorized to resolve disputes based on the principle of amiable compositeur only with the explicit consent of the parties involved in the dispute. Explicit consent is a requirement for the dispute to be adjudicated by the Arbitration Body, and the arbitrator must not disregard this condition. If this requirement is not met, the resulting decision is considered null and void by law.

[23] Peter J. Van Koppen, "Judicial Policy-Making in the Netherlands: the Case-by-Case method," as cited in: Mary L. Volcansek, Ed, Judicial politics and Policy-Making in Westers Europe, New York, Routledge, 2013, p. 128.

[24] Hartkamp, Arthur S. *Contract law in the Netherlands*. Kluwer Law International BV, 2015, p. 37.

[25] Jaremba, Urszula. *National judges as EU law judges: the Polish civil law system*. Vol. 5. Martinus Nijhoff Publishers, 2013.

In handling termination of employment disputes, the judge will only base their decision on the applicable laws. If a judge is presented with a claim that requests a decision based on amiable compositeur, the judge will, ex officio, reject or not accept the claim.

In the Netherlands, employment termination disputes can be resolved through arbitration, where the arbitrator has the authority to make decisions based on the principle of ex aequo et bono, or amiable compositeur. This principle ensures that decisions are fair, just, and beneficial, provided both the employer and the employee agree to its use in resolving their dispute.

In the Netherlands, both employers and employees have the option to choose arbitration as a forum to settle disputes over employment termination. The arbitration process follows Dutch arbitration laws, and both parties must consent to arbitration in advance. There are several arbitration institutions in the Netherlands that specialize in different sectors or types of disputes. Arbitration is more flexible than court procedures but still adheres to the principles of fairness and due process.[26] The arbitrator's decision is final and binding. The resolution will therefore proceed through the Arbitration mechanism according to Dutch arbitration provisions:

> Arbitration is an alternative dispute resolution mechanism in labor matters that parties can choose. Both parties must have a prior agreement in place opting for arbitration. Several arbitration institutions exist in the Netherlands, specializing in different sectors or types of disputes. The arbitration process involves parties mutually selecting one or more arbitrators. The proceedings are more flexible than court procedures but adhere to principles of fairness and due process. The arbitrator's decision is final and binding.

In contrast, the Indonesian legal system, particularly regarding the resolution of industrial relations disputes, offers options such as mediation, conciliation, or arbitration. However, arbitration does not cover termination of employment cases in Indonesia. Arbitration is limited to disputes related to interests or those between trade unions within a single company, as outlined in Article 39 of the Industrial Relations Dispute Settlement Law, which specifies that arbitration can only address interest-based disputes and conflicts between unions within a company.

Comparing the role of arbitration in resolving termination of employment disputes in both countries, several key differences emerge. In the Netherlands, arbitration is a viable option for resolving termination cases, provided both parties agree to it. This allows for a more flexible and efficient process that aligns with fairness and due process principles, and the arbitrator's decision is final and binding, bringing closure to the dispute. The ability to choose arbitration as a resolution forum demonstrates a legal system that values mutual consent and uses arbitration as a means to resolve disputes outside the formal court system. On the other hand, the Indonesian system limits arbitration's role to certain types of industrial relations disputes, excluding employment termination cases. Such disputes must be resolved through mediation or conciliation before being taken to

[26] Hidayah, Nur, Fitria Esfandiari, and Sholahuddin Al-Fatih. "Indonesia's Inability in Removing Self from Colonial Law (Study of Employment Laws)." In *Proceedings of the 3rd International Conference on Indonesian Legal Studies, ICILS 2020, July 1st 2020, Semarang, Indonesia*. 2021.

court, reflecting a more rigid legal framework.[27] This limitation may lead to a slower and more formal process for resolving termination-related disputes.

Given these points, the primary conclusion from this comparison is that while the Netherlands offers a flexible arbitration-based solution for employment termination disputes, Indonesia's legal system restricts arbitration to specific types of industrial relations disputes, leaving termination cases to be handled through traditional judicial processes. This contrast highlights the different levels of flexibility in dispute resolution mechanisms and the distinct legal frameworks each country employs to address employment-related issues.

5. Conclusion

The principle of ex aequo et bono offers judges the discretion to decide cases based on fairness and equity rather than rigid adherence to legal norms. In Indonesia, this principle has been used in employment termination disputes to bridge gaps in legal frameworks. However, its application raises concerns about exceeding judicial authority (*ultra petita*) and undermining legal predictability. This indicates the urgent need for statutory regulation to standardize its use and ensure consistent outcomes. By contrast, the Netherlands provides a structured approach where the application of ex aequo et bono is confined to arbitration, contingent on mutual consent. This system safeguards both fairness and legal certainty, offering a model for Indonesia to emulate. Incorporating clearer guidelines and party consent into Indonesia's legal framework could enhance the equitable resolution of employment disputes while maintaining judicial accountability and procedural fairness.

Adopting ex aequo et bono within alternative dispute resolution mechanisms, such as arbitration or mediation, could offer a more efficient and equitable approach. Engaging stakeholders, including employers and employees, in discussions on these reforms will further ensure the acceptability and practicality of such measures. Future research should focus on developing practical guidelines for the consistent application of the ex aequo et bono principle in Indonesia's employment termination disputes. This includes creating clear statutory provisions to prevent judicial overreach (*ultra petita*) and ensure fairness while maintaining legal certainty. Studies could also explore how integrating ex aequo et bono into arbitration or mediation frameworks might offer a more efficient and equitable alternative to traditional litigation processes.

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