

# INDUSTRIAL RELATION AND CRIMINAL SANCTION THE CASE OF INDONESIA

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## INDUSTRIAL RELATION AND CRIMINAL SANCTION THE CASE OF INDONESIA

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### ABSTRACT

*This research examined the laborers' tendency to utilize criminal sanctions in industrial relations in Indonesia when their company violates their rights. This trend is essentially noteworthy for investors who plan to establish companies in Indonesia, so then they will not become subject to criminal sanctions on labor. Industrial relations involve very complex legal relationships. This is because the legal regime regulating it is a mixture of numerous legal fields, including civil law, state administrative law, criminal law and in certain cases, international law. There is the tendency of the workers/laborers to impose criminal law drawn from various fields of law regulating industrial relations when their company violates their rights. Labor criminal sanctions in industrial relations have their own characteristics in comparison to general criminal sanctions. In the practice of enforcing labor laws in Indonesia, the courts have decided on several labor criminal cases, including not registering workers to the workers' Social Security Organizing Agency or BPJS and stipulating a wage that is below the minimum standard.*

**Keywords:** Criminal Sanctions, Industrial Relationship, Labor.

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### I. INTRODUCTION

The reform of the political and state order that took place in 1998 in Indonesia changed many things, including the economic and legal domains. Using the typology proposed by Nonet and Selznick (Nonet Selznick, 2008), namely the post-1998 legal reforms, many laws led to responsive and even autonomous laws in comparison with the legal order in the New Order and Old Order regimes, which were more of a repressive style of law.

One of the reforms in the field of law related to the economic aspects concerned labor law. The development of labor law in Indonesia came in the new era after the 1998 reform, which

also influenced the dynamics of industrial relations, especially those related to legislation and regulations. The reform era significantly defined the substance of the various existing legislation and regulations. Iman Soepomo claimed that, in the field of industrial relations, the atmosphere and socio-political situations constituted the sources of material law in the labor law itself (Iman Soepomo, 2003). During the Reform era, 3 (three) sets of laws on industrial relations were created, namely Law Number 21 of 2000 on Labor Unions, Law Number 3 of 2003 on Labor, and Law Number 2 of 2004 on the Dispute Settlement of Industrial Relations.

The three sets of the law on industrial relations have provided sufficient legal protection for workers/labors in industrial relations. However, the implementation stands weak, both in the field of labor supervision and in law enforcement in the courts.

Law No. 13 of 2003 on Manpower was born as a material law governing industrial relations, which is a substitute for the previous Manpower Law, Law Number 14 of 1969 on the Provisions of the Basic Provisions on Manpower and Law No. of 1997 concerning Manpower, which never come into effect. Law Number 25 of 1997 should have been implemented October 1<sup>st</sup>, 1998. However, it did not come into effect as a result of rejection from a group of labor unions. As a result, this law's ratification was postponed for two years through Law No. 11 of 1998. After two years of delay, the workers continued to resist the enactment of Law Number 25 of 1997 and even demanded its revocation. This resulted in the issuance of a Government Regulation in Lieu of Law Number 3 of 2000 to accommodate the workers' aspirations while preparing a draft of the Labor Law in lieu of Law No. 25 of 1997.

The Labor Law included a fairly progressive norm for the workers' protection, such as provisions for the amount of severance pay and service time allowance that was better than the previous provisions (Contract Worker Provisions or PKWT), which was very restrictive. The layoff procedures were relatively complicated. Another aspect that was fairly progressive from the perspective of the Labor Law was that there were criminal sanctions against specific norm violators. These criminal sanctions did not exist in the previous Law Number 14 of 1969 on the Basic Provisions on Labor. In addition to the existence of criminal sanctions, the 2003 Labor Law also established the role of Civil Servant Investigator (PPNS) which functioned to conduct preliminary investigation and investigation of labor criminal offenses.

The aspects in the field of labor law include civil law, state administrative law and legal law, which have their own characteristics. Each of them has its own advantages and disadvantages, for the company, workers and for the government. However, from the three aforementioned legal instruments, it is interesting to study the aspects of criminal law in the labor law regime. This is because the aspect of criminal law is still relatively new in terms of its development after the labor law reform through 3 bundles of labor laws. In addition, the criminal sanction path is chosen by workers to claim the normative rights violated by their company.

There are a number of court decisions related to the use of criminal sanctions as an instrument in enforcing the workers' normative rights. The first was in the Social Security Organizing Agency or BPJS criminal case with the President Director of PT NTP as the convict, which was decided by Sumedang District Court, Decision Number 109/Pid.Sus/2017/PN.Smd. The second example is the criminal case of wage underpayment with the owners of UD. SD being the convict and the case was decided in Malang District Court, verdict number: 69/Pid.Sus/2012/PN.MLG. According to these juridical norms and facts, this paper will examine the characteristics and application of criminal sanctions in the labor context in relation to upholding laborer's normative rights.

## 2. RESEARCH METHODOLOGY

This research employed a normative legal research method with a statute approach, a conceptual approach, and a case approach. The legal objects studied were amassed from authoritative legal material, i.e. legislation and court decisions, as well as secondary legal objects such as relevant papers and scientific studies. This author intended to conduct theoretical-normative and praxis studies of the principles and norms/settings of the utilization of criminal sanction of industrial relation, as well as the decisions of the district court and the Supreme Court, are the research objects. Thus, both inductive and deductive reasoning were utilized in this study.

## 3. RESULT AND DISCUSSION

### 3.1. The Characteristics of The Criminal Sanction of Labor Law

The norms in labor law have the same characteristics as public law, even though the aspects of private law are also regulated. This is because government participation is placed in a crucial position. The role of the government includes being the maker of the heteronomous norms in industrial relations, supervising the implementation of industrial relations and providing services to matters related to industrial relations.

The government's presence in industrial relations is *conditio sine qua non* (a certain act is a material cause of a certain injury). This is because the pattern of working relations is a subordinated relationship in which the employer is a party with a higher position, as an employer or order-giver, while the workers are lower as a subordinate or the governed party. This position discrepancy is required to be harmonized with the presence of the government. Thus, there can be a government intervention in industrial relations, which is a positive intervention in the sense of affirmation for the workers/laborers.

On the other hand, despite its public characteristics, labor law has civil aspects. These civil aspects exist because the engagement relationship between employers and workers/laborers starts or is based on a work agreement between the two. In addition, the work agreements, which also include the autonomous norms such as company regulations, are made and therefore apply. They are binding for the employers and workers in industrial relations. These autonomous norms have more civil characteristics than public characteristics. However, even though industrial relations have civil aspects in them, the civil aspects are positioned as a subordinate of the public aspects. This means that the heteronomous norms must be obeyed by the employers and workers and should not be deviated from. Autonomous norms can be regulated further, or they can deviate from the heteronomous norms if they provide better protection or rights for the workers.

From the characteristics of labor law that are public in nature and equipped with civil aspects, there are at least three areas of law that enrich the norms in labor law, namely state administrative law, criminal law and civil law. Thus, law enforcement will also include them.

Law enforcement is the effort undertaken to realize the ideas of justice, legal certainty and social benefits in reality. Therefore, law enforcement is essentially the process of manifesting ideas. Law enforcement is the process of carrying out efforts to uphold or maintain the functioning of the legal norms in a tangible manner such as creating a guideline for perpetrators in reference to traffic, legal relations in public life, citizenship and so on. Law enforcement is an effort to realize the legal ideas and concepts that people expect to become a reality. Law enforcement is a process that involves many aspects (DellyanaShant , 1998).

One of the legal aspirations involved in enforcing labor law is the enforcement of criminal law. The enforcement of criminal law is included in the realm of public law. Government involvement becomes dominant. As an area of public law, the enforcement of criminal law in labor law holds a highly strategic role, especially for the protection of workers. This is because of the unbalanced position of the workers toward the employers, where the workers do not have adequate resources both in terms of the financial aspect and in the human resource aspect. Thus, to reduce this limitedness, the government's presence in the law enforcement process in the case of criminal law in labor becomes essential.

In the general concept of criminal law enforcement, there is an assumption that the criminalization of the criminal law violators is a means of *ultimumremedium*, which means that criminal law is the last instrument used to punish the violators of a legal norm. Even though the concept of *ultimumremedium* is not a principle and it is not regulated in legislation, it is often used as a guideline for many groups, especially law enforcement officers.

Different from the enforcement of general criminal law, which often adheres to the concept of *ultimumremedium*, labor law enforcement is not recognized as the criminal punishment of *ultimumremedium*. The enforcement of criminal law in labor is not dependent on civil law enforcement or state administrative law through labor inspectors.

There are several reasons why the enforcement of labor law is independent and why it does not have to go through civil law enforcement processes through industrial relations dispute resolution and administrative sanctions through labor inspectors. First, the purpose of punishment in labor law contains two objectives, namely as a means to restore the workers' rights when they are violated by the employers and to restore a situation where there are violations of the labor laws by employers.

In addition, there are provisions in Article 189 of Law No. 13 of 2003 concerning manpower, which reads: "Prison sanctions, confinement, and/or fines do not eliminate the obligation of employers to pay rights and/or compensation to workers or labors".

Article 189 of the Manpower Law defines that criminal sanctions and civil sanctions are mutually independent without eliminating one another or without having to overtake the other.

The provisions of Article 189 of Law No. 13 of 2003 also means the overriding of the provisions in Article 81 of the Criminal Code, known as the prejudicial concept as stipulated in the Circular Letter of the Supreme Court Number 4 of 1980 concerning Article 16 of Law No. 14 of 1970 and *Prejudicieel* *reschil*. In the provision, it is stated that *prejudicieel* is about certain criminal acts referred to in the Criminal Code, among others, as in Article 284 of the Criminal Code. Therefore, the prejudicial does not generally apply to all criminal provisions, let alone to criminal provisions in labors which in fact are specific criminal acts outside of the Criminal Code.

Thus, one of the characteristics of criminal law in the context of labor is independence over other legal fields. This means that criminal law in labor is not a subordinate of civil law or the state's administrative law. Thus, the enforcement of criminal law in labor does not have to be preceded by the enforcement of civil law, such as lawsuits in industrial relations courts, nor does it have to be preceded by the enforcement of state administrative law, such as supervision notes from labor inspectors.

The enforcement of criminal law in relation to labor starts from the pre-investigation and subsequent investigation of alleged violations of labor laws. In addition to being carried out by the police as the main investigators, pre-investigation can also be carried out by labor inspectors appointed as investigators who are civil servants (PPNS). This point is regulated in Article 182 paragraph (1) of Law No. 13 of 2003 concerning Manpower which reads: "In addition to

investigators of the Indonesian National Police officers, employees of labor inspectors can be given special authority as investigators of civil servants in accordance with the applicable laws and regulations".

From the stipulation in Article 182 paragraph (1) of Law No. 13 of 2003, the main investigators of labor law violations are the police. This means that the existence of PPNS in labor law does not exclude the police from being investigators. For instance, in the case of a criminal act of a union busting in a company in Bangil-Pasuruan, as in the Cassation Decision of the Supreme Court Number 1038 K/Pid.Sus/2009 in conjunction with the Surabaya High Court Decision Number 54/Pid/2009/PT.Sby, in conjunction with the Decision of Bangil District Court Number 850/Pid.B/2009/PN.Bangil; the investigation was conducted by the police investigators instead of by PPNS in the Pasuruan Regency Manpower Office.

The existence of PPNS as an investigator in criminal cases involving laborers is caused by the material law of labor crime, which is very distinctive and requires its own expertise. Therefore, by providing investigative authority to PPNS, whose personnel are labor inspectors in the workforce, the case handling will be more effective. This is because labor inspectors assigned the task of PPNS are capable of understanding labor law as they must pass the PPNS certification in addition to their daily duties when dealing with labor issues.

## 4. STUDY OF LABOR CRIMINAL CASES

### 4.1. Crimes Related to BPJS Violations in Sumedang

The case began when PT. NP in Sumedang, engaged in the textile sector, was experiencing financial difficulties, resulting in many corporate obligations that should have been paid going unpaid. One of the obligations not paid by the company was the Social Security Management or BPJS retribution. The total liability of the arrears in reference to paying the BPJS retribution was around Rp 940 billion for the period of May 2015 - January 2016. The arrears consisted of premiums that had become the burden of employers amounting to Rp 546 billion, premiums that are the burden of the workers worth Rp 223 billion that had been deducted by the employer but that had not been deposited with BPJS, and a fine of Rp 169 billion.

Upon the non-payment of the BPJS retribution, there had been a preceding agreement between the employer and the worker's union stating that the BPJS retributions were temporarily postponed because it was prioritized for them to pay wages and other rights.

Upon the issue of not paying the BPJS retributions by PT. NP in Sumedang, the President Director of the company was made a defendant by the Public Prosecutor on the charge of criminal acts by collecting and not paying and depositing the retributions that burdened the workers and what had become his/her responsibilities to BPJS. This violated Article 55 in conjunction with Article 19 paragraph (1) and paragraph (2) of Law No. 24 of 2011 on BPJS.

Upon the prosecutor's charge Sumedang District Court in the Decision Number 109/Pid.Sus/2017/PN.Smd decided that the Defendant was found guilty of the criminal offense of collecting but not paying and depositing the retributions that burdened the workers and what had become his/her responsibilities to BPJS. This violates Article 19 paragraph (1) and paragraph (2) of Law No. 24 of 2011 on BPJS, resulting in a fine sentence amounting to Rp 940 billion.

The consideration of the judge by deciding to impose a criminal fine was that the company committing the crime was a company, so it was included as a corporate criminal act. The judge was of the opinion that the non-payment of the BPJS workers' retribution was due to the company's fault as a legal entity/employer and not as person of the defendant. Therefore, the responsibility that could be legally requested was that of the corporation.

Social security is one of the strategic rights of workers/laborers. With social security, workers will be protected in a number of ways, namely physical protection in the event of illness or a work accident so then they are able to work again when they are healthy and being protected from a life quality decrease due to no longer working when they are laid off, either due to retirement or for other reasons. In addition, with this protection, BPJS will provide a sense of security and comfort for workers so then their work productivity will increase, which means that it will benefit all stakeholders, namely the workers themselves, the company and the government.

Social security for workers has now entered a new regime, namely the <sup>10</sup> National Social Security System (SJSN) and the Social Security Organizing Agency or BPJS. This new social security regime is very progressive concerning the protection of workers. Only now are workers being protected with a pension guarantee, in addition to old age insurance. Although the coverage of the pension guarantee is not yet adequate, it has already begun and it is hoped that in time, it will be able to accommodate the workers' protection needs when they are out of work due to being of retirement age. Likewise, the other norms are quite progressive, such as regional government subsidies with the burden of the contributions borne by workers within the PBI scheme (recipients of contribution assistance).

One of the progressive norms in BPJS Law is the sanction imposition on the employers if they do not <sup>15</sup> and deposit the retributions that become his/her his responsibility. Such sanctions can be in the form of administrative sanctions and criminal sanctions. The employers' obligations, in this case, include, <sup>2</sup>lecting the BPJS retributions borne by the workers and depositing them in the BPJS office, as stipulated in Article 19 paragraph (1) and paragraph (2) of the BPJS Law. Regarding the obligation, if an employer violates the stipulation, then he/she can become subject to criminal sanctions, namely imprisonment for a maximum of 8 (eight) years or a fine of maximum Rp 1,000,000,000 (one billion rupiahs), as stipulated in Article 55 of the BPJS Law.

In an "a quo" case, PT. NP did not pay BPJS the retributions that became its responsibility, namely the Retirement allowance (JHT) of 3.7%, the Work Accident allowance (JKK) of 0.89% and the Mortality Allowance (JKM) of 0.3%. Similarly, the BPJS retributions borne by the workers were not paid, despite the workers' wage deduction. The total liability of the arrears in relation to paying the BPJS retributions amounted to Rp 938 billion for the period of May 2015 - January 2016. The arrears of Rp 940 billion consisted of the premiums which became the employer's responsibility worth Rp 546 billion, the premiums which become the workers' responsibility worth Rp 223 billion that had been deducted by the employer but not paid to BPJS, and a fine of Rp 169 billion.

The actions of the <sup>1</sup>resident Director of PT. NP violated the provisions of BPJS Law, namely Article 55 of the Article 19 paragraph (1) and paragraph (2) of Law No. 24 of 2011 on BPJS.

The interesting point was that the judges charged the employer with fines of an outstanding amount of Rp 940,113,147.09 and they did not punish them with any imprisonment. The judge's reason was that the outstanding condition of the contributions was due to the company's financial condition; it was experiencing difficulties so then it was a corporate crime, which resulted in fines. This injunction can be justified because the sanctions stipulated in Article 55 of the BPJS Law could be interchangeably imposed between the sanctions of imprisonment or fines. However, it was quite unfortunate that the judge's verdict was not accompanied by an order stating that if the money was not paid, then the sanction of imprisonment would <sup>8</sup> imposed. The judge ordered that if the fine was not paid, then the property of PT NP could be confiscated by the Prosecutor and auctioned in order to pay the fine. This could not cause a

deterrent effect for the convicts, prompting them to continue not paying because the prosecutor's order to seize and auction off their property is also not easy to implement because, usually, a company's assets are already guaranteed to the bank.

In addition, criminal penalties in the form of financial fines are ineffective because the fine is paid to the Social Insurance Management Agency or BPJS. Meanwhile, the workers could not enjoy the fine money. Judges should make the decision that the fine is to be paid to the workers, especially when related to health retribution, as collateral for workplace accidents, and as life insurance retribution.

#### 4.2. Criminal Cases of Underpayment in Surabaya

The case started when PT PPB, domiciled in Surabaya, employed 35 people and paid them Rp 680,000. The Surabaya City Minimum Wage Requirement at that time was Rp 934,500. The wage payment was made every month at the end of the respective month.

The company even laid off one of the workers with a salary of 50%. The reason for the laying off and for paying wages lower than the stipulations of the City Minimum Wage Requirement was the worker's underperformance when carrying out the company's vision and mission (*conduite*). In addition, the company's performance at that time, in general, was not of a sound condition. In the process of the laying off, the company summoned the worker who was sent home twice. However, the worker did not fulfill the company's call.

In this case, the Public Prosecutor (JPU) sued the company's director in the court with the charge of the violating the minimum wage provisions as stipulated in Article 185 paragraph (1) in conjunction with Article 90 paragraph (1) of Law No. 13 of 2003 on Labor.

Upon the Prosecutor's charge, the Surabaya District Court, in Decision Number 4318/Pid.B/2009/PN.Sby, decided that the defendant was legally and convincingly proven guilty of committing the criminal offense of paying wages lower than the minimum wage, as regulated in Article 90 paragraph (1) in conjunction with Article 145 paragraph (1) of Law Number 13 of 2003 on Labor. The sanction imposed was 1 (one) years imprisonment and a fine of Rp 100,000,000.

Upon the decision of the Surabaya District Court Number 4318/Pid.B/2009/PN.Sby, the defendant filed an appeal to the Surabaya High Court. Upon the defendant's appeal, the Surabaya High Court in Decision Number 635/PID/2010/PT. SBY decided to overrule the appeal.

Upon the Decision of the Surabaya High Court Number 635/PID/2010/PT.SBY, the defendant submitted a cassation to the Supreme Court. Upon the request of the defendant's cassation, the Supreme Court in Decision Number 1438 K/Pid.Sus/2011 decided to overrule the appeal request. The consideration rejection was that the reason for the cassation was unjustified and that the Surabaya District Court and Surabaya High Court were on the right track of applying the law. On the other hand, the defendant, in his capacity as the director of PT. PancaPuji Gunung, was proven to be paying wages that were lower than the minimum wage, thus violating Article 90 paragraph (1) and Article 5 paragraph (1) of the Law Number 13 of 2003 on Labor.

On the Cassation Decision Number 1438 K/Pid.Sus/2011, the defendant filed a Judicial Review to the Supreme Court. Upon the request, the Supreme Court in Judicial Review Number Decision 86 PK/PID.SUS/2013 decided to overrule the application. The Panel of Judges considered that the submitted *novum* evidence was incorrect. The Panel of Judges argued that the defendant, as a director, had the authority to make decisions regarding the workers' payroll. Thus, the defendant was only a subordinate to the owner of the company and



the defendant only continued the previous wage policy. The defendant could not prove the objection to paying below the minimum wage to the owner of the company.

Wages are an important element for workers/laborers in working relations. Therefore, the Labor Law provides special protection. One form of wage protection for workers is a provision regarding the minimum wage consisting of:

1. Provincial Minimum Wage (UMP)
2. Provincial Sectoral Minimum Wage (UMSP)
3. City/District Minimum Wage (UMK); and
4. City/District Sectoral Minimum Wage (UMSK)

The minimum wages are set annually by the governor in each province. For entrepreneurs who are unable to meet the minimum wage requirements, they can submit for a suspension of the minimum wage. If they grant the suspension request, then the governor will issue a letter of suspension. If the employer does not submit a suspension proposal or if the governor declines the proposal, then the juridical consequence is that the employer must pay the worker/laborer above the minimum wage.

In the case of UD.SD in Malang, the employers paid the wages below the minimum wage on the grounds that the performance of the workers/laborers was not in accordance with the targets set by the company. This reason is certainly not justified, because the minimum wage must not be associated with the achievement of certain targets or a particular level of work performance. The minimum wage is a basic wage and a fixed allowance. Meanwhile, the aspects that can be associated with a specific target or employment include a non-permanent allowance. The rationale behind the minimum wage provision is to protect the workers from improper wage payments and not to stimulate the workers to achieve certain targets.

It is often debated whether employers who pay wages that are under the minimum wage provisions can become subject to criminal sanctions if the workers have already disputed their rights through an industrial relations dispute in the Industrial Relations Court. Under the Labor Law, there is no single provision stating that criminal sanctions can be imposed after the Industrial Relations Court's decision to adjudicate the dispute. Since no such provisions are stipulated, criminal sanctions can be imposed on employers who violate the minimum wage provisions even though they have not gone through the Industrial Relations Court. In the aforementioned case, there was no disputes settled in the Industrial Relations Court.

Violations of the minimum wage provisions are subject to severe criminal sanctions, namely imprisonment of at least 1 (one) year and up to a maximum of 4 (four) years and/or a fine of at least Rp 100,000,000.00 (one hundred million rupiahs) up to a maximum of Rp 400,000,000.00 (four hundred million rupiahs). This is as determined in Article 185 paragraph (1) of the Labor Law. Therefore, violating the minimum wage provisions is a crime in industrial relations.

## 5. CONCLUSION

For every violation of laborers' normative right, such as the protection of social security, the freedom to join a union association and the provision of minimum wages by employers, the employers can become subject to sanctions, be they civil sanctions, administrative sanctions or criminal sanctions. Each of these sanctions is independent and not sequential to one another. At present, there is a tendency in Indonesia that workers prefer to use the criminal code as a channel to obtain justice if the company violates their normative rights as in the BPJS criminal case of PT. NP in Sumedang and the underpayment case of UD. SD in Malang.

The criminal sanctions in industrial relations have several special characteristics, including being the main and independent legal instrument (*premium remedium*). Thus, it does not depend on the existence of other sanctions and investigators via civil servants in its law enforcement. The rationale behind the investigation of civil servants in labor crimes is because the investigators of civil servants have more control over the material legal aspects of labor, which have some special characteristics. Even though there are civil servant investigators to carry out labor crime investigations, the police's authority to investigate violations of these labor crimes remains.

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