



Legal Protection of Labour's Freedom of Union Againsts Union Busting in Indonesia

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Abstract

Freedom of association, assembly and expression is part of Human Rights that must be respected, fulfilled and protected. Constitutionally, freedom of association for workers/laborers has been guaranteed in Article 28E (3) which confirms that everyone has the right to freedom of association, assembly and opinion. Union Busting is a restrictive measure against the establishment and implementation of workers freedom of association, beginning with discrimination against workers. This research aims to identifies and analyzes the legal protection of the right to freedom of expression for workers against Union Busting. The results of this research show that restriction of freedom of association is contradictory as Article 104 Paragraph (1) of Law No. 13 of 2003 concerning manpower confirms that every worker/worker has the right to form and become a member of a trade union/trade union. Legal protection is an effort to prevent and overcome the violation or non-fulfillment of the rights of legal subjects. Legal protection against Union Busting is actually needed to protect workers ' rights in forming and running unions so that there is a healthy working relationship between workers and companies.

Keywords: Legal Protection, Freedom of Union, Union Busting.

A. INTRODUCTION

The essence of human rights itself is an effort to maintain the safety of human existence as a whole through a balancing act between individual interests and public interests. Likewise, efforts to respect, protect and uphold human rights are a joint obligation and responsibility between

individuals and the State (Harapan, 2006). Meanwhile, the position of the state in Indonesia's constitutional structure is as a *Duty-Holder* or *Duty Bearer*. In upholding human rights, every citizen is obliged to pay attention, respect and appreciate the human rights owned by others, awareness of human rights, self-respect, dignity and dignity of humanity that has existed since the human being was purified and is a natural right inherent in human being (K.M, 2010).

Freedom of association, assembly and expression of opinions is actually part of human rights guaranteed by Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia and several other provisions of laws and regulations that must be upheld, respected and protected. Article 24 paragraph (1) emphasizes that everyone has the right to assemble, assemble and associate for peaceful purposes. In article 22 paragraph (1) of Act Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights, everyone has the right to freedom to associate with others, including the right to form and join a trade union to protect their interests. In the context of employment, the right to freedom of association is guaranteed in article 5 paragraph (1) of Act Number 21 of 2000 concerning Trade Unions affirms that every worker/laborer has the right to form and become a member of a trade union/trade union, and in article 104 paragraph (1) of Act Number 13 of 2003 concerning Manpower affirms that every worker/laborer has the right to form and become a member of a trade union/trade union.

The constitutional guarantee basically has the consequence that the State has an obligation in terms of protection, promotion, enforcement and fulfillment of human rights to be the responsibility of the government as affirmed in articles 8 and 71 of Act Number 39 of 1999 concerning Human Rights. Various problems regarding workers generally put workers in a vulnerable position so that there is an imbalance between workers' rights and obligations. One of the problems of workers is the elimination of unions or Union Busting which leads to unfair

relations between employers and workers. Union Busting is an act that is included in unfair labor practices in industrial relations (*Worker Organizing*) (Rr. Halimatul Hira, 2023.). This action is a way for employers to carry out with the aim of co-opting, deceiving them, destroying, obstructing, or stopping the activities or existence of trade unions. The various impacts of *Union Busting* are that in addition to the unbalanced relationship between employers and workers, it also leads to various violations of labor rights such as unilateral layoffs, living wages, the absence of collective bargaining agreements and guarantees of other normative rights.

In fact, *Union Busting* is a serious violation of the freedom of workers in forming and establishing unions. Article 2 of the *International Labour Organization* (ILO) Covenant No. 87 on freedom and protection of the right to industrialization affirms that workers and employers without any distinction have the right to establish and, according to the rules of their respective organizations, to join other organizations of their own choice without the influence of others. The guarantee of the protection of freedom of association includes legal protection according to Imam Soepomo which is grouped into 3 (three) types of protection, namely economic protection, social protection, and technical protection (Soepomo, 2009). In this issue, legal protection can be analyzed in terms of social protection, namely the protection of rights guarantees, the protection of freedom of association and the protection of the right to organize.

Similar research discussing the rights of workers to unionize, which subsequently impacts their legal standing and welfare, has indeed been conducted by three previous researchers, including Tampubolon et al. (2023), who in their study emphasized that labor unions play a crucial role, particularly in legal efforts for workers to influence policies related to minimum wage (Tampubolon et al., 2023). Another study was conducted by Mikolajczyk and Goodman, who stated that labor unions play a significant role in efforts to formulate welfare for workers (Adam

E. Mikolajczyk, 2024). Further research conducted by Minchin (2024) also states that the role of labor unions is very significant, particularly in efforts to influence policies and welfare for workers in the United States (Minchin, 2024). Of the three studies, the research conducted by the author is original because it differs from the three previous studies and emphasizes the importance of labor unions in Indonesia.

This article uses a normative juridical research method with a statutes approach and a conceptual approach (Marzuki, 2019). In this research, it identifies and analyzes the legal protection of the right to freedom of expression for workers against Union Busting. This study uses prescriptive analysis techniques to obtain discussion results based on values, principles and applicable legal norms (Noerhadi, 2011). This research uses a statutory and conceptual approach. The approach to laws and regulations is used to examine all regulations related to the problem of union busting. The conceptual approach proceeds from developing doctrines and legal principles that are relevant to legal issues related to union busting. The laws and regulations used in this study include the following:

1. Constitution of the Republic of Indonesia (Constitution of the Republic of Indonesia) of 1945;
2. Act Number 39 of 1999 concerning Human Rights;
3. Act Number 21 of 2000 concerning Trade Unions/Workers;
4. Act Number 13 of 2003 concerning Manpower;
5. Act Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights; and

6. Decree of the President of the Republic of Indonesia Number 83 of 1998 concerning the Ratification of ILO Covenant 87 concerning Freedom of Speech and Protection of the Right to Organize.

B. RESULTS AND DISCUSSION

1. The Right to Associate or Organize For Workers

The right to association or organization refers to article 22 of the Civil and Political Covenant, guaranteeing the existence of two protections at once in one right. This right is within the scope of the protection of civil and political rights. In the civil rights sector, that guarantee protection against intervention and arbitrary actions by the state or other private parties. Meanwhile, as part of the political right, the right to association or organization is required to exist and function in the name of democracy because political interests can be effectively seized if they are in the community together with others such as political parties, professional organizations, and other organizations for special purposes of public interest. Another protection that exceeds the scope of political civil rights is the guarantee of protection of economic rights, namely the right to form trade unions.

Legal protection is an overview of the function of law, which is a concept where law can provide justice, order, certainty, and usefulness. The opinions quoted from several experts regarding legal protection are an effort to protect citizens from arbitrary acts or actions and get guarantees of equality before the law. Legal protection is basically aimed at providing respect and fulfillment of the human rights of aggrieved citizens and the protection is given to the community so that they can enjoy all the rights guaranteed by law (Raharjo, 2000). In essence, legal protection is non-discriminatory because every human being has the same rights and is inherent in the right to legal protection. As a legal state established based on the ideology of Pancasila, Indonesia must

provide legal protection to its citizens. This protection will give birth to the recognition and protection of human rights as individuals and society in the forum of a unitary state that upholds the spirit of family to achieve common prosperity.

Legal protection is an effort to prevent and overcome the violation or non-fulfillment of the rights of legal subjects. When quoting with the expert opinion of Philipus M. Hadjon, it is revealed that legal protection is the protection of human dignity, and the recognition of human rights owned by legal subjects based on legal provisions and as a collection of laws and regulations or rules that will be able to protect one thing from another (Hadjon, 2007). Preventive legal protection is protection provided by the state to prevent violations by the state against citizens. Contextually, preventive legal protection is regulated in the law to prevent a violation and provide limits in carrying out obligations. So that in the context of labor law in Indonesia, there are various rules that have guaranteed the right to freedom of association. The constitutional guarantee of freedom of association is expressly enshrined in article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia which affirms that everyone has the right to freedom of association, assembly and expression. There are various regulations that guarantee freedom of association and establishment of organizations for Workers/Laborers, including the following:

NO	Laws and Regulations	Article Reading
1	Act Number 39 of 1999 concerning Human Rights	Article 24 paragraphs (1) and (2): <i>"(1) Everyone has the right to assemble, assemble and associate for peaceful purposes." "(2) Every citizen or community group has the right to establish a political party, non-governmental organization or other organization to participate in the running of the government and administration of the state in line with the demands of protection, enforcement and promotion of human rights in accordance with the provisions of the law."</i>
2	Decree of the President of	Article 2:

	the Republic of Indonesia No. 83 of 1998 concerning the Ratification of ILO Convention No. 87 concerning <i>Freedom of Association and Protection of Right to Organize</i>	<i>"Workers and employers, without distinction whatsoever, have the right to establish and be subject only to the articles of the organization, to join the organizations of their choice without prior authorization."</i>
3	Act Number 21 of 2000 concerning Trade Unions/Trade Unions	Article 1 number 1: <i>"Workers/trade unions are organizations formed from, by, and for workers/laborers both in the company and outside the company that are free, open, independent, democratic and responsible in order to fight, defend and protect the rights and interests of workers/laborers and improve the welfare of life."</i>
4	Act Number 13 of 2003 concerning Manpower	Article 104 paragraph (1): <i>"Every worker/laborer has the right to form and become a member of a trade union/trade union."</i>
5	Act Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights	Article 22 paragraph (1): <i>"Everyone has the right to freedom to associate with others, including the right to form and join a trade union to protect their interests."</i>

In the context of employment, workers/laborers are always in a subordinate position to employers due to an imbalance in accessibility (*Economic strategic resources*). The imbalance of accessibility determines that workers are used as objects of exploitation for profit without touching the fundamental problems of labor. Employers tend to be in a *powerful* position for workers because of unbalanced power relations. Since the enactment of the Job Creation Law, fair labor law does not place *a fair* relationship between employers and workers which has implications for the loss of corporate social responsibility for workers' welfare.

The labor supervisor (Bawasaker) is actually a public control function that ensures the implementation of laws and regulations in the work environment is an important instrument. As a form of intervention and the presence of the state to realize a guarantee of legal protection for workers so that there is a balanced relationship between employers and workers. In realizing

harmonious industrial relations, labor supervisors must emphasize the importance of *good governance* and non-discriminatory principles. One of the crucial problems in the context of labor is the lack of fulfillment and guarantee of labor rights carried out by employers as a serious violation of labor for which the state must be present in making recovery efforts.

Unilateral termination of employment (PHK) is an instrument used by employers in carrying out *Union Busting* which invites a number of problems that are initiated by intimidation, mutation and even demotion of workers who want to form/establish a trade union. This condition is further exacerbated by the suboptimal implementation of supervision by law enforcement officials. (Hira, 2023) In terms of supervision and investigation of violations of workers' rights, article 40 of Act Number 40 of 2000 explains that in order to ensure the rights of workers/organized laborers and the right of trade unions/laborers to carry out their activities, the labor supervisory officer conducts supervision in accordance with the applicable laws and regulations.

Repressive legal protection is the final protection in the form of sanctions such as fines, imprisonment, and additional penalties given in the event of a dispute or a violation of the law. Repressive legal protection aims to resolve disputes. The handling of legal protection by the General Court and Administrative Court in Indonesia is included in the category of repressive legal protection. The principle of legal protection against government actions rests on and is derived from the concept of recognition and protection of human rights which is directed to the limitations and imposition of obligations of the community and the government.

The case of union busting is always aimed at creating certain conditions according to the will of the employer. At the practical level, there are various forms of *Union Busting* carried out in various ways, including the following (Yogo Pamungkas, 2019):

- 1) Preventing workers from joining trade unions;
- 2) There is intimidation and threats against workers who want to join the union. The intimidation in question was carried out with stigma and bad labeling regarding the worker or labor union;
- 3) Mutation of management and/or union members to weaken the bargaining position of the union;
- 4) Written intimidation through a warning letter (SP) by the Company's Management against Workers who want to join or establish an independent and democratic trade union;
- 5) Suspension sanctions are often directed at vocal labor activists;
- 6) Unilateral termination of Employment for Employees with the status of Employment Agreement with a Certain Time (PKWTT);
- 7) Forming a rival union (*Yellow Union*) to compete with labor unions that can hinder the will of employers;
- 8) Forming a counter management in the trade union;
- 9) There is a rejection of the negotiation and formation of a Collective Labor Agreement (PKB);
- 10) Promotion, with an effort to change the direction / orientation of workers to not unionize;
- 11) Criminalization, in carrying out trade union activities;
- 12) The politics *of fighting* among fellow workers to establish trade unions; and
- 13) Anti-union doctrine or propaganda

In the context of repressive legal protection, the legal protection of workers' freedom from *the Busting Union* is basically regulated in article 28 of Act Number 21 of 2000 concerning Trade Unions. In article 28, it is emphasized that anyone is prohibited from obstructing or forcing to form or not form, become a member or not become a member and/or carry out or not carry out the activities of a trade union/trade union by:

- a) Terminate employment, temporarily dismiss, demote or mutate;
- b) Not paying or reducing workers' wages;
- c) Committing intimidation in any form; and
- d) Conducting anti-trade union formation campaigns

2. Union Busting in Indonesia: Regulations and Legal Implications

Normatively, in the event of a *Union Busting*, article 43 of Act Number 21 of 2000 emphasizes that anyone who obstructs or coerces workers/laborers as per article 28 is subject to a criminal sanction of imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and/or a fine of at least Rp. 100,000,000 (One hundred million rupiah) and a maximum of Rp. 500,000,000 (Five hundred million rupiah). One of the jurisprudence of *the Union Busting case* against workers once occurred in the Bangil District Court Decision Number 850/Pid.B/2009 where there was a unilateral layoff by the company to a number of workers who wanted to participate in the labor union strike action with. The verdict explained that the defendant was proven guilty of committing the crime of obstructing the activities of the trade union/labor union and sentenced him to 1 year and 6 months in prison. (Shubhan, 2020)

In guaranteeing freedom of association for Workers against *Union Busting*, it is important for employers and the state to guarantee and ensure the implementation of freedom of association

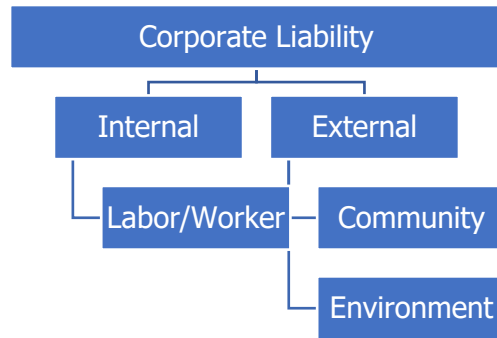
adhering to various principles, namely the Principle of Non-Discrimination, the Principle of Accountability, and Law Enforcement. The Non-Discrimination Principle emphasizes that no person can deprive another person of the Human Rights of another person because of factors such as race, color, gender, language, religion, politics or other views, nationality, possession of birth status or others. In relation to the right to freedom of association, the elimination or restriction of the right to association due to the factor of difference in economic strata/social status cannot be justified for any reason. The principle of non-discrimination is basically enshrined in article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia which affirms that everyone has the right to be free from discriminatory treatment on any basis and has the right to protection against discriminatory treatment.

As part of the responsibility of the state and the private sector in upholding, respecting and protecting the right to freedom of association for workers, legal protection measures are needed through effective implementation. The State's obligation is affirmed in article 72 of Act Number 39 of 1999 concerning Human Rights which states that effective implementation steps are needed in the fields of law, politics, economy, social, culture, state defense-security and other fields. In the framework of the legal protection of freedom of association, it is necessary to apply the principle of due diligence of human rights (*Corporate Human Rights Due Diligence*) for corporations. The Business and Human Rights Guiding Principles explain that every business enterprise has an independent responsibility to respect human rights, and that to do so, they are required to conduct human rights due diligence to identify, prevent, mitigate and take into account how the private sector handles impacts on human rights. Human rights due diligence is a way for companies to proactively manage the potential and adverse impacts of human rights that are actually associated with their involvement. This involves four things, including the following:

- a) Identify and assess actual or potential adverse human rights impacts that the company may have or contribute to through its own activities, or that may be directly related to its operations, products or services through its business relationships;
- b) Integrate findings from impact assessments across relevant company processes and take appropriate actions in accordance with their involvement in those impacts;
- c) Track the effectiveness of actions and processes to address adverse human rights impacts to find out whether they are successful; and
- d) Communicate how impacts are handled and demonstrate to stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place.

Prevention of adverse impacts on society is the main goal of human rights due diligence. This concerns risks to the interests of the general public, not risks to businesses. Risks to human rights can change over time and are informed by engagement in particular with affected stakeholders such as human rights defenders, trade unions, and grassroots organizations. Corporate accountability in human rights due diligence includes 2 aspects, namely internal and external.

The internal aspect includes guaranteeing respect, protection and impact on human rights for Workers/Laborers and the external aspect includes respect, protection and impact on society (community) and the environment. The dimensions of the impact of corporate liability are described in the diagram as follows:



As a guide for effective implementation steps in the context of legal protection of freedom of association for workers, there are 3 pillars in business and human rights principles, namely the principles of protection, respect and restoration. First, the principle of protection affirms the state's obligation to protect human rights (including freedom of association) where the government must protect individuals and groups from violations by third parties (*non-state actors*), including the private sector (corporations). Second, the principle of respect affirms that the private sector's responsibility to respect human rights means not to violate internationally recognized human rights (including freedom of association) by avoiding, reducing or preventing the negative impact of corporate operations. Third, the principle of restorative redress emphasizes that there must be an expansion of access for victims (including Union *busting* victims) to get effective recovery both through judicial and non-judicial mechanisms (O'Brien, 2014).

In carrying out effective implementation steps on the Right to Freedom of Association for Workers as per article 72 of Act Number 39 of 1999, the National Action Plan on Human Rights on Business and Human Rights (RAN-BHAM) is needed (Rights, 2015). The National Action Plan on Business and Human Rights has been regulated in Presidential Regulation of the Republic of Indonesia Number 60 of 2023 concerning the National Strategy for Business and Human Rights. The BHAM National Strategy serves as a guideline for the private sector and other stakeholders to participate in respecting human rights in the business sector. The Labor Law regulates the

employment relationship between workers/laborers and employers, which means regulating the interests of individual individuals, The employment relationship that regulates between workers and employers basically contains the rights and obligations of the parties. The meaning of rights and obligations is always reciprocal between each other. The rights of workers or laborers are the obligations of employers. And vice versa. The employment relationship is inseparable from the employment agreement made by the parties. In Indonesian law, some translate by agreement and some translate by covenant (Suhartoyo, 2019).

The form of legal protection of freedom of association for workers as part of corporate accountability in business and human rights emphasizes the importance of guaranteeing workers to obtain accessibility and guarantee of workers' rights through Collective Labor Agreements (PKB) and companies. The guarantee of workers' rights regulated in the Collective Labor Agreement and Company Regulations is part of preventive legal protection to prevent violations of workers' rights and ensure a balanced industrial relationship between the company and workers in the work environment. Article 116 paragraph (1) of Act Number 13 of 2003 concerning Manpower emphasizes that a collective labor agreement is made by a trade union/labor union or several trade unions/trade unions that have been registered with the agency responsible for the field of employment with employers or several employers. The establishment of a collective bargaining agreement that legitimizes the protection of workers' rights is a form of human rights due diligence in corporate accountability in running business and human rights.

As an example of effective legal protection for freedom of association to prevent/avoid union *busting*, PT Pamapersada Nusantara has for many years established a Collective Labor Agreement that regulates and guarantees workers' rights. The rights of workers enshrined in the

Collective Labor Agreement in Article 5 regulate the Recognition of the Rights of Companies and Trade Unions and their membership, among others, as follows:

- 1) The Company recognizes that a trade union is a legal union that represents and is responsible for and on behalf of its members, both individually and in groups in the field of employment;
- 2) The trade union recognizes that employers have the right to lead and run their business in accordance with the company's discretion, as long as it does not conflict with the provisions that have been regulated in the PKB and the applicable Labor Laws and Regulations;
- 3) The company recognizes the right of trade unions to represent their members both individually and in groups to help resolve issues related to the rules and conditions of employment in the company;
- 4) Members of the security unit, leaders and workers in the Human Capital Development (HCD) function, Organization Development function and Human Capital Services (HCS) function, IS System Administrator, and Industrial Relations, considering the nature of their work that may cause conflicts of interest, both parties agree that they are not justified as trade union administrators because they must protect the interests of the parties according to their respective functions and duties;
- 5) The Company and the Labor Union agree to cooperate on a family basis in order to create peace of mind at work and peace of mind;
- 6) Workers who are elected as union administrators will not be pressured by the company, either directly or indirectly, or discriminated against in carrying out their

duties as long as they do not violate the provisions of the PKB and applicable laws and regulations;

- 7) In a harmonious relationship between the company and the Trade Union, in certain cases the Trade Union management can enter the production parts/units and office rooms after first obtaining the company's permission in order to perform its duties in relation to labor issues;
- 8) The composition of the complete management of the Trade Union and its changes will be notified immediately to the company officially and in writing no later than 30 (thirty) days after the formation or after the change occurs;
- 9) The Trade Union plays an active role and supports the company to enforce company policies towards workers in order to achieve work peace and smooth production;
- 10) The company pays attention to labor issues raised by labor unions; and
- 11) The Labor Union and the company jointly maintain, maintain and protect the company's assets and good name from all forms of threats and disturbances both internal and external.

Legal protection for workers outlined in the collective bargaining agreement is a form of corporate accountability in respecting and fulfilling human rights for workers. The principles of accountability and non-discrimination are important components in the fulfillment and protection of workers' rights from all forms of human rights violations of the Freedom of Trade Union. In the event of a violation of the right to freedom of association (*Union busting*), the state is considered necessary to take strict law enforcement measures and ensure the recovery of the eradication of freedom of association for workers. As the principle of rule *of* law in the framework of human rights, the State and its completeness must adjust to the norms and standards of law that

apply in international human rights instruments. If the State fails to implement it, the aggrieved party has the right to carry out certain *Redress* actions before the court or other Legal Proceedings in accordance with the existing arrangements and procedures in Positive Law in Indonesia.

The law enforcement function is an important part of the repressive legal protection aimed at corporations that violate workers' rights (Friedman, 2000). Legal structure as a system in law enforcement by the state to ensure corporate accountability for violations that occur. Lawrence M Friedman explained that a legal system in its actual operation is a complex organism in which structures, substances, and cultures interact. To explain the background and effects of each part, the role of many elements of the system is needed. The idea of making rules without any thought about how the structure and culture of the law should exist ideally will not be able to enforce a rule so that the goal of making the law becomes unattainable.

C. CONCLUSION

Union Busting is basically a form of violation of human rights against Freedom of Association for workers. Various international and national human rights instruments have regulated and guaranteed the Right to Freedom of Association for Workers so that there are criminal consequences for corporations that commit the crime of *Union Busting*. Effective legal protection of the right to freedom of association is important to ensure the enjoyment of basic rights of workers and ensure the enforcement of laws against violations of workers' rights. The protection of preventive laws that regulate the right to freedom of association guarantees that workers have rights that cannot be restricted and revoked for any reason so that the state has an obligation to ensure that the guarantee, protection and enforcement of the right to freedom of association is carried out optimally. Repressive legal protection has an important role in terms of law

enforcement against parties who violate labor rights through the imposition of sanctions, so that it can be used as law enforcement jurisprudence and a guarantee of non-recurrence.

Human rights due diligence for corporations places the responsibility of corporations as non-state actors to participate pro-actively in upholding, fulfilling and protecting human rights. Business and human rights are guidelines for corporations to prevent or avoid any actions and activities that have the potential to violate human rights and there is a guarantee of recovery for victims from the impact caused.

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