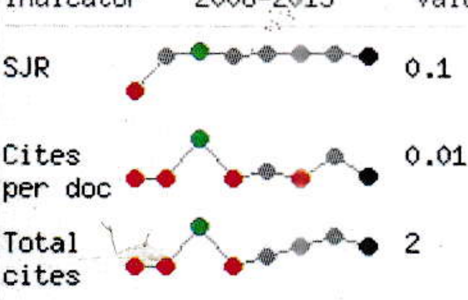
ISSN : 0972-7302

International Journal of Applied Business and Economic Research



Volume 15 Number 7 2017

SERIALS PUBLICATIONS PVT. LTD.
New Delhi, India

ISSN:0972-7302

INTERNATIONAL JOURNAL OF APPLIED BUSINESS AND ECONOMIC RESEARCH

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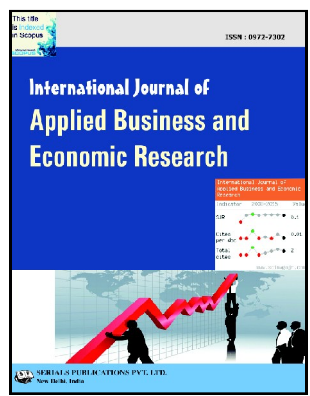

International Journal of Applied Business and Economic Research

ISSN : 0972-7302

available at http: www.serialsjournal.com

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Volume 15 • Number 7 • 2017

Rights to the Freedom of Trade Unions in the Constitution and its Implementation

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Abstract: The right to freedom of labour association has received basic protection in Constitution of 1945. It's explanation is in Law 21/2000 jo. Law 13/2003 jo. Law 2/2004 and it's implementing regulations. There are some restrictions in the implementation in the legislation that removes the right of association. This study aims to analyze the vertical-horizontal inconsistencies on the rule of law regarding the right association that can lead to multiple interpretations over union busting that can eliminate the rights of association. This study uses normative juridical approach and socio legal for union busting on a case that occurred in East Java between the years 2012- 2015. The result of study are, First It's vertical inconsistency (the Law 21/2000 and its implementing regulations against the Constitution of 1945) and horizontal inconsistency (the Law 9/1998 jo. Law 21/2000 jo. UU13 / 2003 jo.UU 2/2004). Second, vertical-horizontal inconsistencies resulted in multiple interpretations which resulted in union busting in Surabaya (non-recognition of trade unions by the Employers), in Gresik (failure of the plan to strike at vital company State), in Sidoarjo (formation of Trade Unions resulted in dismissal), in Jombang (deceiving of the recording of trade unions formation). Third, the difficulty of proving the perpetrators of union busting has removed the nature of the legal protection of the right of labour association. The conclusion was that there were vertical-horizontal inconsistencies on the rule of law regarding the right of associations that can lead to multiple interpretations on union busting in order to eliminate the right of labor association in East Java. Recommendations of revised provisions on the rights of association that raises multiple interpretations and training for law enforcement and legal counseling for people on the rights of labor association.

Keywords: freedom/the right of association, the vertical-horizontal inconsistencies, union busting.

INTRODUCTION

The right to freedom of association have received basic protections in the Constitution of 1945. Freedom of association and assembly, of verbal and written expression and the like, shall be prescribed by law[1]. Everyone has the freedom to association, assemble and express the thought[2].

Association is drafted by the of 1945 Constitution as a right. The implementation of Article 28 E paragraph (3) of the 1945 Constitution, up to day it is stipulated in the Law 21/2000 on Trade unions[3], jo. Law UU13 / 2003 on Manpower[4] jo. The law 2/2004 on Industrial Relations Disputes Settlement/PPHI[5] and its implementing regulations. Implementation of Law 21/2000 jo Law 13/2003 jo. Law 2/2004 on the implementation regulations are restricting and eliminating the right to association. The right to association is worker's right and there is none can stop it. The amount of at least 10 people to be able to form trade unions turned out to be the means of union busting, when there is a manipulation while verification done prior to registration. Without a registration number, the trade union considered invalid and can not perform its function.

Establishing and joining the trade union are the right, and not allowed to members of Security[6]. There is still a trade union which already has a record number, but refused to become a party to the collaborative bergaining[7]. It is the right of workers to strike in case of the failure of the negotiations. For workers who work at a particular company turned out to be a barrier that eliminates the right to strike. Vital State Company State limits the right to strike[8]. There is a criminalization on the board of trade unions[9]. Mutations[10], dismissal[11] and even to the loss of life of workers[12].

The practice of union busting as a manifestation of the lack of clarity on legal rules related to freedom of association. Rising to multiple interpretations on the existing rules and can result in the loss of protection of the right of association. From the above explanation it appears the problems, namely:

1. Are there vertical-horizontal inconsistenciesin the arrangement of association rights of workers?
2. Are the vertical- horizontal inconsistencies in arrangement of association rights of workers comes with multiple interpretations on union busting?
3. Are multiple interpretations of the arrangements of association rights of workers can eliminate the trade union right?

The method used is the normative juridical approach with statute approach and socio legal on the case of union busting occurred in Surabaya, Gresik, Sidoarjo, and Jombang.

DISCUSSION

To association is a right as the embodiment of the legal protection of freedom of association. It takes the role of the State and the community for the success of the right of association, particularly academics and NGO.[13] Universal right of association was set in ILO Convention No. ILO Convention 87[14] and 98[15]. There are the part of ILO core convention.[16] Nationally, the setting of freedom of union has stipulated in Law No. 21/2000 jo. Law 13/2003 jo. Law 2/2004 and regulations of its implementation.

1. Vertical-horizontal inconsistenciesin the arrangement of association rights of labours

Law 21/2000 is the implementation of Indonesia's ratification of ILO Convention No. 87. Unfortunately, the form of ratification by the president's decree no. 83/1998.[17] The position of Presidential Decree (*Keppres*) are hierarchically lies under the Act. Therefore *Keppres* can not be the basis for consideration in Law 21/2000. Although Law 21/2000 is the embodiment of the ratification of ILO conventions 87 and 98, which still has the difference in contents if carried in-depth study.

There are vertical- horizontal inconsistencies on the rule of law on freedom of association in Law 21/2000 and / or the Law 13/2000 jo. Law 2/2004 jo. other implementation regulations. The limitation of this study is on the vertical-horizontal inconsistencies on the aspect of trade union membership, status of labor permanent relations and outsourcing, membership verification, creation of collective labor agreements, strikes associated with rally/ demonstration and union busting. All of those activities are related to one another.

Starting in union membership. Who can establish a trade union? One who can establishtrade union is each worker (Article 5 (1) of Law 21/2000). Establishing a trade union is a right. The right of association is a manifestation of freedom of association. Freedom can not be absolutely implemented. There are restrictions permitted, if it is done legally and set forth in the rule of law as the provision of legal protection. The first restriction is related to the minimum number of workers allowed by law to establish a trade union. A minimal amount who can establish a union is 10 people (Article 5, paragraph (2) of Law 21/2000).

Practically, this amount raises issues with regard to the legal status of relationship of the workers themselves. There are two types of legal status of labor relations, namely the system of permanent workers or outsourced workers. This problem appears in relation to the limitation of the meaning of the trade union.

"The trade union is an organization establishedof, by and for workers / labor either within the company or outside the company, which is free, open, independent, democratic, and responsible to fight, defend and protect the rights and interests of workers / labor and improve the welfare of workers / labor and their families" (Article 1 paragraph 1 of Law 21/2000).

From this provision it is known that trade union can be establsihed by each worker either in the company or outside the company. The word "in the company and outside the company" has caused problems that no notification of trade unions rejected by registrystaff and given a registration numberbut is not recognized by employers, so that its existence can not be a party in the making of a collective labor agreement. This is because the formulation of the provisions of Article 1 point 1 of Law 21/2000 narrowly interpreted which only established within the company as the provision of Article 1 paragraph 2 of Law 21/2000, the trade union in the company is the trade unionestablsihed by workers / labor in the company or in some companies.

Conflict between Trade Unions and Employers can arise from different interpretations of the two foregoing. Article 1 point 1 of Law 21/2000 when juxtaposed with the provisions of Article 1 paragraph 2 of Law 21/2000 has resulted in multiple interpretations. This should not happen, since the law is a system. Provisions in the articles should be interrelated and can not be separated. Article 1 point 1 of Law 21/2000 should be the cornerstone in understanding the provisions of Article 1 paragraph 2 of Law 21/ 2000.

A narrow interpretation of the provisions of Article 1 paragraph 2 of Law 21/2000, only recognizes that only permanent workers can establish a trade union. In practice, in a company can have more than one system of labor relations. Workers with permanent labor relations system and outsourcing. A narrow interpretation of the provisions of Article 1 paragraph 2 of Law 21/2000, resulting in workers with outsourced labor relations system can not establish a trade union in the company. For outsourced workers can only form atrade union at its main company, namely the provider of employment services.

Union membershipis free, but it should not allowed to have two membership. A worker/labor should not be a member of more than one trade/trade union in the company. In the case of a worker / labor in a company registered on more than one trade union / trade unions, he or she has to declare in written in one trade/trade union of his choice (Article 14 of Law 21/2000). Law 21/2000 requires only a written statement.

Practically, there is a provision of *Permenakertrans* No. PER.06/MEN/IV/2005 Year 2005 on Guidelines for Membership Verification Trade/Labour Union ("Permenakertrans 6/2005"). In Article 5 *Permenakertrans* 6/2005 mentioned that the verification of membership in the Trade union conducted by employment agencies in regencies / cities (Department of Labor). Verification is done by examining the Trade union membership card or a written statement from workers who do not have a membership card of Trade union (Article 6 paragraph [1] number 4 Permenakertrans 6/2005). Written statement made by the workers shows among others (Article 6 paragraph [1] number 6 *Permenakertrans* 6/2005):

1. The name of the worker/labor.
2. The section/unit/division of employment.
3. A statement that the worker/labor does not have a membership card of trade/trade unions.
4. A statement worker/labor that he or she has a particular membership of trade /trade unions particular.

Permenakertrans provisions described previously imply that Trade union members in the company should be the workers in that company. The practical verification provisions have become a source of conflicts among unions and employers. Names of workers who have been registered as part of establisher of unions, turns on when verification frequently found differences in membership. Regardless of whether or not there is a manipulation.

As a continuation of the verification, if found differences in the data when proposing the registration with the current verification, it is possible to notice the registration of the trade union could not be implemented and should be suspended. Practically, the suspension did not happen, but refusal registration.[18]

A new Trade union which register that clarifiesits establishment, but rejected, then it will not be a party in making of a collective labor agreement. Can not even carry out other trade union functions, such as:

a) a party in makinga collective agreement and solvingthe industrial disputes;
b) a representative of the workers / labor in cooperation agencies in the field of labor according to its level;
c) a means of creating harmonious industrial relations, dynamic, and justice in accordance with the existing regulation;
d) a means of channeling the aspirations in the fight for the rights and interests of its members;
e) a planner, implementer, and the person in charge of the strike of workers / labor in accordance with the legislation in force;
f) a representative of the workers / laborers in the fight for ownership of shares in the company (Article 4 paragraph (2) of Law 21/2000).

Other forms of multiple interpretations is related to the strike. The practice of informing union strike applied the requirements of rally/demonstrations. If the strike carried out by the rallies or convoy can be categorized as an activity of expression in public. Pursuant to Article 5 jo. Article 6 Perkapolri No. 9 Year 2008 on Procedures for the Implementation Service, Security and Case Management in Public Opinion Submission ("Perkapolri 9/2008"), the organizer of the delivery of public opinion, obliged to give notice in writing to the local police officer, before the activities carried out. According to Article 15 Perkapolri 9/ 2008, the submission of a notification made to the police officers as low as the low-level police station where the activities will be carried out and such notice must be received no later than 3 x police 24 hours before the activity performed. If the notice has been given in accordance with, based on Article 16 paragraph (1) letter b Perkapolri 9/2008, the police are obliged to immediately issue a Receipt Notification (STTP) with copies to the relevant police force, the relevant agencies, the owner / location where the object / target delivery of opinion in public.[19] It was actually two different aspects. Strike only applied for a special legal relationship of employment. The requirement is simply a notification only. At least within seven (7) working days before the strike carried out. Workers/labor and trade/trade union shall notify in written form to the employer and the agency who responsible for local manpower. Notification referred to in paragraph (1) shall at least contain:

a) time (day, date, and time) begins and ends the strike;
b) a strike location;
c) reasons and causes why the strike should happen; and
d) signature of the chairman and the secretary and / or the respective chairman and secretary of the trade/trade union strike in charge.

Differences in interpretation raises the basic difference of the claim about whether there is or not union busting by employers or unions.

2. Multiple Interpretations on union busting

The existence of vertical-horizontalinconsistencies resulted in multiple interpretations which resulted in union busting. Union busting stipulated in Article 28 of Law 21/2000, ie: anyone prohibited from preventing or forcing workers / laborers to form or not form, the caretaker or do not take charge, become a member or not a member and / or running or not running activities union / labor by:

a) Layoffs/dismissal, suspension of employment, demoting, or transferring;
b) do not pay or reduce the wages of workers / labor;
c) giving any intimidation;
d) campaigning against the establishment of trade / trade unions

To act upon, may be subject to criminal sanctions at least 1 (one) year and a maximum of 5 (five) years and or a fine of Rp 100,000,000.00 (one hundred million rupiah) and a maximum of Rp 500,000,000.00 (five hundred million rupiah) Article 43 of Law 21/2000.

During the process of conflict or ongoing industrial disputes, there are employers actions who refuse to recognize the existence of trade unions with various forms of acts that fulfil the requirements such as the provision of Article 28 of Law 21/2000.

In Surabaya, there are cases[20] in which the Union already has a Certificate of Registration of *Kadisnakertransduk* Surabaya No. 250/7912 / 436.12 / XII / 2013 dated December 24, 2013 concerning the registry of the establishment of the PUK-SPL-FSPMI PT Maspion Unit IV. This establishment license (SK) is the form of the State administrative decree that is concrete, individual and final, fulfilled general principles of good governance and the principle of non-interference. Certificate of Registration of *Kadisnakertransduk* Surabaya No. 250/7912 / 436.12 / XII / 2013 dated December 24, 2013 concerning the registry of the establishment of the PUK-SPL-FSPMI PT Maspion Unit IV CAN NOT BE CANCELLED due to insufficient reasons as KTUN (decision of state administration) that contrasts with legislation and general principles good governance.[21]

In Sidoarjo, formation SPAI PUK FSPMI / PT. Interbat period 2013-2016 is legitimate because it has qualified the establishment of a Union based on Law 21/2000. Central Executive Board organizational instruction FSPMI July 13th, 2013 (Letter No. 01274 / Org / DPP FSPMI / VII / 2013) are not legally binding on the establishment PUK SPAI FSPMI PT.NTERBAT. Action PT Interbat refused talks with the PUK SPAI FSPMI PT. Interbat is in violation of the right of association. This action to the correct provisions of Article 28 jo. Article 43 of Law 21/2000. Strike conducted by the SPAI FSPMI PT.INTERBAT PUK is valid. Suspensions made by PT Interbat to 165 workers on 30 September 2013 could not be justified[22], this action violates the provisions of Article 161 paragraph (1) of Law 13/2003. The fact that happened to this case is the dismissal[23] of striking workers.[24]

In Jombang, there was a manipulative rejection in the registry of the establishment of a trade union. Communities around the work place forced the dissolution of the business premises of the PUK SPAI FSPMI PT. CJ Feed Jombang. It should be understood that the rise of the right of union for workers due to the working relationship. If there is no employment relationship, it will not appear right of union includes the right to establish the union. Employment relationship exists because of the legal subject of labor relations that employers and workers, as well as the object of the employment as a reciprocal relationship with their wages. Society is not subject to the law which involved in labor relations at PT. CJ Feed Jombang. Had nothing to do with the emplyment relationship done by a group of workers who have joined in the PUK SPAI FSPMI PT. CJ Feed Jombang with PT. CJ Feed Jombang. Societycan not force the dissolution of the union. It should be the duty of the State to conduct an investigation / further investigation conducted by the Police against the reasons why community gets involved in the affairs of trade union.[25] The fact demands on their pretrial stipulation letter of Termination of Investigation (SP3) from the East Java Police -related cases of banning the right of association (Union Busting) PT CJ Feed Jombang in case no. 19 / prap.Per / 2013 / PN.SBY rejected. PK submission file that has been filed in February 2014 on the case, until now there has been sent to the Supreme Court [26]. The fact demands on their pretrial stipulation letter of Termination of Investigation (SP3) from the East Java Police -related cases of banning the right of association (Union Busting) PT CJ Feed Jombang in case no. 19 / prap.Per / 2013 / PN.SBY rejected.

In Gresik, the plan strike that would be carried out by employees of PT Petrokimia Gresik (SKPKG) is as a result of the failure of the negotiations as demand written negotiation efforts to the employers which have done more than two (2) times within 14 (fourteen) working days (qualify the provisions of Article 137 of Law 13/2003 jo. Article 4 Decree No. 232/2003).Strike that would be carried out by employees of PT Petrokimia Gresik (SKPKG) is performed in order to carry out the demands of basic rights are seriously violated by employers (qualify the provisions of Article 145 of Law 13/2003). Strike will be

carried out by employees of PT Petrokimia Gresik (SKPKG) is a LEGAL STRIKE if the registry has acquired a number of notifications strike plan in accordance with the provisions of Article 140 paragraph (1) and (2) jo. Article 137 of Law 13/2003.

The legal consequences of a strike by employees of PT Petrokimia Gresik (SKPKG)is workers who are on strike, should receive wages during the strike and employers are prohibited from imposing sanctions in accordance with Article 143 of Law 13/2003 jo. Article 144 of Law 13/2003 in conjunction with Article 28 of Law 21/2000. This offense is punishable by criminal sanctions at least 1 (one) year and a maximum of 5 (five) years and or a fine of Rp 100,000,000.00 (one hundred million rupiah) and a maximum of Rp 500,000,000.00 (five hundred million), pursuant to Article 43 of Law 21/2000. However the plan to strike never happens because there is a threat that the strike at PT Petrokimia is a strike conducted in the vital company so that it can be categorized into a disruption of national food security which meets the criteria of subversion.[27]

3. Restrictions that can eliminate workers' right to unionize

The difficulty to proof against perpetrators of union busting has removed the nature of the legal protection of the workers' right for workers.

CONCLUSION

There is a vertical-horizontalinconsistencies on the rule of law regarding the right of association that can lead to multiple interpretations on union busting which resulted in eliminating the right of to unionize for workers in Surabaya, Gresik, Sidoarjo, and Jombang.

RECOMMENDATION

Revised provisions on workers' rights to unionize that rise to multiple interpretations.

NOTES

1. Article 28 UUD 1945
2. Article 28 E (3) UUD 1945
3. Trade Union Act Number 21 /2001 :.
4. Manpower Act Number 13/2003.
5. Industrial Dispute Relation Act Number 2/2004
6. Margarret B. C, Hak Berserikat Satuan Pengamanan (Satpam) Sebagai Pekerja Dalam Hukum Positif Indonesia, *http://yeremiaindonesia.com/wp-content/uploads/2015/06/MBC-HAK-BERSERIKAT-SATUAN-PENGAMANAN1.pdf.*
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