



Reception of Investigation Principles According to ILO International Labor Standards on Labor in Indonesia

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Abstract

The position between workers and workers in labor law always places an unbalanced position, where the position of workers will always be in a weak position. In the dispute over industrial relations disputes regulated in Law Number 2 of 2004 the basis for evidence is based on Article 163 HIR (Herzien Indonesis Reglement)/ 283 RBg (Rechtsreglement Buitengewesten) / 1865 BW (burgerlijk wetboek voor Indonesie). The provisions of this Article give rise to injustice about the reverse evidence that has been established by the International Labor Organization (ILO) through international labor standards and other ILO legal instruments regarding reverse proof in cases of dismissal, Freedom of Association, and Equality in Employment and Occupation. This research utilizes a juridical normative, descriptive approach and is supported by case studies as data support, and an analysis is carried out based on qualitative methods and legal comparisons.

Keywords: *Reception; Reversed Evidence; International Labor Standards*

Introduction

The legal position of labor as regulated in Law Number 13 of 2003 concerning Manpower and Law Number 2 of 2004 concerning the Settlement of Industrial Relations, the quality of the law is mutually contradictory, as a result, the labor law cannot provide proper protection, especially it does not protect workers, workers are placed in a weak and depressed position. One of the things that causes this condition is the material and formal law in Law Number 13 of 2003 concerning Manpower and Law Number 2 of 2004 concerning the settlement of industrial relations does not follow what standard rules have been set by the International Labor Organization (ILO) through international labor standards (International Labor Standards) or other ILO legal instruments regarding the principle of reverse proof.

In Law Number 13 of 2003 on Employment and Law Number 2 of 2004 on the settlement of industrial relations in terms of proof of the case is still based on the provisions of Article 163 HIR/283 RBg/1865 BW, the provisions of this article are very unfavorable and very unfair for the position of workers where the position of workers is under the pressure of the employer (Sudjana,2000) so that the goal of implementing labor law that is fair to both parties is not achieved.

This condition indicates a situation where the law is behind the problems it regulates or *het recht hinkt achter de feiten* or law lagged behind the facts, a condition characterized by a conflict between Law Number 13 of 2003 concerning Manpower and formal regulations in Law Number 2 of 2004 concerning the Settlement of Industrial Relations has a very real conflict with what standard rules have been established by the International Labor Organization (ILO) through international labor standards (International Labor Standards) and other ILO legal instruments regarding the reverse proof.

The regulations relating to the principle of reverse burden of proof in labor cases that are regulated in the values in ILO Conventions and ILO Recommendations are:

1. Article 9 paragraph (2) ILO Convention Number 158 of 1982 concerning Termination of Employment (PHK).
2. Article 8 ILO Convention Number 183 of 2000 concerning Protection of Pregnant Women.
3. ILO Convention Number 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize and ILO Convention Number 98 of 1948 Concerning the Applicability of the Basics of the Right to Organize and to Bargain Collectively has been issued a General Survey by the ILO Committee of Experts in Paragraphs 217 and 218.
4. Paragraphs 230 and 231 ILO Convention Number 111 of 1958 concerning Discrimination in Employment and Occupation has issued a General Survey by the ILO Committee of Experts.
5. Article 6 paragraph (2) letter E ILO Recommendation Number 143 of 1971 concerning Worker Representatives.

In connection with the above, the material law of Law Number 13 of 2003 concerning Manpower and formal regulations in Law Number 2 of 2004 concerning the Settlement of Industrial Relations in the application of the law, none of them adopt the standard values as outlined in the ILO Conventions above regarding reverse proof for cases of dismissal, Freedom of Association and Equality in Employment and Occupation.

The application of the principle of the reverse burden of proof in labor cases is intended to make labor law practices legally beneficial (efficient) for the parties involved in it because of Law Number 13 of 2003 concerning Manpower and formal regulations in Law Number 2 of 2004 concerning the Settlement of Industrial Relations is detailed. Still, it is not binding on rule makers, there is often discretion (Friedmann,2002), and it is very beneficial for employers and detrimental to workers.

By adopting the values contained in the ILO conventions on the principle of reverse proof for cases of dismissal, concerning the Protection of Pregnant Women, on Freedom of Association and Protection of the Right to Organize, on Discrimination in Employment and Concerning Workers' Representation, it is hoped that it will create a more effective labor law. So that this more effective law is a manifestation of responsive law, which aims to make labor law more responsive to the effects of social change and more effective in dealing with social problems relating to problems that arise within the scope of labor law. Social change here is defined as a change in the law which is intended to change from an unfavorable condition to a better condition that is useful for the development of a country because the law must live and develop in society and must be "up to date" with the development of that society (Chairuddin,1999).

Methodology

The approach method in this research is juridical empirical to find out how the relationship between law and society and the factors influencing the implementation of law in society, as primary data. The second data is obtained indirectly through library research. This research specification describes an analysis to describe the applicable law related to law and positive law about the main research problem. Based on primary and secondary data, identification, classification and validation. Qualitative data analysis was carried out, and the results were displayed in the research report.

Result and Discussion

A. Decisions of the Courts of ILO Member States Using the ILO International Labor Standards

International labor standards and other ILO legal instruments concerning termination of employment, freedom of association, and discrimination prove such cases using the Reversed Load of Proof. The ILO has summarized several decisions by the courts of ILO member States which in their judgment apply reverse evidence (ILO, 2011) among others:

1. The Decision of the National Court of Appeal, Fifth Chamber, Argentina No. 144/05 s.d 68536 Dated 14 June 2006, in Parra Vera Maxima Vs. San Timoteo SA Conc

This decision relates to the use of principles by the court in the settlement of cases of dismissal, freedom of association, and protection against anti-union discrimination. The case, in this case, is that the employer dismisses workers who carry out union activities on the grounds of the restructuring program, the Court of First Instance gave a decision to reject the worker's claim because the plaintiff could not prove that the defendant carried out the dismissal in connection with acts of discrimination. The Court of Appeal finally decided that the dismissal by the defendant was illegal because the dismissal was a discriminatory act as retribution for his association activities. This Court of Appeal decision is based on the provisions of international labor standards (ILO,1998).

2. Judgment of the High Labor Court, Sub-Part 1 Specialist in Individual Disputes within Sao Paulo Transporte S.A. Vs. Gilmar Ramos Da Silva, March 5, 2003

This decision relates to the use of principles by the High Labor Court in Brazil for acts of discrimination by employers who dismiss their workers because they are suffering from HIV-AIDS. The case is a worker who an employer lays off because the worker is suffering from HIV-AIDS. However, the decision was overturned by the High Labor Court Decision on the consideration that the act of an employer who dismissed his workers despite knowing his illness was against the effort to uphold human dignity which is a fundamental principle in the Federal Republic of Brazil, and also exists in the 1988 Federal Constitution and is contrary to Convention Number 111 concerning Discrimination (Position and Employment) and Number 117 on Social Policy (Basic Objectives and Standards) and in the ILO Declaration on Fundamental Principles and Rights at Work, 1998.

3. *The Decision of the Spanish Constitutional Court, Second Chamber, 23 November 1981, Case Number 38/1981*

This decision relates to the obligation to use principles by the court in adjudicating cases of anti-union discrimination. The case is that several workers have been dismissed for economic reasons, but the workers consider the dismissal as anti-union discrimination. The Court of First Instance gave the dismissal decision valid because the employer could prove that the economic reasons for the dismissal were proven. The Court of Appeal overturned the decision of the Court of First Instance by giving a permanent verdict of dismiss, but the workers were compensated.

Based on the decision of the Court of Appeal, the workers filed legal remedies to the Spanish Constitutional Court based on unconstitutionality (*recurso de amparo*), using ILO Conventions and non-binding instruments to enrich the interpretation of constitutional provisions, the Spanish Constitutional Court stated that the dismissal was anti union is null and void even though the victims are not union representatives and set up reverse evidence in cases of alleged anti-union discrimination.

4. *United States Supreme Court Judgment, Number 411 U.S. 792 of 1973 In Mc. Donnel Douglas Vs. Green*

This ruling is an early milestone regarding applying a reverse burden of proof in the United States in a labor case regarding discrimination by employers against workers in hiring employees due to differences in skin color. The decision of the Cassation Court stated that in principle, the defendant rejected the appeal by giving considerations as a milestone in the application of reverse proof in labor cases concerning discrimination by issuing a legal rule that if the plaintiff (worker) succeeds in delivering preliminary evidence (*prima facie*), then the burden of proof will shift to the defendant (entrepreneur). In this case, it turned out that the plaintiff succeeded in proving *prima facie* above, and finally, the burden of proof shifted to the defendant. It turned out that in this case, the defendant could not prove that the plaintiff was unable to accept the job vacancies due to non-discriminatory reasons.

B. *Reception of International Labor Standards into Indonesian Civil Procedural Law*

ILS reasons into Civil Procedure Law are based on reasons:

First, substantially, in essence, the International Labor Standards and other ILO Instruments contain a general legal principle that workers must be given protection in settlement of industrial relations disputes in the form of applying a reverse burden of proof. General principles of law, according to Article 38 paragraph (1) of the Charter of the International Court of Justice, are general principles of law recognized by civilized nation (Kusumatmadja & Agoes, 2015) Because all ILO member countries have recognized the principles contained in the International Labor Standards and other ILO instruments regarding BPT, these general legal principles can be used as a source of international law to be applied in industrial relations courts (Kusumatmadja & Agoes, 2015).

In the context of the application of law in courts, the International Labor Standards and other ILO Instruments as a source of international law can be applied in courts (ILO, 2011) based on the first, as discussed in Chapter III that HIR adheres to an open system (Open System Van het Recht), this legal system is not static because the legal system requires decisions (stipulations) from judges based on judgments and the results of the assessment. It creates something new and constantly adds to the breadth

of the legal system so that in the ILO International Labor Standards and other ILO instruments regarding the burden of proof reversed is a source of international law so that an open HIR system can be perceived in HIR can give birth to industrial relations court decisions that lead to international labor standards and secondly, under the provisions of Article 10 paragraph (1) and Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states:

Article 10

The court is prohibited from refusing to examine, try and decide a submitted case because the law does not exist or is not good enough but is obliged to examine and judge it.

Article 5 paragraph (1)

Constitutional judges and judges are obliged to explore, follow and understand the legal values and the sense of justice that live in society.

Philosophically, the provisions of Article 10 paragraph (1) and Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power mandates that judges as law enforcers and justice are obliged to dig (Mertokusumo,2010), follow and understand the legal values that live in society and in considering them. Thus, the judge can give a verdict under the law and the sense of public justice so that by itself the judge can avoid the perception of "the judge as to the speaker of the Law or the mouthpiece of the Law alone" (*La bouche qui prononce les paroles de loi*) (Kamil&Fauzan,2008).

Second, in the practice of justice in Indonesia, Indonesian court decisions use ILS considerations and other ILO instruments that have been ratified or not, including in the decision of the DKI Jakarta High Court Number 651 / PDT / 1988 / PT. DKI dated July 2, 1988, between Nurhatina (Plaintiff / Appellant) vs. PT. Toray Synthetics, and the Indonesian Workers Union (Defendants / Appellants), a case regarding gender discrimination, considered the decision using the 1979 UN Convention on CEDAW and the Supreme Court Decision Number 408 K / Pdt.Sus / 2011 in the case between Toni Tempati vs. PT. Garuda Indonesia (Persero) regarding anti-unionism using ILO Recommendation Number 143 of 1971 concerning Worker Representatives.

Third, based on the Bangalore 1988 Principles, this principle emphasizes that courts can use international law relating to human rights (including labor issues), whether ratified or not.

An example of a case relevant to the Bangalore principle is the application of international labor law to the national court proceedings in Canada in the case of the Supreme Court of Canada Number 2001 CSC 94 in the case between Dunmore VS Ontario (Attorney General) Supreme Court of Canada, interpreting Canadian Charter on Rights and Freedoms under Article 2 of ILO Convention Number 87, annulled a provincial regulation which excluded agricultural workers from the guarantees provided to other workers of freedom of association (ILO,2011).

Based on the Bangalore principle, applying the reverse burden of proof based on the principles of international labor law can be applied in the Industrial Relations Court, considering that it relates to human rights.

Fourth, the substance of ILS is under the principle of appropriateness in the application of the burden of proof, namely that it is the employer who is most likely to prove when compared to workers so that the burden of proof lies with the employer, while from its nature ILS is tripartite, meaning that ILS is made by three parties, namely employers, workers and the government. The members of the ILO and the ILS are universal, meaning that the ILS is formulated in general by taking into account the conditions of employment in member countries.

Conclusion

The reasons for the reversal burden of proof can be applied in industrial relations cases are: First, protection of workers, labor law contains protection of workers because the worker's position is in a weak position, so that in the process of proving in court regarding the burden of proof, workers must also receive protection. By not allowing workers to be given the burden of proof themselves, something impossible must therefore be protected by applying. Second, the courts of several countries, including the United States, Brazil, Argentina, and Spain and Britain, Australia, many countries in Africa, and the Philippines, have applied a reversed burden of proof. Third, several industrial relations court decisions have applied the reverse burden of proof in the termination of relations. Employment, discrimination on freedom of association, evidence that exists in employers, and work accident cases.

Based on the norms stipulated in the International Labor Standard and the ILO Instrument and laws and regulations in Indonesia as well as national and several countries labor practices, it is found that legal principles/rules of application of the burden of proof in labor, especially regarding cases of termination of employment, discrimination and anti-unionism Workers, namely "principles/principles based on protection", the workers are given a prima facie burden of proof and employers are given the burden of proof about the subject matter of the case. For cases of discrimination and anti-trade unions (union-busting) committed by employers against workers indirectly (covertly).

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