



ENFORCING THE MINIMUM WAGE THROUGH CRIMINAL SANTIONS: A CASE OF INDONESIA

Budi Santoso* and Kamal Halili Hassan**

* Coordinator of Labour Law Research Center, Brawijaya University, Indonesia
Ph.D student at Faculty of Law, the National University of Malaysia

** Professor of Labour Law, Faculty of Law, the National University of Malaysia

ENFORCING THE MINIMUM WAGE THROUGH CRIMINAL SANCTIONS: A CASE OF INDONESIA

Budi Santoso¹
Kamal Halili Hassan²

Abstract

This article examines the enforcement of the minimum wage in Indonesia through criminal sanctions. The minimum wage is stipulated under Manpower Act 2003. Employers are prohibited from paying wage lower than the minimum wage, but they may be allowed to make postponement if they are unable to pay the minimum wage. Employer who violates the minimum wage will be subjected to criminal sanctions in prison and/or a fine. Since 2009, there have been several courts applying criminal sanctions to employers who violate the minimum wage. One example of such was a court decision on the case of *Sri Rejeki Mebelindo Ltd. Co. vs. the Labour Union*. The judges sentenced the Director to one and a half years in prison and a fine of 250 million rupiah because the Director was found guilty to pay wage lower than the minimum wage in 2008. However, in enforcing the minimum wage through the criminal sanctions, it is necessary to consider whether the sanctions will not be counterproductive to the company's business operations when the sanctions are imposed directly in the form of imprisonment, not in the form of a fine, since the malefactor is also the owner of the company who operates the company in order to run well.

Keywords

Minimum wage, criminal sanctions

1. INTRODUCTION

Minimum wage is one of the most used instruments for affecting the wage distribution on the labour market. Most countries, both developed and developing, set the level of a legal minimum wages either through statute or by giving legal force to the terms of collective agreements negotiated between employers and trade unions.³ In fact, minimum wage is provided by law in 90% of the world's countries.⁴ In Indonesia, the minimum wage is set in the legislation. Based on Manpower Act 2003, to actualize the income that meets a decent living for humanity, the government sets the minimum wage

¹ Coordinator of Labour Law Research Center, Brawijaya University, Indonesia; Ph.D student at Faculty of Law, the National University of Malaysia; e-mail: budi.santoso@ub.ac.id

² Professor of Labour Law, Faculty of Law, the National University of Malaysia; e-mail: k.halili@ukm.my

³ Simon Deakin and Frank Wilkinson, Minimum Wage Legislation, in Kenneth G. Dau-Schmidt et.al, *Labour and Employment Law and Economics*, Edward Elgar Publishing, Cheltenham, UK, 2009, p. 150.

⁴ Chiara Benassi, *The Implementation of Minimum Wage: Challenges and Creative Solutions*, ILO, Geneva, 2011, p. 2.

policy that protects workers. Minimum wages are set based on the needs of decent living and having regard to productivity and economic growth. Admittedly, the minimum wage is still a problem of employment in Indonesia and summarizing what is often seen as the basic needs of workers and enterprises and also economic conditions to grow and to be productive and competitive.

In the Indonesian labour law, employers who violate minimum wage provisions were threatened with criminal sanctions. The threat of criminal sanctions indicates that a violation of the provisions of the minimum wage is considered as a crime. Government wants to strengthen the efforts of minimum wage enforcement through the threat of criminal sanctions for those who violate them. Almost all elements of workers welcome the regulation, although most are pessimistic that such provisions will be effective. On the other hand, the employers consider that the threat of criminal sanctions would be counterproductive to attempt to enhance economic competitiveness.

However, although the legal sanctions for violating the minimum wage payments are set firmly, the implementation in reality often does not match the expectations. This fact is supported by the data from the Indonesian Ministry of Manpower and Transmigration in 2012 that the number of workers who earned wages above the minimum wage was only 37% of the total workers in Indonesia, while the other 63% only enjoyed wage limited to the minimum wage and many were still receiving below the minimum wage set in each province.⁵ Other violations are many employers who intentionally combine overtime payment and transport allowance with basic salary and benefits so that the total wages reported to be in accordance with the minimum wage. Whereas in the Regulation of the Minister of Manpower and Transmigration No. 1 year 1999 on Minimum Wage mentioned that the minimum wage is only basic salary including fixed allowances.

Lack of knowledge of law enforcement officers about the threat of criminal sanctions in violating the minimum wage and lack of supervision by the labour inspectors are considered as factors weakening the prosecution of violations of minimum wage payment. Practically, this effort is then charged to the labour union as the spearhead of the protection and defense of workers' rights.

⁵ Moh Ridwan, 'Penerapan Sanksi UMP Sering Berujung Damai', available at <http://www.shnews.co/detile-11093-penerapan-sanksi-ump-sering-berujung-damai.html>.

A case of violation of minimum wage payments by the employer to a threat of criminal sanctions presented to the court for the first time was by the labour union in 2009, which was the case in *Sri Rejeki Mebelindo Ltd. Co.vs the Labour Union*. This case has caught the attention of the actors in industrial relations and provides inspiration for other labour unions to use the criminal threat as a negotiation mean of the minimum wage payment with employers. Therefore, it will be analyzed in this paper, especially from the perspective of minimum wage enforcement through criminal sanctions.

2. THE FACTS

Sri Rejeki Mebelindo Ltd. Co. based in Pasuruan region, East Java province, is a company engaged in the area of furniture with 250 employees. From January 2008 to December 2009, the company, led by a director namely Hariyanto Utomo Hidayat, paid the wages to each worker ranged between Rp. 436.200 to Rp. 1.410.600.

Apparently, the monthly wages paid to the labourers mostly were still below the minimum wage of Pasuruan region year 2008 and year 2009 which amounted to Rp. 802.000 and Rp 955.000. In January 2009, the Director filed a request for suspension of the implementation of the Minimum Wage year 2009 to the Governor of East Java. The petition is then granted by the Governor for the period of 6 months, starting from January 1, 2009 until June 30, 2009. During the suspension period, the company must pay workers wages in accordance with the Minimum Wage year 2008.

After the period of the implementation of the Minimum Wage year 2009 suspension ended, in fact the company still gave workers wages below the minimum wage year 2009, even as many as 45 workers were still paid below the minimum wage year 2008. As a result, workers through their labour union, namely the PUK FSPMI Sri Rejeki Mebelindo, had been asked to do mediation to the government that was mediated by the Regent of Pasuruan. Nevertheless, the mediation efforts always failed because the company never attended.

Furthermore, workers coordinated by the labour union held a strike around August 2009 to demand a wage increase in accordance to Minimum Wage 2009. Although there is a demand for payment of wages in accordance to Minimum Wage through the strike, the Company still continued to pay their workers wages below the minimum wage year 2009. After efforts to bring the talks to the employers and

mediation efforts failed, the union ended up taking a last resort that is by reporting the matter to the police with allegations that the company had violated article 185 jo. article 90 (1) Manpower Act 2003.

3. THE LEGAL BACKGROUND

Minimum Wage is one of the most important workplace rights. It is a minimum standard used by employers to pay their workers legally. In the Indonesian labour laws, minimum wage provisions set forth in Article 88, 89, and 90 Manpower Act 2003, Regulation of the Minister of Manpower and Transmigration No. 1 year 1999 on Minimum Wage as amended by Decree of the Minister of Manpower and Transmigration No. 226 year 2000, Decree of the Minister of Manpower and Transmigration No. 231 year 2003 on Procedures for Suspension of Minimum Wage Implementation and Regulation of the Minister of Manpower and Transmigration No. 13 year 2012 on Components and Living Needs Achievement Phases Implementation.

In Indonesia, Minimum Wage serves as a safety net, to prevent the wages to go below the level of the minimum living needs; as an effort to a more equal distribution of income, and uplift a growing middle class; also to make sure that the economic development is not only enjoyed by a small portion of society who has a chance, but also reaches the low income communities and families.

Indonesia has 33 provinces and 509 districts. Due to the cost of daily living needs in each province and district is different, then the minimum wage is divided into the Provincial Minimum Wage, Provincial Sectoral Minimum Wage, Regency Minimum Wage and Regency Sectoral Minimum Wage. The Minimum wages are set annually. Based on Ministerial Regulation No. 1 year 1999, the minimum wage is the lowest monthly wage which consists of basic salary including fixed allowances. This wage applies to those who are single and have a 0-1 year work experience, as a safety net. A review of the wages of workers with tenure of more than 1 year is done on a written agreement between workers/labour unions and employers.

Minimum wage is set by the government based on the necessities of decent living by considering the productivity and economic growth. Decent living is a standard requirement for a single worker to live physically feasible to the needs of 1 month. Article 89 (3) Manpower Act 2003 states that the minimum wage set by the Governor

with regard to the recommendation of the Provincial Wage Councils and / or the Regent / Mayor. The Recommendations of the wage are based on the result of the survey and meeting of the Wage Council. The Wage Council consists of government, employers organization, and trade unions representatives. Additionally, government bodies like the National Statistics Body, Regional Planning body, Ministry of Manpower, Ministry of Industries, Ministry of Trade, Ministry of Agriculture, Ministry of Forestry, Ministry of Transport at the Regional Office are also involved in setting the minimum wage. Employers organization involved in wage setting is APINDO (Employers Association) and Trade Unions Confederations involved are K-SBSI, KSPSI and KSPI (including Federations / Sectors Union which affiliate to one of the 3 confederations).⁶ Universities and experts are also involved in wage setting in Indonesia.

Article 90 (2) Manpower Act 2003 states that entrepreneurs who cannot afford to pay the minimum wage can do the suspension. To obtain a suspension of the minimum wage implementation, the employer must first apply for a suspension to the governor in accordance to the requirements of the provisions of the Decree of the Minister of Manpower and Transmigration No. 231 year 2003. The postponement of the payment of minimum wages by an enterprise that is financially unable to pay minimum wages is intended to release the enterprise from having to pay minimum wages for a certain period of time. If the postponement ends, the enterprise is under an obligation to pay minimum wages that are applicable at the time but is not obliged to make up the difference between the actual wages paid and the applicable minimum wages during the period of time of the postponement.

Article 90 (1) Manpower Act 2003 states that employers are prohibited from paying wages lower than the minimum wage. The prohibition is accompanied by the threat of severe sanctions, as provided in article 185 jo. article 189, the criminal sanctions are in the form of imprisonment for one year and a maximum of four years and/or a fine of 100 million rupiah and a maximum of 400 million rupiah for employers who do not comply the ban. The offences referred categorized as a crime. Imposed criminal sanctions do not eliminate the employer's obligation to pay the rights and/or compensation to the workers.

⁶ Minimum Wage Report, 'Minimum Wage in Indonesia', available at <http://www.wageindicator.org/documents/publicationslist/publications-2011/INDONESIA.pdf>

Of these provisions, it is clear that there is government intervention in wage setting that aims to protect the workers. Indonesian labour law sees the problem of determining the amount of wages cannot be given to the private aspects of the employment relationship between workers and employers alone. This is due to the weak position of workers who are subordinate to employers. Government is obliged to perform its function as a regulator and inspector.

However, those good purposes in fact are not supported by the minimum wage setting for sure. For example, in article 88 (4) Manpower Act 2003 stated that the minimum wage policy is based on the needs of decent living by considering productivity and economic growth. This provision can lead to irrelevancy in the implementation. For example, under the excuse of safeguarding the interests of investment and economic growth in the region, the governor set a minimum wage which is still below the minimum amount for decent living in the area. It clearly shows the less harmony between goal settings of minimum wages and the way of determining the minimum wage.

The existence of a very severe threat, that is in the form of criminal sanctions for employers who do not pay the minimum wage, is a form of strict protection from the regulation substance's point of view. The issue is whether the government has provided guidance and oversight to the employer in giving wages to the workers. The rhetoric of these questions arises because in reality there are many companies that do not pay the minimum wage.

4. THE DECISION OF THE COURT: THE LEGAL ISSUES

The judges in Pasuruan District Court decided that the malefactor Utomo Hidayat, Director of Sri Rejeki Mebelindo Ltd. Co. has been proven legally and convincingly guilty of committing a crime to pay wages lower than the minimum wage set by the government, Pasuruan minimum wage in 2008 as set in the East Java Governor Decree No. 188/399/KPTS/013/2007 and Pasuruan Minimum Wage in 2009 as set out in the East Java Governor Decree No. 188/303/KPTS/013/2008. Such offense as stipulated in article 185 jo. article 90 (1) Manpower Act 2003. Therefore, the malefactor sentenced to prison for one year and fined 250 million rupiah.

The decision was taken by the judges based on the consideration that from the testimony of the witnesses and of the results of the examination by the labour inspector at the Department of Labour Employment in Pasuruan region and based on evidence of a written letter presented in the trial that it has been found in 2009 the company paid the employees who still got paid under the Minimum Wage in 2009 and as many as 45 workers were still paid below the minimum wage in 2008. As a result of these actions, approximately 191 workers suffered losses. The judge also considers that the provisions on wages as defined in Article 89 Manpower Act 2003 is imperative and cannot be unfulfilled in any way, although it is based on the agreement between the employer and employee and if it is conducted, so the deal is then null and void (void ab initio), except by the suspension of the minimum wage implementation.

Furthermore the judges warned that criminal punishment is not aiming for revenge, but the first one is improving, educating, and motivating the malefactor not to commit the act again and preventing other people to refrain from acts that have been committed by the malefactor.

Based on the court decision on the first degree, the malefactor objected and then appealed to the High Court of East Java. On examination in the Court of Appeal, the judges apparently through Decision No. 627/Pid./2010/PT.SBY strengthens Pasuruan District Court Judge's judgment and precisely adds the prison sentence of one and a half years in prison and fined 250 million rupiah.

Court decisions above have given fresh air for the defense of the workers' minimum wage. Employers now have to think twice if they would give workers wages below the minimum wage. However, it is important to observe whether the court decision punishing employers who pay wages below the minimum wage with a sentence of imprisonment is the most appropriate type of punishment.

5. CRITICAL REVIEW

Minimum wage is rated as a device to increase of the wages of workers.⁷ The amount of minimum wage based on the needs of decent living is a necessity since it is the safety net for worker viability. However, considering the position of the workers that is not equivalent with the position of employers, government intervention is important in

⁷ Chaterine Saget, *Penentuan Besaran Upah Minimum di Negara Berkembang*, ILO, Jakarta, 2006, p. 3.

setting the minimum wage issue so that employers do not arbitrarily set the wages. Government interventions in the form of regulations, among others, are the determination of the minimum wage and enforcement. In short, this intervention is intended to provide protection for the welfare of workers.

In policy making of minimum wage enforcement, elements of sanctions will almost certainly always be a very important part set in it. The most severe sanction in this context is the threat of criminal sanction of imprisonment. Reviewed from its goal, policy making of criminalization in the minimum wage enforcement cannot be separated from the protection of workers to prosper. Through the imposition of criminal sanctions for violations of the provisions of the minimum wage, it is expected to be a deterrent as well as to educate the offenders and to provide worker protection. Institutionalizing and implementation of criminal sanctions in enforcing the minimum wage can be an important step towards employers behavioral change in treating their workers.

However, the use of criminal sanctions in enforcing the minimum wage is not the first strategy. Referring to the opinion of Andrew Ashworth⁸ associated with the enforcement of criminal sanctions, criminal prosecutions should not be regarded as the primary means of protecting individual and social interests. In terms of prevention, more can probably be achieved through various techniques of situational crime prevention, social crime prevention, and general social and educational policies. Soft approaches need to be applied first, such as persuasion and education to employers of having to pay the minimum wage. If the approach is unsuccessful, it is then the use of the hard approaches of legal enforcement, such as through the threat of civil or even criminal penalties.

Surprisingly, although the threat of criminal sanctions in enforcing the minimum wage in Indonesia has been set up since 2003 and since that time many employers are still paying their worker wages below the minimum wage, apparently not even once have the labour inspectors processed it as an act of criminal. Persuasion and education efforts may already often be done, but when the minimum wage violations by employers are still ongoing, they are supposed to increase the level of enforcement into

⁸ Andrew Ashworth, *Principle of Criminal Law*, fifth edition, Oxford University Press, Oxford, 2006, p. 16.

more severe means. This is what has caused distrust among workers and trade unions towards the functions and the roles of labour inspectors that are supposed to provide protection to workers.

Comparing to other countries, the use of the threat of criminal sanctions is the most effective way to combat wage policy violations by employers. For example, in the United States, specifically in New York and Los Angeles, the application of criminal sanctions for employers who violate wage and hour regulations has contributed greatly in increasing public awareness that do not pay or pay wages below the minimum wage is a crime.⁹ This makes the employers will think twice if they would provide wages below the minimum wage.

In the context of the violation of the minimum wage provision case by Sri Rejeki Mebelindo Ltd. Co., the efforts of the labour union to report to the police on the alleged violation of the provisions of minimum wage implementation by the employer cannot be separated from the weak enforcement of the minimum wage by labour inspectors and also the prolonged process of the dispute resolution through bipartite or tripartite mechanism.¹⁰ Unions' reports to the labour inspectors are not followed up immediately with the simultaneous efforts of persuasion and education to employers to willingly pay minimum wages to the workers. This causes employers becoming increasingly apathetic to solve these problems, as evidenced by the absence of employers in the mediation effort. In the end, the union appeared frustrated and there is no other way to earn their right to the minimum wage in addition to give 'reply' to the employer for what he did.

For the union, this way is expected to be an effective way to provide a deterrent effect to employers that non-compliance with minimum wage policy is a crime and therefore can be sentenced to imprisonment. In this case, the union may be the most potential actor to strengthen the implementation of the provisions enforcement of the

⁹ "Two Los Angeles car wash owners sentenced to jail for labour law violations," August 16, 2010, <http://latimesblogs.latimes.com/lanow/2010/08/two-los-angeles-car-washowners-sentenced-to-jail-for-labour-law-violations.html>, diakses tanggal 23 Februari 2012.

¹⁰ Surya Tjandra, 'Strategi Kaum Buruh Indonesia Meraih Keadilan', unpublished working paper, 2011, p. 9.

minimum wage, which in turn it is expected the compliance towards the provisions of the minimum wage by employers is increased.¹¹

However, what needs to be considered is whether the imposition of criminal sanctions for employers who violate minimum wage will not be counterproductive when sanctions are imposed directly in the form of imprisonment, not to be fined first, considering the defendant who is also the owner of the company must run the company's business continuity. In this situation, it is necessary to consider the welfare and proportionality principles. Welfare principle recognizes the social context in which the law should go and give weight to the common goals.

In the context of employment relations between workers and employers, the collective goal is the realization of the common good, that employers want their investment increase through profits, while workers want to earn income that can provide for his necessities and his family. This collective goal cannot be achieved when a company is unable to operate properly due to the owner as well as the director is in the prison. Therefore, there must be proportion between the sanction given by the outcome rather than the imposition of sanctions. If the imprisonment sanction provided for employers who violate minimum wage will actually undermine the collective welfare goals in an employment relationship, this should be avoided. It is necessary to look for alternative forms of sanctions for violations of the minimum wage when the soft approaches are ineffective.

The employer has to compensate the workers by paying them the difference between the paid wage and the minimum wage. The compensation system should provide a full reimbursement to the worker, even for the loss of purchasing power due to inflation over the years. For instance, in Thailand an interest rate of 15% per year is applied and in the UK the arrears have to be paid at the current minimum wage rate.¹² Back pay compensation of the workers may also constitute a form of punishment if it is more costly to the employer than the compliance with the minimum wage. For instance, arrears in the UK include the rate of inflation take into account, and therefore the final

¹¹ Howard Wial, *Minimum-Wage Enforcement and the Low-Wage Labour Market*, Keystone Research Center, USA, 1999, p. 30.

¹²'Low Pay Commission 2009' and 'ILO TRAVAIL 2009' in Chiara Benassi, *The Implementation of Minimum Wage: Challenges and Creative Solutions*, p. 16.

settlement amount ends up being higher than the regular payment of the minimum wage.¹³

Furthermore, if the employer does not pay the amount of compensation to workers within a certain time, then the employer may be subjected to pecuniary fines by keeping paying compensation to workers. Severe fines are keys to the effectiveness of the enforcement system, because only consistent losses represent a deterrent to non-compliance for employers. What needs attention is that the costs of non-compliance should always outweigh the benefits. In the end, if employers are not willing to pay it within a certain time or even repeat to violate the minimum wage, only then the threat of criminal sanction of imprisonment can be applied as a form of the most emphatic enforcement of the minimum wage.

6. CONCLUSION

Violation of the minimum wage in Indonesia is threatened with criminal sanctions, in the form of a fine and/or imprisonment. Since this provision was set in 2003, there have been several cases related to violations of the minimum wage posed by workers to the court as a criminal offense and yet only one case that has been decided by the court in which the offender was sentenced to imprisonment and also fined. However, the imposition of direct imprisonment sanctions for issues related with the minimum wage cannot be considered an effective deterrent for employers. The sanctions would be counterproductive towards the goals concerned with employers and workers welfare. Alternative sanctions can be given by requiring employers to pay compensation and/or pecuniary fines in advance where the cost of sanctions should be higher than the benefit of the workers' underpayment. Moreover, the application of sanctions should be sure and incremental.

¹³ Chiara Benassi, *The Implementation of Minimum Wage: Challenges and Creative Solutions*, p. 17.