CRIMINALIZATION POLICY OF UNION BUSTING IN INDONESIA'S LABOR LAW: NORMATIVE GAPS, ENFORCEMENT FAILURES, AND COMPARATIVE LESSONS FOR REFORM

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ABSTRACT

Union busting represents a serious threat to labor democracy and fundamental rights in Indonesia. Although Law No. 21 of 2000 prohibits employer interference in trade union activities and provides for criminal sanctions, its enforcement has remained largely ineffective. This study investigates the normative and institutional failures underlying this gap and argues for the urgent need to establish a coherent criminal policy on union suppression. Using a normative-juridical method combined with comparative analysis, the article finds that Indonesia's current legal framework suffers from vague offense definitions, lack of evidentiary support structures, and fragmented enforcement mechanisms. Drawing on models from South Korea, Canada, and South Africa, the study proposes a reform blueprint including revised legal definitions, rebuttable presumptions, dual-track enforcement via administrative and criminal pathways, and proportional corporate sanctions. Criminalization is justified not only as a last resort but as a necessary response to systemic impunity and democratic erosion. The findings offer actionable recommendations for legal reform, institutional design, and policy alignment with international labor standards.

***Keywords**: Comparative Law, Criminalization, Freedom of Association, Indonesia, Labor Law, Labor Rights Enforcement, Union Busting*

INTRODUCTION

In recent decades, labor law has become a critical frontier in the battle between capital flexibility and workers' rights. Among the most insidious threats to labor democracy is union busting—the deliberate suppression or obstruction of trade unions by employers through illegal or unethical means. In Indonesia, despite formal legal recognition of freedom of association under Article 28E(3) of the 1945 Constitution, union busting remains a pervasive yet under-criminalized violation.[1] The growing discrepancy between legal norms and actual practice has raised urgent questions about the adequacy of current legal instruments in preventing and punishing such conduct.

At the international level, the International Labour Organization (ILO) considers freedom of association a fundamental labor right. Indonesia has ratified ILO Convention No. 87 (Freedom of Association) and Convention No. 98 (Right to Organize and Collective Bargaining), both of which mandate member states to protect trade unions against interference.[2] Yet according to the ITUC Global Rights Index 2023, Indonesia is classified as a country with "regular violations of rights," where union leaders frequently experience threats, surveillance, arbitrary transfers, and even dismissals.[3] These acts are often perpetrated with impunity, reflecting the state's regulatory and penal failure in safeguarding workers' collective freedoms.

[1] Article 28E(3), Constitution of the Republic of Indonesia (1945).

[2] International Labour Organization, "Ratifications for Indonesia," https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102937.

[3] ITUC, *Global Rights Index 2023*, https://www.ituc-csi.org/global-rights-index-2023.

From a doctrinal perspective, Indonesia's Law No. 21 of 2000 on Trade Unions nominally prohibits actions that obstruct or hinder union formation. However, the enforcement mechanism is largely administrative, lacking explicit penal sanctions for employers who commit union-busting.[4] The few criminal provisions that exist under Law No. 13 of 2003 (as amended by the Omnibus Law No. 11 of 2020) are either inapplicable or too vague to address union suppression systematically.[5] As a result, union busting has become a low-risk, high-reward practice, emboldening employers to prioritize corporate control over labor rights.

From a criminological lens, this reflects a broader normative vacuum: the absence of criminal policy instruments to address workplace violations that threaten not just individual contracts, but core democratic principles such as participation, organization, and representation.[6] Criminal law, as argued by Ashworth, functions not merely to punish but also to symbolically affirm societal values and signal unacceptable behavior.[7] In this sense, union busting is not simply an industrial relations offense—it constitutes a criminal attack on democratic labor institutions.

The problem is compounded by institutional weaknesses in enforcement. Most union-related disputes are relegated to industrial relations courts, which adjudicate in the realm of civil law. This procedural orientation deters criminal investigation and shifts the burden of proof onto workers and unions, many of whom lack resources for prolonged legal battles.[8] Moreover, law enforcement agencies and labor inspectors rarely treat union busting as a criminal offense, often viewing it as a "labor management issue" rather than a violation of human rights.[9]

This reality is particularly alarming in light of the rising number of reported cases. A 2022 report by the Trade Union Rights Centre (TURC) documented more than 75 union busting incidents in just two years—none of which resulted in criminal prosecution.[10] These include cases involving multinational corporations in the plantation, manufacturing, and services sectors, many of which systematically dismantled independent unions following worker protests. Even when legal challenges are filed, outcomes are frequently delayed, dismissed, or compromised through backdoor settlements.

Research Gap

Despite the prevalence and severity of union busting, existing Indonesian legal scholarship has not sufficiently addressed the criminal dimension of this phenomenon. Most studies tend to approach union suppression from the perspective of industrial relations or labor dispute resolution, without conceptualizing it as a matter of criminal policy and penal reform.[11] This has led to a critical gap in the literature: there is no comprehensive normative framework in Indonesia that theorizes the criminalization of union busting as a necessary legal response to structural violence in labor relations.

International comparative research, by contrast, has increasingly advocated for criminal liability in cases of severe anti-union conduct. For instance, South Korea's TULRAA Article 81 treats employer interference as a criminal offense, while Canada's Labour Code Section 94(1) imposes direct criminal sanctions for acts of union suppression.[12] These models demonstrate that criminal law can

[4] Law No. 21 of 2000 on Trade Unions, Articles 28–29.
[5] Law No. 13 of 2003, as amended by Law No. 11 of 2020, only provides indirect references to worker protection without union-specific penal clauses
[6] Siegel, J. (2005). "Criminal Law and the Limits of Union Suppression," *Industrial Law Journal*, 34(3), 211–225.
[7] Ashworth, A. (2010). *Principles of Criminal Law*, 7th ed., Oxford University Press, p. 35.
[8] Mahy, P. (2012). "Labour Law Reform in Indonesia," *Melbourne Journal of International Law*, 13(2), 398–412.
[9] Interview findings cited in TURC (2022), *Laporan Advokasi Hak Serikat*, pp. 15–18.
[10] Ibid
[11] Sembiring, A. (2021). "Industrial Dispute Settlement and Labor Court Limitations," *Indonesian Journal of Labour Law*, 9(1), 22–39.
[12] TULRAA (South Korea), Article 81; Canada Labour Code, Section 94(1).

be used effectively to protect union rights—so long as it is proportionately designed, clearly defined, and enforceable.

Novelty of the Study

This article presents a novel theoretical and policy analysis by framing union busting as a criminogenic phenomenon that necessitates explicit penal intervention. Unlike prior studies that focus on collective bargaining, labor inspection, or union registration procedures, this research proposes a structured criminalization framework for union busting, grounded in principles of ultima ratio, proportional justice, and constitutional protection of human rights.[13] The article also offers comparative insights from foreign legal systems that have enacted criminal prohibitions against union interference, thereby enriching the debate on Indonesian labor law reform.

Problem Statement

The core legal problem addressed in this article is the absence of clear, enforceable criminal sanctions against union busting practices in Indonesian labor law. Despite constitutional guarantees and international treaty obligations, employers continue to engage in anti-union tactics with little fear of criminal liability. This reflects both a normative gap (lack of explicit penal provisions) and an enforcement gap (lack of implementation mechanisms). The Indonesian legal system thus fails to provide deterrence, accountability, or remedy for one of the most serious forms of labor rights violation. Without a coherent criminal policy, union suppression will persist as an endemic problem that undermines industrial democracy and weakens the rule of law in the labor sector.

RESEARCH METHODOLOGY

The present study adopts a normative juridical research design, integrating legal-dogmatic analysis with a comparative legal approach. [14] This methodology is selected to examine the normative foundations, doctrinal gaps, and regulatory deficiencies in Indonesia's existing legal framework related to union busting, and to propose feasible criminal policy alternatives based on international best practices.

Normative juridical research (*penelitian hukum normatif*) refers to the examination of legal norms, principles, doctrines, and statutory provisions using logical and prescriptive reasoning. It emphasizes what the law ought to be (*de lege ferenda*) in addition to what the law currently is (*de lege lata*). In this article, normative legal research is used to interpret constitutional mandates, statutory lacunae, and penal policy concepts as they relate to labor law and criminalization.

The research is based on a combination of primary legal materials, including:

1. The 1945 Constitution of the Republic of Indonesia;
2. Law No. 21 of 2000 on Trade Unions;
3. Law No. 13 of 2003 on Manpower (as amended by the Omnibus Law No. 11 of 2020);
4. Relevant Criminal Code (KUHP) provisions (both the old KUHP and KUHP 2023);
5. International legal instruments, especially ILO Conventions No. 87 and 98.

In addition to these, secondary legal materials such as scholarly articles, jurisprudence, policy reports, and legal commentaries are utilized to support interpretative and comparative analysis.

This study also applies doctrinal interpretation to determine the normative coherence of labor rights protection and the extent to which criminal law can and should be invoked to protect trade union freedom. Legal doctrines such as *lex specialis derogat legi generali*, *ultima ratio*, and *nullum*

[13] Ferraz, O.L.M. (2008). "Criminal Law and Human Rights," *Journal of Comparative Law*, 3(1), 65–82.
[14] Dr. Johnny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif* (Bayu Media, 2013).

crimen sine lege are applied to assess the feasibility and limits of criminalizing anti-union behavior in the Indonesian context.[15]

To strengthen its analytical foundation, the research also integrates theoretical frameworks from criminology and labor law theory, including:

1. Symbolic criminal law theory, which emphasizes the normative messaging function of criminal sanctions;[16]

2. Industrial pluralism theory, which supports the institutional autonomy of trade unions as a pillar of labor democracy;[17]

3. Neoliberal critique, which contextualizes union busting within broader processes of deregulation and labor commodification.[18]

These theoretical perspectives provide a multi-dimensional lens for understanding union busting not only as a violation of labor rights, but also as a socially injurious act that may necessitate criminal accountability.

Furthermore, the study employs a comparative legal method (*rechtvergleichung*) to examine how other jurisdictions have addressed union busting through penal legislation. This comparison serves two purposes: First, it identifies best practices and institutional models that have been successfully implemented in other democratic legal systems; second, it provides a referential benchmark for evaluating the deficiencies of Indonesia's current regulatory approach.

The countries selected for comparison are:

1. South Korea: which uses an integrated labor law regime (TULRAA) that criminalizes unfair labor practices, including employer interference in union formation;

2. Canada: whose federal labor code specifies criminal liability for employer intimidation, coercion, and termination related to union activities;

3. South Africa: which prohibits employer interference and provides remedies through specialized labor institutions with constitutional backing.

The comparative analysis follows the functional method, which examines how different legal systems solve similar problems rather than comparing them solely based on their formal laws.[19] The focus is on legal reasoning, policy justification, and institutional effectiveness. Thus, the analysis is not limited to statutory comparison but extends to enforcement modalities, judicial decisions, and administrative practices.

Although this study does not involve fieldwork or empirical data collection, it draws from secondary empirical studies, policy reports, and documented union busting cases in Indonesia, published by organizations such as TURC, LBH Jakarta, and ITUC. These are used illustratively to underscore the urgency of penal reform and the systemic nature of anti-union behavior in practice.

The choice not to use empirical legal research is grounded in the study's normative focus, which aims to offer prescriptive solutions through legal reconstruction rather than descriptive social inquiry. Nevertheless, select empirical data are used to support normative arguments and highlight the consequences of legal inaction.

[15] Marzuki, P.M., *Penelitian Hukum*, Jakarta: Kencana, 2011, p. 35.
[16] Jakobs, G. (2004). "Criminal Law as a Symbolic System," *Zeitschrift für Internationale Strafrechtsdogmatik*, 9(1), 23–38.
[17] Fox, A. (1966). *Industrial Sociology and Industrial Relations*, Royal Commission on Trade Unions, UK.
[18] Harvey, D. (2005). *A Brief History of Neoliberalism*, Oxford University Press, p. 160–166.
[19] Zweigert, K. & Kötz, H. (1998). *Introduction to Comparative Law*, 3rd ed., Oxford University Press.

In terms of legal reform methodology, this article uses deconstructive critique (legal diagnosis) followed by constructive synthesis (legal prescription). The first part of the analysis maps out the legal vacuum, enforcement weaknesses, and contradictions in Indonesian labor law. The second part proposes a reformulated penal approach, including the potential insertion of new provisions in the Labor Law or the Penal Code that criminalize union busting with clear definitions, thresholds, and proportional sanctions.

This prescriptive component draws inspiration from the ultima ratio principle in criminal law, which mandates that penal intervention be reserved for serious violations that cannot be addressed by civil or administrative means.[20] To ensure alignment with this principle, the proposed criminal provisions will be calibrated to target only severe and systemic acts of union suppression—especially those involving violence, coercion, or persistent institutional interference.

In sum, the research methodology applied in this study is multi-faceted, combining:

1. Doctrinal-normative analysis of Indonesian and international legal instruments;
2. Comparative functional analysis of selected jurisdictions;
3. Criminal policy theory to evaluate proportionality and effectiveness;
4. Prescriptive synthesis to propose legal reforms that are both normatively sound and pragmatically enforceable.

This methodology is expected to produce not only academic insights, but also concrete policy recommendations for improving Indonesia's labor protection regime, especially in addressing union busting as a criminal act, not merely an industrial relations offense.

RESULT AND DISCUSSIONS

Normative Deficiencies and Enforcement Failures in the Criminalization of Union Busting in Indonesia

Union busting remains one of the most persistent and destructive threats to industrial democracy in Indonesia. Despite formal guarantees in constitutional and statutory law, the practical protection of workers' right to organize continues to be undermined by both legal vagueness and institutional inaction. This section critically examines the current normative framework, identifying key deficiencies in Indonesia's labor and criminal laws, and analyzes the enforcement failures that render existing legal protections ineffective in practice.

At the normative level, Law No. 21 of 2000 on Trade Unions serves as the primary legal instrument governing freedom of association in the employment relationship. Article 28 of the law explicitly prohibits acts that interfere with or obstruct union formation and activities, including termination, suspension, demotion, wage reduction, intimidation, and anti-union campaigns. These prohibitions are reinforced by Article 43, which classifies such acts as criminal offenses (*kejahatan*), punishable by 1 to 5 years of imprisonment and/or a fine of IDR 100 million to IDR 500 million.[21] In principle, this establishes a clear statutory basis for criminal prosecution of union busting behavior.

However, the actual enforcement of these provisions is virtually nonexistent. While the law criminalizes employer interference, the statutory language is overly general, lacking sufficient doctrinal clarity to guide investigation, prosecution, and adjudication. Terms such as "intimidation," "obstruction," and "campaigns against unions" are not legally defined or interpreted in consistent judicial decisions. As a result, they are highly vulnerable to manipulation or dismissal as normal management prerogatives. For example, an employer who dismisses a union activist may claim

[20] Andi Hamzah, *Asas-Asas Hukum Pidana*, Jakarta: Rineka Cipta, 2005, p. 112.
[21] Law No. 21 of 2000 on Trade Unions, Articles 28 and 43.

performance-based or disciplinary justification, which, absent a legal presumption of retaliation, can rarely be disproved by the employee.[22]

A major normative gap lies in the absence of mens rea formulation. Article 43 does not stipulate whether intent (*dolus*) or negligence (*culpa*) is required to prove criminal liability. Without explicit language addressing the mental element of the offense, prosecutors are left to apply general criminal law principles under the Penal Code (KUHP), which themselves are not harmonized with labor-specific contexts. In practice, this causes prosecutors to hesitate in pursuing union busting cases, given the difficulty of proving beyond a reasonable doubt that an employer acted with criminal intent to suppress organizing activity.[23]

Further compounding the problem is the lack of rebuttable presumptions that could shift the burden of proof in favor of the worker. In many other jurisdictions, anti-union retaliation that occurs within a certain period after a protected activity (e.g., organizing, filing a complaint, participating in a strike) is presumed unlawful unless the employer proves a legitimate, non-retaliatory reason. Indonesia's laws do not provide such presumptions. Therefore, the evidentiary burden falls entirely on the employee to establish the employer's motive, often without access to internal documentation, witness protection, or legal representation. This evidentiary asymmetry effectively neutralizes the practical utility of criminalization, making prosecution an improbable outcome in all but the most blatant cases.[24]

In terms of institutional enforcement, the weaknesses are equally severe. The Labor Inspectorate (Pengawas Ketenagakerjaan) is nominally tasked with ensuring compliance with labor laws, including freedom of association. However, the scope of their investigative authority in criminal matters remains unclear and inconsistent. While Articles 40-41 of Law No. 21 of 2000 acknowledge the role of both labor inspectors and police in addressing violations of union rights, no formal protocol governs how these two agencies cooperate or refer cases for prosecution. In practice, labor inspectors limit their role to administrative inspection and reporting, while police are reluctant to treat union-related violations as criminal matters, viewing them instead as employment disputes better handled through civil courts.[25]

This institutional ambiguity often leads to a "forum displacement" effect. When workers file complaints regarding union busting, they are almost always directed toward Industrial Relations Courts (Pengadilan Hubungan Industrial), which adjudicate civil disputes such as unfair dismissal or wage claims. While this mechanism is crucial for compensatory remedies, it effectively sidelines the criminal dimension of anti-union acts. Employers accused of union busting are rarely subjected to criminal investigation, and the outcome is usually negotiated reinstatement or a financial settlement—without any admission of wrongdoing or penal consequences. In this way, civil remedies displace criminal accountability, even in cases where statutory crimes have arguably been committed.[26]

Moreover, Industrial Relations Courts are often ill-equipped to examine the structural nature of union suppression. They tend to focus on individual employment contracts rather than broader patterns of anti-union discrimination. Without mechanisms to aggregate cases or examine systemic interference, even serial violators of union rights can avoid meaningful scrutiny. This gap is especially problematic in sectors where precarious or outsourced labor predominates, such as

[22] Wahyudi, F. "Union Busting in Indonesia: A Systemic Violation of Labor Rights." *Journal of Industrial Relations and Law* 13, no. 2 (2021): 121–139.
[23] Andi Hamzah, *Asas-Asas Hukum Pidana*. Jakarta: Rineka Cipta, 2005, 87.
[24] TURC, *Laporan Advokasi Serikat Buruh 2022*, 14–15.
[25] UU 21/2000, Articles 40–41; see also Surat Edaran Menteri Tenaga Kerja No. SE.01/MEN/1998.
[26] Mahy, Petra. "Labour Law Reform in Indonesia: Some Lessons from the Asian Region." *Melbourne Journal of International Law* 13, no. 2 (2012): 398–412.

manufacturing, plantations, and logistics, where unionization efforts are frequently met with coordinated resistance across multiple worksites.[27]

In addition to normative and institutional problems, broader political and economic factors also contribute to the failure to criminalize union busting effectively. The Job Creation Law (Omnibus Law No. 11 of 2020) and its implementing regulations, including Government Regulation No. 35/2021, have been widely criticized for undermining labor protections by liberalizing contract work, extending probationary periods, and making dismissals easier. While these reforms were justified on the grounds of improving investment competitiveness, they have also created a regulatory environment that incentivizes union avoidance. In such a context, the criminalization of union busting becomes not only a legal question but also a political one—subject to resistance from powerful business interests and administrative inertia.[28]

Empirical data support these concerns. According to the Trade Union Rights Centre (TURC), between 2020 and 2022 there were at least 75 documented cases of union busting across major industrial zones in Java, Sumatra, and Kalimantan. These include threats against union leaders, systematic dismissal of organizing members, and formation of yellow unions by management. However, none of these cases resulted in successful criminal prosecution, and most were either dropped or resolved informally through non-binding mediation.[29] This points to a systemic failure not just of law enforcement, but of the entire institutional architecture meant to uphold labor rights.

A case that exemplifies these failures is the CNN Indonesia union conflict in 2023, where journalists attempting to form a union under the national media federation were subject to internal disciplinary actions, threats of non-renewal, and online harassment. Although complaints were filed with the Jakarta Labor Office and supported by the Alliance of Independent Journalists (AJI), no criminal proceedings were initiated under Article 43 of Law No. 21 of 2000. The matter was instead resolved through internal negotiation, with the union achieving limited recognition but no restitution for the violations committed.[30]

Taken together, these findings reveal that the problem in Indonesia is not the absence of criminalization, but rather the failure to operationalize existing legal norms. The criminal provisions in Law No. 21 of 2000 are insufficiently defined, procedurally weak, and structurally marginalized by civil dispute resolution mechanisms. Without reforming both the legal doctrine and enforcement institutions, criminalization will remain symbolic—proclaiming protection but delivering none.

In sum, Indonesia's framework for criminalizing union busting suffers from a combination of normative vagueness, evidentiary barriers, institutional disconnection, and political disinterest. This constellation of failures transforms what ought to be a robust guarantee of labor rights into an ineffective legal fiction. Addressing this requires not only better legal drafting but also structural redesign of the enforcement pathway—so that the promise of criminal protection for unions is not just theoretical, but practically realizable.

Theoretical and Comparative Justifications for the Criminalization of Union Busting

The criminalization of union busting is not merely a question of punitive policy; it reflects a deeper theoretical inquiry into the role of criminal law in protecting foundational rights, regulating power imbalances, and preserving democratic institutions within the workplace. To understand whether union suppression should be addressed through penal instruments, one must first assess the

[27] TURC, *Mapping Kasus Union Busting di Sektor Manufaktur dan Perkebunan*, 2021.
[28] Gunawan, R. "Job Creation Law and Its Impact on Labor Protection." *Indonesian Law Review* 11, no. 1 (2021): 35–60.
[29] Trade Union Rights Centre (TURC). *Annual Case Monitoring Report 2022*, p. 19.
[30] AJI Indonesia, *Kronologi Kasus Serikat CNN Indonesia*, Press Release, March 2023.

normative weight of the rights being violated, the failure of existing remedies, and the comparative experiences of jurisdictions that have adopted criminalization as part of their labor protection framework.

From a theoretical perspective, criminal law functions as more than a tool of retribution. Scholars such as Günther Jakobs have articulated the symbolic dimension of criminal law, wherein penal sanctions not only punish but also express societal condemnation of behaviors that transgress fundamental values.[31] In this view, the act of criminalization reaffirms the legal system's commitment to democratic norms and draws a line between acceptable and intolerable conduct. When applied to the context of labor relations, union busting represents a direct assault on the collective agency of workers—a foundational element of industrial democracy. To treat such actions merely as civil disputes or contractual disagreements, therefore, is to understate their constitutional and public character.

Freedom of association and the right to organize are not peripheral rights in modern legal systems; they are integral to the architecture of social justice and democratic participation. In Indonesia, these rights are enshrined in Article 28E of the 1945 Constitution, and further protected through the ratification of ILO Convention No. 87 and No. 98, which bind the state to ensure that employers do not interfere in union formation or operation.[32] The ILO Committee on Freedom of Association has repeatedly emphasized that acts of intimidation, dismissal, or retaliation against trade unionists constitute grave violations of international labor standards.[33] These acts do not merely harm individual workers; they erode the institutional infrastructure through which workers collectively assert their interests, leading to long-term distortions in wage negotiation, working conditions, and accountability.

In this context, the principle of ultima ratio—that criminal law should be used only as a last resort—must be revisited. While it is true that penal sanctions should not be the first line of response to every social problem, their application becomes appropriate when other mechanisms consistently fail to deter harmful conduct. The Indonesian experience, as shown in the previous section, is one of systematic under-enforcement of anti-union provisions. Civil and administrative remedies have proven insufficient to hold employers accountable, particularly in sectors where asymmetries of power are entrenched and the threat of dismissal effectively silences collective action. In such cases, criminalization becomes not a draconian measure, but a proportionate response to restore normative equilibrium and social deterrence.[34]

Support for this position can be found in comparative legal systems that have explicitly criminalized union busting or related forms of employer interference. A particularly instructive example is South Korea, where the Trade Union and Labour Relations Adjustment Act (TULRAA) serves as the backbone of labor rights enforcement. Article 81 of TULRAA lists specific unfair labor practices, including employer coercion, discrimination based on union membership, and refusal to bargain in good faith. Violations are subject to criminal penalties, and the system is supported by the National Labor Relations Commission (NLRC), which functions as an administrative adjudicator empowered to issue binding orders for reinstatement and compensation.[35] Crucially, the Korean system operates on a dual-track enforcement model, where administrative findings can escalate into criminal investigations if orders are ignored or if the conduct is deemed egregious.

[31] Jakobs, Günther. "Criminal Law as a Symbolic System." *Zeitschrift für Internationale Strafrechtsdogmatik* 9, no. 1 (2004): 23–38.
[32] ILO, *Freedom of Association and Protection of the Right to Organise Convention*, C87; *Right to Organise and Collective Bargaining Convention*, C98.
[33] ILO Committee on Freedom of Association, *Digest of Decisions*, 6th ed., 2018, paras. 800–820.
[34] Ashworth, Andrew. *Principles of Criminal Law*, 7th ed. Oxford: Oxford University Press, 2010
[35] South Korea, *Trade Union and Labour Relations Adjustment Act (TULRAA)*, Article 81; Ministry of Employment and Labor, *Enforcement Manual*, 2022.

The Korean model demonstrates the value of legal clarity, procedural layering, and institutional specialization. It recognizes that while civil and administrative tools may resolve individual disputes, criminal sanctions are necessary to deter systemic or repeated violations that undermine the legitimacy of labor institutions. In addition, the structure enables rapid intervention through the NLRC, preventing delays that often render union organizing efforts vulnerable to employer retaliation.

Similarly, in Canada, the Canada Labour Code prohibits employer interference with union activities under Section 94(1). The enforcement of this provision is handled by the Canada Industrial Relations Board (CIRB), which conducts investigations, holds hearings, and issues binding decisions. Although criminal prosecutions are not common, the statute provides the basis for penal consequences in cases involving defiance of CIRB orders or bad-faith conduct.[36] The Canadian model also incorporates evidentiary presumptions, such as presuming employer retaliation when adverse actions occur shortly after union activity. This shifts the burden of proof onto employers to demonstrate that the action was based on legitimate, non-retaliatory grounds.

The use of presumptions and burden-shifting mechanisms is a crucial lesson for Indonesia, where union cases often collapse due to the difficulty of proving employer intent. In contrast, the Canadian and Korean frameworks recognize the structural disadvantages faced by workers and adjust evidentiary rules accordingly. This facilitates more effective enforcement without compromising the presumption of innocence, as employers retain the opportunity to rebut presumptions with credible evidence.[37]

Beyond the OECD context, South Africa provides another relevant model. Under its Labour Relations Act, South Africa prohibits employer interference and provides remedies through the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Courts. While criminal sanctions are not frequently used, the courts have broad powers to issue contempt orders and to escalate matters where employers fail to comply with decisions. What distinguishes the South African model is its constitutional foundation: the right to fair labor practices is enshrined in the Bill of Rights (Section 23) of the 1996 Constitution, creating a powerful normative baseline for judicial interpretation.[38] This approach emphasizes that labor rights are not merely contractual or economic, but fundamental rights protected by the state.

Taken together, these comparative systems illustrate a convergence around several key principles: first, that union busting constitutes a serious violation of public law, deserving of robust sanctions; second, that criminalization can coexist with civil and administrative remedies, forming a layered enforcement strategy; and third, that legal precision, evidentiary innovation, and institutional design are essential to making criminalization effective without being excessive.

In light of these lessons, the Indonesian legal framework requires substantial revision. The existing provisions in Law No. 21 of 2000 must be clarified to include specific acts, such as retaliation within a set period after union activity, threats, surveillance, or the creation of company-dominated unions (yellow unions). Furthermore, new procedural devices should be introduced, such as presumptions based on timing and pattern of behavior, and the creation of an independent labor commission capable of issuing binding interim orders. These decisions, when violated, could then trigger criminal liability, as in the Korean or Canadian systems.

Importantly, criminal penalties must be designed proportionally and progressively. First-time violations might result in civil or administrative sanctions, while repeated or aggravated offenses—particularly those involving violence or coordinated dismissals—would merit custodial sentences or

[36] Government of Canada, *Canada Labour Code*, RSC 1985, c. L-2, Section 94(1); Canada Industrial Relations Board (CIRB) Guidelines.
[37] D. Doorey, "Just Cause Dismissals and Anti-Union Discrimination," *Canadian Labour and Employment Law Journal* 19, no. 2 (2013): 253–278.
[38] Republic of South Africa, *Labour Relations Act* (1995), and *Constitution of South Africa* (1996), Section 23.

high-impact corporate fines scaled to company turnover. This model respects the principle of ultima ratio, ensuring that criminal law is not overused but remains available as a credible deterrent when other mechanisms fail.

Finally, the inclusion of criminal sanctions should not be viewed as hostile to business interests. On the contrary, as the Canadian and South Korean examples show, a clear and predictable legal environment strengthens labor relations and reduces long-term disputes. Investors value legal certainty, not legal impunity. A well-designed criminal framework, applied proportionally and with procedural safeguards, can enhance Indonesia's compliance with international standards, bolster the credibility of its labor system, and promote genuine industrial peace.

Thus, the theoretical and comparative analysis affirms that union busting, when left unpunished, represents a breach of constitutional rights, a threat to democratic institutions, and a source of industrial instability. Criminalization, far from being an ideological excess, is a principled, proportionate, and evidence-based response—especially when modeled on jurisdictions that have successfully combined protection with enforcement. For Indonesia to meet its legal commitments and moral obligations, such a reform is not only justified—it is imperative.

Toward a Coherent Criminal Policy on Union Busting: Recommendations for Legal Reform in Indonesia

Given the normative weaknesses and systemic enforcement failures identified in the previous sections, it is imperative for Indonesia to embark on a structured reform agenda aimed at establishing a coherent and enforceable criminal policy against union busting. Such a policy must not only correct doctrinal ambiguities and institutional fragmentation but also reflect constitutional mandates, international commitments, and comparative best practices. The objective is not to criminalize all industrial disputes or managerial decisions but to ensure that deliberate, repeated, or aggravated acts of union suppression are treated with the seriousness they warrant—as violations of public law, not mere breaches of private employment contracts.

The first step toward this goal is the reformulation of the criminal offense itself. While Article 28 of Law No. 21 of 2000 lists several prohibited acts—such as termination, intimidation, or obstruction of union activity—the language is overly broad and lacks a precise legal construction of the offense. To address this, future amendments should clearly define the actus reus (prohibited acts) and mens rea (intentionality or recklessness). For example, the criminal provision should specify that any employer who, "with intent or knowledge," takes adverse employment actions substantially motivated by an employee's union involvement, commits an offense. This construction not only aligns with international labor norms but also provides a defensible basis for prosecution in accordance with the principle of legality (*nullum crimen sine lege*).[39]

To strengthen evidentiary feasibility, the law should introduce rebuttable legal presumptions. These could include a presumption of anti-union intent where an employer dismisses or penalizes an employee within 90 days of the employee's union activity, unless the employer can demonstrate a legitimate and non-retaliatory cause. Similarly, patterns of conduct—such as simultaneous dismissal of multiple union leaders or the issuance of internal circulars discouraging union membership—should be treated as prima facie indicators of union busting. Such legal devices are standard in many labor jurisdictions, including Canada and the United States, and are essential in shifting the burden of proof in environments characterized by information asymmetry and employer dominance.[40]

Beyond doctrinal reform, Indonesia requires an institutional reconfiguration of enforcement mechanisms. The current fragmentation—where labor inspectors, police, and industrial relations

[39] Andi Hamzah, *Asas-Asas Hukum Pidana*. Jakarta: Rineka Cipta, 2005, 34–35.
[40] Doorey, D. "Anti-Union Discrimination and the Burden of Proof." *Canadian Labour Law Journal* 18, no. 2 (2012): 205–229.

courts operate in parallel without integration—has proven ineffective. A promising model is the dual-track enforcement structure, as seen in South Korea and Canada, where a specialized administrative tribunal is empowered to issue binding findings of fact, interim relief (such as reinstatement), and remedial orders, with the capacity to refer egregious or repeat violations to the criminal justice system. In the Indonesian context, this could take the form of a Labour Relations Commission (Komisi Hubungan Industrial Nasional) with regional branches, staffed by judges, labor inspectors, union representatives, and employer associations, supported by independent investigators.[41]

This commission would serve as the first line of enforcement, handling complaints of union suppression through rapid adjudication. Where an employer is found to have violated workers' rights and fails to comply with commission orders, the case would automatically be escalated to the public prosecutor's office (kejaksaan) for criminal proceedings. This mechanism ensures graduated enforcement: not every labor violation is criminalized at the outset, but criminal liability becomes appropriate when the employer demonstrates willful defiance of lawful orders, engages in repeat offenses, or causes substantial harm to union functioning.

In terms of penalties, Indonesia must adopt a proportional and progressive sanction structure. For first-time or minor offenses, non-custodial penalties such as fines, restitution, and mandatory compliance training may be appropriate. However, aggravated union busting—involving violence, intimidation, or mass retaliation—should attract custodial sentences, ranging from two to five years, depending on the severity of the harm caused. Moreover, corporate liability should be recognized, with fines calculated based on company turnover or annual wage bill. This approach ensures that sanctions are not symbolic but impose real economic consequences, especially for large enterprises.[42]

An effective criminal policy also requires preventive measures and affirmative obligations. Employers should be legally mandated to adopt internal compliance systems, including written non-retaliation policies, training modules for HR personnel, and grievance procedures accessible to workers. In jurisdictions such as the UK and Germany, the existence of such systems is taken into account during litigation as a mitigating factor in determining liability or penalty. Indonesian law could adopt a similar standard, thereby incentivizing compliance rather than punishment as the default strategy.[43]

Complementing legal and institutional reform, there must also be strategic investments in enforcement capacity. Labor inspectors need training in criminal investigation techniques, digital evidence collection, and forensic documentation of workplace patterns. Prosecutors must be equipped with specialized units capable of understanding the complexity of labor relations, especially in multi-tiered subcontracting chains or global supply networks. Cooperation with trade unions and civil society is also essential, particularly in the documentation and verification of claims, whistleblower protection, and legal aid. A functional enforcement system cannot rely on victims acting alone—it must be proactively institutionalized.

Importantly, this criminalization policy must be carefully aligned with constitutional safeguards and rule-of-law principles. The clarity of definitions, the availability of defense rights, the proportionality of sanctions, and the possibility of judicial review are all non-negotiable elements of a just penal regime. Critics may argue that introducing criminal sanctions in labor disputes risks chilling investment or managerial discretion. However, empirical studies have found that investors prefer environments with legal certainty, where the rules of engagement are transparent and the consequences of misconduct are predictable. Countries such as Canada, Germany, and South Korea,

[41] OECD, *Employment Outlook 2019: The Future of Work*. Paris: OECD Publishing, 2019.
[42] Mahy, Petra. "Proportionality in Sanctions for Labour Law Offenses." *Australian Journal of Labour Law* 33, no. 1 (2020): 65–89.
[43] ILO, *Guide to Preventing Discrimination and Violence at Work*. Geneva: ILO Publications, 2020.

despite their robust labor protection laws, continue to attract foreign investment and maintain competitive labor markets.[44]

Finally, to ensure accountability and promote legal culture, the government should publish an annual enforcement report on union rights, including statistics on complaints received, orders issued, prosecutions initiated, and convictions secured. This report should be integrated into Indonesia's obligations under ILO supervisory mechanisms and made accessible to the public. Transparency is not only a democratic imperative—it is also a strategic tool in building trust and deterring misconduct through reputational pressure.

In summary, a coherent criminal policy on union busting in Indonesia must rest on five pillars: (1) precise and enforceable legal norms; (2) evidentiary innovations such as presumptions and pattern recognition; (3) institutional reform that links administrative and criminal procedures; (4) proportional and progressive sanctions that apply to individuals and corporations alike; and (5) preventive compliance measures supported by enforcement capacity and public oversight. Such a policy not only addresses the failures of the current system, but also places Indonesia on a path toward international best practices, stronger industrial relations, and greater fidelity to its constitutional and treaty-based commitments.

CONCLUSION AND SUGGESTIONS

The criminalization of union busting in Indonesia represents both a legal necessity and a policy challenge. Although statutory instruments such as Law No. 21 of 2000 on Trade Unions formally prohibit anti-union practices and assign criminal penalties, enforcement has remained largely symbolic. The findings of this study demonstrate that the gap between formal legality and practical protection is sustained by multiple interlocking failures: doctrinal vagueness, evidentiary asymmetries, institutional fragmentation, and a persistent policy bias favoring labor market flexibility over associational rights.

In normative terms, the Indonesian legal framework suffers from the absence of clearly defined criminal elements, particularly regarding employer intent (*mens rea*) and the legal thresholds for proving retaliation. Without statutory presumptions or guidance on motive reconstruction, prosecutions are rare, and legal protection becomes illusory. Moreover, the absence of detailed procedural guidelines and a lack of coordination between labor inspectors, police, and prosecutors effectively renders the existing criminal provisions inert.

On the institutional level, the displacement of union-related violations into civil and administrative forums, particularly Industrial Relations Courts, has led to the erosion of criminal accountability. Employers found to have engaged in union suppression are frequently shielded from legal sanction by negotiated settlements, mediated compromises, or procedural inaction. Such outcomes undermine the deterrent function of criminal law and normalize impunity in labor relations.

The comparative evidence reviewed in this study, particularly from South Korea, Canada, and South Africa, reinforces the argument that criminal sanctions are an appropriate and proportionate tool when used within a graduated enforcement model. These jurisdictions demonstrate that criminal law can be integrated with administrative and civil remedies, not as a replacement, but as a strategic complement—particularly in cases involving repeated, aggravated, or institutionally supported anti-union behavior.

From a theoretical standpoint, union busting is not simply a matter of private employment grievance—it is a public harm that affects democratic participation in the economy, weakens institutional accountability, and undermines the moral legitimacy of labor law. The symbolic and expressive functions of criminal law are essential in affirming that freedom of association is not negotiable, and that its suppression will be met with condemnation and sanction.

[44] OECD Investment Policy Reviews: Indonesia 2021. Paris: OECD, 2021.

Based on these findings, the following policy recommendations are proposed to ensure that Indonesia's legal system evolves toward a coherent and effective criminal policy on union busting:

1. Reformulate the legal definition of union busting in Law No. 21 of 2000, incorporating a precise enumeration of prohibited acts, including retaliation, surveillance, intimidation, and the creation of employer-dominated unions (yellow unions), with clear references to intentionality and knowledge.

2. Introduce rebuttable legal presumptions to ease evidentiary burdens on workers and prosecutors, particularly in cases where adverse actions occur within a specified period following union activity, or where patterns of conduct suggest coordinated suppression.

3. Establish a dual-track enforcement system, creating a specialized administrative body (e.g., a National Labor Relations Commission) empowered to issue binding interim and final orders, including reinstatement and back pay. Non-compliance with these orders should trigger automatic referral for criminal prosecution.

4. Implement a proportional and progressive sanction framework, distinguishing between minor and serious offenses. While first-time or procedural violations may warrant civil penalties and compliance orders, aggravated or repeated violations should result in custodial sentences and turnover-based corporate fines.

5. Recognize corporate criminal liability, particularly for systemic union busting practices facilitated by organizational policies or management instructions. Penalties should be scaled to company size and economic capacity, ensuring they are deterrent in effect.

6. Mandate internal compliance mechanisms for medium and large enterprises, including anti-retaliation policies, training programs for human resource departments, and accessible grievance procedures. Employers who demonstrate good faith preventive efforts should be eligible for mitigation in sentencing.

7. Invest in institutional capacity-building, especially for labor inspectors and prosecutors, equipping them with tools for digital evidence collection, case tracking, and victim-witness protection. Standard operating procedures (SOPs) should be developed to integrate the roles of inspection and prosecution.

8. Ensure public transparency and accountability through the publication of annual reports detailing complaints, investigations, prosecutions, and outcomes. These reports should be integrated with Indonesia's reporting obligations under ILO supervision and made publicly accessible.

9. Safeguard rule-of-law principles by ensuring all criminal provisions comply with the constitutional principle of *nullum crimen sine lege*, including the right to defense, appeal, and proportionality in punishment. Judicial review mechanisms must be available for all criminal and administrative decisions.

10. Foster social dialogue by involving trade unions, employer associations, academics, and civil society in the design, monitoring, and revision of anti-union legislation and enforcement frameworks. Criminalization should not be viewed as a tool of class conflict, but as a guarantee of institutional fairness and industrial peace.

In conclusion, the path toward a just and effective criminal policy on union busting in Indonesia requires not only legal reform but also political will, administrative coordination, and cultural change. It demands that the state move beyond symbolic recognition of labor rights toward substantive enforcement grounded in law, guided by principle, and responsive to the lived realities of workers. Criminalization, when carefully designed and responsibly applied, can be a vital component in restoring the dignity of labor and strengthening the democratic foundations of industrial relations.

REFERENCES

1. AJI Indonesia. *Kronologi Kasus Serikat CNN Indonesia*. Press Release, March 2023.
2. Andi Hamzah. *Asas-Asas Hukum Pidana*. Jakarta: Rineka Cipta, 2005.
3. Article 28E(3), *Constitution of the Republic of Indonesia* (1945).
4. Ashworth, Andrew. *Principles of Criminal Law*. 7th ed. Oxford: Oxford University Press, 2010.
5. Canada. *Canada Labour Code*, RSC 1985, c. L-2, Section 94(1); *Canada Industrial Relations Board (CIRB) Guidelines*.
6. Doorey, David. "Anti-Union Discrimination and the Burden of Proof." *Canadian Labour Law Journal* 18, no. 2 (2012): 205–229.
7. ———. "Just Cause Dismissals and Anti-Union Discrimination." *Canadian Labour and Employment Law Journal* 19, no. 2 (2013): 253–278.
8. Ferraz, Octavio L. M. "Criminal Law and Human Rights." *Journal of Comparative Law* 3, no. 1 (2008): 65–82.
9. Fox, Alan. *Industrial Sociology and Industrial Relations*. Royal Commission on Trade Unions, United Kingdom, 1966.
10. Government of South Korea. *Trade Union and Labour Relations Adjustment Act (TULRAA)*, Article 81; Ministry of Employment and Labor, *Enforcement Manual*, 2022.
11. Government of the Republic of South Africa. *Labour Relations Act* (1995); *Constitution of the Republic of South Africa* (1996), Section 23.
12. Gunawan, R. "Job Creation Law and Its Impact on Labor Protection." *Indonesian Law Review* 11, no. 1 (2021): 35–60.
13. Harvey, David. *A Brief History of Neoliberalism*. Oxford: Oxford University Press, 2005.
14. Ibrahim, Dr. Johnny. *Teori & Metodologi Penelitian Hukum Normatif*. Bayu Media, 2013.
15. International Labour Organization (ILO). *Freedom of Association and Protection of the Right to Organise Convention*, C87; *Right to Organise and Collective Bargaining Convention*, C98.
16. ———. *Guide to Preventing Discrimination and Violence at Work*. Geneva: ILO Publications, 2020.
17. ———. "Ratifications for Indonesia." https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102937.
18. ILO Committee on Freedom of Association. *Digest of Decisions*. 6th ed. Geneva: ILO Publications, 2018.
19. International Trade Union Confederation (ITUC). *Global Rights Index 2023*. https://www.ituc-csi.org/global-rights-index-2023.
20. Jakobs, Günther. "Criminal Law as a Symbolic System." *Zeitschrift für Internationale Strafrechtsdogmatik* 9, no. 1 (2004): 23–38.
21. Law No. 13 of 2003 on Manpower, as amended by Law No. 11 of 2020 (*Job Creation Law*).
22. Law No. 21 of 2000 on Trade Unions, Articles 28–43.
23. Mahy, Petra. "Labour Law Reform in Indonesia: Some Lessons from the Asian Region." *Melbourne Journal of International Law* 13, no. 2 (2012): 398–412.
24. ———. "Proportionality in Sanctions for Labour Law Offenses." *Australian Journal of Labour Law* 33, no. 1 (2020): 65–89.
25. Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta: Kencana, 2011.
26. OECD. *Employment Outlook 2019: The Future of Work*. Paris: OECD Publishing, 2019.
27. ———. *Investment Policy Reviews: Indonesia 2021*. Paris: OECD Publishing, 2021.
28. Republic of Indonesia. *Surat Edaran Menteri Tenaga Kerja No. SE.01/MEN/1998 tentang Hubungan Industrial*.
29. Sembiring, A. "Industrial Dispute Settlement and Labor Court Limitations." *Indonesian Journal of Labour Law* 9, no. 1 (2021): 22–39.
30. Siegel, J. "Criminal Law and the Limits of Union Suppression." *Industrial Law Journal* 34, no. 3 (2005): 211–225.
31. Trade Union Rights Centre (TURC). *Annual Case Monitoring Report 2022*. Jakarta: TURC, 2022.

32.———. *Laporan Advokasi Hak Serikat,* 2022.
33.———. *Mapping Kasus Union Busting di Sektor Manufaktur dan Perkebunan,* 2021.
34.Wahyudi, F. "Union Busting in Indonesia: A Systemic Violation of Labor Rights." *Journal of Industrial Relations and Law* 13, no. 2 (2021): 121–139.
35.Zweigert, Konrad, and Hein Kötz. *Introduction to Comparative Law*. 3rd ed. Oxford: Oxford University Press, 1998.