

Strengthening Legal Protection for Safety and Health Work for Labour through Constructing Corporate Criminal Responsibility in Indonesia¹

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Abstract

This work is aimed at exploring, formulating and designing an equitable legal framework for guaranteeing safety and health work for labour at workplace. This is caused by so many problems in protecting the labour's interest, particularly in safety and health work as a part of fundamental human rights. Those problems are related to normative problems, such as unclear terminologies, weak sanction, vague corporate responsibility, as well as practical issues, such as tension between economic interests and fundamental human rights, the rise of work accidents, occupational diseases, and so forth. Therefore, this work will focus on the importance of the law reform in order to create and strengthen protection for safety and health work for labour at workplace. To visualize those objectives, it will employ the normative legal research, by using statute and case approaches. All data will be collected based on extensive and intensive literature review. At the end, this work will elaborate and design the ideal model of legal framework in protecting safety and health work for labour through embodying justice, fundamental human rights and proportional principles. The reform will be focused on completing the appropriate terminologies, strengthening the sanctions, and visualizing the boundaries of corporate criminal responsibility.

Keywords: Justice, fundamental human rights, safety and health work, corporate criminal responsibility

1. Introduction

Besides its merits, technological device also has potential hazards toward the occurrence of accidents and diseases in the workplace².

¹ I would like to thanks to Hayyan ul Haq, S.H., LL.M., Ph.D., the guru, who provided a series lectures on legal reasoning, legal epistemology, legal method, and writing, as well as a series intensive consultation and supervision for supporting me in completing this work. I also would like to thanks to my Co-Promotor: Prof.Dr. Ediwarman, S.H.,M.Hum. (Professor at Criminal Law) and Prof.Dr. Budiman Ginting, S.H.,M.Hum. (Professor at Investment Law) who supervise me in completing my dissertation in Law Faculty, University of North Sumatera, Dr. Dayat Limbong,S.H.,M.Hum., senior lecturer in Administrative Law, in Law Faculty, University of Nomensen, who already provided substantive contribution to this work. Many thanks to Dr. Mirza Nasution, S.H.,M.Hum, Director of Centre for Pancasila and Constitution Study, North Sumatera and Dr. Triono Edi, S.H., M.Hum., Director of Post-graduate (Master of Law) Program, University of Muhammadiyah North Sumatera, who facilitated and created a dynamic and inspiring collective learning, through a series public lectures and academic meetings with Hayyan ul Haq.

² According to Article 1 letter 'a' of the Law No. 1 of 1970, workplace is defined as, "every space or field, either closed or open, moving or immobile, where labors or the workforce often enters for the purposes of a business; and the place where the sources of danger exist as specified in Article 2 "Thus, every place where 3 (three) elements exist: 1) existence of a business, both economically and socially, 2) source of danger, and 3) workers who work in it, either full-time or part-time."

Sources of potential hazards³ may lead to the level of high degree of potential hazards⁴, and finally lead to the next level of *real danger*⁵, namely *occupational accidents*⁶ and *occupational diseases*⁷. Article 9 (4) of the Law No. 1 of 1970⁸ requires the board⁹ of corporation¹⁰ (Read: limited liability company¹¹ or *Naamloze vennotschap*) meet and comply with all the terms of Occupational Health and Safety (OHS)¹² and the prerequisites that apply to businesses and workplaces to protect employees/workers. However, in reality such obligations are often ignored or not truly obeyed. A number of evidence shows that employees/workers that became victims¹³ of occupational accidents and cause quite high loss¹⁴ had increasingly continued to rise¹⁵. (See Matrix 1).

Matrix 1: Cases of Accidents in Indonesia from 2009 to 2013

Year	Occupational accident cases	Increase of Percentage (%)	Deaths	Increase of Percentage (%)
2009	96.314	1,67	2.144	-
2010	98.711	2,49	1.965 (+)	-
2011	99.491	0,79	2100	6,87
2012	103.074	3,60	2.419	15,19
2013	129.911	26,04	3.093	27,86

Data Source: PT.Jamsostek (Jaminan Sosial Tenaga Kerja¹⁶)

³ Sources of danger — according to the explanation of Article 2 Paragraph (2) the Law No. 1 of 1970 — consist of; 1) machinery, aircraft, work tools, and equipment, materials, etc. 2) work environment, 3) the nature of work, 4) work procedures, and 5) process of production.

⁴ High levels of potential danger, according to the explanation of Article 5, Paragraph (2) letter 'b' of the Government Regulation No. 50 of 2012 are stated as "A company that has the potential hazards causing accidents that harm human life and the disruption of production processes and work environment pollution."

⁵ The danger is said to be potential if those factors have not brought accidents yet. If an accident has already occurred, then the danger is declared as a real danger. See Suma'mur, Safety and Prevention of Accidents, (Keselamatan Kerja dan Pencegahan Kecelakaan). Jakarta, Gunung Agung, 1981, p. 5.

⁶ According to the provisions of Article 1, number '1' of the Regulation of the Minister of Labor of the Republic of Indonesia Number 03/Men/1998, accident is defined as; "Undesired and initially unexpected events that can cause casualties to human or property".

⁷ Occupational Diseases (hereinafter is referred to as "OD") according to the provisions of Article 1 of Presidential Decree No. 22 of 1993 are "diseases caused by work or the working environment".

⁸ The Law No. 1 of 1970 on "Work Safety", widely termed as "Occupational Health and Safety (OHS)", hereinafter referred to as "OHS".

⁹ The Board, according to Article 1 paragraph 1 OHS is defined as, "those who have duties to directly lead a workplace or its independent parts".

¹⁰ Black's Law Dictionary defines corporation is an entity (usually a business) that having authority under law act as a single person distinct from the shareholders who own it, having rights to issue stock and exist indefinitely. Paralel with the above concept, W.J. Brown defines a corporation is a legal person with a legal existence separate from the people who organize and run it, and it has perpetual succession, regardless of changes of people who own or hold the title of the corporation. Other comments of the concept of corporation, J.C. Smith and Brian Hogan in Eric Colvin indicated the line of thinking of corporation is generally epitomized in the catchphrase "Corporations don't commit crimes". See :Black's Law Dictionary, Bryan A. Garner (Editor in Chief), Ninth Edition, (St. Paul, MN, United State of America, West Publishing Co, 2004) Op. Cit., p. 391.

¹¹ Article 1 paragraph 1 of the Law No. 40 of 2007 states, "Limited Liability Company (Ltd.) is a legal entity which is established in the form of a joint-venture, through agreement, that runs businesses with authorized capital divided entirely into shares and meets the requirements set forth in this law and its regulation implementation". The definition of a limited liability company according to the Law No. 40 of 2007 underwent slight changes compared to the Law No. 1 of 1995, i.e. the addition of a new phrase of "joint-venture".

¹² The terms of conditions of OSH according to the provisions of Article 4, Paragraph (1) of Law No. 1 of 1970, cover all activities, from planning, manufacturing, transporting, distributing, trading, installing, using, utilizing, and storing materials, goods, technical products and the production apparatus that contains and can cause accidents.

¹³ As stated in "The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985; "Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omission of criminal laws operative within member state, including those laws proscribing criminal abuse of power". See, Muladi, Human Rights; nature, Concepts and Implications within the Perspectives of Law and Society (Hak Asasi Manusia; hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat) (Bandung, Refika Aditama, 2009), p.108. Also see, Mahrus Ali, the Basics of Criminal Law (Dasar-Dasar Hukum Pidana), (Jakarta, Sinar Grafika, 2012), p.19.

¹⁴ Occupational accidents, according to Suma'mur, have caused 5 types of losses, namely: damage, organizational chaos, complaints and griefs, disorders and disability, and death. See Suma'mur, Safety and Prevention of Accidents (Keselamatan Kerja dan Pencegahan Kecelakaan), *Op. Cit.*, p. 5-6.

¹⁵ Muhaimin Iskandar, the Minister of Manpower and Transmigration, also recognizes that the protection of the OSH in Indonesia is very alarming, because many corporations have not implemented its program yet. Another indication of weak implementation of OSH can be seen in the high occupational accidents in Indonesia, e.g. 2400 workers died annually due to workplace accidents. In its development, it turned out that the number of accidents at work is increasing every year. See: Suara Pembaruan, High claims of Social Security signifies that Application K3 is inadequate, Jakarta, Monday, October 10, 2011; See: http://menteri.depnakertrans.go.id/?show=news&news_id=118; See also: <http://www.beritasatu.com/nasional/78656-menakertrans-kerugian-kecelakaan-kerja-rp280-triliun.html>; Metro TV, Running Text March 1, 2015, 09.00 hrs.

¹⁶ PT.Jamsostek (Ltd.) has been transformed into the Social Security Agency for Employment (known as BPJS) since January 1, 2014 in accordance with the Law No. 24 of 2011.

In 2008 93,823 cases were identified (other sources mentioned 94,736 cases¹⁷) or in another word the average occurrence of cases was 360 per day¹⁸. During 2010, there were payments for 98,711 cases¹⁹ or a daily average of payment was given to more than 411 cases of occupational accidents. There was an increase of 2.49 per cent compared to that of 2009, i.e. 96,314 cases²⁰. The number of work accidents in 2011 reached 99,491 cases and out of this number, 2100 death cases²¹ happened. In 2012 there were some 103,000 cases. This means that every day nine death cases of workers²² occurred. From these cases; 91.21% of the accident victims got recovered; 3.8% underwent disability; 2.61% experienced partial disability, 37 cases of total permanent disability and the rest died (2,419 cases). On the average, 282 cases of occupational accidents occur every day (Social Security Annual Report 2012).²³ Throughout the year of 2013 the number of participants who experienced occupational accidents had reached 129,911. This means that 9 people died due to accidents in the workplace daily. This figure underwent a dramatic increase of 50 percent compared to that of the previous year (2012), which only recorded 6 death cases daily due to accidents in the workplace²⁴.

The above data can be far much greater because in reality many companies do not register their employees/workers to Department of Manpower, not to mention the informal workers whose number was much larger than the formal ones²⁵. Despite the reliability of the above data, deaths due to the accidents in the workplace in Indonesia are categorized high. In Singapore, for example, the number of occupational accidents leading to death in 2004 was 83 cases; 71 cases in 2005; 62 cases in 2006; 63 cases in 2007; and 67 cases in 2008. On the average, in the European countries only two people died per day due to accidents²⁶ in the workplace.

International Labor Organization (ILO) noted that Indonesia belonged to the category of a country with fairly high occupational accidents. Out of 100,000 workers, 20 of them suffered from fatal accidents. The average figure per year was 99,000 cases of occupational accidents and 70% of them involved fatality²⁷ – causing death and permanent disability²⁸. From the study on the standards of occupational accidents conducted by ILO in 2009, Indonesia was ranked in the position of 152 out of 153 countries being studied²⁹.

The current study aimed to strengthen the legal basis for the Law of OHS that constructed the corporate criminal responsibility for the protection of employees/workers in their workplace. Considering OHS protection aims to maintain the fundamental rights of workers/laborers as mandated in the 1945 Constitution, the Law of Safety of Work is then considered no longer relevant to guarantee the occupational health and safety (OHS) protection for employees/workers. The basic principles of the Law of Safety of Work, especially its philosophical and sociological bases, terminology, criminal sanctions and criminal responsibility are quite weak.

¹⁷<http://jakarta.kompasiana.com/layanan-publik/2012/05/09/perlunya-budaya-k3-untuk-menekan-angka-kecelakaan-kerja-461784.html>

¹⁸Nasional Pelita, 32 Years PT. Jamsostek has Improved the Social Security and Welfare of Indonesian Workers (32 Tahun PT. Jamsostek Tingkatkan Kesejahteraan Tenaga Kerja di Indonesia), 6 September 2010, <http://www.bataviase.co.id/node/374653>.

¹⁹ Jamsostek, The Protection of Jamsostek Cases: Accident Cases are still Classified High (Perlindungan Kasus Jamsostek Kasus Kecelakaan Kerja Masih Tergolong Tinggi), http://www.jamsosindonesia.com/cetak/print_externallink/74/

²⁰<http://jakarta.kompasiana.com/layanan-publik/2012/05/09/perlunya-budaya-k3-untuk-menekan-angka-kecelakaan-kerja-461784.html>

²¹ <http://repository.usu.ac.id/bitstream/123456789/34993/5/Chapter%20I.pdf>

²² <http://www.jamsostek.co.id/content/news.php?id=3955>

²³<http://www.fkm.ui.ac.id/content/strategi-peningkatan-keselamatan-kerja-keselamatan-publik-di-indonesia-melalui-pendekatan>

²⁴ <http://repository.unhas.ac.id/bitstream/handle/123456789/10692/INDRA%20K11110913.pdf?sequence=1>

²⁵*The number of Indonesian workers in the formal sector is estimated around 30 million. Nine million of them have participated in the Social Security program while the remaining, more than 20 million formal workers, have not been registered in the Social Security program. The same is true with the informal workers. It is estimated that out of 70 million informal workers, only one percent has been protected by the insurance policy. From the above data, the average accidents in the workplace reach more than 100,000 cases per year. The above data were taken from 9 million formal workers who became members of the Social Security program whose total members all over Indonesia were 100 million. This means that there were 90 million Indonesian employees/workers whose occupational health and safety work was unprotected. These employees/workers were working in various informal sectors. Generally, the informal employees/workers experienced even worse working relationship compared to those who worked in the formal sectors, both in terms of wages and working conditions. See a note for Indonesian OHS in 2011, Murder in the Workplace Still Continues (Pembunuhan di Tempat Kerja Itu Masih Terus Berlangsung), posted on Wednesday, February 15, 2012, fokus.news.viva.co.id/news/read/218702-pengangguran-turun-belum-tentu-sejahtera*

²⁶<http://www.fkm.ui.ac.id/content/strategi-peningkatan-keselamatan-kerja-keselamatan-publik-di-indonesia-melalui-pendekatan>

²⁷ <http://www.antaraneews.com/berita/353187/kecelakaan-kerja-di-indonesia-masih-tinggi>

²⁸ <http://finance.detik.com/read/2012/10/16/120952/2063698/4/angka-kecelakaan-kerja-di-ri-masih-tinggi>

²⁹Farid Akbar Harahap, Reliability Assessment as an Attempt to Reduce Human Errors in the Application of Occupational Health and Safety in the Workplace, (*Reliability Assesment Sebagai Upaya Pengurangan Human Error Dalam Penerapan Kesehatan dan Keselamatan Kerja*), A Thesis (Depok, Fakultas Teknik, Program Studi Teknik Industri, Universitas Indonesia, 2012), p. 1.

Therefore, a stronger legal construction of OHS that could protect the health and safety of employees/workers in the workplace should be constructed, so that they would be free from accidents in the workplace and occupational related diseases.

2. Analysis of Regulations on Occupational Safety and Health work for Employees /Workers at the Workplace

2.1. Anatomy of the Law No. 1 of 1970 concerning Safety of Work

Textually, the Law No. 1 of 1970 that regulates the safety of employees/workers can be investigated from the anatomy of legislations. This anatomy of legislations encompasses operational definitions contained in the general provisions and general principles that guarantee the safety protection of employees/workers, sanctions, and the provisions of criminal law when companies fail to provide safety protection for employees/workers in the workplace. From this anatomy, some weaknesses are identified as follows: (i) the Law is no longer relevant to provide adequate protection for the safety of workers; (ii) the Law also does not contain provisions of regulation pertaining to penalties for crimes committed by corporation when it fails to provide protection for employees/workers. With reference to the weaknesses above, the researcher proposes that improvement, renewal or reform of the Law No.1/1970 needs to be constructed.

2.2. Normative Problem

The normative problem in this study is closely related to some weaknesses pertaining to the validity of the legal institution that regulates the health and safety of employees/workers in the workplace. This normative weakness may originate from the contradictions among the norms and legislation. In addition, the weakness can also be stemmed from the vacuum of law, legal uncertainty, or vague rules regulating occupational health and safety of the employees/workers. In detail, some of these weaknesses can be elaborated as follows:

2.2.1. Problems of Management Terminology

OHS protection is one of the efforts to defend the rights of employees/workers to live and have the life (fundamental rights³⁰) in the workplace. If the considerations (basic ideas) that become the rationale for developing the Occupational Safety Law are examined, the use of the word "need" in the law does not give strong binding to the essence of fundamental rights itself; for example. "...that the safety of any other persons who are in the workplace also need to be guaranteed "; "...that every source of production needs to be operated and used safely and efficiently"; "...that all efforts to foster norms of labor protection need to be sought "; "...that the development of norms needs to be embodied in legislation that contains provisions of occupational safety ..."

The OHS protection of employees/workers is actually an order to the corporate/ employers to make any effort to prevent accidents and occupational diseases in the workplace. According A. Hamid S Attamini³¹, the rule of law (legislation) should contain the following properties: (a) command (*gebod*), (b) prohibition (*verbod*), (c) permission (*toestemming*), and (d) exemption (*vrijstelling*). A norm has the quality of command (*gebod*)³² to do something, and therefore, the word "shall" and "must" should be used.

The board is defined as "the person who has a duty to lead directly a workplace or its independent divisions". This definition is different from that of Rimmelink's, which states that in practice, the board consist of people who "give orders" or "lead".³³ The broader meanings of the board have been developed in many special laws beyond the Code of Penal (*wetboek van Strafrecht*). In this relation, Alvi Syahrin³⁴ interprets the board in the Article 116 of the Law number 32 of 2009, as "the person who gives an order to commit a crime" or "person who acts as a leader in the activities of criminal offense".

³⁰ Sabon claims that fundamental rights do not depend on the existence of positive law, including the Constitution. Such rights are agreed upon, cut or trimmed in any circumstances, even under martial law. See Max Boli Sabon, Human Rights: Education Materials for Higher Education, (*Hak Asasi Manusia: Bahan Pendidikan untuk Perguruan Tinggi*). (Jakarta, Atma Jaya University, 2014). p.30.

³¹ A.Hamid S Attamini, The role of Presidential Decree in the State Governance, (*Peranan Keputusan Presiden RI dalam Penyelenggaraan Pemerintahan Negara*), Dissertation, (Jakarta,Fakultas Pascasarjana Universitas Indonesia,1990), p.314-315.

³²http://ditjenpp.kemenkumham.go.id/files/doc/1944_Perumus%20Norma%20dalam%20Peraturan%20Perundang-undangan.pdf

³³Rimmelink, in Alvi Syahrin, 2009, p.25.

³⁴ Alvi Syahrin, *Ibid.*, p.24.

Even long before the enactment of the Law of Safety of Work, for example, Article 15, Paragraph (1) of Emergency Law No. 7 of 1955³⁵ states³⁶, "If it were an economic crime ... then ... criminal charges could be put against those who give orders to commit the crime" or "those who act as leaders in an action or negligence or both."

The researcher conducted interviews with a number of officials (employees), OHS inspectors, both in the central (Ministry) and local government level (Department of Labor) to get their opinions regarding the definition of "board" in the workplace. The results were interesting to analyze because it turned out that their understandings were varied; some interpreted the board consisted of Director, Manager, and Supervisor. This has clearly become a problematic issue. How could supervisor conduct surveillance on the enforcement or implementation of labor legislation if the terminology used to define the board itself is not clear?³⁷

Pertaining to the definition of the board, it is interesting to scrutinize the Law No. 40 of 2007³⁸. Article 1, Paragraph 5 in conjunction with Article 92 Paragraph (2), mentions that the board is equal to management, i.e. "the company organ that runs the company and is fully responsible for the management of the company ..." This is not followed by further explanation. However, if we look closely at the Article 155, it further states, "the provisions of the responsibility of the Board of Directors ... or the mistakes and negligence that stipulated in this Law does not reduce the provisions stipulated in the legislation of Criminal Law". Therefore, according to the researcher, the board should be interpreted as "those who gave orders to commit a crime" or "person(s) acting as leader(s) in the activities of a criminal offense".

2.2.2. Weak Sanctions

The provisions of Article 15, Paragraph (2) of the Law of Safety of Work state that, "These legislative regulations mentioned in paragraph (1) may provide criminal sanctions for violations of regulations with imprisonment for a maximum of 3 (three) months or a maximum fine of Rp 100.000, - (one hundred thousand rupiahs)". The sanction indicates the voluntary elements, if the violation can be free from the sanctions. Although the criminal law is familiar with the terms exclusion of punishment and criminal responsibility — both for justification or pardon reasons — the formulation of the provisions of criminal sanctions should not use the word "may", because it is the judge who has the authority to determine the conditions that fulfill the logical reasons for the exclusion of punishment.

Apart from the mild imprisonment and cheap fines that are no longer compatible with the present³⁹ condition, the weakness of the law of Safety of Work, in the researcher's view, is the use of a single model for a criminal punishment threat (alternative criminal punishment threat) which is known in the Criminal Code⁴⁰. Some laws other than the Criminal Code have deviated from the general patterns of criminal punishment threats mentioned in the Criminal Code, such as a heavy weight of criminal punishment threats using a cumulative model (marked with the conjunction "and" in between the two types of crimes threatened) or combination of an alternative-cumulative model (marked by conjunctions "and/or" in between the two types of crimes threatened)".⁴¹ According to R. H. Hutauruk, the recognition of corporation as the subject of criminal law underlies the emergence of various laws beyond the Criminal Code (including the special criminal laws) that use an alternative-cumulative model of criminal threats. This model is considered to be able to increase the prevention and cause deterrent effects⁴².

³⁵ The Emergency Law No. 7 of 1955 on the Investigation, Prosecution, and justice for Economic Crime, (State Gazette of the Republic of Indonesia Year 1955 No. 27, A Supplement to State Gazette of the Republic of Indonesia Number 801).

³⁶ Mahrus Ali, Principles of Corporation Criminal Law (*Asas-Asas Hukum Pidana Korporasi*), *Op. Cit.*, p.68-69.

³⁷ See: Provisions of Article 1 paragraph 32 of the Law No 13 of 2013 in conjunction with Article 1 point 5 of the Law of Work Safety in conjunction with the Law No. 21 of 2003 in conjunction with Article 1 paragraph 1 of the Presidential Regulation No. 21 Year 2010.

³⁸ The Law No. 40 of 2007 on Limited Liability Companies (State Gazette of the Republic of Indonesia Year 2007 No. 106 and a supplement to State Gazette of the Republic of Indonesia of 2007 No. 4756). (*Undang-undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas, (Lembaran Negara Republik Indonesia Tahun 2007 Nomor 106, Tambahan Lembaran Negara Republik Indonesia Tahun 2007 Nomor 4756)*).

³⁹ The Minister of Labor's statement and results of interviews with the officials in charge of labor inspection (OHS), and trade unions / employees/workers brought to light the same opinions, i.e. the threat of sanctions in the Law of Work Safety were too trivial and light, both imprisonment and fine penalty.

⁴⁰ Barda Nawawi Arief, Anthology of Criminal Law Policies (*Bunga Rampai Kebijakan Hukum Pidana*), (Bandung, Citra Adya Bhakti, 1966), p.160

⁴¹ Chairul Huda, Weighting patterns of Criminal Law in the Special Criminal Law, (*Pola Pemberatan Pidana dalam Hukum Pidana Khusus*), *Op.Cit.*, p.12-13.

⁴² Rufinus Hotmaulana Hutauruk, *Op. Cit.*, p.100.

Indeed, fine penalties can only be imposed to corporation. However, individuals, like officials, owners, and employers may be subject to both (imprisonment and fines) in order to improve the effectiveness.

Further, the sanctions contained in the Law of Safety of Work are considered weak as they only determine the maximum criminal threats that a judge can pass. Similarly, some laws beyond the Criminal Code have used a special minimum punishment; this system is known in the Criminal Code. With this system, the law no longer simply specifies the maximum criminal penalty that can be imposed by the judge, but by the special minimum punishment as well. This aims to limit the judge independence to freely pass crime punishment, between generally minimum and maximum sentences⁴³. In this regard, Barda Nawawi Arief states that a specific minimum punishment should consider the impact of relevant offenses on public (employees/workers), such as posing a danger/public unrest, dangers/health/ environment or causing death or crime prevention factors (*recidivie*)⁴⁴.

2.2.3. Weak Criminal Responsibility

The essence of this research is the issue of criminal responsibility in the Law of Safety of Work. The result of investigation conducted by the researcher indicates that out of 40 regulations on the execution of the Law of Safety of Work (see Diagram 2), only 22 of them were identified as subjects of law that bore criminal responsibilities. Out of these regulations, 13 (thirteen) applied for the responsibility of the board, head of engineering, individual and the owner, all which were individual in nature (*naturlijk persoon*); 8 (eight) regulations worked for regulations pertaining to entrepreneurs⁴⁵ acts (7 of them were alternative in nature) and "individual" (*naturlijk person*) as well. Even though the definition of "employer" in the Law of Safety of Work also includes "partnership" and "legal entity", in the end "individuals' interests" becomes the concerns. Only two ministerial regulations⁴⁶ explicitly stated that accountability went to the corporation (company⁴⁷). (See Figure 3)

In my opinion, the dominance of criminal responsibility for the board and others is the main weakness of the Law of Safety of Work. Neither this law nor its implementation strictly admits and formulates the corporate (read: limited liability company) as a subject of criminal law — which is often found in the criminal legislations beyond the criminal Code⁴⁸. According to Andi Hamzah, cooperative as a subject of criminal law directly accountable for criminal conducts has been recognized since 1951, i.e. the Emergency Law No. 17 of 1951 on Stockpiling. Then, it was widely known as the Law No. 17 of 1955 on Investigation, Prosecution and Judiciary of Economic Crime⁴⁹. From Rufinus' research it was found that the formulation of corporation as a subject or criminals had existed since the enforcement of the Law number 12 of 1950 on Tax Distribution⁵⁰.

⁴³ Chairul Huda, *Loc.Cit.*

⁴⁴ Barda Nawawi, *Op.cit.*, p.174. in Chairul Huda, *Ibid.*,

⁴⁵ According to the Large Dictionary of Indonesian Language, an entrepreneur is defined as a person who undertakes a business, merchant, businessman. <http://kbbi.web.id/usaha>

⁴⁶ The Regulation of the Minister of Manpower, Transmigration and Cooperatives Number Per/01/Men/ 1976 on the Obligation of Company Hygiene and Health Training for Company Doctors, and the Regulation of the Minister of Manpower and Transmigration Number Per. 01/Men/1976 on the Obligation of Company Hygiene Health and Occupational Safety exercises for the Company Paramedics.

⁴⁷ The Law of Work Safety does not give the definition of "enterprise", but the definition is given by its implementation regulation and other laws. According to Article 1, (6) of the Law No. 13 of 2003, Jo Article 1(5) of Government Regulation No. 50 of 2012 the definition of "company" contains: (a) any form of enterprise — whether it has a legal status or not; whether it is owned by an individual, a partnership or a legal entity, either run by private or state entity — that employs employees/workers by paying them wages or other forms of remuneration, (b) any social enterprises and other enterprises that have officials and hire other people by paying them wages or other forms of remuneration.

⁴⁸See: Mahrus Ali, *Principles of Corporation Criminal Law (Asas-Asas Hukum Pidana Korporasi)*, (Jakarta, Raja Grafindo Persada, 2013), *Op.Cit.*, p.69-73; Also See: Rufinus Hotmaulana Hutaauruk, *Op.Cit.*, p.25-46; Barda Nawawi Arief, *Capita Selecta of Criminal Law (Kapita Selekta Hukum Pidana)*, (Bandung, Citra Aditya Bakti, 2003), p.223.; and Muladi and Dwidja Priyatno, *Op.Cit.*, p.89. , and; Muladi and Diah Sulistyani RS, *Corporate Criminal Responsibility (Pertanggungjawaban Pidana Korporasi)*, (Bandung, Alumni, 2013), p.50-53.

⁴⁹ Andi Hamzah, *Economic Crime Law (Hukum Pidana Ekonomi)*, (Jakarta, Erlangga, 1977), p.48., Also see, Rufinus Hotmaulana Hutaauruk, *Op.Cit.*, p.24.

⁵⁰ *Ibid.*

The implementation Regulation of the Law No. 1 of 1970

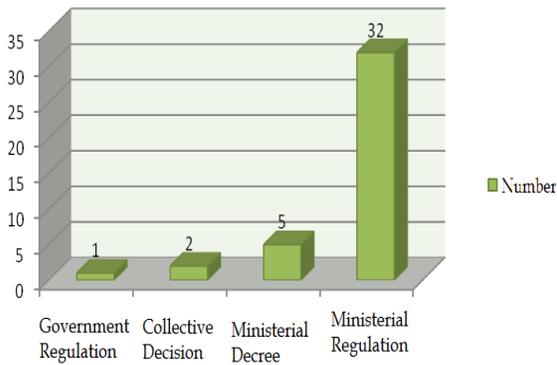


Diagram 2.

CRIMINAL RESPONSIBILITY FOR THE VIOLATION OF OHS

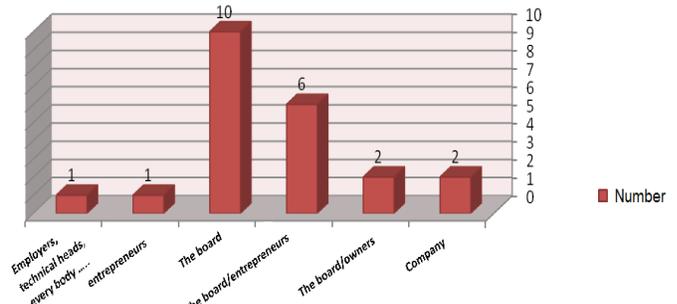


Diagram 3.

2.3. Practical Problems

The practical issue appears due to conflict of interests between the management or leaders or owners of the company and employers/workers. On the one hand, the entrepreneurs or corporate leaders are interested in promoting their economic advantages. On the other hand, employees/workers are interested in maintaining their safety as part of the protection of human rights. The failure to accommodate and balance the economic and human right interests reflects that the commitments of the entrepreneurs or corporate leaders in providing legal protection for employees/workers are weak. This should be a real concern for the government in carrying out its constitutional obligations, i.e. to provide protection and realize social justice for all Indonesian citizens.

2.3.1. Economic Interest vs Human Rights

It is undeniable that OHS is still regarded as an unnecessary (*wasteful*) cost by corporations, and therefore, OHS is often under-emphasized or ignored in the production process. Regardless of such truth, OHS is actually an investment that is proportionally in line with productivity. As described above, the researcher’s analysis has yielded results that surpassed the productivity issues of the employees/workers, i.e. the right to live and the fundamental rights to work respectably in their workplace.

As the implementation/compliance of OHS is assumed wasteful and to be able to disrupt economic interests and production of profits, the protection of fundamental rights of employees/workers is then minimized. In the researcher’s opinion, the continuous corporation mistakes happen because the law of the Safety of Work is not able to position the protection of OHS for employees/workers as fundamental rights that should be placed above economic interests.

Similarly, the Minister of Labor once said that the implementation of OHS in Indonesia was still largely dependent on the economic conditions (in this case the economic condition of the corporation). This statement seemed to provide an additional power for the corporation to justify that OHS could be underestimated, bargained (compromised), voluntarily neglected, only suggested, and given a space but not obeyed. This is in contrast with the recognition from ILO, which states⁵¹ "Whatever circumstances happens in a country, OHS remains fundamental human rights that must be protected, whether the state/corporate experiences economic growth or recession. The corporate should not be focused only on the pursuit of profit at the expense of the lives and human health (employees/workers) ".

2.3.2. Corporation Commitment to Occupational Safety and Health Work

Viewed from philosophical, sociological and judicial considerations/substances, the problems and weaknesses of the Law of Safety of Work above are stemmed from weak terminology, sanctions and criminal responsibility.

⁵¹ Pia K. Markkanen, Occupational Safety and Health in Indonesia (*Keselamatan dan Kesehatan Kerja di Indonesia*), Working Paper 9, (Manila, Philippines, International Labour Organization, Sub-regional Office South-East Asia and the Pacific, April 2004), p.34; in 2004. ILO has suggested that the Law of Work Safety Law be enhanced into strong OHS based on the provisions of ILO Convention No. 155/1980 on Occupational Safety and Health along with its accompanying recommendation.

Thus, in the researcher's opinion, a commitment required from the corporation is no longer based on the power of the Law of Safety of Work but based on people's expectation and corporate awareness to apply Pancasila as the nation's way of life. These values are derived from the Constitution that mandates the protection of fundamental rights.

3. Designing Adequate Legal Framework for Occupational Safety and Health Work Protection in the Workplace

3.1. Ideal Model for Protection of Health and Safety at Work

The establishment of legal regulations in Indonesia is derived from Pancasila- which serves as the "basic philosophy of the state" (*philosophische grondslag*) and "way of life"⁵². Indonesian founding fathers formulated Pancasila based on the abstraction of cultural and religious⁵³ values that were accepted and believed as truth by Indonesian citizens. Consequently, Pancasila — as the core philosophy⁵⁴ — becomes the essential ground norms (*Grundnorm, staatsfundamentalnorm*), a source of values and positive laws to realize the collective goal, collective ideals and/or the country's ideal state⁵⁵ (*staatsidee*) based on the principles of constitutionalism and four (4) ideals of the state embodied in the Preamble of the 1945⁵⁶ Constitution. The values referred here are those principles contained in Pancasila, namely: divinity, humanity, unity, the deliberation of democracy and justice which becomes the source of legal materials for Indonesian positive laws. This ideal state of law (*rechtsidee*) functions to encourage the construction of justice through the positive law.

Thus, the welfare state is wholly contained as a single unity within the five principles of Pancasila that cannot be separated from one another, although, according to the researcher, some values may be more dominant than the others, depending on the ideals (objectives) to be achieved. For example, for the purpose of welfare of employees/workers, divinity, humanity, and justice values could be very dominant. The rights of employees/workers to get "appropriate jobs" and OHS protection is well embodied within the Article 27 paragraph (2)⁵⁷ in the amendment of the 1945 Constitution of the Republic of Indonesia. After the amendment, clauses 28A⁵⁸ and 28D⁵⁹ came into being. Those clauses constitute issues of human rights⁶⁰, more precisely the fundamental⁶¹ rights, the positive non-derogable rights, the elementary rights (*fundamentele rechten*), which become the legal basis for the Law No. 14 of 1969⁶².

⁵²Kaelan, Nationality Pancasila State: Historis, Philosophical, Juridical, and actualization (*Negara Kebangsaan Pancasila: Historis, Filosofis, Yuridis, dan Aktualisasinya*), (Yogyakarta, Paradigma, 2013), p.39.

⁵³ The values were owned by Indonesian citizens prior to establishing a state, prior to judicially establishing the state of Indonesia. These values were resulted from the thoughts and ideas of the people of Indonesia about a better life. See Kaelan, *Ibid.*, p.47. and p. 57.

⁵⁴ Pancasila is essentially the foundation or philosophical basis for the state and legal order of Indonesia. See, Kaelan, *Ibid.*, p. 50.

⁵⁵ According to Jimmy Assiddiqie, collective ideals determine the sturdiness of state constitution. Because of the abstraction of this togetherness, in the end similar interests will come up among people who undeniably have to live within pluralism or diversity. Therefore, the agreement to ensure unity within the framework of state life, the formulation of shared goals or ideals is required; this is referred to as the state philosophy or ideal state (*staatsidee*). The state's objective functions as the philosophical basis (*philosophische grondslag*) and common platforms in the context of state life. See, Kaelan, *Ibid.*, p.45.

⁵⁶ The four ideals of state are contained in the preamble of 1945 Constitution of Indonesia, namely: (1) to protect the people and the country of Indonesia, (2) to promote (increase) the public welfare, (3) to educate the nation, and (4) to participate the implementation of world order based on peace and social justice.

⁵⁷ Article 27, Paragraph (2) that states, "Every citizen has the right to work and decent livelihood for humanity" was retained after the amendment of 1945 Constitution. Further, it was added in Chapter XA under the title "Human Rights", i.e. Article 28A through Article 28J, while the maintenance of fundamental rights (the right to live), through the OHS protection concerning the welfare of the employees/workers, was contained in Article 28A and Article 28D of the Amendment of 1945 Constitution; it is declared as the basic rights, human rights. Article 27 paragraph (2) was first realized in the form of the Law of Employment of 1948 No. 12 (the first national law regulating the labor law), especially Article 6 paragraph (1) and Article 16.

⁵⁸ Article 28A, "Every person has the right to live and to defend his/her life and living".

⁵⁹ Article 28D "Everyone has the right to work and to get rewards and fair/appropriate treatment in relation to employment".

⁶⁰ Although the 1945 Constitution of the Republic of Indonesia (before the amendment) did not mention the term human rights, it addresses the basic rights (*grondrechten, grundrechte*). See, Koesparmono Irsan, Law and Human Rights (*Hukum dan hak Asasi Manusia*), (Jakarta, Yayasan Brata Bhakti (YBB), 2009), p.1.

⁶¹ Besides fundamental rights, there are also non-fundamental rights, as contained in Article 28J, Paragraph (2) 1945 Constitution of Indonesia in conjunction with Article 73 of Law No. 39 of 1999. See, Max Boli Sabon, *Op. Cit.*, p.31.

⁶² The Law No. 14 of 1969 (State Gazette of 1969 Number 55 & a supplement to the State Gazette No. 2912. Article 9 states, "Every worker is entitled to get protection of safety, health, decency, maintenance of work ethics and fair treatment in accordance with human dignity and religious moral", then Article 10," The government fostering employment protection that includes: (1) Norms of safety; (2)

The latter was further replaced by the Law No. 13 of 2003⁶³ (hereinafter referred to as the Labor Law). A year later, as a result of the development and technology, the issue of OHS was getting more increasingly crucial. Then, Article 9 in conjunction with Article 10 of the Law No. 14 of 1969⁶⁴ (now known as the Article 86 in conjunction with Article 87 of the Labor Law) were reaffirmed with the principal legislation, namely the Law No. 1 of 1970 (Read: the law of work safety⁶⁵), that regulated OHS in general.

The scope of this law is an occupational safety in all workplaces within the jurisdiction of the Republic of Indonesia, whether they are on land, under the ground, on the water surface, under water or in the air. The researcher is of the opinion that the scope of the Law of Safety of Work has already been complete and still relevant up to now and, therefore, no single party gives any objection or tries to provide new inputs. The provisions of the Law of Safety of Work apply in the workplace⁶⁶ and its safety requirements (as stipulated in the specified legislation)⁶⁷ and the principles of scientific techniques⁶⁸. The director⁶⁹ conducts general implementation of the Law of Safety of Work while the inspectors⁷⁰ and safety experts⁷¹ are assigned to run direct supervision to ensure that the Law of Safety of Work is obeyed and implemented.

Article 1 of the Law of Safety of Work provides an operational understanding that further became the object of the researcher's analysis. The board is defined as those who have duties to lead directly the workplace or its independent divisions. The board is required to meet and comply with all terms and conditions applicable for the businesses and workplace in operation⁷². An executive⁷³ is a person or a legal entity that: (a) runs his/her owned businesses and for that purpose she/he uses workplace, (b) runs other people's business independently and for that purpose she/he uses the workplace, (c) works in Indonesia to represent a person or a legal entity mentioned in (a) and (b); when the person represented lives outside Indonesia.

The execution of the provisions⁷⁴ of articles in the Law of Safety of Work is regulated by the legislation and "can" provide criminal sanctions (*strafmaat*) for violations of the rules.

Norms of occupational health and hygiene in the company; (3) Norms of work; (4) Provision of compensation, care and rehabilitation in the case of accidents.

⁶³ According to the Law No. 13 of 2003 (State Gazette of 2003 No. 39, State Gazette No. 4279) Article 86 Paragraph (1), every employee/worker has the right to get protection of: a) occupational safety and health; b) moral and decency; and c) treatment in accordance with human dignity and religious values; according to Paragraph (2), the safety of employees/workers must be protected to realize optimal productivity, implement occupational health and safety efforts. "

⁶⁴ Article 9 of the Law No. 14 of 1969 states "Every labor is entitled to get the protection of safety, health, decency and maintenance of work ethics in accordance with human dignity and religious moral ", and then Article 10 says, "The government supervises the protection that covers: (1) Norms of safety; (2) Norms of occupational health and hygiene in the company; (3) Norms of work; (4) Provision of compensation, care and rehabilitation in the case of accidents".

⁶⁵ The Law of Work Safety basically replaces the Safety Law issued in the Dutch colonial period, namely *Veiligheids Reglement* (VR) of 1910 (State Gazette No. 406 1910), which was valid until after the independence of the Republic of Indonesia 17 August 1945. The background of this replacement can be seen in the explanation of the Law No. 1 of 1970.

⁶⁶ See Article 2, Paragraph (1) the Law of Work Safety

⁶⁷ See Article 4, Paragraph (1) of the Law of Work Safety

⁶⁸ See Article 4, Paragraph (2) the Law of Work Safety

⁶⁹ Officials appointed by the Minister of Labor (Article 1 point 5 of the Law of Work Safety)

⁷⁰ Technical employees with special skills from The Department of Labor are appointed by the Minister of Labor (Article 1 point 6 of the Law of Work Safety).

⁷¹ Specialized technical skilled labors from outside are appointed by the Department of labor to supervise and disseminate the meaning of the Law (Article 1 point 7 of the Law of Work Safety)

⁷² See Article 9 Paragraph (4). The board obligations according to the Law of Work Safety is contained in Article 8 (1) and Paragraph (2), Article 9 Paragraph (1), Paragraph (2) and Paragraph (3), Article 11 Paragraph (1), Article 14..

⁷³ The definition of entrepreneur in the Law of Work Safety is changed and expanded as stated in Article 1, Paragraph 5 of the Law No. 13 of 2003 in conjunction with Article 1 point 6 of the Government Regulation No. 50 of 2012. "Person" means: (a) An individual, a partnership or a legal entity that operates a self-owned enterprise, (b) An individual, a partnership or a legal entity that independently operates the company that is not his/her own, (c) An individual, partnership, or a legal entity in Indonesia represents a company as referred to in paragraphs a and b and whose owner is outside the territory of Indonesia.

⁷⁴ Rosjidi Ranggawidjaja states that in the legislation texts and references related to the Indonesian Constitutional Law, a variety of terms is known, such as legislation, legislative requirement, regulatory legislation, and state regulation. The term "legislation" (including "rules of legislation"), according to Solly Lubis, is derived from the word "law", not from "laws". The word "law" has no connotation with the term "legislation", as the term "law" has its own meaning. Solly further says that regulatory legislation itself is the rule concerning the procedures for the production of state rules. See, Rosjidi Ranggawidjaja, Introduction to Indonesian Legislation (*Pengantar Ilmu Perundang-Undangan Indonesia*) ,(Bandung, Mandar Maju, 1998), p.15., See also, Solly Lubis, Platform and Technical Regulations, (Bandung, Mandar Maju, 1989), p.1- 2..

The model of criminal formulation used for this is single punishment of criminal threat or some alternative⁷⁵ punishments of criminal threat. One main criminal offense is imposed with a single penalty⁷⁶ with a maximum imprisonment of 3 (three) months "or" a maximum fine of Rp. 100.000, - (one hundred thousand rupiahs)⁷⁷.

3.2. Formulating Principles for Adequate Legal Framework

This section focuses on exploring core elements for the creation of a legal framework that can surely provide protection for the health and safety of employees/workers. Theoretically, the elements that must exist are related to the truth or rationale embodiment of law, such as justice, human rights and proportionality. Those three elements must exist in the establishment of a legal framework to ensure the health and safety of employees/workers.

3.2.1. Principles of Justice

The principle of justice serves as a guidance to ensure equal treatments for all components of the company, i.e. corporate management and its employees/workers. Judicially, the position of employees/workers and management is equal. But in reality, both socially and economically, the welfare of employees/workers and their social status are far below that of the management. The source of these disparities is concerned with the economic level, income, welfare, and social status. This disparity shows that the government has failed to uphold justice, as mandated by Pancasila, the grand norm of positive⁷⁸ Indonesian laws. Constitutionally, all the elements contained in Pancasila should form the basis of the applicable legal framework in Indonesia, including all the rules and laws relating to occupational health and safety for employees/workers.

3.2.2. Principles of Human Rights

The principle of human rights is the most fundamental aspect that can be used to measure the validity of the policy and administration of the state. Human rights are the core elements that must be considered in designing and strengthening the legal framework for the protection of employees/workers. The legal basis for this lies in the universal obligation for Indonesian government as it has ratified the Universal Declaration of Human Rights (UDHR) of 1948. Accordingly, the Indonesian government is obliged by its constitutional obligation to protect citizens of Indonesia. In the national level, the government is obliged by its constitutional obligation to protect all of its citizens, both at home and abroad⁷⁹.

3.2.3. Proportional Principle

The feature of this principle is that it treats any entity in an appropriate and fair manner. This treatment is based on the interpretation of performance or deeds made by individuals. For example, workers who have been doing productive works and giving benefits to the company are justified to get the company's attention in the form of protection for their safety and health in the workplace. So far, this kind of reciprocal relationship has not been regulated by the Law No.1 of 1970. Workers are only positioned as part of production components that have to do something based on the terms of conditions agreed upon, without appreciating their deeds or acts or optimum performance. In the attempt of providing protection for the safety and health of employees/workers, proportional principle is applied not only to the appreciation of the workers' performance, but also to the provision of sanctions, violations of law or crimes committed by any entity.

3.3. Renewal of the Law No.1 /1970 Concerning Safety of Work

Renewal of this legislation is needed to strengthen the protection of health and safety of employees/workers as this law is no longer adequate. A number of terms associated with labors, and employers or corporations do not support safety and health protection of employees/workers. Moreover, the sanctions imposed for violations and crimes against employees/workers are not clearly stated. Similarly, the criminal responsibility of the corporation is not regulated explicitly. The three reasons above become the basis of the need for renewal of the Law No.1/1970.

⁷⁵ Barda Nawawi Arief, *Op. Cit.*, p. 167-168.

⁷⁶ Chairul Huda, *Op. Cit.*, p.12.

⁷⁷ See Article 15, Paragraph (2) and (3) of the Law of Work Safety

⁷⁸ See: The fifth principle of Pancasila stresses the importance of social justice for all Indonesian people.

⁷⁹ See: The Preamble of the 1945 Constitution of Indonesia.

3.3.1. Revision of Terminology of Board

The terminology of board contained in the Law of Safety of Work shows ambiguity in the practice of law enforcement. The evidence for this is showed by the definition of management that is translated mainly as someone who leads. Thus, the term board is defined as a person who gives a command to commit criminal acts, as commonly used in the various special laws beyond the Code of Penal. To the researcher, the use of the term "need" in the consideration section of the Law of Safety of Work implies optional or permissible meanings. In order to strengthen the protection of OHS employees/workers, the Law of Safety of Work should be renewed by replacing the term "need" with "must", to imply mandatory or imperative⁸⁰ meanings.

3.3.2. Strengthening and Increasing Sanctions for the Protection and Safety of Occupational Health in the Workplace

The strengthening of sanctions may include the replacement or addition to sanctions imposed not only to the board but also to the corporation. It is therefore necessary to strengthen the safety protection of employees/workers. Increased sanctions may include the rise in the number or amount of fines and losses as a result of the employer or management's failure to protect the safety of employees/workers. In addition, the scope of these sanctions should also be extended, not only in the form of fine sanctions but types of punishments for criminal offenses — such as management's negligence or misconduct that causes death, illness or lifelong disability — need to be formulated as well.

3.3.3. Visualization of Corporate Criminal Liability

In this section the researcher will describe an idea to possibly include corporation as a responsible party that can be charged by a criminal law. This idea is required to ensure balanced relationship between the employees/workers with the corporation. Moreover, this idea also serves to prevent corporations' arbitrary actions against employees/workers and in particular ensure the protection of workers or laborers' safety at workplace. In my opinion, the corporate accountability should be strictly regulated and formalized in the form of both legislation and other regulations related to occupational health and safety of employees/workers in the workplace.

4. Closing Remarks

The legal framework for the protection of safety of employees/workers in Indonesia has been identified inadequate, because until now, the government still uses the provisions of the law, which refers to the Law No.1 / 1970 on the Work Safety. This has been regarded irrelevant with the declaration of fundamental rights as stated in Article 28 of the Constitution of 1945 because it does not address adequately workers' safety and increasingly complex health problems. Theoretically, if we look at those normative sources, they should become the bases for developing theoretical and practical law in Indonesia. For these reasons, the government must undertake reforms to adjust policies and rules as required by the 1945 Constitution.

Relating to the above context, the researcher proposes that the legal reform should include the improvement of terminology related to the potential protection of occupational safety in the workplace, such as terminology in the management, leadership, entrepreneurs, workers, laborers and others. It is necessary to clarify the boundaries of responsibilities of each element involved in the protection of the safety of employees/workers. Moreover, it is necessary to strengthen the weak sanctions. This aims to give a sense of justice for the workers and increase the employers or management's awareness and responsibility for the safety of workers. Strengthening these sanctions could be realized in relation to increasing amount of accountability, the breadth or scope of responsibility pertaining to death, illness, lifetime disabilities, and so forth. In addition, elements of the legal reforms should also include a proportionate accountability of the employers or the company management for the employees/workers. All of the above ideas are geared to assist the government to realize its constitutional duty, i.e. providing employees/workers with adequate legal protection in accordance with the mandate contained in the Indonesian Constitution of 1945 section 28 and the Universal Declaration of Human Rights. ***

⁸⁰ Purnadi Purbacaraka dan Soerjono Soekanto, On the Norms of Law(*Perihal kaedah Hukum*), (Bandung, Alumni, 1978),p.314.

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