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THE 1ST PROCEEDING INTERNATIONAL CONFERENCE AND CALL PAPER

Omnibus Law Opportunities And Challenges Towards
Entrepreneurs And Labor : Comparative Review

June 27 2020

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*" Omnibus Law Opportunities And Challenges Towards
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*" Omnibus Law Opportunities And Challenges Towards Entrepreneurs And Labor
: Comparative Review"*

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OMNIBUS LAW FOREIGN INVESTMENT IN INDONESIA

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ABSTRACT

The main source of national development funds in Indonesia is domestic funds. However, the amount of domestic funds available is very limited, so the government utilizes funds from abroad. One source of funds from abroad that can be used to finance Indonesia's national development is foreign investment. Foreign investment as a form of capital flow has an important role for the economic growth of a country, especially developing countries. This is due to foreign investors not only transferring capital goods, but also transferring knowledge and human capital. For Indonesia and other developing countries, foreign investment has a direct contribution to the planned national development. Based on this background, a problem arises namely how to apply omnibus law to foreign investors in Indonesia. Indonesia can adopt the omnibus law to create investment legal instruments that can increase investment interest in Indonesia. This is because the problems regulated in investment law are very complex. Not only is the issue of investors coming and investing their capital, but it is closely related to various aspects such as employment, infrastructure, fiscal and non-fiscal incentives and others as such. The complexity of this problem is not yet regulated by the Investment Law.

Keywords : *omnibus law, foreign investment*

INTRODUCTION

During the inauguration of the President and Vice President of the 2019-2024 periods which took place on October 20, 2019, President Joko Widodo in his speech said that Indonesia is currently experiencing demographic bonuses, where the number of productive age population is much higher compared to the number of unproductive age population. This is both a big opportunity and a big problem. This great opportunity will be created when Indonesia is able to build superior human resources. This must be supported by a conducive political and economic ecosystem. One way is to simplify and reduce all forms of regulatory constraints. The application of the omnibus law in Indonesia should begin by changing the investment law relating to the ease of business licensing so that they are mutually adjusted and do not overlap. Thus the harmonization of the investment law will benefit local and foreign investors, the community and the state.

The main source of national development funds in Indonesia is domestic funds. However, the amount of domestic funds available is very limited, so the government utilizes funds from abroad. One source of funds from abroad that can be used to finance Indonesia's national development is foreign investment.

Foreign investment as a form of capital flow has an important role for the economic growth of a country, especially developing countries. This is due to foreign investors not only transferring capital goods, but also transferring knowledge and human capital¹²⁷. For Indonesia and other developing countries, foreign investment has a direct contribution to the planned national development.

In the implementation of foreign investment activities, there is a possibility of disputes between foreign investors and the Government of Indonesia. The dispute was caused by various reasons, including violations of investment contracts by investors or by the government, revocation of investment permits by the government, violations of investor rights regulated in the Investment Law, and expropriation or nationalization of foreign companies. Efforts to provide guarantees in foreign investment activities in Indonesia as a form of protection for foreign investors are certainly expected to increase the flow of foreign investment to Indonesia. It cannot be denied that Indonesia urgently needs the presence of foreign investors. In turn, with the increase in foreign investment, it will provide a greater contribution to the Indonesian economy, and the presence of a guarantee in providing foreign investment activities in Indonesia as a form of protection for foreign investors, of course, is expected to increase the flow of foreign investment to Indonesia. It cannot be denied that Indonesia urgently needs the presence of foreign investors. In turn, with increased foreign investment, it will make a greater contribution to the Indonesian economy.

Besides that, the need to change the investment law related to the ease of business licensing because it refers to the theory of the level of legal norms (Stufentheorie) from Hans Kelsen. According to Hans Kelsen:

“The legal norms are tiered and layered in a hierarchy (arrangement), in a sense, a lower norm applies, sourced and based on higher norms, higher norms apply, sourced and based on even higher norms, so it should arrive at a norm that cannot be explored further and is hypothetical and fictitious namely the basic norm (grundnorm).”¹²⁸

In line with this, Maria Farida Indrati argues that “the basic norms are established in advance by the community as the basic norms which are the basis for the norms below, so that a basic norm is said to be presupposed.”¹²⁹

Article 7 paragraph (1) of Law No. 12 of 2011 concerning the Formation of Laws and Regulations as amended by Law Number 15 of 2019 (Law No. 12 of 2011) contains the types and hierarchy of legislation consisting of:

- a. The 1945 Constitution of the Republic of Indonesia;
- b. Stipulation of the People’s Consultative Assembly;
- c. Government Act / Regulation in Lieu of Law;
- d. Government regulations;
- e. Presidential decree;
- f. Provincial Regional Regulations; and
- g. Regency / City Regulations.¹³⁰

The legal power of this legislation is closely related to Hans Kelsen’s level theory of legal norms because the lower norms are sourced and based on norms higher So that the lower laws and regulations

127. Hans-Rimbert Hemmer et al., tanpa tahun, *Negara Berkembang dalam Proses Globalisasi: Untung atau Buntung?* (Jakarta: Konrad Adenauer Stiftung - Jakarta Office), p. 11.

128. Hans Kelsen, *General Theory of Law and State* (Russell & Russell 1945) p. 113

129. Maria Farida Indrati, *Ilmu Perundang-Undangan 1* (Kanisius 2007) p. 41.

130. UU No. 12 Tahun 2011.

should be harmonious with the higher laws and hierarchies.

In Indonesia, the omnibus law was conceived by Sofyan Djalil who was then serving as Coordinating Minister for the Economy of the Republic of Indonesia. This saw the ease of doing business in Indonesia which was considered still difficult and convoluted. The length of the bureaucratic chain, overlapping regulations across ministries¹³¹, and the number of regulations that are not harmonious¹³² are factors that inhibit the ease of doing business in Indonesia. The government recently issued an Indonesian Government Regulation that could learn from the Philippines, which had already implemented an omnibus law in the field of investment by issuing an omnibus investment code of 1987. Through the omnibus investment code of 1987, investors would be given a number of incentives and basic rights that guarantee their business in the Philippines¹³³. Looking at its form, the omnibus investment code of 1987 is a kind of codification in the field of investment, so that everything related to investment arrangements refers to the omnibus investment code of 1987.

Indonesia can also see the implementation of omnibus law in the United States. An example is The Omnibus Public Land Management Act of 2009, where this law establishes millions of hectares of land in the United States as a protected area and establishes a national landscape conservation system¹³⁴. The formation of this law was initiated because of concerns about climate change that could affect access to water resources. In addition, this law also has a charge for recovery act that is expected to produce investments that are beneficial for the protection and recovery of ecosystems in the United States¹³⁵. Looking at The Omnibus Public Land Management Act of 2009, the form is a law that contains more than one substantive material that was previously separated in several acts / laws.

The Problem

Based on this background, a problem arises, namely how is the application of omnibus law for foreign investors in Indonesia?

Methods of Research

In accordance with the problem under study, this research is a normative legal research. According to Soerjono Soekanto and Sri Mamudji, normative legal research or also called library legal research¹³⁶ is “legal research conducted by examining mere library materials or secondary data”¹³⁷.

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131. Anonim, ‘Rantai Birokrasi Masih Jadi Kendala Investor Berinvestasi di Indonesia’ (Okefinance, February 12, 2018) <<https://economy.okezone.com/read/2018/02/12/320/1858267/rantai-birokra-si-masih-jadi-kendala-investor-berinvestasi-di-indonesia>> accessed June 20, 2020.
 132. Yuyu Agustini Rahayu, ‘Regulasi Masih Menjadi Kendala Investasi di Indonesia’ (Merdeka.com, September 28, 2018) <<https://www.merdeka.com/uang/regulasi-masih-jadi-kendala-investasi-di-indonesia.html>> accessed June 20, 2020
 133. Regulus E. Cabote, ‘Philippines: Investment Incentives Under The Omnibus Investment Code of The Philippines’ (Mondaq, January 17, 2001) <<http://www.mondaq.com/x/9714/Investment+Strategy/Investment+Incentives+Under+The+Omnibus+Investment+Code+Of+The+Philippines>> accessed June 20, 2020
 134. Ima Mayasari, ‘Menggagas Omnibus Law’ (Kumparan, November 12, 2018) <<https://kumparan.com/dr-ima-mayasari-m-h/menggagas-omnibus-law-1542018891459839175>> accessed June 20, 2020
 135. Barack Obama, ‘Obama Signs The Omnibus Public Lands Management Act of 2009’ (New York Times, March 30, 2009) <<https://www.nytimes.com/2009/03/30/us/politics/30lands-text.html>> accessed June 20, 2020
 136. Depri Liber Sonata, ‘Metode Penelitian Hukum Normatif dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum’ (2014) 8 (1) Fiat Justitia 15, 30.
 137. Soerjono Soekanto dan Sri Mamudji, Penelitian Hukum Normatif Suatu Tinjauan Singkat (Raja Grafindo Persada 2010) 13-14.

Research Result and Discussion

Foreign investment based on Article 1 Number 3 of Law Number 25 Year 2007 concerning Investment formulates the meaning of foreign investment as an activity to invest in doing business in the territory of the Republic of Indonesia which is carried out by foreign investors, both those who use foreign capital fully or those who are related to domestic investors. Investment activities are activities to include capital or investment with the aim of carrying out a business activity. This investment activity is carried out by foreign investors, both those whose capital is owned by foreign parties and whose capital is a joint venture between foreign parties and domestic parties. Foreign investment through joint ventures is foreign capital in collaboration with domestic investors, provided that foreign parties control a maximum of 95% of capital, while domestic investors have a minimum of 5% capital¹³⁸. In addition, the notion of foreign investment, in Article 1 Number 8 of the Investment Law also defined the definition of foreign capital, namely:

“Foreign capital is capital owned by a foreign country, a foreign national, a foreign business entity, a foreign legal entity, and / or an Indonesian legal entity that is partly or wholly owned by a foreign party.”

Based on the above understanding, it is known that foreign capital owners can consist of several parties, namely:

1. Foreign country;
2. Foreign nationals;
3. Foreign business entities;
4. Foreign legal entity; and
5. Indonesian legal entities which have part or all of their capital owned by foreign parties.

Research carried out so far, there is no literature or expert that gives the characteristics or characteristics of the omnibus law. This is understandable because it is true that there are not many countries that clearly and firmly say that implementing omnibus law. However, looking at the practice in several countries, it can be concluded that several things are characteristic of the omnibus law. Perhaps the characteristics contained in this author's views are often carried out in the practice of legislation in most countries, but are not recognized or recognized as omnibus law.

The author distinguishes these characteristics into two namely general characteristics and special characteristics. General characteristics are the characteristics of the omnibus law, all of which must be had in every application of the omnibus law. Whereas special characteristics are characteristics which are supporting or complementary to general characteristics and not these entire special characteristics must be applied. The general characteristics of the omnibus law are divided into two namely:

1. Acceleration of the Legislation Process In the application of the omnibus law there must be characteristics of the acceleration of the legislation process. This is because in principle the omnibus law was chosen to realize efficiency and effectiveness in the legislation process. Not infrequently the legislation process from the beginning to be enacted takes months or even years. With an omnibus law that can shorten several lines of legislation so that a law will be completed more quickly.
2. Complexity of the Problem The complexity of the problem in question is the number or variety of problems regulated in one law. If in a law only regulates one type of problem, even though there is an acceleration of the legislative process in it, it cannot be called an omnibus law, and vice

138. Salim HS dan Budi Sutrisno, *Hukum Investasi di Indonesia* (Jakarta: RajaGrafindo Persada, 2008), p 148-149.

versa. Simply put, if we look at the definition of omnibus law or omnibus bill in the Black's Law Dictionary, it will say "A single bill containing various distinct matters ... "In addition, if it refers to Prof.'s opinion Jimly Asshiddiqie said that there are three conditions for practicing omnibus law, namely, the Act to be changed is directly related, the Act to be changed is not directly related, and the Act to be changed is not related but in practice intersects, conclusions can be drawn also that the problem set must be complex because it consists of several types of problems.

Furthermore, the special characteristics of the omnibus law are also divided into two namely:

1. Codified Codification is a form of law that is made in writing, where the maker (legislative) provides a special form of jurisdiction that contains the formulation of principles that are made in writing as a standard operation of the enactment of provisions in the codification (exclusive operation / exclusionver verwerking)¹³⁹. Codification aims to achieve legal certainty, legal simplification and legal unity. This is in line with the omnibus law principle that puts forward efficiency and effectiveness. A concrete example is the omnibus investment code of 1987 in the Philippines. This codification contains at least investment, employment, human resources, and natural resources, fiscal and non-fiscal incentives. Although not all omnibus laws are codified, the writer believes that choosing the codified form will make the law simpler and easier to understand.
2. Political Style or Motive Law is a legal product whose manufacture cannot be separated from the political process. The political style or motive referred to the methods used by the legislature and executive to expedite the legislative process. This political style or motive is actually aimed at accelerating the legislative process, but it is not uncommon to find in practice that political style or motive is aimed at forming consensus in political parties, parliaments, and governments with parliament. Or this is used to enter certain political agendas

The government has tried to create a good investment climate in Indonesia through various regulatory instruments, PP (government regulations), Perpres (President Regulation) and Perda (local regulation). The spread of these various arrangements makes it not simple and there is no legal unity. In addition, it does not rule out the possibility of legal disharmony both vertically and horizontally. This needs to be the awareness of the government and the legislators to create a complete, simple, efficient and effective investment law in creating a good investment climate in Indonesia. The importance of creating a conducive investment climate and provide supporting facilities will increase investment in Indonesia the instrument for creating a conducive climate is law. A law (in this case a law / regulation) is needed that can accommodate the wishes of investors but does not neglect national interests. the government has tried to issue various PPs, Perpres and Permen to accelerate investment growth in Indonesia. But that alone is not enough, there needs to be an integrated arrangement.

Indonesia can adopt the omnibus law to create investment legal instruments that can increase investment interest in Indonesia. This is because the problems regulated in investment law are very complex. Not only is the issue of investors coming and investing their capital, but it is closely related to various aspects such as employment, infrastructure, fiscal and non-fiscal incentives and others as such. The complexity of this problem is not yet regulated by the Investment Law. Later it was only thought and published its arrangements in the form of PP, Perpres or Permen (ministerial regulation).

In addition, an urgent matter that requires a fast but precise process Omnibus law can be the answer because the process that does prioritize the efficiency of the discussion time of the Act. Especially in

139. Tim Pengajar Hukum Pidana UI, Position Paper (RKUHP Kodifikasi atau Kompilasi) (Bidang Studi Hukum Pidana UI, 2014) 4.

Indonesia, members of the DPR are often preoccupied with political campaigns in the regions. This of course further narrows the time space for maximum work to discuss the law.

The style characteristics or political motives in applying the omnibus law used in the United States and Turkey can be applied. Especially if the government formed after the 2019 elections was fragmented like 2014 ago, where the government was held by President Joko Widodo with his coalition called the Great Indonesian Coalition, while in parliament it was controlled by the Red and White Coalition which incidentally was opposite the government Although this is slowly melting.

Why this is an advantage, because each party has a strong position in the discussion of an Act. If you want the bill to be approved together in the discussion, then a consensus must be formed between the government and the DPR. If you feel that their interests are not accommodated, it is very easy for those who feel disadvantaged to not approve the bill in discussion.

Even in a fragmented situation, the authors see this as a great opportunity to be able to give birth to a good investment law and to create a good investment climate; especially if the government and parliament are not fragmented. This will be much easier to achieve.

The real challenge of implementing the omnibus law is to provide an understanding to all parties, both the government and members of the House of Representatives and the wider community about what an omnibus law is. The author believes that omnibus law is not something new and foreign in Indonesia. This is a technique for developing a law that is more efficient and effective. It is precisely this technique can form a consensus between the government and parliament when a deadlock occurs. There is also a need for a strong political commitment in parliament because parliament is the main key to realizing the omnibus law. As long as there is still a sectional ego, it will be difficult to realize the omnibus law.

The existence of the omnibus law will not interfere with the hierarchy of laws and regulations as regulated in Article 7 of Law No. 12 of 2011. The true omnibus law is a technique and that was born from that technique is a law which is actually a legal product that has been around for so long. Not the opinion of some legal experts who say the omnibus law as an umbrella law because it is not known in the hierarchy of statutory regulations in Indonesia.

The omnibus law should contain basic provisions that can be used as a reference for other ministries or institutions. This becomes important because departing from these basic provisions often arise problems. Examples in the health sector are several laws, including the Hospital Law, the Medical Practice Act, the Health Workforce Act, the Midwifery Law, and the Pharmacy Law. Several articles in the Law on Health Workers have been tested before the Constitutional Court because they are considered to contain a conceptual error which confuses medical staff and other health workers without differentiating between professional and vocational workers. The Constitutional Court overturned 4 of the 22 articles tested related to the term medical personnel and the existence of the Indonesian Medical Council (KKI)¹⁴⁰.

If you see Law No. 30 of 2014 concerning Government Administration (Government Administration Law) various basic provisions have been incorporated into the administration of government. The Government Administration Law is not compiled into an omnibus law, but its content can be a reference for omnibus law practices in Indonesia. This can avoid differences in definition and conceptual errors between one law and another that regulates the same thing.

140. Anonim, 'MK Cabut Istilah 'Tenaga Medis' dan 'KKI' dari UU Tenaga Kesehatan' (Hukum Online, December 14, 2016) <<https://www.hukumonline.com/berita/baca/lt5851234771b7e/mk-cabut-istilah-tenaga-medis-dan-kki-dari-uu-tenaga-kesehatan>> accessed June 20, 2020.

The application of omnibus law in several countries compared to the Philippines and the United States has similarities and differences. The complexity of the problem set is the equation found in the application of the omnibus law in the three countries. Both countries make omnibus law as an option to accommodate these needs because if using conventional law, it will take a long time. This means that in these three countries there is time efficiency in the discussion and enactment of laws. While each country has special characteristics or characteristics that are only found in that country. In the Philippines, omnibus law is accommodated in the form of codification. Whereas in the United States the form of law. This form has nothing to do with the government system or legal system adopted by the country. The choice of the form of the omnibus law is more on practical matters to accommodate the needs of the drafters of the law. The special characteristic found in the United States is that there is a political style or motive to form a consensus between the government and parliament and within the parliament itself. But not infrequently this political motive becomes a “tool” to bypass some of the legislation processes that should be taken.

The drafting of an investment law in Indonesia if examined from the formation of the omnibus law is very likely to be applied in a typical Indonesian style. Omnibus law is actually a technique in the preparation of laws aimed at realizing efficiency and effectiveness. The basic material is the basic provisions that become a reference for other ministries or institutions. The existence of political motives and the will of the parliament to form an omnibus law play a big role. If there is still a sectional ego it will be difficult to realize the omnibus law. In addition, another challenge for the application of the omnibus law is to provide understanding to all parties, both the government and members of the House of Representatives and the wider community about what an omnibus law is. On the other hand it is necessary to carry out a comprehensive and in-depth inventory of issues related to investment. This is done so that in preparing future investment laws, all aspects related to investment are understood. So that in the future there will be no confusion or even a legal vacuum

Conclusion

The government has tried to create a good investment climate in Indonesia through various regulatory instruments, to PP, Perpres and Perda. The spread of these various arrangements makes it not simple and there is no legal unity. In addition, it does not rule out the possibility of legal disharmony both vertically and horizontally. This needs to be the awareness of the government and the legislators to create a complete, simple, efficient and effective investment law in creating a good investment climate in Indonesia. The importance of creating a conducive investment climate and provide supporting facilities will increase investment in Indonesia. The instrument for creating a good climate is law. A law (in this case a law / regulation) is needed that can accommodate the wishes of investors but does not neglect national interests. The government has tried to issue various PPs, Perpres and Permen to accelerate investment growth in Indonesia. But that alone is not enough, there needs to be an integrated arrangement.

Indonesia can adopt the omnibus law to create investment legal instruments that can increase investment interest in Indonesia. This is because the problems regulated in investment law are very complex. Not only is the issue of investors coming and investing their capital, but it is closely related to various aspects such as employment, infrastructure, fiscal and non-fiscal incentives and others as such. The complexity of this problem is not yet regulated by the Investment Law.

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