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The Reconstruction of Investment Law based on Social Justice

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Abstract. *Investments and aspirations towards social justice are interrelated and influence each other. A well-planned investment begins with legal drafting and a wise effort to potentially become a major force in achieving social justice. For this reason, a thorough approach is needed in designing and implementing investments, taking into account the social and environmental impacts that may arise. This research aims to know the reconstruction of investment law based on social justice as the ideal of social justice is not just a wish, but can be realized through sustainable and comprehensive investments. The research used normative legal research, which is used as the opposite of the empirical/sociological legal research method. The result showed a well-planned investment begins with legal drafting and a wise effort to potentially become a major force in achieving social justice. For this reason, a thorough approach is needed in designing and implementing investments, taking into account the social and environmental impacts that may arise. In this way, the ideal of social justice is not just a wish, but can be realized through sustainable and comprehensive investments.*

Keywords: *Investment; Justice; Social.*

1. Introduction

The presence or entry of foreign capital into a country is a debate for economists and jurists around the world. The intellectual academic debate gave birth to theories that are pro and con and confront each other (vis a vis) between its supporters. Classical and Neo Classical Theories are represented by Adam Smith, independent theory by Karl Marx, middle theory. (M. Soenarajah, 2010). Classical and neo classical theories or dependent theories postulate that foreign capital is a necessity for developing countries because it can provide stimulus for foreign capital does not bring benefits to the welfare of society and only benefits foreign investors who are mostly driven by Multi National Corporations (MNCs). The last theory is the middle theory or recipient of capital (middle path theory), which postulates that foreign capital can bring benefits to the host country, because it

will open up new jobs and other multi effects but must also be selective in utilizing foreign capital so that the loss of the country's economic sovereignty (Sirwanto, 2020).

Based on the understanding of the theory above, the investment policies of a country with other countries are different from each other so that they have implications for the investment regulations issued, sometimes even seeming far from the ideology adopted, even very liberal or neo-liberal, in the case of Indonesia, for example, the birth of Law No. 25 of 2007 in the process through a long debate process in the legislature. Even after being enacted, it immediately received criticism from various critical thinker groups.

According to UGM economist Revrisond Baswir, the implementation of neoliberal economic agendas was caught red-handed through the cancellation of all or several articles contained in three legislative products, which were proven to violate the constitution, as follows: (1) Law No. 20 of 2002 concerning Electricity; (2) Law No. 22 of 2001 concerning Petroleum and Natural Gas (Migas); and (3) Law No. 25 of 2007 concerning Investment.

This study is different from previous studies related to investment regulatory reform, including Legal Reform and Realization of Foreign Investment in the Era of President Joko Widodo by Nandang Sutrisno et al. (Nandang Sutrisno, 2020). Furthermore, research on the Job Creation Law Investment Cluster, Participatory Paradigm Review (Nurul Fibrianti, et al., 2021). Another study is Omnibus law in regulatory arrangements in Indonesia (Muhammad Insa Ansari, 2021). In addition to these studies, there is also research published internationally discussing government participation in international investment law and its reform. (Tito Bramantyo Aji). Another international study on Omnibus Law as Investment Law Reform in Indonesia Based on the Hierarchy of Legislation Principles (Imam Sujono and Mulyanto Nugroho

Based on the comparison with previous studies, both nationally published and internationally published studies, it can be stated that this study has novelty because it aims to specifically discuss the reconstruction of articles of investment laws that are simultaneously contradictory to basic norms as the highest norms of the norm system. The consequences must be reconstructed so that social justice is simultaneously achieved for all Indonesian people.

2. Research Methods

The legal research used is normative legal research, which is used as the opposite of the empirical/sociological legal research method. So if the normative legal research method is chosen, the researcher will certainly not use a quantitative approach in the research. Therefore, with the normative research method, the researcher uses qualitative research. So, qualitative methods are used in normative research as well as in empirical research, while quantitative is only used in empirical/sociological research methods, so that if the normative research method is used together with the quantitative method, it is a combination of two elements that are not compounds. Unless one research model is only a complement to the other research model. (Nelvitia Purba et al., 2014). The approach used is the principle approach as stated by Paton that the principles or principles of law have been accepted in legal science as fundamental thoughts in legal life and the legal system (Marzuki, 2020). The method used to analyze is a descriptive

and qualitative method. descriptive is analyzing data by explaining in detail and precisely about certain phenomena related to the writing of this law (Lexy Melong, 2000).

3. Result and Discussion

Hans Kalsen put forward a theory regarding the levels of legal norms (stufen theory), the substance of which is that legal norms are tiered and layered in a hierarchy (arrangement), in the sense that a lower norm applies, originates and is based on a higher norm, a higher norm applies, originates and is based on a higher norm, and so on until a norm that cannot be traced further and is hypothetical and fictitious, namely the Basic Norm (Groundnorm). The basic norm, which is the highest norm in a system of norms, is no longer formed by a higher norm, but the Basic Norm is first determined by society as the Basic Norm which is for the norms below it, so that a Basic Norm is said to be). Hans Kelsen's theory of norm levels was inspired by one of his students named Adolf Merkl who stated that a norm always has two faces.

Adolf Merkl is of the view that: "A legal norm is sourced and based on the norm above it, but downwards it also becomes the basis and source for the legal norm below it so that a legal norm has a relative validity period because the validity period of a legal norm depends on the legal norm above it so that if the legal norm above it is revoked or abolished, then the legal norms below it are also revoked or abolished." Based on Adolf Merkel's theory, it can be explained that Hans Kelsen's norm hierarchy theory also states that a norm is always based on and sourced from the norm above it, but downwards the legal norm also becomes the source and becomes a lower norm than it. Hans Kelsen's student, Nawiasky, developed his theory. With the norm hierarchy in relation to a State, that in addition to the legal norms being layered and hierarchical, the legal norms are also grouped. (Hans Kelsen, 2014).

Hans Nawiasky groups legal norms in a state of law in a country into four large groups consisting of groups, namely:

1. *Staatsfundamentalnorm,* namely the Fundamental Norm of the State;
2. *Staatsgrundgesetz,* namely the Basic Rules or Principles of the State;
3. *Formal Gesetz,* namely Formal Law, and
4. *Verordnung & Autinime Satzung*, namely Implementing Rules & Autonomous Rules

In relation to the forms of legislation in Indonesia, especially in the context of the formation of laws, the theory of legal norms will at least be able to provide understanding and facilitate in identifying and seeing various problems in the legal system. There are many bases and measurements to determine what has ever been applicable in Indonesia. First, it can be seen from the phase of the constitutional journey, namely the period before the independence of the Republic of Indonesia (Dutch East Indies Era), and the period after independence. In the phase after independence to determine the form of legislation can be seen from the enactment of various Constitutions of the Republic of Indonesia in 1945 (Constitution). Second, the form of legislation is seen from the various provisions that regulate the types and forms of legislation. Indeed, to explain the forms of legislation, it is ultimately necessary to examine the order of legislation, as

previously stated. In Indonesian positive law, provisions are regulated regarding the types and hierarchy (ordering) of statutory regulations as stated in Law No. 12 of 2011 concerning the Formation of Statutory Regulations as amended by Law No. 15 of 2019 concerning Amendments to Law No. 12 of 2011 concerning the Formation of Statutory Regulations which was amended for the second time by Law No. 13 of 2022.

Based on Article 7 paragraph (1) of the Law on the Establishment of Legislation, the types and hierarchy of legislation are determined as follows:

a. The 1945 Constitution of the Republic of Indonesia;

b. Decree of the People's Consultative Assembly;

c. Law / regulation substitute law

d. Government Regulation;

e. Presidential Regulation;

f. Provincial Regulation; and

g. Regency/City Regional Regulation.

Hans Kelsen is of the opinion that every regulation must have a hierarchy, starting from the basic norm and becoming a benchmark for the validity of the norms below it. According to Kelsen, the norms in a country do not stand parallel and are coordinative, but rather each norm has different levels. Kelsen places the constitution as the basic norm for every legislation to be made, so existing laws must not conflict with the constitution. In line with Kelsen's opinion, the principle of Lex superior derogate legi inferiori applies. In terms of the hierarchy of norms, the basic norm is the one on which the norms below it depend.

3.1 Urgency of Reconstruction of Law No. 25 of 2007

The principle of economic democracy is translated from article 33 paragraph (1) of the 1945 Constitution which reads: "The economy is structured as a joint effort based on the principle of family". The use of the principle of family as a form of Indonesian economic democracy that is not based on individualism, but to achieve shared prosperity and as an affirmation of the Indonesian nation's economy. It can also be said that economic democracy is the same as the absence of economic disparities or the realization of economic justice in society.

Mohammad Hatta called the formulation of article 33 of the 1945 Constitution a guided economy, the main idea in this article is to create national economic independence, where one way is that the main branches of production must be controlled by the State and provide a proper and strong place for cooperatives as drivers of the national economy, namely an economy driven by the majority of the Indonesian people. In relation to the principle of family as the foundation of the nation's economy and views on individualism and individuality, Bung Hatta has his own thoughts about the three (Zulkifli Suleman, 2010). Individualism provides direction that individuals must act in achieving their life needs. Individualism does not allow society to bind individuals. It

cannot be denied that humans need individuality, but individuality that is based on intelligence, strength of character and refinement of character.

These two characteristics always underlie the movement of the economy including cooperatives. If a cooperative is organized without being able to present an atmosphere of solidarity, then the address of the cooperative members can feel and understand what the meaning of common interests is. So, the cooperative is used as a tool to achieve personal needs. This will be a problem, for example, when the selling price elsewhere is lower than the cooperative, then members who do not have a spirit of solidarity will move to that other place. As a result, the cooperative dies. The spirit of individuality is very necessary in meeting the needs of life. If it is not attached to the spirit of individuality, then the spirit of cooperatives is zero. Humans who do not have the spirit of individuality tend to surrender to fate and destiny. However, on the other hand, the spirit of individuality must be antinomized with a sense of responsibility for common interests. Indonesia has a philosophy of life of Pancasila, which is also the Groundnorm/basic principle for the Indonesian legal system. Generally, the legal system and economic system are closely related to the ideology adopted by a country. The explanation of the five principles of Pancasila is contained in the preamble to the 1945 Constitution, and is stated in the articles of the 1945 Constitution, so that all laws and regulations in Indonesia, including in the economic sector, must not conflict with the 1945 Constitution as the highest norm (Jimly Asshidiqie, 2000).

This principle of kinship is in line with the concept of progressive law initiated by Satjipto Rahardjo, that government administrators should have an ethical awareness that governance is basically a job that handles such broad and fundamental humanitarian problems, so that trusting and using law as the only instrument is very inadequate. (Satjipto Raharjo, 2006). It requires a spirit (compassion), empathy, dedication, determination and high commitment, and in such a framework it means that moral principles are needed that can underlie the ethical considerations of government administrators in carrying out their main tasks and functions.

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Therefore, there are several articles that must be reconstructed, namely:

Number	**The substance of Article**	**Contradictory (antinomy/Ideal das sollen)**
1	Article 3 paragraph (1) letter a Law no. 25 of 2007 reads: "Investment is carried out based on the following principles: legal	This principle is contrary to Article 33 paragraph 1 which states: The economy is structured as a joint venture based on the

	certainty. In the explanation, it is stated that the principle of legal certainty in a rule of law state lays down the law and provisions of statutory regulations as the basis for every policy and action in the field of investment.	principle of family. This means that every law and regulation is based on the principle of family, not legal certainty. In accordance with this principle, in carrying out investment activities, it must prioritize economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental insight, independence, balance of progress, and national economic unity for the welfare of all Indonesian people. Article 3 paragraph (1) letter a Law no. 25 of 2007 reads: "Investment is carried out based on the following principles: legal certainty. In the explanation, it is stated that the principle of legal certainty in a rule of law state lays down the law and provisions of statutory regulations as the basis for every policy and action in the field of investment.
2	Article 3 paragraph (1) letter d Law no. 25 of 2007 implies equal treatment for foreign investors and domestic investors.	The affirmation of equal treatment should only apply to domestic investors, so that they get the main priority. Equal treatment for foreign investors and domestic investors certainly opens up great opportunities for foreign investors to get the opportunity to invest in all fields. Paragraph (3) of this article is horizontally contradictory to the provisions of Article 32 paragraph (3), which states: "in the event of a dispute in the field of investment. Between the government and foreign investors, the parties will resolve the dispute by starting international arbitration which must be agreed upon by the parties."
2.	Article 7 (1) The government will not take action to nationalize or take over ownership rights of investors, except by law. In the event that the government takes action to nationalize or take over ownership rights as referred to in paragraph 7 paragraph (1) above, the government will provide compensation, the amount of which is determined based on market prices. If no agreement is reached between the two parties regarding compensation or damages as referred to in paragraph (2), the settlement will be carried out through arbitration.	

3.	Article 8 paragraph (1) of Law No. 25 of 2007 which states that: " the investor may transfer its assets to the party desired by the investor in accordance with the provisions of the laws and regulations".	The article provides flexibility for investors to transfer assets (capital flight) as widely as possible, considered to present a legal uncertainty for the workforce, because at any time the company can carry out the transfer of assets (capital flight) by closing the company, relocating its business and capital investment which results in termination of employment on a large scale. Isn't this projection also supposed to be the government's consideration of the impact of the policies it issues, instead of providing a permanent solution, it can backfire
4.	in Article 12 of Law No. 25 of 2007 states that all fields of business are open to investor activity, except for Fields or types of business that are declared closed and open with requirements.	As an entrance to the understanding of economic liberation, because the field of Indonesia solely based on the spirit of giving the widest possible liberation for investors, thus the desired direction is the reduction of the role and sovereignty of the state
5.	Provisions of Article 12 paragraph (4) of Law No. 25 of 2007 that the criteria and requirements for closed and open business fields with requirements and the list of closed and open business fields with their respective requirements will be regulated by Presidential Regulation"	This article, being prone to abuse of discretion, means that there is a great opportunity for the president to determine the criteria for open business fields, so that the Presidential Regulation will have great potential to be loaded with personal interests and the interests of foreign investors (capitalists).
6.	Provisions of Article 32: 1) in the event of a dispute in the investment bank between the government and the investor, the parties first resolve the dispute through deliberation and consensus. 2) in the event that the settlement of the dispute as referred to in Paragraph (1) is not reached, the settlement of the dispute can be done through arbitration or alternative Dispute Resolution or court in accordance with the provisions of the laws and regulations 3) in the event of a dispute in the field of investment between the government and domestic investors, the parties may resolve the dispute through arbitration based on the agreement of the parties, and if the settlement of the dispute will be made in court 4) in the event of a dispute	Contrary to the consideration of letter (c) of Law No. 25 of 2007 which states that to accelerate National Economic Development and realize the political and economic sovereignty of Indonesia, it is necessary to increase investment to cultivate economic strength into real economic strength by using capital derived, both from within the country and from abroad.

in the field of investment between the government and foreign investors, the parties will resolve the dispute through international arbitration which must be agreed upon by the parties.

The birth of Law No. 25 of 2007 (UUPM) can be categorized in the scope of Jeremy Bentham's utilitarian hedonistic theory into an understanding that will be applied and disseminated in the Indonesian economic system. The entry of this understanding has been preceded by the understanding of its supporters. that is individualism. Individualism has entered Indonesia's collective living organization. The gate opening occurred during the era of the Soharto government. Based on 5 (five) of this article seen Law No. 25 of 2007 as an instrument not for the welfare of the people and vice versa, law No. 25 of 2007 can lead to the increasing dependence of the Indonesian nation to the liberalistic foreign economic forces where one of its characteristics is to open the door as wide as possible for foreign investment to enter with an elastic set of rules, such as PP No. 20 of 1994 on Article 6 which opens the opportunity for foreign investors to own shares up to 95% which is very contrary to Article 33 of the 1945 Constitution. The 1945 Constitution generally regulates provisions on the economy that aspire to the greatest welfare for all people, so this is still abstract but there is no standard measure for the word" maximum".

Law No. 25 of 2007 as a derivation of the 1945 Constitution has indeed led to the specificity of the field of investment studies. However, as the nature of the law is generally accepted, indicating that there has not been seen any concrete support that can be used in proving the rules that become its provisions. (Muhammad Erwin, 2015). On the other hand, there is also legal confusion in the field of regulation of exploration and exploitation of Natural Resources in the Exclusive Economic Zone (EEZ), where there is no single article that regulates to encourage investment even though Indonesia's ocean area is much wider than the land area. (Eny Budi Sri Haryani). Instead of reconstructing law No.25 in 2007 the government even gave rise to the Omnibus Law to regulate investment regulation (Orpa J. Nubatonis, 2023).

3.2. Omnibus Law Is Not the Answer

The practice of legislation carried out by the government during President Jokowi seems to use repressive legal politics, is made in a hurry and closes the dialogue space with marginalized people with the illusion of the welfare of the people as a jargon for the entry of investors (Hamalatul Qu'ani, 2020). Agrarian conflicts in various regions such as Wedas Village Yogyakarta Papua, Rempang village in Batam indicate this phenomenon. In particular, any agricultural dispute affects legal uncertainty and also affects Indonesia's investment environment, especially in relation to land ownership and use (Fuad et al, 2024). The government's assumption is that the omnibus law method will have implications for the simplification of hyperregulation, especially in the field of investment and related thereto (Prabowo and Adhi Setyo. 2020), but it's not that easy because there is no guarantee that the simplification will have implications for the regulations below, so it needs a National Regulatory Agency (Jimly Asshiddiqie, 2020).

4. Conclusion

Investments and aspirations towards social justice are interrelated and influence each other. A well-planned investment begins with legal drafting and a wise effort to potentially become a major force in achieving social justice. For this reason, a thorough approach is needed in designing and implementing investments, taking into account the social and environmental impacts that may arise. In this way, the ideal of social justice is not just a wish, but can be realized through sustainable and comprehensive investments, simplification of hyperregulation, especially in the field of investment and related there, but it's not that easy because there is no guarantee that the simplification will have implications for the regulations below, so it needs a National Regulatory Agency's role.

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