

Decriminalization of Omnibus Law To Enhance Investment In Indonesia

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Abstract

This study explains about decriminalization through Omnibus Law as a mean to attract investment to Indonesia. Omnibus Law that enacted in November 2020 has revoke 17 penal articles and revise another 50 penal articles to “material delict”. This was done to boost confidence to investors and business actors, so they are more comfortable to put their investment and run their business in Indonesia. The policy of decriminalization is something that equitable to do. This is done because of several factors that are taken into considerations, such as political and economic reasons. With the national priority of Indonesia now is towards the recovery of its economy through investment amid the Covid-19 pandemic, it is not strange that this decriminalization policy through Omnibus Law was taken. However, the effectiveness of it to reach its goal still need time to prove.

Keywords: Decriminalization; Omnibus Law; Investment

Abstrak

Penelitian ini menjelaskan tentang dekrimalisasi melalui Omnibus Law sebagai sarana untuk menarik penanaman modal ke Indonesia. Omnibus Law yang berlaku pada November 2020 telah mencabut 17 pasal pidana dan merevisi 50 pasal pidana lainnya menjadi “Delik Materiil”. Hal ini dilakukan untuk meningkatkan kepercayaan kepada investor dan pelaku usaha, sehingga mereka lebih nyaman untuk melakukan investasi dan menjalankan bisnisnya di Indonesia. Kebijakan dekrimalisasi adalah sesuatu yang adil untuk dilakukan. Hal ini dilakukan karena ada beberapa faktor yang menjadi pertimbangan, seperti alasan politik dan ekonomi. Dengan prioritas nasional Indonesia saat ini adalah menuju pemulihan ekonominya melalui investasi di tengah pandemi Covid-19, tidak aneh jika kebijakan dekrimalisasi melalui Omnibus Law ini diambil. Namun, efektivitasnya untuk mencapai tujuannya masih perlu waktu untuk membuktikannya.

Kata kunci: Dekrimalisasi; Undang-undang Omnibus; Investasi

Introduction

South East Asia (SEA) countries are now in a race to attract Foreign Direct Investments (FDI). In 2019, according to UNCTAD (United Nations Conference on Trade and Development), FDI in SEA were reaching up to USD 156 billion which is a 5% rise from the previous year. This growth was strongly driven by Singapore, Indonesia, and Viet Nam. On the other hand, FDI in some other SEA states such as Myanmar, Laos, and Thailand were decline, while FDI in Malaysia was flat. However, in 2020 as the world was hit by coronavirus, UNCTAD projected that FDI in Asian countries could be fall up to 45%.¹ In response to the current situation, in order to maintain economic growth, Indonesian government under the banner of improving ease of doing business and attract more FDI to the country, in November 2020, enacted an Omnibus Law No. 11 Year 2020 about Job Creation (“Omnibus Law”) that with this single legislation are revoke 2 legislations and revise 82 other legislations. Something that never been seen in the history of law making in Indonesia, since this type of Omnibus Law never been done before and traditionally a legislation can only be revised by another legislation that regulates the same matter.

In the Omnibus Law, there are significant changes regarding penal regulations. From 82 legislations that are revised by Omnibus Law, 26 legislations revoke or change its penal articles which 17 penal articles has been revoked and 50 penal articles has been changed from “*formal delict*” to “*material delict*”.² This indicates that Indonesian law maker try to attract FDI and boost ease of doing business in Indonesia through decriminalization by Omnibus Law. Too many criminal provisions can make business actors or investors feels anxious to run their business or invest in Indonesia, since a slight violation from their business activities can have criminal consequences instead of fines or other administrative punishments. In this article we will discuss decriminalization through Omnibus Law as a mean to attract FDI to Indonesia.

Research Methodology

This article uses a normative juridical research method derived from a literature study.³ This method is used to answer the problems that arise in this research which

¹ UNCTAD, Investment flows to developing countries in Asia could fall up to 45% in 2020, <https://unctad.org/news/investment-flows-developing-countries-asia-could-fall-45-2020>, accessed 7 March 2021.

² In “material delict” there is a certain consequence which is prohibited by the law, it is not enough by only proving that the wrongful act has been done. In “formal delict” it is enough by proving that the wrongful act has been done regardless the consequence of that wrongful act. See Andi Hamzah, *Asas-asas Hukum Pidana*, 2nd edn, (Jakarta: PT Rineka Cipta, 2008), page 99.

³ Serjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, 8th edn, (Jakarta: PT Raja Grafindo Persada, 2004), page 29.

cannot be separated from the need for data which can be met by searching for materials from books or other articles. Normative juridical means that this research refers to the legal norms contained in statutory regulations and court decisions along with norms that apply and bind society.⁴ The type of research used in this article is descriptive because it is intended to provide data as accurate as possible about humans, circumstances, or other symptoms.⁵

The type of data used in this research is secondary data. Secondary data are data that are not obtained directly from the field but are obtained from literature studies.⁶ This secondary data consists of primary, secondary, and tertiary legal materials. Primary legal materials are binding legal materials. Primary legal materials include, among others written law such as statutory regulations and court decisions. This research was conducted by reviewing and analysing primary legal materials, such as Law No. 11 Year 2020 about Job Creation. Secondary legal materials are materials that provide an explanation of primary legal materials.⁷ To explain the primary legal materials, secondary legal materials are used, such as books, scientific journals, articles from newspapers, and the internet. Tertiary legal materials are guidelines for primary and secondary legal materials such as dictionaries and encyclopaedias.⁸ Data collection in this study was carried out by studying documents or library materials, which is a data collection done through written data using content analysis.⁹

Analysis

1. Criminalization

Criminalization is a measure or determination by the authorities about certain acts that by society or community groups are considered as an act which is punishable as a criminal act or making an act becomes a criminal act and therefore can be convicted by the authorities. This is done by establishing laws which said act is punishable by criminal sanctions.¹⁰ Which acts that will be considered as a criminal act are depends on various considerations. One of the opinions that we need to consider in our discussion is the opinion of William J. Chambliss, who said that:

“Crime is a political phenomenon. What gets defined as criminal or delinquent behaviour is the result of political process within which rules are formed which prohibit or require

⁴ Sri Mamudji, et.al., *Metode Penelitian dan Penulisan Hukum*, (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), page 9-10.

⁵ Serjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, 8th edn, (Jakarta: PT Raja Grafindo Persada, 2004), page 34.

⁶ *Ibid.*, page 28.

⁷ *Ibid.*, page 52.

⁸ *Ibid.*, page 33.

⁹ Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: Penerbit Universitas Indonesia, 2008), page 21.

¹⁰ Salman Luthan, “Asas dan Kriteria Kriminalisasi”, *Jurnal Hukum*, Vol. 16, No. 1.

people to behave in certain ways.

...

Nothing is inherently criminal, it is only the response that make it so. If we are to explain the social forces that cause crime, we must first explain the social forces that cause some acts to be defined as criminal while other acts are not.”¹¹

He further adds that:

“... the reality of criminal law in action is determined by political and economic forces that create social relations attended to by police department, prosecuting attorney’s offices, courts, prisons, and every other bureaucratic agency charged with the responsibility of “upholding the law.”¹²

Based on the explanations from William J. Chambliss, we can understand that whether an act is determined as a criminal offence or not is depends on political and economic considerations, and of course those considerations may change from time to time. As has been explained repeatedly in many of his speech, President Joko Widodo (Indonesia’s head of state) has emphasized the importance of investment as the key to national economic recovery amid the Covid-19 pandemic.¹³ This shows that legislation made by his administration will mostly formed to meet economic goals and to increase FDI that flows to the country. One of the ways to achieve this goal as we can see in Omnibus Law is by decriminalizing various acts in many business-related activities. It is hoped that with this measure, investors will be more interested and feel more comfortable to put their investment and conducting business activities in Indonesia.

2. Decriminalization

Decriminalization can be interpreted as a process, in which certain behaviour that initially qualified as a criminal offence and subject to criminal sanctions, then the criminal qualifications and sanctions for that behaviour are eliminated.¹⁴ Soerjono Soekanto said that decriminalization process can occur for several reasons, such as:

- a. A sanction, sociologically, is an approval or rejection of certain patterns of behaviour. It is possible that society’s values regarding certain sanctions for certain behaviours have changed, so that the behaviour subjected to these sanctions is no longer rejected;
- b. The emergence of strong doubts about the objectives to be achieved by the

¹¹ Soerjono Soekanto, et.al., *Kriminologi: Suatu Pengantar*, 1st edn, (Jakarta: Penerbit Ghalia Indonesia, 1981). page 54.

¹² Ibid, page 56-57

¹³ DDTC News, Presiden Jokowi: Kuncinya Ada di Investasi, https://news.ddtc.co.id/presiden-joko-wi-kuncinya-ada-di-investasi-28228?page_y=800, accessed 10 March 2021.

¹⁴ Soerjono Soekanto, et.al., *Kriminologi: Suatu Pengantar*, 1st edn, (Jakarta: Penerbit Ghalia Indonesia, 1981). page 66

imposition of certain criminal sanctions;

- c. There is a strong belief that the social cost of applying certain criminal sanctions are enormous; and
- d. The effectiveness of certain criminal sanctions is limited, so the application will cause a loss of legal authority.¹⁵

Furthermore, in the decriminalization process there is an awareness that criminal sanction is an "*ultimum remedium*". Therefore, certain behaviours that are still considered to be against the law will be subject to non-criminal sanction, which, if ineffective, will end with criminal sanction as the last resort.¹⁶ Criminal law should not be placed as the first instrument or "*premium remedium*" to regulate society. Therefore, the use of criminal law to regulate the society regarding certain acts is not a necessity but only an alternative to other available regulatory instruments.¹⁷

The existence of criminal law must be limited because criminal law is the harshest field of law with very heavy sanctions. Criminal law is used only to protect the vital interest of society. Actions that need to be criminalized are actions that directly disturb the orderliness of society.¹⁸ Criminal law should be used sparingly, since criminal sanctions is the harshest legal sanction and can cause stigma for the person who was given the sanction. The use of criminal law to regulate community activity shows a tendency towards exaggeration in totalitarian countries and relatively frugal in democratic countries. Criminal law must be used sparingly when the social order works well and can only be used excessively in a disorderly social condition.¹⁹

According to Bassiouni, the decision to criminalize or decriminalize must be based on certain factors, such as:

- a. The balance of the means used in relation with the results to be achieved;
- b. Cost analysis of the results obtained in conjunction with the goals to be attained;
- c. The assessment or appraisal of the objective sought in relation to other priorities in allocation of human resources; and
- d. The social effects of criminalization or decriminalization in terms of their subsequent effects in society.²⁰

Based on the above explanation, we can understand that which act should be determined as criminal acts and not are depends on the interest and values of the society at that time. With the current situation which the need to recover economic situations which was devastated by the Covid-19 pandemic become the national priority, the urge to give investors and business actors comfort to put their investment

¹⁵ Ibid, page 66-67.

¹⁶ Ibid, page 68.

¹⁷ Salman Luthan, "Asas dan Kriteria Kriminalisasi", Jurnal Hukum, Vol. 16, No. 1.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

and conducting business activities, outmatch the need to provide harsh punishment for certain behaviours that previously classified as criminal offences before the enactment of Omnibus Law.

3. Investment

Investment According to Dhaniswara K. Harjono is any form of investment activity, both carried out by domestic investors and foreign investors to do business in the territory of the Republic of Indonesia.²¹ The implementation of government affairs in the field of investment, which is a mandatory affair of local governments, is based on the criteria of externality, accountability, and efficiency of the implementation of investment activities. Therefore, the law regulates investment activities, both foreign investment and domestic investment and does not hold a special separation of laws, as did the previous investment law which consisted of two laws, namely The Foreign Investment Act and the Domestic Investment Act.²²

In general, investment activities can be classified in two large parts. According to Jonkers S, the types of investment are direct investment or also called long-term investment and indirect investment or also called portfolio investment.

- a. Direct investment or also known as long-term investment. The meaning of this type of direct investment is generally associated with the existence of capital management activities. Its activities can be carried out in the form of:
 - 1) Establishing joint venture companies together with local partners;
 - 2) Conducting joint operation schemes without forming a new company;
 - 3) Convert technical and management assistance to the company;
 - 4) licensing, etc.
- b. Indirect investment or also called portfolio investment. Types of investment in indirect concepts are usually characterized:
 - 1) Shareholders have no control over the management of the company in their daily business;
 - 2) The risk factor is borne by the shareholders themselves so that it is basically ensured that it does not interfere with the company in controlling the activities;
 - 3) It is generally not protected by international customary law.²³

Based on the source of capital, investment can be divided into 2, namely domestic investment whose sources of capital are purely derived from domestic sources and foreign investment whose sources of capital use only from foreign capital or that are in Joint Venture with domestic investors. To determine whether a business is a foreign investor or a domestic investor, it can be seen who puts capital in the

²¹ Dhaniswara K. Harjono, *Hukum Penanaman Modal*, Jakarta: PT Radja Grafindo Persada, 2007, page 122-123.

²² *Ibid*, page 122.

²³ Jonker Sihombing, *Investasi Asing Melalui Surat Utang Negara di Pasar Modal*, Bandung:PT. Alumni, 2008, page 160.

business. If the person who places or deposits capital is a foreign citizen, then the business is a foreign investment. If the business is capitalized by an Indonesian citizen, the business is categorized as a domestic investment business. Furthermore, if the business is a combination of capital participation from Indonesian citizens and foreign citizens (partners) then the business is categorized as foreign investment.

The amount of capital participation paid by the parties in this case between Indonesian citizens and foreign citizens is not determined by the amount. As long as there is foreign national capital, the business is a foreign investment. In practice in the field, what often happens is that foreign investors have more control over the amount of paid-up capital.

Based on this explanation, it can be stated that investment activities are classified into two parts, namely direct and indirect investment. Direct investment is an investment activity that is generally carried out directly by investors, in the form of establishing joint ventures company, converting technical and managerial assistance to the company, etc. Indirect investment is an investment activity carried out by investors indirectly or generally only in the form of capital flows without active involvement such as stock trading and others. Meanwhile, when viewed from the source of funding, investment is divided into domestic investment (PMDN) and foreign investment (PMA).

According to Law Number 25 of 2007, capital investment activities are only divided into 2 (two) groups, namely domestic investment (PMDN) and foreign investment (PMA). Domestic investment is an investment activity to do business in the territory of the Republic of Indonesia carried out by domestic investors using domestic capital and foreign investment is an investment activity to do business in the territory of the Republic of Indonesia carried out by foreign investors, both those who fully use foreign capital and those who are in joint venture with domestic investors.²⁴

The benefits of Domestic Investment (PMDN) are include: able to save foreign exchange, reduce dependence on foreign products, encouraging the advancement of domestic industry through forward linkages and backward linkages, and contribute to the efforts to absorb labor. Meanwhile, the benefits of foreign investment for developing countries are include: creating jobs, technologists and useful skills, and sources or foreign exchange.

Based on article 3 paragraph (2) of Law Number 25 of 2007, it is stated that the objectives of organizing investment are as follows:

- a. Increasing national economic growth;
- b. Creating jobs;
- c. Improving sustainable economic development;
- d. Improving the competitiveness of the national business world;
- e. Increase national technological capacity and capability;
- f. Encouraging the development of the people's economy;

²⁴ Law No. 25 of 2007 about Investment, Article 1 paragraph (5) and (6)

- g. Cultivate the potential economy into a real economic force by using funds derived both from within the country and from abroad; and
- h. Improving the welfare of society.

Judging from the purpose of investment mentioned above, it can be concluded that the ultimate goal of investment is to improve the nation's economy through economic sectors regulated in Law Number 25 of 2007.

Investment Organizing Institutions in Indonesia at the Central Government level, as part of the renewal of investment provisions, institutions that handle investment are firmly appointed in the Investment Law, namely the Indonesia Investment Coordinating Board (BKPM). In article 27 of Law Number 25 of 2007 concerning Investment, it is stated:

- a. The government coordinates investment policies, both between government agencies, between government agencies and Bank Indonesia, between government agencies and local governments, and between regional governments.
- b. Coordination of the implementation of investment policies as referred to in paragraph (1) is carried out by the Investment Coordinating Board.
- c. The Investment Coordinating Board as referred to in Paragraph (2) is led by a person to and is directly responsible to the President.
- d. The Head of the Investment Coordinating Board as referred to in Paragraph (3) is appointed and dismissed by the President.

As a follow-up to article 27 of the Investment Law, the Government in this case the President as Head of Government on September 3, 2007 issued Presidential Regulation of the Republic of Indonesia Number 90 of 2007 concerning the Indonesia Investment Coordinating Board (BKPM). Based on Article 1 Paragraph (1) it is described: The Investment Coordinating Board, which is further referred to in this Presidential Regulation, is called BKPM, is a Non-Departmental Government Agency subordinate to and directly responsible to the President, furthermore, in Paragraph (2) it is stated that the BKPM is headed by a Head. The duties carried out by the BKPM are described in article 2 as follows: BKPM has the task of coordinating policies and services in the field of investment based on the provisions of laws and regulations. Based on Article 3 of Presidential Regulation Number 90 of 2007, In carrying out the duties as referred to in Article 2, BKPM carries out the functions of:

- a. Assessment and proposal of national investment planning;
- b. Coordination on the implementation of national policies in the field of investment;
- c. Assessment and proposal of investment service policies;
- d. Establishment of norms, standards, and procedures for the implementation of investment activities and services;
- e. Development of investment opportunities and potential in the regions by empowering business entities;
- f. Making a map of investment in Indonesia;

- g. Coordination of promotion and investment cooperation;
- h. Development of the investment business sector through investment coaching, including increasing partnerships, increasing competitiveness, creating healthy business competition, and disseminating information as widely as possible within the scope of investment implementation;
- i. Guidance on the implementation of investment, and provide assistance in solving various obstacles and consulting on problems faced by investors in carrying out investment activities;
- j. Coordination and implementation of one-stop integrated services;
- k. Coordination of domestic investment carrying out its investment activities outside the territory of Indonesia;
- l. Provision of licensing services and investment facilities;
- m. Guidance and general administrative services in the fields of general planning, administration, organization and management, staffing education and training, finance, law, archives, data and information processing, equipment and household; and
- n. Implementation of other functions in the field of investment in accordance with the provisions of laws and regulations.

For the local government level, the Local Bureaucracy (OPD) that is given the task of carrying out the affairs of the investment sector is the Investment And One-Stop Integrated Service Service, both at the Provincial Government level and the Regency / City Government. The establishment of Investment and Integrated One-Stop Services Agency (DPMPTSP) at the provincial government level and regency/city governments is a mandate of Government Regulation Number 18 of 2016 concerning Regional Apparatus which is followed up by Regulation of the Minister of Home Affairs Number 100 of 2016 concerning Guidelines for the Nomenclature of the Provincial and Regency/City Investment and One-Stop Integrated Services Service.

Conclusion

Basically, the criminal law policy must be based on the principles that criminal law or criminal punishment is an "*ultimum remedium*", which can only be applied when any other regulatory instruments (e.g. administrative law or civil law) have been tried and found ineffective. Criminal law cannot become a "*premium remedium*", only because it will give a huge deterrent effect and force society to comply with the regulation. The determination of criminal behaviour is also depending on the society's interest and values at a particular time, some behaviours that previously determined as criminal offences can be decriminalized if the interest of the society desire so.

In the case of decriminalization of many acts in Omnibus Law, it is something equitable in criminal law policy to meet with the need of political and economic

situation of the society and it is also in line with the principles of criminal law as an “*ultimum remedium*”. It is hoped that with this decriminalization policy, investors and business actors can invest and run their business without worrying too much about being exposed with the severity of criminal sanctions and in return can increase FDI that coming to the country. However, since this policy was just recently being implemented, we cannot yet see its effectiveness. Whether this policy will truly provide benefits, or on the contrary have negative effects, will be found out only after we have been observing this policy for some time.

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