

RECONSTRUCTION OF INVESTMENT POLICY IN BUSINESS FIELDS OF HOSPITALITY SECTORS BASED ON JUSTICE VALUE

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ABSTRACT

The overlap in the principle of law actually becomes a tool of Regulation on the application of the principles of economic law in various laws and regulations. The reality contradictions of the application of the principle of law illustrate the existence of certain interests which are pragmatic in dealing with the principle of family law that has long lived in the traditions of the Indonesian people. The research approach method used was empirical juridical. Data used were primary data and secondary data with descriptive analytical data analysis. The results of the study found that the need to reconstruct Article 4 and Article 19 letter b of the legal norms.

Keywords: Reconstruction, Investment Policy, Hospitality Sector, Justice

A. Introduction

The entry of foreign capital into the Indonesian economy is a demand for the situation, both economic and political Indonesia. The alternative of raising funds for the development of the Indonesian economy through direct capital investment is very good compared to other international fund withdrawals such as foreign loans.¹ Foreign capital brought by investors is very important as a tool to integrate the global economy.

Globalization and economic liberalization have a major impact on international trade law and foreign investment in a many countries, including Indonesia². An inseparable relationship between investment regulations and international trade regulations has actually been discussed by the international community at the time of the United Nations Conference on Trade and Employment in 1948 in Havana. This conference resulted in Havana Charter asking the participating countries to avoid being discriminatory against foreign investors³. After the Uruguay Round, the relationship between investment regulations and international trade regulations has become stronger. There are at least two main agreements that can be used to measure harmony between investment regulations and host country obligations based on international agreements namely Agreement on Trade Related Investment Measures (Agreement on TRIMs) and General Agreement on Trade in Services (GATS).⁴

As a component of capital flows, domestic investment (Indonesian: *Penanaman Modal Dalam Negeri* or abbreviated as PMDN) and foreign direct investment (*Penanaman Modal Asing* or abbreviated as PMA) are one of the important sources of financing for developing regions and are able to contribute significantly to development. David Kairupan said:

Foreign Direct Investment is considered as a relatively stable capital flow compared to other capital flows, for example portfolio investment and foreign debt. Various policies have been carried out by the Indonesian government to achieve

¹ Yulianto Syahyu, "Pertumbuhan Investasi Asing Di Kepulauan Batam: Antara Dualisme Kepemimpinan dan Ketidakpastian Hukum", Jurnal Hukum Bisnis, Vol.22, No.5, Tahun 2003, page46.

² An An Candrawulan, 2011, *Hukum Perusahaan Multinasional, Liberalisasi Hukum Perdagangan Internasional dan Hukum Penanaman Modal*, Bandung, Alumni, page iii.

³ United Nation, *The impact of Trade Related Investment Measures : Theory, Evidency and Policy Implication* , sebagai mana dikutip Mahmul Siregar, "UUPM dan Penyelesaian Sengketa Perdagangan Internasional dalam Kegiatan Penanaman Modal, Jurnal Hukum Bisnis, Jakarta : Yayasan Pengembangan Hukum Bisnis, 2007, page22.

⁴ Mahmul Siregar, "UUPM dan Penyelesaian Sengketa Perdagangan Internasional dalam Kegiatan Penanaman Modal, Jurnal Hukum Bisnis, Jakarta : Yayasan Pengembangan Hukum Bisnis, 2007, page23.

a goal that is to make the Indonesian people prosperous with the current economy, one way is by investing (investment) both by domestic investors and foreign investors.⁵

In addition, investment activities have a positive impact on recipient countries, such as encouraging business growth, the availability of technology from investors both in the form of production processes and machinery, and creating jobs.⁶

In 2009 the Indonesian Government has set an economic growth target of 7.9%. Growth will be achieved through capital investment and domestic consumption. Growth at this level is very important to halve the number of unemployed within four years. Our level of domestic consumption will not be able to create sufficient employment. This clearly puts pressure on Indonesia to attract more new investments, especially from abroad, in order to cover shortages.⁷

Meanwhile the unemployment rate in Indonesia can be said to be relatively high, both open and half-open unemployment totaling 40 million people. Similarly, the new workforce in Indonesia is around 2.5 million people each year. Theoretically, economic growth that only relies on consumption can only encourage economic growth of around 4%, whereas it is estimated that every economic growth of 1% can only create employment of around 400,000. with this assumption, the number of workers that can be absorbed in 1 (one) year only reaches 1,600,000 people.

Moreover, there are concerns that there will be termination of employment of 1,000,000 workers in connection with the many closures of factories that produce textiles and textile products (TPT), which will further increase the unemployment rate. This illustration shows that low economic growth raises the problem of increasing unemployment, which in turn will increase the number of poor people and can also impact on the creation of political and security instability.

A healthy business environment to invest is not only needed to attract domestic and foreign investors, but for existing companies to choose locations in Indonesia. The main factors that influence the business environment are labor and productivity, regional economy, physical infrastructure and social and political conditions and institutions.⁸

B. Research Methods

Soerjono Soekanto divided legal research into two kinds of normative legal research and the study of empirical law. Normative legal research also called library law is legal research conducted by examining library material or secondary data only. Whereas according to Ronald Dworkin, normative juridical research is a study that analyzes the law both written in the legislation (law as it is written in the book), as well as the law decided by a judge through a court process (the law is decided by the judge through judicial process).⁹

C. Research and Discussion

C.1. Value Reconstruction of the Investment Policies in Tourism of the Hospitality Sector Business Based on Justice Value

The principle is the heart of the law, as Satjipto Raaharjo said, quoting Paton's opinion that the principle of law is the heart of the rule of law, for two reasons:¹⁰

1. The principle of law is the broadest basis for the birth of a rule of law, which is the reason for the birth of a rule of law and is the ratio of legislation from the rule of law.
2. Legal principles will not be exhausted by creating to a legal regulation and will still exist and give birth to the next regulation.

The principle of law is not a legal rule, and to be able to understand a rule of law, the legal principles must be known. The principle of law gives ethical meaning to a rule of law.¹¹ The function of the principle of law is to realize the basic principles (fundamental values) as a method of behavior as much as possible into the positive law and law enforcement. Although it is difficult to realize (incorporate the metaphor) perfectly into positive law, it is not even possible.¹²

⁵ David Kairupan, *Aspek Penanaman Modal Asing di Indonesia*, Jakarta: Kharisma Putra Utama, 2013), page 15

⁶ Delissa A. Ridgway dan Maria A. Thalib, "Globalization and Development : Free Trade, Foreign Aid, Investment and Rule of Law", California Western Journal, sebagaimana dikutip Camelia Malik, page 335.

⁷ Todung Mulya Lubis, "Infrastruktur dan Kepastian Hukum", Kompas, 14 June 2005.

⁸ Kompas, "Reformasi Iklim Investasi", 4 February 2006.

⁹ Ronald Dworkin, *Metode Penelitian*, <http://repository.usu.ac.id/bitstream/123456789/408/123456789/40856/4/Chapter%20I.pdf> accessed on 26 July 2014.

¹⁰ Satjipto Raharjo, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, 1995, page 45.

¹¹ Ibid, page 47.

¹² Ibid, page 42.

The principle of law is part of our psychological life. In every principle of law, humans see an ideal that they want to achieve. Isn't the purpose of the law perfection or public order; an ideal or hope, an ideal. The principle of law provides an ethical dimension to law.¹³

Every law and regulation has legal principles in its norms. The principles of law and legal norms are two different things. Legal principles are not always clearly seen in the article of a law. Bruggink calls it the principle of law with the term meta specific rules, while legal norms are termed the principles of fundamental assessment (basic principles).¹⁴

The definition of principle according to some opinions of legal experts depends on a fundamental understanding. The experts are consecutive:¹⁵ According to Paul Scholten in his treatise *Rechtsbeginselen*, the principles of law are tendencies which are conditional on the law by our decency (*tendenzen, welke ons zedelijk voordeel aan het recht stelt*). Karl Larenz's notion in *Methoden der Rechtswissenschaft* is like Paul Scholten's opinion. The principles of law are measures of ethical law that give direction to the formation of law (*de rechtschetsche, rechtsggeevende maatstoven der rechtsvorming*). Furthermore, according to Bellefroid, in *Beschouwingen over Rechtsbeginselen* the principles of general law are basic norms which are explained from positive law and by law is not questioned from more general rules (*uit het positieve recht of geleide en door rechtswesenschap niet totnog algemener te herleiden grondmormen regelen*). Furthermore, according to Bellefroid, however, the principles of general law constitute the deposition of positive law in a society. This legal principle by Bellefroid is based on the dualistic understanding of the understanding of natural law and the understanding of positive law. Likewise according to Prof. Mr. H.J. Hommes in *de betekenis van de algemene rechtsbeginselen voar de praktijk*. The principles of law must not be considered as concrete legal norms, but need to be seen as general grounds or indications (*rechtsnoer*) for applicable law.

Legal principles are general foundations contained in legal regulations that contain moral and ethical values, are direction directions for the formation of laws that fulfill philosophical values that have a sense of justice and truth, sociological values that are in accordance with cultural values that applies in the community and juridical values in accordance with the provisions of the prevailing laws.¹⁶

Sudikno Mertokusumo quoted the opinion of Scholten, Bellefroid and Van der Velden, concluding that the principle of law is not a concrete law, but rather a basic, general and abstract mind, which is the background to the concrete rules contained in and behind every legal system incarnated in regulations and legislation and the judge's decision which is a positive law and can be found by looking for characteristics or characteristics that are common in the concrete rules.¹⁷

The principle of law has two grounds. First, the principle of law is rooted in the reality of society and second to the values chosen as a guide by common life. The statement of real and legal factors is a function of the principle of law. except that, the principle of law has a function in law and law science. The function of the principle of law in law according to Klanderman is validating and having a normative influence and binding on the parties. It is legitimate because it bases its existence in the formulation by lawmakers and judges. However, besides that the function of the principle of law in law is to complete the legal system, to make the legal system flexible. In our study of law, the principle of law in legal science is only regulative and explosive. The principle of law does not only affect positive law, but in many cases also creates a system; one system, which doesn't exist without that system. Recognition of the principle of legitimacy (who bases it on a false state that gives "bezit", is obliged (protected), creates between article 1977 of the Indonesian Criminal Code on the one hand and Article 584 and 612 of the Indonesian Criminal Code on the other hand a system that previously did not exist. check and balances. "That the principle of law often often refers to the opposite method is a gift, because it points to the opposite direction so that it is in control or limiting and thus in balance."¹⁸

The legal principle is abstract, it cannot be applied directly to concrete events and there are also legal principles that can be expressed in the form of regulations. Legal principles cannot be applied directly to concrete events such as 'point *d'interet point d'action* (who has a legal interest can file a lawsuit), "*restitutio in integrum*" (return to the original state), "*in dubio pro reo*" (in matters of doubt the judge must decide in such a way as to benefit the defendant); *resjudicata pro veritate habetur* "(what the judge has decided must be considered correct)," everyone is deemed to know the law ", "the protection of the third party who is committed well". However, there are also legal principles that can be expressed in the form of concrete regulations or articles.

¹³ Ibid, page11.

¹⁴ JJ. Bruggink, *Refleksi Tentang Hukum* (Alih bahasa Arief Sidharta), Citra Aditya Bakti, Bandung, 1999, page119.

¹⁵O. Notohamidjojo, 1975, *Demi Keadilan dan Kemanusiaan*, BPK Gunung Mulia, Jakarta Pusat, page49.

¹⁶Khudzaefah Dimyati, 2010, "*Teorisasi Hukum*", *Studi Tentang Perkembangan Pemikiran Hukum di Indonesia Tahun 1945-1990*, Genta Publishing, Yogyakarta, p. 208

¹⁷ Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, Cahaya Atma Pustaka, 2014, page 7.

¹⁸ Ibid, page 8.

Some examples are as follows: "*nullum delictum nulla poena sine praevia lege poenali*", (article 1 paragraph 1 of the Criminal Code), "presumption of innocence article 8 paragraph 1 of Law No. 48 of 2009, "*exceptio non adimpleti contractus*" (deterrence that the opposing party is negligent too), thus thus unable to demand fulfillment of achievement, article 1266 of the Criminal Code, "*audie et alteram partem*" (both parties must be heard), "*actio Paulina*" (Article 1341 of the Indonesian Criminal Code), articles 1338, 1977 of the Indonesian Criminal Code and 23 AB contain legal principles as well. *Lex specialis derogat legi generali* (if there is a conflict between a specific law with a general one, the special applies: article 1 KUHD, *lex superior derogat legi inferiori* (if there is a conflict between high laws and low ones then the high the high one must take precedence: Article 4 paragraph (1) TAP MPR No.III / MPR / 2000.¹⁹

Division of Government Affairs between the government, provincial government and district/city governments in Number 6 concerning government regulation No. 38 year 2007 is removed indicating that the Governor's discretionary authority is very large and contradicts the principle of protection, because the investment location is entirely located in the district/city.

To reconstruct the principles contained in the investment policy of the North Sumatra province in the hospitality business sector, the hospitality sector used an analysis of progressive law spearheaded by Prof. Satjipto Raharjo. Progressive law considers that the law is for humans. So the law is to make people happy, the law is to serve humanity. Not human to law.

Sidharta, said Prof. Satjipto especially in the last years of his life alludes to what is called deep ecology. This concept means that the law is no longer solely for humans, but for the happiness of all living beings. This very deep legal ethical character is reasonable to put the law has a meaning that is deep ecology. Bernard L. His paper also revealed that progressive law is a law with the spirit of doing the best for society, nation and state. Progressive law which characterizes the legal ethical content for the interests of the people and the nation concerned has a relationship with the view of Satjipto Rahardjo which places the principle of law as a bridge that connects legal regulations with social ideals and ethical views of the community²⁰. An ethical view rejected by progressive law is a liberal view of modern law. On the other hand, Satjipto Rahardjo revealed that progressive law is a correction to the weaknesses of modern law which is full of bureaucracy and wants to free itself from the domination of a type of liberal law. Progressive law rejects the notion that order only works through state institutions. Progressive law is intended to protect the people towards the ideal of the law and reject the status quo, and does not want to make the law a technology that is not conscientious, but a moral institution.²¹ 8 This legal morality is oriented towards the interests of the people. Progressive law can be referred to as pro-people law or pro-justice law. Satjipto Rahardjo means the law of pro-people or pro-justice, namely to prosper and give justice to the people (bring justice to the people). This legal character changes the character of the liberal law that has dominated so far. The legal character that is just and prosperous for all Indonesian people has been mandated by Pancasila, the 1945 Constitution to state officials.

Correction of the progressive law with liberal character is seen in the investment law policy as introduced by international investment law through the Uruguay Round which produces several agreements such as GATT (General Agreement on Tariffs and Trade), GATS (General Agreement on Trade and Services), TRIPS (Trade Related Aspects of Intellectual Property Rights), and TRIMS (Trade Related Aspects of Investment Measures), and approval of the establishment of the World Trade Organization in 1994 and ratified by Indonesia through Law No. 7 of 1994. Investment liberalization in the globalization of world trade with a liberal character also applies at the ASEAN level with the establishment of the ASEAN Economic Community. In it clearly has regulated investment liberalization at the level of ASEAN countries. Indonesia has also adjusted the nature of the implementation of investment liberalization with Law No. 25 year 2007.

In accordance with the hierarchy of legislation and the principle of *lex superior derogat legi inferiori*, the investment policy in the region must also be based on liberal principles, which are realized or not do not necessarily benefit the local government.²²

Investment policies in progressive law view are liberal in character and this is not in accordance with people's conscience and justice. Liberal law wrapped in modern law is not designed to bring prosperity to society, but is designed to facilitate human freedom and independence, whereas progressive law aims to prosper and provide justice to the people. Satjipto Rahardjo reminded that in the midst of a huge wave of globalization that wiped out all the barriers facing it, in the midst of global restructuring, we should continue to observe whether it is all beneficial to increase people's prosperity as much as possible. As long as everything still has to stand, use and refer to the Constitution, the development of national law should be faithful to serve the ideals of creating maximum prosperity for all Indonesians. His orientation or support is for social welfare and justice for all Indonesian people. This is what is not in the modern law design with a liberal character including liberalization in the investment sector.

¹⁹ Ibid, page 9.

²⁰ Satjipto Rahardjo, opcit, page 45.

²¹ Satjipto Raharjo, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia*, Genta Publishing, Yogyakarta, 2009, page 2.

²² See the regulation of North Sumatra Province No. 2 of 2015 concerning Provision of Incentives and Provision of Ease of Foreign Investment, Bali Provincial Regulation No. 1 of 2016 concerning the granting of incentives and / or ease of investment to the community and the capital investment and regulation of Jambi Province 10 of 2012.

The investment law with a liberal character is pragmatic and praxis which is merely to accommodate the investment needs that are free only in fulfilling liberal world trade. In Muladi's view, these global changes are more organic, and pragmatic and praxis-nuanced, should not be quickly aligned with basic cultural values and instrumental values.

The basic values of efficiency, legal certainty, non-discrimination, justice, openness seem to have replaced cultural values such as people, social justice, social welfare, the happiness of society, God and humanity that are just and civilized. By using critical legal studies, progressive law reminds that the basic values are as stipulated in Article 3 of Law No. 25 year 2007 has been in the investment liberalization doctrine which has become the grand design of the global trading system in which Indonesia has been involved in various international agreements on the implementation of liberal world trade including liberalization in the investment sector. Today's international trade politics has placed Indonesia in imposing product legislation that is stalled on international trade politics by ignoring the cultural values of its people. Progressive law that promotes law that conscience leads to the investment law that is already in the legislation product to be returned to the conscience of the Indonesian people, namely the law for justice and social welfare of the Indonesian people. Using the progressive law proposed by Dr. Bernard L. Ask, this law is what works best for society, nation and state.²³

Justice and social welfare of the people in progressive law optics for Indonesia have a basis. Philosophically, the Fourth line of the Preamble to the 1945 Constitution clearly mandates the state to realize the welfare of society. Likewise the Precepts of the Pancasila V also outline a legal ideal for a country that embodies social justice for all Indonesians. Both of these philosophical foundations have been stated in Article 33 paragraph (3) of the 1945 Constitution which states that the control of the state over the earth, water and natural resources contained therein is used to the greatest extent possible for the prosperity of the Indonesian people. This means that investment policies in Indonesia must be aimed at the prosperity of all Indonesians.

The legal function oriented to social justice which is directed by Article 33 of the 1945 Constitution actually undergoes fundamental changes after the demands for the development of economic laws with liberal-capitalistic character listed in Article 33 paragraph (4). This legal provision states that the national economy is organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainability, environmental insight, independence, and by maintaining the balance of progress and unity of the national economy. Legal formulation which states that economic development must be carried out efficiently means that economic development is carried out by following the laws of the global economy which are characterized by free market economy. This change is the entry point for the principles of economic law with a free market pattern alongside the principles of legal development based on kinship. The formulation of the legal provisions seems to overlap between the principles of economic development which are in the flow of economic globalization as introduced in Article 33 paragraph (4), with the formulation of Article 33 paragraph (1) which places the principle of kinship in economic development. This overlap in the principle of law actually becomes a tool of Regulation on the application of the principles of economic law in various laws and regulations. The reality of the application of the principle of law which contradicts this illustrates the existence of certain interests which are pragmatic in the face of the principle of family law that has long lived in the traditions of the Indonesian people. Satjipto Rahardjo called it solidly "a country based on popularity", where the people are the source of orientation in decision making, whether political, economic, legal, and others. This is what Satjipto Rahardjo called by building Indonesia with a paradigm of reason, which is believed to be able to bring this nation into a wider and deeper globalization.

Reconstruction of the legal principle of Regional Regulation No. 5 of 2015 concerning Giving Incentives and Ease of Investment

No	Principle	Reconstructed Principle
1	Article 3 letter b reads "giving incentives and facilities based on the principle of equality".	Ideally article 3 letter b reads "giving incentives and facilities based on the principle of justice".

C.2. Reconstruction of Investment Policy Norms in the Hospitality Sector Tourism Business Based on Value of Justice

Reconstruction of Norms is an effort to re-create or renew the existing legal rules as long as they are positive law. The law or updated legislation is not without reason. In addition, because it is no longer suitable with the development of society, it is also intended to answer the various problems of society that are always changing.²⁴

Norms are guidelines, sizes, criteria, or provisions that regulate human behavior in society based on certain values. Norms are measures, guidelines, rules or rules that form the basis of consideration and assessment that contain sanctions and reinforcement of human behavior.

²³ Bernard L. Tanya dkk, *Teori Hukum Strategi Tertib Manusia Lintas Ruang*, Genta Publishing, Yogyakarta, 2013, page 190.

²⁴ Mhd. Syafi'i, *opcit*, page 23.

Daniel S Lev²⁵ said that if you look at the Indonesian legal issues, it must be viewed from the reality of history and the development of law in Indonesia. At the present time there are differences in the perspective of law among Indonesian groups. Various dissatisfactions with law enforcement and handling of several legal issues stem from unequal perspectives on what is meant by law and what constitutes legal sources.²⁶

Division of Government Affairs between the government, provincial government and district/city governments in Number 6 concerning government regulation No. 38 year 2007 is removed indicating that the Governor's discretionary authority is very large and contradicts the principle of protection, because the investment location is entirely located in the district/city. Regional heads of regents/mayors should be given certain authority on certain types of businesses. Associated with regional autonomy, the emphasis is on the district/city.

Reconstruction of Regional Regulation No. 5 of 2015 concerning Giving Incentives and Ease of Investment

No	Norm	Reconstruction
1	Article 4 letter a reads "giving incentives and facilities is done with the aim of stimulating investors to invest".	Ideally Article 4 letter a reads "giving incentives and facilities to be carried out with the aim of stimulating investors to invest their capital and create jobs as widely as possible".
2	Article 19 letter b reads "giving incentives and facilities to be given to investment at least meets the following criteria: absorbing a lot of local workforce".	Ideally 19 letter b reads "giving incentives and facilities to be given to investment at least meets the following criteria: absorb 75% of the local workforce".

D. Conclusion

The principle of law is part of our psychological life. In every principle of law, humans see an ideal that they want to achieve. It is not the purpose of the law perfection or public order; an ideal or hope, an ideal. The principle of law provides an ethical dimension to law. The principle that originally provided incentives and facilities based on the principle of equality was to provide incentives and facilities based on the principle of justice. Reconstruction of Norm law in the provisions of Article 4 letter a reads "the provision of incentives and facilities is carried out with the aim of stimulating investors to invest and create employment as widely as possible. And Article 19 letter b.

²⁵Daniel S Lev, "Hukum dan Politik Indonesia, Kesenimbangan dan Perubahan", dalam Teguh Prasetyo dan Abdul Halim Barkatullah, *Filsafat, Teori & Ilmu Hukum :Pemikiran Menuju Masyarakat yang Berkeadilan dan Bermartabat*, Rajagrafindo Persada, Jakarta, 2014, page 320

²⁶In the history of legal philosophy was born the school of history pioneered by Karl Von Savigny which emphasized the core of his teaching that the *das recht nicht gemacht, estis und wird mit dem Volke*, the law was not created but grew and developed with the community. His view points to the point that in this world there are many nations, and each nation has a *Volkgeist*, a people's soul. This soul is different, both according to time and place. Its reflection appears in the different cultures of each. The law comes from the soul of the people, therefore the law is different at all times and places. It doesn't make sense if there are laws that are universal and eternal. Furthermore, Von Savigny said that what is the legal content develops from a simple society that is reflected in each individual's behavior to a complex society, where the people's legal awareness is on the words of the jurists, see Lili Rasjidi, *Filsafat Hukum, Apakah itu*, Remaja Rosdakarya, Bandung, 1993, page 47-48. Other figures from this school are Sir Henry Maine and in American James Coolidge charter, see Antonius Cahyadi dan E. Fernando M. Manullang, *Pengantar ke Filsafat Hukum*, Kencana, Jakarta, 2008, page 47-49.

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