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Investment and environmental impact assessment: impact of the change in environmental approval regulations towards environmental sustainability under the Job Creation Act

Ocena wpływu inwestycyjnego i środowiskowego:
Wpływ zmiany w przepisach dotyczących zgody środowiskowej
na zrównoważony rozwój środowiska
w ramach Ustawy o tworzeniu miejsc pracy

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Abstract: The abolition of environmental permits for business activities in the Ciptaker Law has generated quite a reasonable debate. Environmental permits are one method of preventing environmental damage and pollution. The abolition of this environmental permit aims to facilitate investment for investors, both domestic and foreign investors. This article will discuss the function of licensing and what the impacts and threats to the environment are of the abolition of environmental permits in the Ciptaker Law.

Keywords: environmental, sustainability, regulations, Job Creation Act

Abstrakt: Zniesienie pozwoleń środowiskowych dla prowadzących działalność gospodarczą, usankcjonowane ustawą Ciptakera, wywołuje sporo kontrowersji. Pozwolenia środowiskowe są jedną z metod przeciwdziałania zanieczyszczeniu i niszczeniu środowiska naturalnego. Zniesienie tej kontroli środowiskowej ma na celu ułatwienie inwestorom, zarówno krajowym,

jak i zagranicznym, realizację zamierzonych inwestycji. Niniejszy artykuł omawia funkcję licencjonowania oraz wpływy i zagrożenia dla środowiska, jakie pociąga za sobą zniesienie pozwoleń środowiskowych umożliwione ustawą Ciptakera.

Słowa kluczowe: środowisko, zrównoważony rozwój, przepisy środowiskowe, ustawa o tworzeniu miejsc pracy

1. Introduction

The old phrase *ubi societas ibi ius* meaning “where there is society, there is law” is an interesting concept that highlights the relationship between law and society. The presence of law in a society is not only based on interests of individuals who bind themselves to a community, as elaborated by Soedikno Mertokusumi in his writing *Mengenal Hukum* (Mertokusumo, n.d.), but also on the holistic aspect of existence of society as such. Thus, the existence of law in a society depends on the continuing existence of this society. Consequently, when a society disappears, the law disappears with it.

Humans and societies often tend to neglect the fundamental aspect of their existence, where oft-times they tend to act recklessly by ignoring the fundamental aspect of their lives, which is the environment they live in and rely on to sustain themselves. Thus, the existence of humans and societies resulting in the emergence of law is not solely based on self-interest, but also on the presence of the natural environment. Hence, it can be asserted that the destruction of the environment, which leads to the disappearance of humans and societies, will also lead to the disappearance of the law itself.

In essence, the argument above aims to highlight the importance of the influence of nature and the environment on human existence and society. Problems related to nature or the environment will have significant and multidimensional impacts, including on legal aspects themselves. At the doctrinal level, generally, problems arising from actions that threaten the existence of humans and society related to nature or the environment will be regulated, both in terms of prevention and mitigation, by “those” who violate them through environmental laws. However, this article discusses the opposite, where it is the legal rules (at the legislative level) that become a factor in the potential for environmental problems or issues to arise. While environmental laws aim to regulate and prevent actions that threaten human existence and society, the article suggests that legal rules themselves can contribute to potential environmental problems. As such, it is crucial to examine legislative measures and ensure that they align with environmental protection goals. By doing so, it may be possible to mitigate the negative impacts of legal rules on the environment and promote a sustainable future.

The Indonesian Government released policies with the main intention of improving the investment climate between 2019 and 2020, followed by simplification programs in licensing and the removal of certain permits, both basic and sectoral, aimed at creating and implementing better conditions for business activities in Indonesia through Law Number 11 of 2020 regarding Job Creation (Law of the Republic of Indonesia Number 11 of 2020 Concerning Job Creation, 2020) established through the Omnibus Law mechanism (Luhukay, 2020).

Considering that revoking business permits can also weaken the Government's function in implementing environmental protection, there is a constant danger threatening environmental sustainability over time. With the weakening of the Government's function, the environmental protection is at risk due to pollution and destruction caused by prolonged environmental mismanagement with unsuitable implementation methods. Pollution and environmental destruction refer to the addition of various substances resulting from human activities to the environment, which can have detrimental effects on the environment (Erwin, 2011). This occurs when a substance or energy is introduced into an environment by human activity or natural processes in such a concentration that it causes changes in the environment, including its ability to naturally function in terms of health, wellbeing, and safety (Nanik, 2013).

The revocation of the environmental permit was carried out for various reasons, one of which is to replace it by environmental assistance that cannot be scientifically justified, considering that it is not yet clear what institution/s will be responsible for providing the assistance to business activities. Even if an environmental agency is appointed, there is no legal guarantee given the proliferation of business activities in each region (Bilal, Muhamad, Azhar Nur Fauzi, 2021).

In essence, before the implementation of the Omnibus Law on Job Creation, which contains more than 1,200 articles with 15 chapters, 11 clusters and revises 79 sectoral laws, regulations regarding permits related to the environment had already existed juridically as stipulated in Article 40 of Law No. 32 of 2009 on Environmental Protection and Management (Law Number 32 of 2009 on Environmental Protection and Management, n.d.). where – based on “lexical interpretation” (Mertokusumo, n.d.) – the aforementioned article provides the guidance that environmental permits are mandatory in business activities. Considering that new business permits can only be issued or owned when environmental permits have been issued first. Meanwhile, in terms of obtaining environmental permits themselves, Article 40 of the Environmental Protection and Management Law requires an Environmental Impact Analysis (EIA). The obligation of EIA itself is referred to in Article 13 paragraphs (1) and (2) of the Environmental Protection and Management Law, with the

main objective of controlling pollution and/or environmental damage carried out in the framework of preserving the function of the environment as well as emphasizing preventive efforts and not handling of environmental damage.

Therefore, from the explanation above, it certainly creates its own dialectic whether the governmental program related to improving and facilitating investment by simplifying and revoking some permits, including environmental permits and the obligation of doing an Environmental Impact Analysis (EIA), as stipulated in the Job Creation Law, is the right policy and does not rather create further problems related to environmental damage and pollution, which certainly requires further study.

The obligation to carry out Environmental Impact Analysis (EIA) is one of the requirements for obtaining environmental permits. It is worth noting that the Law on Job Creation revises sectoral laws and regulations regarding permits related to the environment.

2. The impact of simplification and abolition of environmental permits on indications of environmental pollution

Indonesia is a country with the finest natural resources in the world, with abundance of various sources of natural wealth. There is also a lot of exploitation carried out to be able to obtain wealth which can later provide sustainable welfare. If, however, the rich resources are not managed properly, the environment and society can be affected severely and ultimately suffer irreparable losses. For this reason, there is a need for strong legal studies in answering these problems, in line with which Jeremy Bentham argues that nature provides happiness and damage. The duty of the law is to maintain happiness and prevent evil (Salman, n.d.). The main purpose of the law is expediency. What is meant here is that the main purpose of law is happiness, tranquility, peace for as many people as possible (Rangkuti, 2003). Benefits can be obtained if there is harmony between environmental maintenance and economic needs.

The abolition of this business license can also weaken the Government's function in implementing guarantees for environmental protection. With the weakening of the Government's function, on the other hand, there is a danger that constantly threatens environmental sustainability, bearing in mind that with the abolition of business licenses, the Government does not have strong legality to stop these businesses as there is no business license. Prolonged environmental management with inappropriate implementation methods greatly impacts the ecosystem of an environment whose sustainability is disrupted due to pollution and environmental destruction. RTM Sutamihardja argues that environmental pollution can add various materials as a result of human

activity to the environment and usually has a harmful effect on the environment (Erwin, 2011), where a situation arises in which a substance and/or energy is introduced by human activities or by the natural process itself in such a concentration that changes occur in the natural conditions, including those that result in the environment not functioning as before in the sense of health, welfare and safety life (Nanik, 2013).

The main task of the Government regarding this licensing matter is to embody state goals, through public services and Government participation in the social life of the community. With the increasing development in various sectoral fields, Government interference is increasingly active and intensive in various aspects of people's lives (Atmosudirjo, 1983). Similarly, Prajudi Atmosudirjo, the role of the state in granting licenses is a step to determine and dispense a prohibition by law (Nanik, 2013) Accordingly, the goals that should be achieved in general can be described as follows:

1. Meeting the need to promote activities of a particular character;
2. Using permits to prevent harm to/from the environment;
3. Satisfying the desire to protect certain objects;
4. Granting permission for small objects to divide;
5. Permitting to set directions by selecting people and activities (Luhukay, 2020).

The number of the above provisions can underline that the importance of licensing as part of the implementation of business activities as well as the abolition of business licenses in the Omnibus law of Job Creation are very reasonable. This is because the elimination of environmental permits is part of the Simplification of Permits which are grouped into two parts, namely Basic Licensing and Sector Licensing. Basic permits are grouped into 3 (three) parts, namely Location Permits, Environmental Permits, and Building Permits (Building Permits (Building Permits (IMB) and Certificates of Proper Function (SLF) (Helmi, 2012). The reasons on which environmental permits are based are as follows: (Bilal, Muhamad, Azhar Nur Fauzi, 2021)

1. *Current conditions and problems.* The main problems faced by business actors in starting a business in Indonesia are the difficulty in managing licenses to do business, the actors being faced with complicated business licensing procedures, the many types and numbers of licenses that must be owned, a long time to process permits, and the high costs of starting and running a business in Indonesia. This condition is exacerbated by the low quality and consistency of regulations and rampant corruption, which results in high costs to obtain business licenses. The OSS system is still facing many obstacles in its implementation, crucial problems in the implementation of the OSS system, including many overlapping regulations, the lack of integration of the OSS system as a whole

with the Ministries/Institutions and Regional systems and the constraints of various licensing governance arrangements (business procedures) regulated in the NSPK of Ministries/Institutions. This problem has resulted in the existence of the OSS system in the business licensing process in Indonesia, which has not been able to realize an ideal business licensing mechanism.

2. *Expected conditions*. Simplifying business licensing, where business licensing is carried out in a relatively short time, uncomplicated procedures, and low costs. By implementing risk-based regulations as a reference for determining the type of business licensing accompanied by the implementation of inspections for effective control, it will simplify the business licensing mechanism and will ultimately provide economic, social and environmental benefits. Based on international practice, licensing is used as an exception for limited business activities, where there is an affected public interest due to risks to health, safety, security, and the environment. Assurance of business certainty is the main prerequisite for conducting business activities in a country. In that context, licensing is an entry point to convince business actors that the capital invested will grow and develop in a conducive business environment. With these ideal conditions, business actors can obtain services easily, efficiently and with certainty without having to sacrifice aspects of environmental safety and social protection which are an important part of every economic activity. The presence of the OSS system as a new mechanism in the business licensing process in Indonesia is expected to be a breakthrough to overcome obstacles to the implementation of business activities in Indonesia. The OSS system that utilizes information technology in the implementation of its services is a reform of business licensing services in Indonesia, where the OSS system comes with the spirit to provide ease and certainty of doing business. (Sumantoro, 2008).

3. Basic Licensing Concept Analysis and evaluation of laws and regulations related to basic licensing.

Omnibus Law is a new legal product designed as a form of breakthrough to replace the existing regulations or laws. In this case, the existence of various Ciptakerguna Laws answers legal problems ranging from *tumpang* problems to the laws and regulations that remain or are not in accordance with other legal regulations. In this case, this study is more focused on the Omnibus Law Draft of Job Creation itself consisting of 79 laws with 15 chapters and 174 articles targeting 11 clusters, including environmental issues. The revision and deletion of several articles was carried out in Law Number 32 of 2009, concerning Environmental Protection and Management. One of the articles that is planned to be removed is Article 40 which requires environmental permits to obtain business permits. The abolition of these permits raises various legal polemics, which is because the environment is a unity of space with all objects, forces,

conditions, and living things, including humans and their behavior. They affect nature itself, the survival of life, and the welfare of humans and other living organisms (Muis, 2019).

The importance of environmental protection includes the following goals:

1. Protecting the territory of the Unitary State of the Republic of Indonesia from pollution and/or environmental damage;
2. Ensuring human safety, health and life;
3. Ensuring survival of living organisms and preservation of ecosystems;
4. Maintaining preservation of environmental functions;
5. Achieving harmony and balance of the environment;
6. Ensuring fulfillment of justice for present and future generations;
7. Ensuring fulfillment and protection of the right to the environment as part of human rights;
8. Controlling the utilization of natural resources;
9. Realizing sustainable development;
10. Anticipating global environmental issues.

Based on the aforementioned arguments, licensing is the main thing in maintaining and determining an agreement from the authority based on the law. Licensing has three very vital functions to perform (Luhukay, 2019), including the following: first, as of 2021, development of engineering instruments – the Government can make regulations or decisions that provide incentives for socioeconomic growth. All forms of licensing are carried out on the basis of the interests of the community and the state, so that the interests of the state can be achieved without having to hurt the community. They are some forms of licensing that occur and are available in Indonesia (Luhukay, Roni Sulistyanto & Jailani, 2019). The second function of finance is to be a source of income for the state. The granting of permission is in the form of a licensing levy. For this reason, the existence of licensing has a major impact on the state and regional sources of income. This revenue also greatly helps the state financing determine the direction of the state policy aimed at providing the welfare to the Indonesian people. The third function is to be an instrument for regulating community actions and behavior, meaning that environmental permits have a preventive function and in the Environmental Law make one of the several instruments that function to prevent environmental damage and pollution. Business activities must be carried out by various administrative legal means available to the Government, whether manifested in concrete actions or legal actions. One form of the juridical instruments is the provision of licensing which is an effort to allow business activities (*beschikkinge welke iets toestaan wat tevoren niet geoorloofd*) to find out about the types of business plans and/or activities that must be completed with AMDAL. This requires

getting acquainted with the Regulation of the State Minister of Environment Number 5 of 2012, concerning Types of Business Plans and/or Activities that Must Be Completed with Environmental Impact Analysis. In the annex to the Decree, several types of businesses are regulated that must be accompanied by an Environmental Impact Analysis, namely:

1. Multisectoral field
2. Field of defense
3. Fisheries and marine sector
4. Forestry
5. Field of transportation
6. Field of satellite technology
7. Industrial field
8. Field of public works
9. Housing and residential areas
10. Energy and mineral resources field
11. Tourism sector
12. Field of nuclear power

Without AMDAL it is not possible to apply for an environmental permit. Furthermore, environmental permits are a prerequisite for submitting a Business License application (sectoral). Thus, without having an AMDAL document, one cannot apply for both permits.

Issuance, implementation and enforcement of laws based on environmental permits as a means to protect and preserve community forests from natural resource management activities and their impact on the environment must implement the principles of good governance as a standard for the Government. If the reason for the removal of permits is treated as part of facilitating investment, this is not in line with Adrian Sutedi, who argues that "To facilitate the granting of permits must be done by one agency (if in the Region a Licensing Office is formed). This is very important to do as part of the environmental eligibility requirements." The granting of permission is given accompanied by conditions, so control must be carried out, both by the granting agency and by the court. The control carried out by the licensing agency is basically a requirement that has been outlined in the permit granting decree. Those controls include the area the permit is for, and so on.

The abolition of environmental permits will reduce the tools to control and prevent the impact that will occur for the environment. The abolition of environmental permits also has the potential to cause various environmental problems, such as damage to natural resources, environmental destruction and pollution, as well as negligence of the best interests of indigenous peoples and local communities in due utilizing natural resources. This is because of the lost

authority of the central and regional governments to actually control the impact of pollution and damage that can effectively be controlled through such licensing.

Licensing is part of the state's mandate to control the existing natural resources, yet the context of state natural resource control must be able to provide maximum benefits for all Indonesian people, which is the most important part of natural resource control. Welfare does not mean that natural resources must be exploited and produced economically, but natural resources that are entrusted to us by children and grandchildren must provide benefits in the long term of their existence so that the benefits received are benefits not only intragenerational but also benefits between generations.

In general, utilitarianism emphasizes actions that must be chosen from two or more options that are most capable of bringing maximum happiness. This means that the birth of the Ciptaker Bill does not only talk about economic growth and economic welfare, but also speaks for a space or place where the environment is also a guarantee in providing welfare.

The Ciptaker Law has remained a polemic to this day because it is considered to violate the principle of constitutionalism by violating the spirit of legal harmony, in the sense of triggering conflicts between laws and regulations. In addition, the Ciptaker Law is considered contrary to various basic principles stipulated in the constitution itself. Apart from this, the bill contradicts Law Number 32 of 2009 concerning Environmental Management (Environmental Management Law and the legal principle of *Lex Superior derogat legi inferior* (higher legislation overrides lower legislation). Regarding the conflict with Article 28 H of the Constitution of the Republic of Indonesia of 1945, "everyone has the right to live a prosperous life physically and mentally, to reside, and to get a good and healthy living environment and the right to health services" (The Constitution of the Republic of Indonesia of 1945, 1945).

The conflict can be seen by the abolition of environmental permits, the state's guarantee of the fulfillment of a healthy place to live and environment mandated by the Constitution is not implemented because the conflict is not in harmony and in line with the constitutional spirit. The Government is entrusted with power exercised with a view to protecting the rights of citizens. Moreover, the concept of the welfare state as a modern state concept has given greater power to the Government to act. This power is solely to promote and achieve the fulfillment of human rights. The Government no longer only guarantees economic fulfillment, but must strive for fulfillment of the provision of shelter and a healthy living environment. For this reason, the fulfillment of the right to a healthy living environment is the Government's obligation to fulfill.

In this case, the Ciptaker Law should be guided by the rational principle used to prevent legal obsessiveness, meaning that the policy of eliminating busi-

ness licenses must contain meaning, accuracy or implementation in accordance with the objectives and means used to achieve the objectives. For this reason, the application of the Ciptaker Law relating to the abolition of business licenses is considered irrational and contains legal obesity, which means that this law is very unurgent to implement and the difficulty of obtaining environmental permits should be the bureaucratic system in Benahai, not even giving birth to excessive legal products so that it conflicts with legal products or with the Constitution itself. This, in turn, creates legal uncertainty and causes legal difficulties in public life as well as arbitrary actions by companies.

3. Closing remarks

The Impact of the Elimination of Environmental Permits for Business Activities in the Ciptaker Law can be seen in the absence of good compensation for the removal of environmental permits, still it is not unreasonable, considering that environmental permits have a preventive function and are one of several instruments that function to prevent environmental damage and pollution. In addition to the abolition of environmental permits, there will occur an actual loss of authority on the part of the Government, both central and regional, with regard to carrying out the control of the impact of pollution and actual damage since those can be controlled much more effectively if there is an environmental permit. At least licensing has three very vital functions, including: first – to provide an instrument of development of engineering: governments can make regulations or decisions that provide incentives for the social growth of economies; second, the function of finance is to be a source of income for the country; third – the function is to be an instrument of regulating people's actions and behavior. Thus, the Ciptaker Law, while removing AMDAL function permits, greatly impacts and influences threats to the environment because it indirectly provides freedom for business actors to establish their businesses. Even though this freedom will be limited, the limits are not clear and therefore the impact of the new law raises a great deal of concern and must be monitored with possible immediate follow up so that pollution and environmental damage can be controlled effectively.

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