

LEGAL CERTAINTY FOR INVESTORS POST DECISION OF THE MK NO.91/PUUXVIII/2020 TOWARD ECONOMIC RECOVERY IN INDONESIA

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Article	Abstract
Keywords: Economic Develop-ment; Investment; In-donesia. DOI: 10.28946/scls.v1i2.3046	Investment can be an important instrument for Indonesia because natural resources are abundant, but only a small portion can be explored by Indonesian citizens because they are constrained by not having large capital. Exploration requires large funds; therefore, the government brings foreign investors to Indonesia. Investors need to be a very important part of realizing the nation's ideals for the welfare of the people, as stated in the preamble of the 1945 Constitution. Investment can be put to good use to enhance economic development and become one of the instruments to increase the nation's national income. For this reason, after the decision of the Constitutional Court No. 91/PUUXVIII/2022, it will have a good impact on Indonesia's economic recovery. This research is a normative juridical research based on applicable legal sources. This research was analyzed descriptively with a qualitative approach. The results of the research will explain the effectiveness of the Constitutional Court's decision and see its impact on the Indonesian economy.

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A. INTRODUCTION

One of a country's dreams and goals is realizing a prosperous, just, and prosperous society.¹ To achieve one of these goals, a country will carry out various kinds of efforts to meet the community's needs and create prosperity in people's lives. One of the efforts made by the government to achieve this goal is to make various new policies and regulations that are expected to be a solution to the economic development of a country.²

One of the new policies and regulations in regulating the country's economy is Law Number 11 of 2020 concerning Job Creation (Job Creation Law). The Job Creation Law is a law that regulates regulatory changes in various sectors to improve the investment climate and is

¹ Mia Kusuma Fitriana, "Peranan Politik Hukum Dalam Pembentukan Peraturan Perundang-Undangan Di Indonesia Sebagai Sarana Mewujudkan Tujuan Negara (Laws and Regulations in Indonesia As the Means of Realizing the Country's Goal)," *Jurnal Legislasi Indonesia* 12, no. 02 (2015): 3.

² Miki Indika and Yayuk Marliza, "Upaya Pemberdayaan Usaha Mikro Kecil Menengah (UMKM) Dalam Mengatasi Kemiskinan Di Kecamatan Tugumulyo Kabupaten Musi Rawas," *Mbia* 18, no. 3 (2019): 53, <https://doi.org/10.33557/mbia.v18i3.598>.

expected to have a good influence on economic development in Indonesia.³ Establishing the Job Creation Law, which the Indonesian Parliament passed on October 5 2020⁴ has several purposes. The first objective is to create and increase employment by providing comfort, protection, and empowerment to cooperatives and MSMEs, as well as domestic industry and trade, to absorb as many Indonesian workers as possible, considering regional balance and the progress of the national economy. Second, all citizens should be ensured that they receive jobs and compensation and fair and proper treatment in their employment relationships. Further adjustments in various regulatory aspects in terms of equity, strengthening and protection of cooperatives and MSMEs and domestic industry, as well as making various adjustments to regulatory/regulation aspects to improve the investment ecosystem and encourage and accelerate national strategic projects in line with national interests based on national technology guided by Pancasila ideology.⁵

Business licensing by the Job Creation Law has provided an incentive for investment. In contrast, previously, there was a lot of overlap in business licensing between central and regional authorities and ministries/agencies. This overlap causes licensing regulations to go through a protracted and time-consuming process, making it difficult for investors wishing to invest in Indonesia.⁶ The Job Creation Law then came with no longer protracted and time-consuming regulations, making it easier for investors to invest in Indonesia.

In its ratification process, the Job Creation Law has caused protests from various groups of society because there are articles in it that are considered problematic, especially articles related to investment permits, employment, and the environment. In addition, the process of drafting, reviewing, and ratifying the Ciptaker Law was also considered to be flawed in its formal formation.⁷ This resulted in an action movement from the community, one of which was an action coordinated by the civil society alliance "Gejayan Calling", on March 9, 2020, in Yogyakarta. The alliance involves workers, students, environmental activists, fishermen, indigenous peoples, and other parties.⁸ The conflict was continued with a request for Judicial Review⁹ submitted by Migrant CARE, the West Sumatra Nagari Customary Density Coordinating Board, the Minangkabau Customary Court, and Muchtar Said were later partially granted by the Constitutional Court. Through Decision Number 91/PUU-XVIII/2020, the Constitutional Court determined:

- 1) Declares the formation of Law Number 11 of 2020 concerning Job Creation is contrary to the 1945 Constitution of the Republic of Indonesia and does not have conditionally binding legal force as long as it does not mean "no amendments have been made within 2 (two) years since this decision was pronounced.

³ Hari Agus Santoso, "Efektifitas Undang-Undang Cipta Kerja Terhadap Peningkatan Investasi," *Jurnal Hukum Positum* 6, no. 2 (2021): 254.

⁴ Catur J. S. et al., "Perlindungan Hukum Terhadap Kesejahteraan Pekerja Melalui Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja," *Lex Specialis* 1, no. 2 (2020): 178.

⁵ Abel Tasman Marbun et al., "Investasi Asing Dan Tenaga Kerja Asing Di Indonesia Berdasarkan Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja," *Jurnal Lex Specialis* 1, no. 2 (2020): 157.

⁶ Hilma Meilani, "Hambatan Dalam Meningkatkan Investasi Asing Di Indonesia Dan Solusinya," *Bidang Ekonomi Dan Kebijakan Publik* 11, no. 19 (2019): 1-6.

⁷ Wahyu Widiyaningrum and M. Isnaini, "Pembangkai Berita Aksi Unjuk Rasa Menolak Undang - Undang Cipta Kerja," *Jurnal Ilmu Komunikasi Dan Bisnis* 6, no. 2 (2021): 189, <http://jurnal.stiks-tarakanita.ac.id/index.php/JIK/article/view/494>.

⁸ Bambang Sadono and Lintang Ratri Rahmijati, "Pro Kontra Terhadap Prosedur Dan Substansi Omnibus Law Rancangan Undang-Undang Cipta Kerja," *Jurnal Hukum & Pembangunan* 51, no. 3 (2021): 603, <https://doi.org/10.21143/jhp.vol51.no3.3125>.

⁹ *Judicial review in the common law legal system is often understood as an effort to review statutory regulations carried out by the judiciary, although in the context of a wider scope of authority, because sometimes it also tests administrative acts. In general, judicial review is a nomenclature related to judicial activities 'in which a superior court had power to determine questions of constitutional validity of enactment of the legislature'.*

- 2) This statement states that Law Number 11 of 2020 concerning Job Creation will remain in force until repairs are made following the time limit specified in this decision.
- 3) Declare if within 2 (two) years the legislator cannot complete the revision of Law Number 11 of 2020 concerning Job Creation, then the law or articles or content of the law that has been revoked or amended by the law -Law Number 11 of 2020 concerning Job Creation is declared to be valid again.
- 4) Declare suspending all strategic actions/policies that have broad implications. It is also not justified to issue new implementing regulations relating to Law Number 11 of 2020 concerning Job Creation.

Based on the background above, this writing was carried out to answer the problem regarding how legal certainty for investors after the Constitutional Court decision NO.91/PUUXVIII/2020 leads to economic recovery in Indonesia. In this writing, the author uses a research method in the form of normative legal research, namely research that conducts an inventory of applicable laws and regulations, with an effort to find the philosophical basis or principles of the applicable laws and regulations, or it can be said as research that seeks to make legal discoveries appropriate to a particular case.¹⁰ The novelty of this research is an explanation of legal certainty for investors after the Constitutional Court's decision and its relation to Indonesia's economic recovery".

B. RESEARCH METHODS

This study uses a problem approach method, namely normative juridical with a statutory approach (statute approach) and historical approach (historical approach). The statutory approach is an approach that aims to review all laws and regulatory bases related to the topic being researched. Historical approach (historical approach) is an approach that is intended to know the historical values that form the background and influence the values contained in a statutory regulation. In addition, research looks at the social side to see the positive impact of the regulations used.

C. ANALYSIS AND DISCUSSION

1. Overview of the Importance of Investors

Investment can be an important instrument for Indonesia because natural resources are abundant. Still, only a small portion can be explored by Indonesian citizens because they are constrained by not having large capital. Exploration requires large funds; therefore, the government brings foreign investors to Indonesia. In its efforts to accelerate national economic development and realize Indonesia's political and economic sovereignty, it is necessary to increase investment to process economic potential into real economic power by using capital originating both from within the country and from abroad.¹¹ In addition, in facing changes in the global economy and Indonesia's participation in various international cooperation, it is necessary to create a conducive, promotive investment climate that provides legal certainty, justice and efficiency while considering national economic interests. Article 1, paragraph 1 of Law no. 25 of 2007 concerning investment provides the following definition :

"Investment is all forms of investing activities, both by domestic investors and foreign investors to do business in the territory of the Republic of Indonesia".

Based on the definition above, it can be seen that there is a difference between what is meant by domestic investment and foreign investment. Foreign investment is an investment

¹⁰ Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum* (Bandung: Mandar Maju, 2008), 86.

¹¹ Section C Considering "The Law Number 25 of 2007 Concerning Investment" (2007).

activity carried out by foreign investors, either using fully foreign capital (100% carried out by foreign investors) or joint ventures with domestic investors (forming a joint venture company or investment limited liability company foreign). In order to encourage increased investment activities, significantly increasing investment activities carried out by foreign investors, the Indonesian government provides various treatments for investment and investment facilities.

Based on the description above, it can be seen that the government, based on the law on investment and various implementing regulations, will always try to create a conducive investment climate, especially for the entry of foreign investors. In order to build trust, the government receiving state investment considers it necessary to establish regulations that make it easy for investors to invest, in this case, Law no. 11 of 2020 concerning Job Creation.

2. Legal Certainty for Investors After the Constitutional Court's Decision (No.91/PUUXVIII/2020)

Certainty is a matter (statement) that is certain, conditions, or provisions. The law essentially must be certain and fair. Certainly, as a guideline for conduct and fairness because the code of conduct must support an order that is considered reasonable. The law can carry out its function only because it is fair and implemented with certainty. Legal certainty is a question that can only be answered normatively, not sociologically.¹²

According to Kelsen, law is a system of norms. Norms emphasize the "should" or *das sollen* aspects, by including rules about what to do. Norms are deliberative human products and actions. Laws that contain rules of a general nature serve as guidelines for individuals to behave in society, both in relationships with fellow individuals and in relations with society. These rules become limits for society in burdening or taking action against individuals. The existence of these rules and the implementation of these rules give rise to legal certainty.¹³

Legal certainty normatively is when a regulation is made and promulgated with certainty because it regulates clearly and logically. Clear in the sense of not causing doubts (multiple interpretations) and logical. It becomes a system of norms with other norms so they do not clash or cause a conflict. Legal certainty refers to implementing clear, permanent, consistent, and consequential laws whose implementation cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands but factually characterize law. An uncertain law that does not want to be fair is not just bad.¹⁴

This teaching of legal certainty originates from the Juridical-Dogmatic teaching, which is based on a positivistic school of thought in the world of law, which tends to see law as something autonomous and independent because, for adherents of this thinking, law is nothing but a collection of rules. For adherents of this school, the purpose of law is nothing more than guaranteeing legal certainty. Legal certainty is embodied by law, which only makes a general rule of law. The general nature of the legal rules proves that the law is not aimed at realizing justice or benefit but solely for certainty.¹⁵ Legal certainty is a guarantee regarding the law that contains justice. Norms that promote justice must function as rules that are obeyed. Gustav Radbruch states that justice and legal certainty are permanent parts of the law. He argued that justice and legal certainty must be considered, and legal certainty must be maintained for the security and order of a country. Finally, positive law must always be obeyed. Based on the theory of legal certainty, the values to be achieved are justice and happiness.¹⁶ Suppose it is related to the theory of legal certainty with the MK decision

¹² Dominikus Rato, *Filsafat Hukum: Mencari, Menemukan, dan Memahami Hukum* (Yogyakarta: Laksbang Pressindo, 2010), 59.

¹³ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Kencana, 2008), 158.

¹⁴ C.S.T. Kansil et al., *Kamus Istilah Aneka Hukum* (Jakarta: Jala Permata Aksara, 2009), 385.

¹⁵ Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)* (Jakarta: Toko Gunung Agung, 2002), 82.

¹⁶ *Ibid.*, 95.

NO.91/PUUXVIII/2020 which states that the Job Creation Law is unconstitutional. In that case, it is necessary to understand first that conditional unconstitutional can occur when the article is requested and tested. When the decision is read out, it is unconstitutional (contrary to the 1945 Constitution). Still, the article will become constitutional if the conditions set by the Constitutional Court are met.

These requirements are by the contents of the Constitutional Court Decision No. 91/PUU-XVIII/2020, which emphasizes three things, namely: first, the Job Creation Law is unconstitutional with conditions and does not meet standard standards, as well as the methods stated in the 1945 Constitution and Law Number 12 of 2011 concerning Formation of Legislation; secondly, the Job Creation Law does not involve broad public participation. The Constitutional Court Judge, in his legal considerations point 3.17.8, emphasized that public participation is something that must be a concern and fulfilled in the formation of laws. The opportunity for the public to participate in the formation of laws is also a fulfillment of the constitutional mandate, which places the principle of people's sovereignty as one of the main pillars of the state as stipulated in Article 1 paragraph (2) of the 1945 Constitution. The decision of the Constitutional Court No. 91/PUU-XVIII/2020, precisely point 7 reads:

"Declare to suspend all actions/policies that are strategic in nature and have broad implications, and it is also not justified to issue new implementing regulations relating to Law Number 11 of 2020 concerning Job Creation."

The Constitutional Court's order in point 7 of this decision states that two different phrases must be understood. First, declaring to suspend all actions/policies that are strategic in nature and have broad implications related to the Job Creation Law. Second, it is also not justified to issue new implementing regulations relating to Law Number 11 of 2020 concerning Job Creation.

The legal consequences of the Constitutional Court Decision No.91/PUUXVIII/2020 on the first Copyright Law were to suspend all strategic actions/policies and have broad implications. This refers to Article 4 of the Job Creation Law, which states that the 10 clusters in the Job Creation Law are strategic policies. So, automatically, in fact, this Constitutional Court Decision has "frozen" the Job Creation Law before any revisions are made by the given 2 (two) year timeframe. Then, the Constitutional Court's decision also stated that the Job Creation Law and its derivative regulations, which are still valid, are a form of legal certainty to avoid a legal vacuum during those 2 (two) years. So that within 2 (two) years, the Job Creation Law and its derivatives are still valid as a legal umbrella, but matters relating to strategic nature and broad impact are to be postponed first.

The second legal consequence was the Constitutional Court Decision, which stated that it was not justified to issue new implementing regulations relating to the Job Creation Law, giving an order to the Government that the government was not allowed to issue derivative regulations based on the Job Creation Law. So, it can be said that it is clear that both the Government Regulations/Implementing Regulations that have been issued and those that will be issued have been "frozen" since the Constitutional Court's Decision was pronounced on November 25, 2021.

The third legal consequence is that the Job Creation Law is unconstitutional, so it is necessary first to understand that conditionally constitutional, a law or part of it becomes constitutional (not contradicting the Constitution) as long as it fulfills the conditions set by the Constitutional Court, conversely if the conditions are not met it becomes unconstitutional (contrary to the Constitution).

"The law remains valid but can be invalidated in the future if the legislator failed to comply with the Court's prescriptions in interpreting and implementing the law".

A law or part of it is unconstitutional (contrary to the Constitution) when the decision is read out and becomes constitutional (not contradicting the Constitution) if the conditions set

by the Constitutional Court are met. If the conditions set by the Constitutional Court are not met, it remains unconstitutional (contrary to the Constitution).

"The law is invalid, but can be validated in the future if the legislator complies with the Court's prescriptions in interpreting and implementing the law".

However, the determination of the conditional unconstitutional Job Creation Law does not necessarily eliminate the legal force of the Job Creation Law itself. The legal consequence that impacts the statement that the Job Creation Law is conditionally unconstitutional is that the Job Creation Law is declared to remain in force for the given 2 (two) year revision period. If the government has made improvements within 2 (two) years, then the Job Creation Law is declared Constitutional and can continue to apply. However, suppose within these 2 (two) years the government does not/cannot make improvements. In that case, the Job Creation Law is declared permanent constitutional. It is no longer valid, so the law that was previously revoked or replaced and amended by the Job Creation Law is declared valid again. This is by the ruling of the Constitutional Court in its decision, which reads:

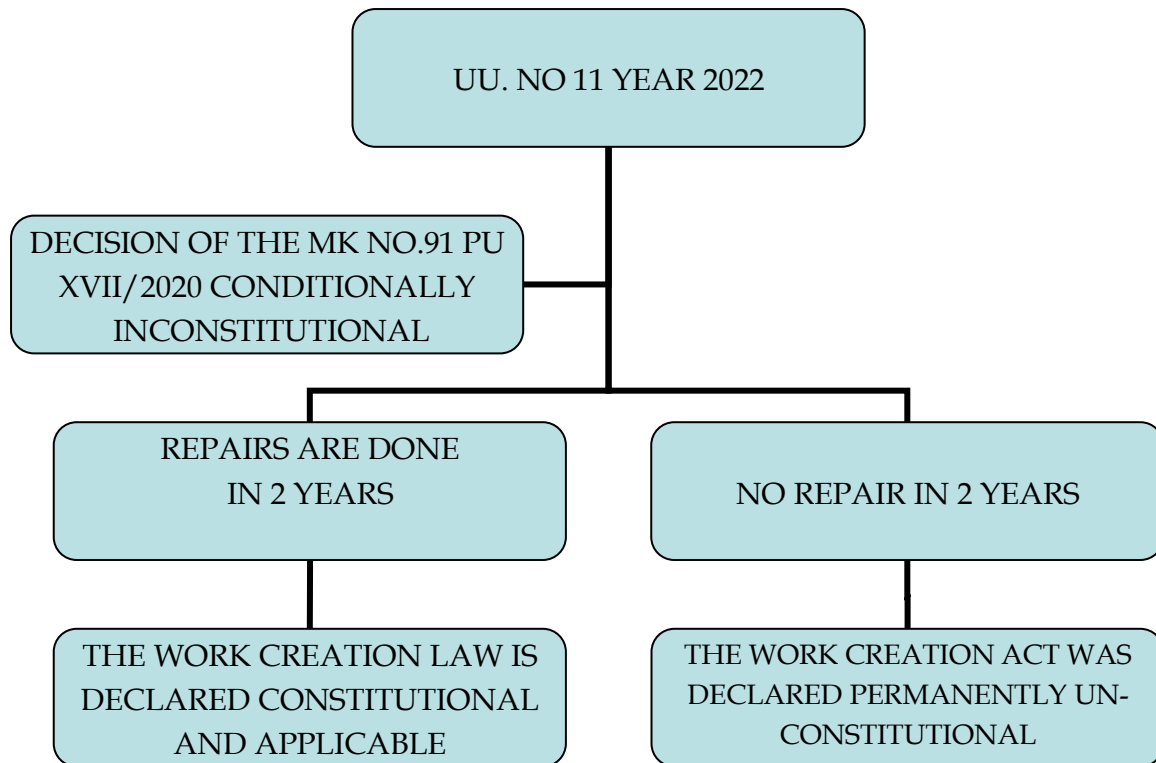
"Declaring that if within 2 (two) years, the legislator cannot complete the revision of Law Number 11 of 2020 concerning Job Creation, then the law or articles or content material of the law which has been revoked or amended by the Law -Law Number 11 of 2020 concerning Job Creation is declared to be valid again."

MK Decision NO.91/PUUXVIII/2020 states that the conditional Unconstitutional Job Creation Law does not necessarily result in a lack of legal certainty for investors who are willing to invest in Indonesia. This was explained by the fact that even conditions make the Job Creation Law declared constitutional, namely by making improvements within 2 (two) years. Where if, within the 2 (two) year grace period, the legislator cannot complete the revision of the Job Creation Law, then for the sake of legal certainty, mainly to avoid a legal vacuum, the law or articles or content of the law that has been revoked or amended must be declared valid return. So, it can be understood that legal certainty, which is the legal umbrella for investors who want to invest in Indonesia, is the Job Creation Law during the 2 (two) year period of the improvement.

If, within 2 (two) years after the reading of the MK decision NO.91/PUUXVIII/2020, the government has made improvements to the Job Creation Law, then the Job Creation Law will be declared constitutional and can continue to apply as a legal umbrella providing legal certainty to investors who want to invest in Indonesia. However, if after 2 (two) years since the reading of the MK decision NO.91/PUUXVIII/2020, the government has not or has not made any improvements to the Job Creation Law, then the Job Creation Law is declared permanently unconstitutional, and causes the law that has been revoked or amended by the Copyright Law The work is declared valid again, and directly becomes a legal umbrella that provides legal certainty to investors who want to invest in Indonesia. So after the Constitutional Court decision NO.91/PUUXVIII/2020, it still provides legal certainty for investors and does not become an obstacle to the pace of the economy in Indonesia.

So that, the legal umbrella that becomes legal certainty after the MK decision NO.91/PUUXVIII/2020 is:

1. Since the reading of the MK decision NO.91/PUUXVIII/2020 for the next 2 (two) years, the legal basis is the Job Creation Law
2. 2 (two) years after the reading of the MK decision NO.91/PUUXVIII/2020:
 - a) If improvements are made, the legal umbrella will be the Job Creation Law.
 - b) If no improvements are made, then the legal umbrella will be the law that the Job Creation Law previously revoked.



D. CONCLUSION

Legal certainty for investors after the Constitutional Court Decision NO.91/PUUXVIII/2020 is that if, within 2 (two) years since the reading of the Constitutional Court decision NO.91/PUUXVIII/2020, the government has made improvements to the Job Creation Law, then the Job Creation Law will be declared constitutional and can continue to act as a legal umbrella that provides legal certainty to investors who wish to invest in Indonesia. However, if after 2 (two) years since the reading of the MK decision NO.91/PUUXVIII/2020, the government has not or has not made any improvements to the Job Creation Law, then the Job Creation Law is declared permanently unconstitutional and causes the law that has been revoked or amended by the Copyright Law The work is declared valid again, and directly becomes a legal umbrella that provides legal certainty to investors who want to invest in Indonesia.

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