

HARMONIZATION OF LAW: BETWEEN NEEDS AND EXPECTATION TO PROTECT TRADITIONAL KNOWLEDGE IN PATENT LAW OF INDONESIA

Dewi Sulistianingsih

Faculty of Law, Semarang State University, Kampus Sekaran, Gedung C-4, Gunungpati, Semarang, Jawa Tengah Indonesia
50229

e-mail:dewi_sulistia_ningsih@yahoo.co.id

ABSTRACT

The participation of Indonesia in the signing of WTO agreement brings consequences to this country in term of harmonizing the Intellectual Property Rights (IPR) owned by Indonesia and the one prevails internationally. The patent law, as a part of IPR, is also affected by this law harmonization. Indonesia is required to establish as well as harmonize its national patent law with the international patent law. This paper will discuss on how Indonesia's patent law is affected by the ratification process and adjusting itself to the international instruments. A problem arises when it is then confronted with the efforts to protect traditional knowledge. The issue seems to question whether harmonization done by Indonesia is the answer to the existing problem. The problem arises because of Indonesian people's expectation of legal requirements which can accommodate their needs and expectations instead of the international ones. This is an important legal issues for the existence of an ideal legal system. Efforts to achieve a stable national legal system is still hampered by many laws and regulations that are not in accordance with the changing dynamics of an increasingly complex society.

Keywords: Law Harmonization, Traditional Knowledge, Patent Law

INTRODUCTION

Intellectual Property Rights agreement (IPR) related to trade, known as TRIPs (Trade Related Aspects of the Intellectual Property Rights), is the result of negotiations that are not fully understood by developing countries during the Uruguay Round. The idea to integrate the protection of IPR in the World Trade Organization is promoted by developed countries at the request of large industrial groups, with the aim to establish standardize rules and apply them in all countries in order to protect their interests. Developing countries do not succeed in stopping the implementation of TRIPs, but at the national level, governments still have little autonomy in the implementation of the treaty obligations. The formation of TRIPs is aimed to reduce distractions and obstacles to international trades, as well as to promote effective IPR protection and guarantee useful measures and procedures to enforce IPR. The globalization era has made the protection of IPR is no longer an issue for one country but a concern of the international community, especially since the signing of TRIPs. Technology is also a trigger in strengthening the IPR enforcement problems, especially in patent rights (as it pertains to technology).

Patent is a part of IPR and an exclusive right given by a nation to the inventors for the inventions they have made¹ in technology, which in a certain period of time manage the inventions by themselves, or give the rights to other party to manage them. In this respect, the inventor explains his invention thoroughly in a form of a published document so that other parties recognize what has been invented by the inventor. As a reward, the government gives a monopoly rights for a certain period of time for the inventor. This monopoly rights is what we call as patent.

HARMONIZATION OF LAW

Indonesia has a patent law, namely Law No. 14 of 2001 and this law is applied in Indonesian territory. A patent law is valid for a national territory², therefore, some international agreements have been held to establish regulations in IPR, including patent, for the countries participate in the agreements. Indonesia has ratified international conventions, especially those related to patent law. Some of the international conventions that have been ratified by Indonesia are: (1) Paris Convention for the Protection of Industrial Property & Convention Establishing the World Intellectual Property Organization (Paris Convention) & (the establishment of WIPO), ratified through Presidential Decree No. 24 of 1979 amended to Presidential Decree No. 15 of 1997; (2) Patent Cooperation Treaty (PCT) and Regulation Under the PCT (PCT), ratified through Presidential Decree No.16 of 1997. Related to traditional knowledge (TK)³, Indonesia has ratified the CBD⁴, by the stipulation of the Law No. 5 of 1994 about the

¹ The differences between invention and discovery: Discovery is the finding of a novel properties of a material or object that is already been known or pre-existing naturally. While the invention is an innovation in the form of an idea that is poured into a specific problem-solving activities in the field of technology, which can be either the process or the production or refinement and development or production processes. Inventions can be patented, while the discovery is not.

² Granting patent rights are territorial, that is, binding only in certain locations. Thus, to obtain patent protection in some countries or regions, one must register a patent application in each country or region.

³ Article 8 (j) of the Convention on Biological Diversity (CBD) in 1992, said that traditional knowledge is "... knowledge, innovation, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and use of biological diversity sustainable ...". Therefore, Agus Sardjono states that traditional knowledge is defined as knowledge that is owned or controlled and used by a community, society or certain ethnic groups that are inherited and continues to evolve according to the changing environment. See Agus

ratification of CBD. Debates have raised in the international world in the efforts to protect the traditional knowledge, which one of them is Minister Declaration in DOHA, CBD, TRIPs and WIPO. WIPO of 1997 formed the Global Intellectual Property Issues Division, which aim to identify the issues impacted in the IPR system, and one of them is the issue on TK.

Indonesia is a one of WTO members by ratifying *Agreement Establishing The World Trade Organization* (a WTO agreement) through the Law No. 7 of 1994 on 2 November 1994. The logic consequence of the participation of Indonesia in WTO is the obligation to adjust the national laws and regulations with those of the WTO's, including the concept of IPR as stated in TRIPs.

Ratification⁵ done by Indonesia created many debates. International agreement ratification (especially TRIPs) is an interesting and a most discussed issue since it is closely related to the binding force of an international agreement. Indonesian government as a part of international community makes international relationship and cooperation embodied in international treaties. This condition creates legal consequences, and one of them is ratification. International treaties with ratification as one of the requirements is not valid if one of the parties has not ratified the treaties.

Ratification is not only an international problem, but also a national legal problem. A country that wants to ratify an international agreement/convention⁶ has to do many adjustments by considering the existing law and regulation in the respected country (the national law). The adjustment process is not an easy thing and requires special attentions.

One problem concerning about the debate on TRIPs instruments ratification and patent law in Indonesia is the question on whether ratification is a mandatory or just a way to "safe" Indonesia's position in the international perception. Another problem is about the implementation of TRIPs regulations that are stated in the Patent Law of Indonesia. Indonesia readiness to face the globalization is a never ending "homework". Basically, Indonesia government recognizes the existence of international law (including the international convention, such as: TRIPs, PCT, CBD, Doha Declaration, and other international convention). However, Indonesia cannot simply accept those international law before harmonization between international law and national law has been done. It is supported by the regulation on Article 11 of Wina convention of 1986 which states that: "...the consent of the state to be bound by a treaty may be expressed by signature, exchange, of instruments constituting a treaty, ratification, acceptance, approval, or accession, or by any other means so agreed". It means that Indonesia is related to the agreement but the agreement will not fully take effect immediately.

The post ratification process does not stop after the ratification law is enacted. A series of process such as substantial harmonization and related institutional synchronization should be done. Moreover, the draft of the law as the implementation of the content of the convention must be accepted as a recognized source of a national law in the law system under the constitutional of 1945⁷.

The urgency of harmonization of the laws on IPR must be done to face the globalization. Law harmonization is an idea to accommodate the national and international tendencies. In other words, regulation in IPR (including the patent law) in Indonesia should adopt the regulation and principles in TRIPs. In this globalization, the law harmonization⁸ from international level to national level is a common thing. The integration of domestic and internal interests of a nation, national and international

Sardjono, 2006, *Hak Kekayaan Intelektual dan Pengetahuan Tradisional*, PT. Alumni, Bandung, page 1. Compare the definition with one made by Endang Purwaningsih who says that Traditional Knowledge is the work of a traditional society (indigenous) can be cultural customs, works of art, and technology, which is used since hereditary ancestors. (See Endang Purwaningsih 2005, *Perkembangan Hukum Intellectual Property Rights, Kajian Hukum terhadap Hak atas Kekayaan Intelektual dan Kajian Komparatif Hukum Paten*, Ghalia Indonesia, Bogor, page 245). Stephen A. Hansen and Justin W. VanFleet provide definitions of TK, "Traditional knowledge (TK) is the information that people in a given community, based on experience and adaptation to a local culture and environment, have developed over time, and continue to develop. This knowledge is used to sustain the community and its culture and to maintain the genetic resources for the continued."

⁴ Convention Biological Diversity (CBD) was the first global agreement that included all aspects of biodiversity, including genetic resources, species and ecosystems. CBD is an international instrument that recognizes that the conservation of biological diversity is a common concern of humankind and an integral part of sustainable development.

⁵ Ratification of endorsement of a document by the state parliament, particularly the endorsement of a law, agreements between countries, and approval of international law. See *Kamus Besar Bahasa Indonesia Online*, www.kamusbahasaonline.org, retrieved December 15, 2013. In article 2 of the 1969 of Vienna Convention, the ratification is defined as an international action in which a state expressed willingness or make a consent to be bound by an international treaty. Therefore, in ratification, the law is not retroactive. It binds since the signing of the ratification. In the draft law, the treaty emphasizes the term ratification on the meaning of confirmation since it has been done at the time of approval of the member states agreed on the signing of international treaties/conventions

⁶ The form and the name of an international agreement in practice is quite diverse, including : treaty ; convention, agreement , memorandum of understanding , protocols , charters , declaration , the final act ; arrangement , exchange of notes , agreed minutes , summary records , verbal process , modus vivendi , and a letter of intent . In general, the form and the name of the agreement indicates that the material governed by the agreement has different level of cooperation . However, by law, these differences do not diminish the rights and obligations of the parties contained in an international treaty. The use of a particular form and name for an international treaty basically shows the desire and intention of the parties and the political implications of such parties . As the most important part of the process of making treaties , ratification of international treaties require high level of attention since in this level, a country officially committed themselves to the agreement . See explanation of Law No. 24 of 2000 on International Treaties .

⁷ Romli Atmasasmita, *Pengaruh Hukum Internasional Terhadap Proses Legislasi*, A Seminar Module on National Legislation, Legislative body of Indonesian House of the Representative, on 21 Mei 2008, p. 6

⁸ Harmonization of laws are scientific activities towards harmonizing the written law which refers to the philosophical , sociological, economic and juridical values. In the implementation, harmonization is a comprehensive assessment of the law drafts, with the aim to determine whether the draft of law has been reflected in various aspects of harmony or conformity with other national the law, the unwritten laws that exist in the community , or by conventions and international agreements, both bilateral and multilateral, which has been ratified by the Government of Indonesia. See BPHN, *Perumusan, Harmonisasi Hukum tentang Metodologi Harmonisasi Hukum*, (Jakarta : BPHN Departemen Kehakiman, 1996/1997), page 37

interests, as well as inter-sectors interest can be done through “localized globalism” system (Santos⁹). It is “how” the global values is localized or managed based on the local values, interests, and needs. According to Santos, by accommodating this system, law trans-nationalization—through harmonization—does not only mean homogeneity, similarity, or protection toward the nation’s identity.

To respond the changes and excesses of globalization, every nation prepares themselves in different ways. Especially in law, Santos identify 4 principles that serve as the basis of responses made by nations in the world, elaborated based on the tendency embodied in the characters of trans-global. They are: *globalized localism; localized globalism; cosmopolitanism; and common heritage of humankind*¹⁰.

Different from what is stated by Santos that trans-nationalization/harmonization is not always easy to be implemented in the trend law harmonization, including in economy, Robert B. Seidman states that law of one nation cannot be simply directed according to the law of other nation. An analysis on how the foreign law transfer or harmonization is performed by one country has ever been done by Robert B. Seidman in his study on the former British colonies in Africa. This study raises a question on what may happen if the law and regulation are taken over from the countries. The result showed that the law of a nation cannot simply be transferred to another country. The result was then formulated in the proposition entitled “*The Law of Nontransferability of Law*”.

The differences in arguments about law harmonization from the international level to the national level have become a never ending debate. It is also experienced by Indonesia in harmonizing IPR in its national law. Indonesia has ratified various international instruments related to IPR without considering in detail about the elements exists in the society.

Indonesian government has ratified international treaties related to TRIPs, enacted and amended many laws and other law instruments that govern IPR. The enforcement of various laws concerning about IPR brings consequences to Indonesian citizen since the citizens are considered to understand the laws once they are enacted. It means that Indonesian citizens are all attached by the law. In reality, not all people understand even the law that has been enacted for a long time. Therefore, one priority to be done to enforce the law in IPR is through harmonization of the laws¹¹. Harmonization of the laws is done to adapt one law of IPR with other IPR laws so that they are not overlapping one and another that may result in inconsistency and conflict between the two laws. Concern appears if disharmony in the law will result in disharmony in its enforcement, so violation of laws will likely to happen. Therefore, harmonization is needed to adjust and adapt the laws so that they become proportional and advantageous for the public interests.

Basically, law harmonization is aimed to achieve justice and legal certainty. In doing so, the most important thing is to put our orientation on the law principles, which are justice, values of life, unity of the law and consistency, without conflicts, as well as legal certainty and equality under the law. They should be achieved for the accomplishment of the goals and the prevention of disharmony in the law. Disharmony in the law can be caused by¹²: (1) the discrepancies between the drafts of various laws. This condition may happen because of the existence of many laws and regulations as well as the provision that everyone is considered to understand the law being enforced; (2) the discrepancies in the administration of national and international law; (3) the discrepancies between legal law and habits, customs, and religious rules; (4) the discrepancies between the law and its implementation regulation, and between the law and other government’s policies; (5) the discrepancies between the law and jurisprudence with the Supreme Court Circular; (6) Policies in the central government are contradictory, and the differences of the policies in the central government level and local government level; (7) the formulation of the regulation is less stringent and invites different interpretations; (8) there is a clash between the government institutions’ authorities due to unclear and less systematic division of powers.

L.M.Gandhi sees the disharmony of law in its formation and practice, which are caused by¹³: (1) the discrepancies of various laws; (2) inconsistencies between the law and its implementing regulations, (3) The differences between the law with the government policy; (4) The differences between law and jurisprudence with Supreme Court Circular; (5) inconsistencies between policies in the central government; (6) the differences between the central government and local government policies; (7) the differences between the law certain definitions of the terms; (8) conflicts between the authorities of government agencies due to unclear and less systematic division of powers.

⁹ Santos, Boaventura De Sousa, *Toward A New Common Sense: Law, Science and Politics In Paradigmatic Transition*, New York: Routledge, 1995,

¹⁰ Santos says : “ *I tried to reconstruct these multiple tensions analytically by identifying the four major forms of trans-nationalization in which they are played out and the defined according to the specific dominant organizing principles underlying them: globalized localism; localized globalism; cosmopolitanism; common heritage of humankind*”. Santos, Boaventura De Sousa, *Toward A New Common Sense: Law, Science and Politics In Paradigmatic Transition*, New York: Routledge, 1995, p., 375.

¹¹ Harmonization in *Kamus Besar Bahasa Indonesia* (Indonesian Dictionary) is meant as efforts to search for synchronization, in *Websters New Twentieth Century Dictionary*, harmonization is *the act of harmonizing*. The word harmony itself comes from “harmony” which means the expression of feeling, action, ideas, and interest: Kata harmonisasi sendiri berasal dari kata harmoni yang dalam bahasa Indonesia yang berarti pernyataan rasa, aksi, gagasan dan minat: harmony, congeniality. See *Kamus Besar Bahasa Indonesia Online*, www.kamusbahasaindonesia.org, retrieved on 12 Oktober 2011.

¹² BPHN, *Perumusan, Harmonisasi Hukum tentang Metodologi Harmonisasi Hukum*, (Jakarta : BPHN Departemen Kehakiman, 1996/1997), p. 34.

¹³ L.M. Gandhi, *Harmonisasi Hukum Menuju Hukum Responsif*, in “*Pidato Pengukuhan Guru Besar Ilmu Hukum UI* 14 Oktober 1995, p 12.

Conflict and disharmony happen between Patent Law, Law No. 5 of 1990 tentang Konservasi Natural Resources, and Law No. 5 of 1994 on the ratification of CBD. The Law No. 5 of 1990 and the Law No. 5 of 1994 have mandated to do conservation of natural resources including medicinal plants using the traditional knowledge of Indonesian society. It is not visible in the Patent Law for the protection and conservation efforts of such plants.

The existence of Law No. 14 of 2001 on Patents is not automatically able to achieve that goal. There are still problems which should be solved in the existence of the Patent Law for the effectiveness of the Law No. 14 of 2001. The problems include the lack of protection of Traditional Knowledge (TK) within the framework of patent law. It would appear a big question, what exactly is the concept and strategy of the Indonesian government regarding TK in IPR context. Why if there is a disagreement concerning the matter of protection? Who actually receive bigger benefits with the protection or no protection, the holders of TK, the country that own the TK, or the holder of patent rights.

Indonesian Patent Law cannot avoid the process of ratification and adjustment of international instruments. Problems arise when we are exposed to the protection of TK. The issue seems to question whether harmonization that has been done by Indonesia is the answer to existing problems. The problems arise because of the public pressure on the legal need to accommodate the needs and expectations of the Indonesian people, not the needs and expectations of the international community.

Legal issues are important for the existence of an ideal legal system. Efforts to achieve a stable national legal system is still hampered by many laws and regulations that are not in accordance with the changing dynamics of an increasingly complex society. Although attempts to fill the void law has been done but they are not optimal due to lack of coordination in the implementation of Prolegnas between institutions/government agencies so that the laws overlap and do not support one and another¹⁴.

Lawsuits are able to interact and accommodate the needs of protection, a phenomenon that must be followed to prevent misappropriation. Laws should be able to answer and resolve the problems of protection of the TK in Indonesia. Disharmony and conflict can be solved in order to realize the ideals, needs and expectations of the people of Indonesia, especially in maintaining natural resources and traditional knowledge of Indonesia. The need for the protection of the state assets (TK and natural resources) is ideally intended for the welfare of the Indonesian people. Leave these expectations in the country through appropriate legal instruments.

Conclusion

In the era of globalization, there is an attempt to make the unification of international law in the world. The unification of the efforts is done on voluntary or of necessity of the states to ratify international instruments. After the ratification, the issue does not stop there. It is a huge task for a nation to make the process of law harmonization that they have ratified. An issue -by- issue appears related to the harmonization process, especially for traditional knowledge. In Indonesia TK harmonization face the problems in harmonizing the international instruments which would lead to a lot of disharmony and the effectiveness of the law that has been ratified. Traditional knowledge is a knowledge -based society, and it would be difficult to be protected through the patent system. The communal nature of traditional knowledge will collide with the nature of the patent monopoly. Then, is the ratification and harmonization that has been done by Indonesia in patent law is the correct answer and need to be able to eliminate the loss for Indonesia needs biopiracy action on traditional knowledge. Close examination of the patent should be done since protecting traditional knowledge is hard to do. At the end, the protection of traditional knowledge in Indonesia in the framework of patent law is a necessity.

REFERENCES

- Agus Sardjono. (2006). *Hak Kekayaan Intelektual dan Pengetahuan Tradisional*, Bandung : PT. Alumni.
- Ali Mansyur. (2012). *Hukum dan Tantangan Ekonomi Global*, in *Bunga Rampai "Hukum dalam Berbagai Dimensi"*, Lampung : Penerbit Universitas Lampung
- BPHN. (1996/1997). *Perumusan, Harmonisasi Hukum tentang Metodologi Harmonisasi Hukum*, (Jakarta : BPHN Departemen Kehakiman, 1996/1997), p. 34.
- Endang Purwaningsih.(2005). *Perkembangan Hukum Intellectual Property Rights, Kajian Hukum terhadap Hak atas Kekayaan Intelektual dan Kajian Komparatif Hukum Paten*, Bogor : Ghalia Indonesia.
- Law No. 24 of 2000 on International Treaties .
- Romli Atmasasmita. (2008). *Pengaruh Hukum Internasional Terhadap Proses Legislasi*, A Seminar Module on National Legislation, Legislative body of Indonesian House of the Representative, on 21 Mei 2008
- Santos, Boaventura De Sousa. (1995). *Toward A New Common Sense: Law, Science and Politics In Paradigmatic Transition*, New York: Routledge.

¹⁴ Ali Mansyur, *Hukum dan Tantangan Ekonomi Global*, in *Bunga Rampai "Hukum dalam Berbagai Dimensi"*, (Lampung : Penerbit Universitas Lampung, 2012), p 18.