LOCAL WORKING PATENT

An IGJ Discussion on the discourse of abolishing Article 20 of the Patent Law 2016

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Introduction

The discourse of abolishing Article 20 of the Patent Law 2016 through Article 110 of the Omnibus Law on Job Creation Bill is a serious discourse. Moreover, when the abolition was motivated by demands from outside parties demanding the abolition of the article. Should lawmakers in Indonesia follow what the outside parties desire?

In answering this question, it is best to know the history of patents and the concepts surrounding them. This is essential; therefore, we can answer these questions properly and correctly.

The History of Patent

Patent history began in the European region in the XV century. Many versions of this history have been written by various academic circles. At least there is a version that tells us that patents were motivated by events that occurred in the middle of the XV century.

Long story short, at that time many merchants from Venice brought their merchandise to the British region. Over time, an idea emerged from the authorities in England, hence these merchandise did not have to be brought from Venice, but instead made in British territory. The advantage of manufacturing these products in the UK was their lower prices. Besides, the authorities in England wanted the British to be able to make these products. For this reason, the British authorities offered to the merchants; hence they would gladly teach the British to make these products. In return for the willingness of the merchants, they were given a "patent letter" containing the right to monopolize the trade regarding these products in the UK.

From this history, it can be seen that the history of patents itself is an exchange between the willingness of the merchants and the British authorities. Merchants who were willing to disclose information about technology and then teach it to the British people would be given the right in the form of the right to monopolize trade regarding these products in the UK.

Until now, the concept of patents is still the same meaning applicants must disclose information about the technology in their disclosure requirements. Then, the State, through its apparatus, checks whether the technology meets the novelty requirements and other conditions which are later stated in the TRIPs Article 27

paragraph (1). Various articles reveal that many countries then ask the right recipient (patent holder) to implement the manufacture of their products within the jurisdiction of the patent granting country. This is what is then known as *local working*. This is a reasonable request because the patent concept itself is a reward from the State in the form of the right to monopolize the use of the technology concerned.

Local working patent

Local working is related to the purpose of regulating patents into international conventions as well. TRIPs clearly state in several articles that it requires technology to develop with the provision of rewards to the inventors of new technology. This means that patents must have a social and economic impact on the citizens of nations who participate in the TRIPs agreement.

It is worth citing several articles on the TRIPs regarding this concept.

- **Article 2 TRIPS jo Article 5A(2) Paris Convention**: Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to **prevent the abuses** which might result from the exercise of the exclusive rights conferred by the patent, for example, **failure to work**

- **Article 27(1) TRIPS**: Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are **new**, **involve an inventive step,** and are **capable of industrial application**. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70, and paragraph 3 of this Article, patents shall be available and patent rights enjoyable **without discrimination** as to the place of invention, the field of technology, and whether products are imported or locally produced

- **Article 27(2) TRIPS**: **Members may exclude from patentability inventions**, the prevention within their territory of the commercial exploitation of which is necessary **to protect order public or morality**, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law

- **Article 7 TRIPS - Objectives**: The protection and enforcement of intellectual property rights should **contribute** to the **promotion** of ***technological innovation and the transfer and dissemination of technology***, to the **mutual advantage** of producers and users of technological knowledge and in a manner **conducive to social and economic welfare**, and to a **balance of rights and obligations**”

- **Article 8 TRIPS – Principles-1**: Members may, in formulating or amending their laws and regulations, **adopt measures necessary to protect public health** and nutrition, and to promote the public interest in sectors of **vital importance to their socio-economic** and **technological development**, provided that such measures are consistent with the provisions of this Agreement

- **Article 8 TRIPS – Principles-2**: Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed **to prevent the abuse of intellectual property rights by right holder**s or the resort to practices **that unreasonably restrain trade or adversely affect the international transfer of technology**

From the TRIPs articles quoted aforementioned, it appears that patents are tools to disseminate technology and a means to transfer technology, therefore patents have a high social impact, both through learning (education) and the economic progress of nations through technological development itself.

Patents are not only about "granting monopoly rights", but also granting monopoly rights is a reward, hence technology develops which in turn will have an impact on the world of education and teaching as well as the development of technology itself which will further have an impact on economic growth. Limiting patents to monopoly matters is a diversion from the original purpose of the patent system itself. *Local working* then becomes a necessity. The right to monopolize without considering its social impact is a mistake.

It should be considered once again that granting patents balanced with *local working* is a necessity. The utmost important matter then is how to manage this problem fairly and can be implemented (or implementable). The solution is not to abolish Article 20 of the Patent Law. Why so?

Article 20 of the Patent Law is just a continuation of the same articles that have been stated in the Indonesian Patent Law, namely the 1989 Patent Law (art. 18) and the 2001 Patent Law (art. 17: 1). Thus, *local working* is nothing new in Indonesia, more so in the world. Why are we now busy with efforts to abolish Article 20 of the 2016 Patent Law?

The answer is crystal clear by looking at who is demanding the abolition of the article. The reason that article 20 contradicts Article 27 of the TRIPs because it is considered discriminatory is a matter that is involuntarily forced. Article 27 TRIPs clearly cannot be read alone. It must be read systematically in the unity of the idea with the other articles. First, TRIPs highly respect the legal sovereignty of participating countries. Second, TRIPs respect the national interests of participating countries. Third, TRIPs still want the monopoly right to have a good social impact by preventing the abuse of intellectual property rights by right

holders in the form of blocking patents and failure to work which are adopted from Article 5A of the Paris Convention mentioned above.

Furthermore, the discrimination used as an excuse to demand the abolition of Article 20 of the Patent Law is a mistake. Discrimination is applied not to local products versus imported products, but discrimination against citizens of the WTO participating nations. The principle of the most favored nation and national treatment is about the nation, not about the product. WTO-TRIPs does prohibit discrimination that is applied to citizens of the nation because what is regulated is trade performed by citizens of the nation, not about products. The state may not discriminate against its citizens. One should not apply discrimination against local products versus imported products. This conclusion will emerge if what is read is not only the words without discrimination in Article 27 paragraph 1 TRIPs, but read all the articles that animate WTO-TRIPs.

The compilers of TRIPs understand that granting monopoly rights through patents without being balanced with the *transfer of technology* and *local working* will have an impact on the abuse of patents in the form of *patent blocking*, which is patent registration whose purpose is only to prevent other people from trading products whose technology is requested for protection. The request for protection should not only be interpreted as an effort to monopolize the trade, but also as a reward to motivate other people to develop their technology. *Local working* is considered as that very effort; therefore, the granting of patent rights should not be followed by *abuse of patent rights,* in the form of *patent blocking* and *failure to work*. This is why many countries implement *local working*.

The question is, how can *local working* be implemented fairly and benefit all parties, including the patent owners themselves? This is what executives and regulators have to think about, namely how to ensure that *local working* can be implemented fairly without compromising the rights of patent holders. It is expected that the following matters can be taken into consideration:

- Providing the patent owners, a sufficient period of time to choose to implement the technology themselves, or granting permission to anyone who is interested and can implement the invention (through implementing regulations)

- For certain products related to public health and urgent national interests, the implementation of *local working* can be conducted through a compulsory license with appropriate royalties (through implementing regulations)

- If the patent owners have objections to making their own products in Indonesia or refuse to grant a license to a local partner, then the Attorney General's Office may file a patent abolition on behalf of the nation of Indonesia in order to enforce the national interest (Patent Law has already regulated)

- After the patent is terminated, anyone can use the invention freely, because it is no longer protected by the patent. That is why abolition cannot be implemented arbitrarily but through a well and just trial process.

Efforts to fulfill foreign requests to abolish article 20 of the Patent Law are clearly short-cut efforts that are completely inappropriate. It is like trying to kill rats, but what is being burned in the barn and the rice in it.

Article 20 of the Patent Law and the Constitution

The preamble of the 1945 Constitution affirms the State's objectives, which are protecting all of Indonesia's citizens, educating the nation's life, and advancing public welfare. Article 20 of the Patent Law might be said to be a manifestation of the mandate of the Constitution in defending national interests to educate the nation's life and promote the general welfare through (1) transfer of technology policy, (2) absorption of investment, and (3) provision of employment opportunities. The three objectives set out in Article 20 of the Patent Law are an ideal form of implementation of the Constitution. This means that Article 20 of the Patent Law is constitutional. If later this article is to be abolished for reasons that are deemed to be *"unconstitutional"*, then presumably the law that will abolish article 20 of the Patent Law is unconstitutional, and therefore it has the potential to become the object of a lawsuit against the constitution before the Constitutional Court.

Closing

It is highly expected that we can become an independent nation and are not afraid of external threats. On the other hand, we must have the courage to say *'NO'* to outside parties, if the national interest demands so. We just have to be clever in responding to any form of foreign intervention.