

ENFORCEABILITY OF PATENT LAW IN INDONESIA (JURIDICAL AND HISTORICAL PERSPECTIVE)

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ABSTRACT

Historically the Patent Law in Indonesia has existed since the Dutch colonial era with the ratification Octrooiwet 1910 No. 136 Government Gazette No. 1911. 313 and entered into force since July 1, 1912. In the days of the Japanese occupation in 1942-1945, all the legislation in the field of intellectual property rights remain in force. Indonesian nation since independence, as defined in the 1945 Constitution, all laws Dutch colonial heritage still apply provided it does not conflict with the 1945 Constitution, however, is not the case with the Patent Act that are considered contrary to the Indonesian government. The setting of the first patent in Indonesia in 1989 with the passage of Law Number 6 year 1989 on Patents. Other legislation in the field of intellectual property rights based on the TRIPS Agreement, in 2001 the Government of Indonesia passed Law Number 14 year 2001 on Patents. This paper will describe the enforceability of patent law in Indonesia. An analysis of the applicability of patent law issues will be conducted with three approaches force of law enactment, namely the validity of philosophical, sociological and juridical. The basic assumption of this paper is that a law has judicial power if the formal requirements of the establishment of the laws have judicial power if the formal requirements of the formation of legislation have been met, while the law has the power sociologically valid if the law applies effective as the rules of society, and can be implemented.

Keywords: legal enforceability, legal, historical, Trips, intellectual property rights

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INTRODUCTION

Technology has an important role in developing the economy in one country. Therefore, there is an assumption from many countries in the world that the economic development cannot be separated from industrialization. Technology as an intellectual creativity of human beings, where its creation sacrifices abundant amount of thoughts, times, and funds, has valuable economic benefit. Therefore, the inventors of those technologies are given legal protections, named patents. In Indonesia, the patent law is written in the Act Number 13 of 1997 amended in the Act Number 14 of 2001.

Patent is a legal protection of intellectual properties in the field of technology. The point of discussion in the patent law is technology. This patent is given by one country, especially to the inventors who invent technologies for certain period of time. Technological inventions that can receive patents are the one with novelty², inventive steps³, and industrially applicable⁴. In Indonesia, those requirements are absolute and explicitly written in the Act No. 14 of 2001 about patent. The Indonesia's patent law stated that the inventions protected by patent are new technological inventions, in the form of processes and products, or the refinement and improvement of processes and products. It can be in the form of machineries or food, beverages, and even medical products. By giving the patent, the inventors or the patent holders have the rights to utilize the patent, for example by producing the patented products, using the patented technology, and other activities related to the sale of those patented products or processes.

In Indonesia, the patent can only be obtained by registering the inventions to the Patent Office, namely Directorate General of Intellectual Property Rights of Indonesian Republic (Direktorat Jenderal Hak Kekayaan Intelektual Republik Indonesia)⁵. Patent rights in Indonesia are divided into⁶ product patent⁷ and process patent⁸. Moreover, patent can also be classified into general

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² An invention is considered new if its acceptance date is different from the same prior technology (prior art or the state of art). The disclosure can be done orally, through demonstration, or by other means which allows experts to carry on the invention.

³ An invention that for someone with technical expertise is considered as unpredictable with respect to the existing expertise then the invention is submitted.

⁴ An invention can be applied in industry based on the explanation written in the proposal. If the invention is in the form of product, it should be able to be made in a mass production with consistent quality. If the invention is in the form of process, the process should be able to be applied practically.

⁵ The name of the Patent Office stated in the old patent Act (no.13 of 1997) is changed into Directorate General to clarify a comprehensive system of intellectual property rights agents.

⁶ Kansil, C.S.T., *Hak Milik Intelektual – Hak Milik Perindustrian dan Hak Cipta* (Jakarta, Sinar Grafika, 2000), p. 10.

patent (patent) and simple patent. The exclusive rights given to the patent holders are also differs in the length. For the general patent (patent) the protection is for 20 years, whereas for the simple patent the protection is only 10 years. A simple patent is commonly be called as a utility model. In essence, the utility models is invention in the mechanical fields, and comparing to general patent (patent), the technological progress required is less, the inventive step is less, and the term of protection is much shorter. Our patent law does not discuss the definition of utility model, but only discusses about the scope of utility model. The length of time of patent protection is given for the patent holders or inventors so that they can enjoy and reimbursed all the cost they have sacrificed to make the inventions. Moreover, it is also done to guarantee that the society in general still can use the patented products or process even after the patent time frame is over.

There are two systems that are generally applied to register patents. They are: a) First to File system which gives patent to those who register their qualified new invention first; and b) First to Invent system which give patent to those who invent their qualified new invention first. In giving patent to the proposers, Indonesia applies the First to File system. Therefore, the patent law in Indonesia gives protection to the invention claims. The purpose of the claim is to decide how wide or narrow the patent protection is given, which is highly depended on how broad or limited the claim is. A broader claim does not guarantee that the inventors will receive more benefit. It sometimes leads to other patents' violation. However, a too narrow claim will bring loss to the proposer, from both the economic and technological interests since the scope is too limited. Therefore, the determination of a claim is very important. In the Article 52 of the patent act in Indonesia states that there is a clear description about some important errors and other vagueness that should be underlined, including unclear description of the claim containing disconnection and inconsistencies in the description of the claim.

Patent issues in Indonesia cannot be separated from its history, regulation, and implementation in Indonesia's society. There are many unsolvable debates about patent in Indonesia, due to the willingness of the people to protect all that belongs to them. Basically, patent gives monopoly rights to its holders or inventors, concerning about the inventions they have made which have economy potentials.

The presence of strong and effective patent system will bring a lot of benefit, such as information distribution and incentive support to invest in product developments or in new products which finally be used or consumed by public. Patent monopoly will end at a predetermined time (20 years for patent and 10 years of simple patent or utility model). It is worthy since to get patent right is so expensive and takes a lot of time.

Basically, no one likes monopoly except the one who has the monopoly. One area that legalizes monopoly is intellectual property rights, and the strongest monopoly right in intellectual property is patent. The strength of patent is its pure monopoly, which does not allow others to use or exploit the patented products without the permission of the patent owner.

THE HISTORY OF PATENT REGULATION IN INDONESIA

The historical root of patent regulation in Indonesia began with the ratification of *Octrooiwet* 1910 number 136, *Staatsblad* 1911 number 313 by the Dutch Colonial, and starting on 1 July 1912, the ones which was implemented were *Industrieel Eigendom Kolonien* 1912 and *Auteurswet* 1912, *Staatsblad* 1912 No. 600. In Japanese colonial times, all intellectual property right acts were still implemented. After Indonesia's Independence Day, all the acts made by the Dutch Colonial remained valid as long as they did not contradict to Indonesia's constitution, UUD 1945. However, the patent law was an exception. It was stated in the Dutch act that the registration of the patent could be done in Batavia (now Jakarta), but the assessment of the patent proposal should be done in *Octrooiraad*, which is located in Netherland. On 12 August 1953, the Minister of Justice issued an Announcement No. J.S. 5/41/4 State Gazette No. 69 of 1953, which regulated about the registration of provisional domestic patent proposal, and an Announcement No. J.G. 1/2/17 State Gazette No. 91 of 1953, which regulated about the registration of provisional patent proposal abroad. The last announcement gave a legal protection and enabled the request of other countries' patents to be registered in Indonesia⁹.

On 23 July, Indonesia's President formed a special team (named *Tim Keppres 34/Team Decree 34*), to solve the problems that arose in the implementation of patent and copyright law, company trademark, and commerce trademark, as well as to complete the preparation and the legislation of patent. This team had several functions, including:

1. Carrying out an inventory of:
 - a. any problems arose in the implementation and the preparation of the act.
 - b. any problems found in the act that were required to be revised

⁷ Making, selling, keeping, renting, offering, using, and providing the patented products for sale or rent or taken over.

⁸ Using patented production processes to create or make products and performing other actions as stated in the contents of patented products rights.

⁹ See Rachmadi Usman, *Hukum Hak atas Kekayaan Intelektual*, (Bandung : Alumni, 2003), p. 190-1991, OK Saidin, *Aspek Hukum Hak Kekayaan Intelektual*, (Jakarta : PT. RajaGrafindo Persada, 2006), p. 229, Dian Nurfitri dan Rani Nuradi, *Pengantar Hukum Paten Indonesia*, (Bandung : Alumni, 2013), p. 27, and also <http://www.dgip.go.id/tentang-kami/sekilas-sejarah>, *Sekilas Sejarah Perkembangan Sistem Perlindungan Hak Kekayaan Intelektual (HKI) di Indonesia*, accessed on 10 Januari 2013.

2. Gathering all the necessary materials needed to solve the above problems, including required information from the related parties.
3. Holding discussions with the related necessary parties, in national as well as international scopes, in order to solve the stated problems.
4. Giving advices needed for the solving of the problems to the president.

The regulation about patent started with the ratification of Act No. 6 of 1989. This act was valid since 1 August 1991, and then amended into Act No. 13 of 1997. The forming of the Act No. 6 of 1989 was based on the technological development, especially in industrial field¹⁰. In the patent law of 1997 stated about TRIPs agreement. The last Act about intellectual property rights with the agreement of TRIPs, was Act No. 14 of 2001 about patent.

On 15 April 1994, Indonesia's government signed the Final Act: *Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations*, which included *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)*. The agreement impacted on Indonesia's patent law, in which UUP should adjust based on the TRIPs, so that the Act No. 14 of 2001 about patent was ratified. Principally, the patent system in Indonesia were:

Table 1: Patent Law System in Indonesia

No.	Regulation	Explanation
1.	<i>Octrooiwet</i> 1910 <i>Stb.</i> No. 33	Implemented since 1912 and invalid since Independence Day
2.	Ministry of Justice Announcement No. J.S. 5/41/4 B.N. 55, dated 12 Agustus 1953	Provisional attempt related to the domestic registration of patent proposal
3.	Ministry of Justice Announcement No. J.G 1/2/17 B.N. 53 – 91, dated 29 Oktober 1953	Provisional attempt related to the registration of patent proposal abroad
4.	Act No 6 of 1989 about Patent	Statute Book No. 39 of 1989, Supplement to Statute Book No. 3398
5.	Act No. 13 of 1997 as the amendment of Act No 6 of 1989 about Patent	Statute Book No. 30 of 1997, Supplement to Statute Book No. 3680
6.	Act No. 14 of 2001 about Patent	Statute Book No. 109 of 2001, Supplement to Statute Book No. 4130

The rapid development of the technology, along with the willingness of Indonesia's government to adjust all its intellectual property rights regulations according to TRIPs, made the amendment of the Act occurred. Act No. 14 of 2001 about Patent had been refined with so many additions and omissions with the purpose of giving sufficient protections to the patent holders.

There are 8 principles in the Act. They are¹¹:

- a. Patent is only related to technological invention which can solve certain problems. Technology is the core of patent.
- b. The legal protection concerning about technological invention is given based upon request. Therefore, registration must be done by the inventors in the field of technology, so that their invention can be protected by the patent law.
- c. The registration of the patent is territorially based. The registration in one country does not automatically means that the invention is registered in other countries, except if the inventors have registered their inventions in those countries.
- d. The registration system applied in Indonesia is First to File system (the first inventor registering their invention holds the patent). This system is written in Article 34 of the Patent Law.
- e. Patent can be transferred through many ways, including inheritance, grant, will, written agreement, or other ways justified by the law.
- f. To protect the public interest, the patent law regulates that bolar provision and parallel import is not a violation.
- g. The commercial court has the authority to settle patent infringement lawsuits in the civil fields. In addition, indonesia's Patent Law also provides opportunity for many parties to settle the patent issues through alternative dispute resolution arbitration institution.
- h. Criminal acts written in Indonesia's patent law is crime by accusation. By using this accusation, the aggrieved party is expected to report more actively. Without the report, their complaint will not be processed.

THE ENFORCEMENT OF PATENT LAW IN INDONESIA

¹⁰ The basis of the formation of Patent Act of 1989 were: (1) Article 5 verse (1), Article 20 verse (1), Article 33 verse (1) and (2) National Constitution of 1945; (2) Article 16 of Act No. 5 of 1984 about industry.

¹¹ Tomi Suryo Utomo, *Hak Kekayaan Intelektual (HKI) di Era Global*, (Yogyakarta, Graha Ilmu, 2010), p. 108

The enforcement of patent law in Indonesia is only in line with the international instrument. It seems that Indonesia's government only adjusts its implementation with the international instrument without paying attention to the condition of its people. J. J. H. Bruggink¹² states that there are three kinds of law enforcements, such as empirical, normative, and evaluative. Moreover, Bruggink says that it is also important to state about to whom the law is implemented (*adressat/addressee*) and who obey the law. Factual implementation can be done along with empirical research about the behavior of the local society. This implementation can be said to be sociological enforcement. Normative enforcement is also called juridical or legal enforcement. It means that the rule of the law can be enforced if that rule is the part of other systems' rules, which are inter-correlated. A lower specific legal rule is derived from higher common legal rules. Evaluative enforcement or evaluative philosophical or material enforcement is a condition where the content of legal rules is considered valuable. The three types of law enforcements is inter-correlated.

In the implementation of patent law in Indonesia, we have to pay attention to the three types of law enforcements above to make sure that the rules is effectively implemented. So, concerning only to the international instrument will cause more harms than benefits. First, philosophically, following only the international instruments will destroy the value system of Indonesia's people. Patent law originally came from foreign country, which means that we have to adopt the law. Therefore, not may Indonesian understand about patent in the 70s. Second, juridically, consistency and harmonization of the law structures does not always suit well. Third, sociologically, the society will not be so responsive toward the law. Therefore, violation of the law, especially patent law, is likely to happen. It is due to the communal society culture which makes the people of Indonesia difficult to accept the patent concept. This point of view hampers the development of patent law in Indonesia; especially that patent law requires active participations of the individuals to report any violation occurred.

Indonesia has a special law that gives a legal protection for the inventors in technology, named Act No. 14 of 2001 about Patent. This patent law is made not only to protect the inventors but also to serve as the country's commitment after ratifying *Agreement Establishing the World Trade Organization* which includes the aspects of *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs), focuses on patent issues. Therefore, after ratifying the agreement, Indonesia must align its national law about patent with TRIPs.

However, the existence of the patent law does not automatically guarantee the the achievement of its goals. There are some problems that should be solved related to the effectiveness of the implementation of patent law.

The enforcement of patent law has not brought significant impact to the numbers of patent proposals registered in Indonesia. It is because the law has not been used effectively by public as well as private researchers, and also the businessmen in Indonesia. Therefore, patent law cannot be used as a driving force of the national economic development.

CONCLUSION

Historically, Indonesia has amended its patent law by adjusting it to the international regulation. Indonesia's patent law No. 14 of 2001 is the last act which is philosophically enforced. However, the fundamental philosophy used in this law is different from the one owned by Indonesian. Our society holds communal values which is different from the patent value that highly respects the individual ownership. The existence of patent law will destroy the value system of the country. Sociologically, the enforcement of patent law in Indonesia makes the society violates the law itself. It is proven by the low level of patent registration in Indonesia, in comparison to other countries. Juridically, although the patent law has been adjusted vertically to Pancasila and National constitution (UUD 1945), but this legal product did not originally come from Indonesia. Therefore, there are many of other acts or legal products which contradictory to or do not support the patent law.

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¹² J.J.H. Bruggink, *Refleksi Tentang Hukum*, terj., PT. Citra Aditya Bakti, Bandung, 1999, p. 147.-157.

