POLICY STUDY IN INDONESIA'S PATENT LEGAL SYSTEM

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ABSTRACT

The Indonesian Patent Law, which was first drafted in 1989, is quite a controversial. As a legal instrument, the Patent Law strongly reflects the monopolistic character. In fact, it raises strong resistance from the community. The cultural values of mutual cooperation become the argument for rejection and at the same time concern related to the promoting of individualistic values and culture. The problem is, as a country that projects industrialisation as the backbone of the economy, the existence of the Patent Law becomes a necessity. The Patent Law is believed to be the driving force of the industry through technological inventions. The conflict between values of the people's aspirations and the pragmatic policies of the government needs to be compromised and harmonized properly. This research is important to revisit the constellation of politics and legal policy in the establishment of the 1989 Patent Law. The research method is normative and analyze based on the perspective of responsive legal theory and the welfare state. The result of research shows that the preparation of the Patent Law has succeeded in harmonizing substantive patent norms with national interest. The politics of patent law has become the strategy in realizing national goals to build economic power through industrialisation based on technology. This rationality justifies the policy of the need for Indonesia to have a Patent Law in favor of national interests to support industry and economic development.

Keywords: Patent; Politic of Law; National Interest.

ABSTRAK

Undang Undang Paten Indonesia yang pertama kali disusun tahun 1989 merupakan instrumen hukum yang cukup kontroversial. Sebagai instrumen hukum, UU Paten sangat kuat merefleksikan karakter monopolistik. Oleh karena itu, memunculkan resistensi yang kuat dari masyarakat. Nilai-nilai budaya kegotong royongan menjadi dalil penolakan dan sekaligus kekawatiran akan menguatnya budaya individualistik. Masalahnya, sebagai Negara yang memproyeksikan industri sebagai tulang punggung ekonomi, keberadaan UU Paten menjadi keniscayaan. UU Paten diyakini akan menjadi motor penggerak industri melalui invensi-invensi teknologi. Benturan nilai-nilai aspirasi masyarakat dan tuntutan pragmatis pemerintah perlu dikompromikan dan diselaraskan dengan baik. Penelitian ini penting untuk dapat memahami konstelasi politik dan kebijakan hukum dalam penyusunan UU Paten 1989. Metode penelitian yang digunakan adalah yuridis normatif dengan teori hukum responsive dalam perspektif welfare state. Hasil penelitian menunjukkan bahwa penyusunan UU Paten telah berhasil mengharmoniskan norma-norma hukum paten dengan kepentingan nasional. Politik hukum paten menjadi strategi dalam mewujudkan cita-cita nasional membangun kekuatan ekonomi melalui pilar-pilar industri yang bertumpu pada basis teknologi. Rasionalitas ini yang memberi justifikasi kebijakan perlunya Indonesia memiliki UU Paten yang berpihak pada kepentingan nasional guna mendukung pembangunan ekonomi dan industri.

Kata kunci: Paten; Politik Hukum; Kepentingan Nasional.

A. INTRODUCTION

It is unavoidable impact of the Industrial Revolution 4.0 era that intellectual property rights (IPR) law has more important and strategic role in supporting the economic development, including industry and the growth of the business sector (Panggabean, 2017). In the context of Indonesia, IPR confronts two major challenges, namely the capability of human resources (HR) and the reliability of IPR legal system. To overcome the challenges in the HR field, the government has taken various policies and strategic initiatives to prepare creative, innovative and competent HR. In this context, creative is meant to be a behavior of people who are able to rely on creativity, initiative and ability to create new works (Wahyudi, 2013). Something is considered new if it has a form, meaning and characteristics that are different from previous works. Moreover, it has a better quality, more useful and further enriches the nation's cultural treasures. In short, it builds the quality as well as quantity of human resources who have the creativity and skills to realize new ideas that are innovative and beneficial for society. In relation to IPR, such strategic efforts are based on Law No. 28 of 2014 concerning Copyright (Copyright Act), as a specific regulation established to address the digital disruption of creative economy (Ramli, 2018).

Whilst, the innovative means someone's ability to utilize skills and expertise to create new works (Wahyudi, 2013). In the legal phrase of patent, new works resulting from one's innovative efforts are called inventions. In the Patent Law it is defined that an invention is an inventor's idea that is embodied into a specific problem-solving activity in the field of technology in the form of a product or process, or improvement and development of a product or process. Included in this understanding are patents and simple patents or petty patents (Nasir, 2016). The quality of such inventions is influenced by the quality of human resources, both related to the level of reliability of the innovation and the ability of the solution, or the strength of the technological problem-solving.

The setting up of IPR regulations is demanded to the maximum extent possible adjusted to global world and developments. One of the most focused and highlighted IPR rules is patents.

Indonesia has established and developed patent systems since the Dutch colonial era. At that time, Indonesia recognized patents through Octrooiwet 1910 which took effect on July 1, 1912 (Purwaningsih, 2005). In 1989, Indonesia instituted patents through Law No. 6 of 1989 concerning Patents. Since then, the Patent Law has undergone many changes, and the latest is regulated through Law No. 13 Year 2016 concerning Patents (Patent Law).

It should be acknowledged that the patent law has reaped controversies since its academic proposal. The debate is influenced by interlinked interests, such as economic, political, social, including foreign relations as well as defense and security. Nevertheless, the law has succeeded in compromising various opposing interests,

harmonizing diverse aspirations and differing policy orientations. The Patent Law has crystallized various desires and interests that are synergized with one another.

One of the most highlighted issues is that policy orientation to protect national interests has diminished. Various boundary signs and protective umbrellas that were developed at the beginning of the construction of the patent law system, are now blurred and unreadable norms. The Patent Law is considered to be very liberal, contrary to the Indonesian social system which prioritizes mutual values. In addition, the Patent Law in various countries becomes the trigger to the innovative power of community and the creator of conducive climate for new inventions in the field of technology, but now has become no more than just an instrument which guides inventors on how to apply a patent. All provisions of the Patent Law, except Article 20, are more of a technical instrument for how to get a patent. Beyond that, the provision of Article 20 is the only norm that inherits the nationalistic spirit. Like India, the Indonesian Patent Law must take maximum advantage of the TRIPS Agrement's flexibility.

The Patent Law is considered to have abandoned the principle of mutual cooperation, and highly accommodates individualistic and liberal system. The initiative to compile the Patent Law received a lot of criticism from various parties, including academics, because of its very strong monopolistic character. The government experiences a lot of criticism because it was considered to have promoted individualistic and monopolistic values in Indonesia legal system.

On the other hand, through the Patent Law, Indonesia hopes to optimize the acceleration of industrial development. Patent Laws must be able to secure protection for novel inventions, investment flows and technology transfer and create a conducive climate to the development of innovative strength among society. To that end, the patent protection system inevitably has to follow the regulatory trends adopted in the global world.

This paper intends to describe the debate and political influence on the process of establishing Law No. 6 of 1989 on Patents. The choice of this reference has a relevant reason, because this law was prepared in the middle of the pro-contra discourse. There is resistance, even among the academics. Some of them are, the strong resistance to the norms of patent regulation which are substantially laden with monopolistic character. Such characters are considered not in accordance with the values of mutual cooperation that are still rooted and actual in people's lives. In addition, the degree of people life and the level of development are not ready yet to implement this highly influential patent legal system.

This paper is also compiled with the aim of understanding the political dimension of Indonesian IPR, particularly in the field of patents, which is full of tips and strategies directed to defend national interests. As the responsive laws of Selznick and

Nonet (Yudo, 2016), the 1989 Patent Law has several strategic norms that are not in line with the standarized doctrines and cannot be flexible according to the needs (Purnomo, 2017). The nationalistic provisions are no longer existed, they are abandoned as consequence of the commitment to comply with international agreements, especially the WTO-TRIPS Agreement as public law. It is categorized as public law because it regulates economic relations between countries, even up to the context of relationship between individuals and companies, including related entities (Sirait, & Tiopan, 2018).

In this paper the authors use responsive legal theory (Nonet, & Selznick, 1978) and social engineering theory as promoted by Roscoe Pound with the doctrine of law as a tool of social engineering (Kusuma, 2009). In responsive legal theory, law is understood as a responsible and adaptive to the progress of social phenomenon. In such a concept, the law operates to maintain essential things for its integrity to address to the existence of new forces in its environment. The characteristic of responsive law is to look for the implied values contained in regulations and policies. This theory is relevant as the tool for analysis of the norms and policies in the Patent Law.

Additionally, Roscoe Pound's legal theory is also used as mentioned above because through patent legal instruments, Indonesia wants to "engineer" the change from an agrarian society to become an industrial society. The norms of the Patent Law will directly move to engineer a new society based on the vision and orientation of the industrial economy.

The policies direction of patent law should be based on national condition and interest. The use of national interests as the basis for policy and consideration in formulating patent system is part of the politics of IPR law that needs to be understood. In the Indonesian context, the main concerns is the principle of mutual cooperation. On the other hand, however, the principle of mutual cooperation is confronted with liberal and individualistic principles that are adopted in most developed countries. In practice, especially when discussing changes to the 1989 Patent Law, the provisions with nationalistic spirit were reviewed, and then dropped as regard to the compliance of Indonesian commitments to international agreement, especially the WTO-TRIPS Agreement.

This paper intends to answer 2 (two) following problems:

1. How is the background of Indonesian Government's policy and its politics of law in the establishment of the Patent Law?
2. How is the policy direction of Indonesia's Patent Law in accordance to the national interests?

In terms of substance, this paper is novel and original compared to some references as quoted as follows:

Tommy Suryo Utomo in The Pharmaceutical Patent Protection Impact on Indonesia Drugs Price which analyzes the impact of patented

pharmaceutical product on medication's prices (Utomo, 2009). Such a topic is only one example of the policy that the author analyzes. Yoyon M. Darusman reviewed the title regarding the position and legal protection for patent holders in the framework of Indonesian national and international law (Darusman, 2016). This topic is different in terms of the approach and focus of the research study.

Meanwhile, on the Public Interest in Patent Protection, Winner Sitorus' article concerns the principle of public interest that does not have criteria, both in patent regulations and the TRIPS Agreement (Sitorus, 2014). Furthermore, although not too "apple to apple comparison", Agus Sardjono's writings on Culture and Intellectual Property Development in Indonesia discussed in depth Indonesia's policy of adopting the IPR Law regime, including patents and transfer of technology (Sardjono, 2011). The direction and focus of the analysis differs from the writer's topic. On an international scale, two journals have been used by the author as a comparison. The Chinese Journal Perspective, containing Bryan Mercurio's writings on The Protection and Enforcement of Intellectual Property in China Since Accession to the WTO: Progress and Retreat which highlights on China's failure to enforce IPR laws (Mercurio, 2012). It was analyzed in terms of conditions, whether the Chinese government has the power to enforce IPR laws, or it is weak in facing conflicts and challenges related to domestic interests. Meanwhile, Song Hongson from Yantai University, China, reviews the dilemma on patents in China. In the WIPO Journal: Analysis of Intellectual Property Issues, it is questionable whether patent growth is driven by government policy or market force. Does the article focus on Patent as a Developmental Target? Dilemma of China's Patent. Indicated Innovation Incentive Strategy, 2016. In short, the author's article has its own state of the art.

B. RESEARCH METHODS

The research methods of this articles is normative as explained by Peter Mahmud Marzuki (Marzuki, 2007). The analytical approach is the historical approach since what is discussed in this study is a pro and contra debate in the process of establishing the Patent Law in 1989, and the result of the political compromise on it.

Data sources include, among others, Law No. 6 Year 1989 on Patent, Law No. 13 Year 2016 on Patent, minutes of meetings related to the discussion of the Patent Law, national and international journals, books, and international conventions on IPR subjects.

C. RESULT AND DISCUSSION

1. Patent Law Formulation and Ratification Process

Procedurally, the drafting of a law takes a different process from the preparation of Government Regulations (PP) or Presidential Decree (Perpres). The law was drafted at the initiative of the Government or the House of Representatives initiative which was then discussed by the two parties

in a leveled process up to its ratification by the President (Natabaya, 2006 & Mahendra, 2005). Considering that the DPR is a political institution, thus based on the role and its involvement in the law making, its legal output are deemed as political products. It is a political product because law is the crystallization of political aspirations, or political wills that interact and compete with each other (Mahfud MD, 2001). Political touch and intervention can be sensed in the establishment of the law, both ones agreed upon by acclamation and also ones decided by voting. In this context, politics becomes the determinant factor of law.

As recognized by Moh. Mahfud MD (Mahfud MD, 2001), the law was apparently not sterile from political influence. Politics often intervenes in the making (and implementation) of laws. This paper does not question which subsystems are more supremative either law or politics, but questions the political influence on the law-making process and the resulting legal products. As a reference study, It is best to choose Law No. 6 Year 1989 on Patents, namely the first national Patent Law after independence in 1945. The choice of reference has a relevant reason, because this law was prepared in the midst of pro-contra discourse. There is resistance, even among the academics. Among these, there is a strong resistance to the norms of patent regulation which are substantially laden with monopolistic characters. Such characters are considered not in accordance with the values of mutual cooperation that are still rooted and actually existing in people's lives. It should be admitted that this discourse is the remainder of rejecting reaction to the promotion of Copyright Act. In addition, the degree of life and level of development progress in Indonesia are still considered not ready to implement this highly influential patent law system.

It is noteworthy that the controversy surrounding the Government's policy in the field of IPR law did indeed arise when the Government and the DPR revised Law No. 6 Year 1982 on Copyright. The substance and direction of the amendment regulated in Law No. 7 Year 1987 gave the impression that the Government accommodated individualistic, monopolistic and even liberal values. This is considered as a form of Indonesia's weakness on its bargaining power towards donor countries (Sardjono, 2011). The evidence is, the provisions regarding the extension of the period of copyright protection appear to no longer prioritize the character of social functions. On the contrary, it is more accommodating the individualistic values, including the establishment of monopoly rights over creation. Moreover, the initiative in formulating the Patent Law, which has stronger monopolistic character, makes it more difficult for the Government because it is considered to have promoted individualistic and monopolistic values. The attitude of resistance to the need to protect inventions in the field of technology actually seems to be stronger among universities. Academics seriously question the policy basis that underlies the development of the national IPR legal system as a whole. What is certain, at that time

Indonesia only had the Trademark Law Year 1961 and the Copyright Act Year 1982, which are very minimal and very limited. To be able to have a complete, modern and adequate IPR legal system, in accordance with the norms and standards of the TRIPS Agreement, Indonesia must strive to set up a number of laws. Among them, the Patent Law, the Industrial Design Act, the Trade Secret Act, the Integrated Circuit Layout Design Act, and the Plant Variety Protection Act. However, developing a legal system for IPR is certainly not finished by just compiling the legislation. Like China, which has been very consistent with TRIPS obligation (Mercurio, 2012), Indonesia needs administrative tools to support the implementation of the system, human resource development and socialization to enhance public understanding and education of the law authorities.

Responding to resistance to the plan to establish the Patent Law, the Government has provided policy answers that are justifiable, logical and address to the reality of the capabilities and conditions of the Indonesian society at that time. It should be admitted that Indonesia's capacity and capability in the field of technology is indeed not equivalent to that of developed countries. That is why, the direction of patent regulation policy must rest on conditions of national ability and interest. In Catherine Seville's view, "national laws, unsurprisingly, tended to focus their attention on the protection of nations rather than non-nationals" (Seville, 2013). As indicated above, the idea to prioritize national interest as the absolute ground for the patent system is part of the politics of IPR law. For example, the impact of patents on medication prices (Utomo, 2009). In short, the real situation and conditions as well as the level of ability of the Indonesian people were taken into consideration. Those factors strongly influenced the policies and direction of the stipulated regulation. This condition reflects the view of Moh. Mahfud MD (Mahfud MD, 2001), which assesses the law as a dependent variable (influenced variable) and politics based on national interests as an independent variable (influential variable). The legal status as a variable influenced by politics or determinant politics that dictate legal policy is seen in Indonesia's first Patent Law which was passed in 1989 and entered into force in 1991. The spirit of national interest defense strongly colors various regulatory policies in the law. It is certain that national interest is not the only variable that directs the mission and objectives of the regulation. Through the Patent Law, Indonesia hopes to optimize the acceleration of industrial development. Its mission is clear, namely to protect technological inventions, investment flows and technology transfer. It eventually create a supportive climate to the development of creative and innovative capabilities. All of them are directed to support the progress of industry and the national economy in order to realize the welfare of the people. Once again through the Patent Law, the state must be strengthened and not weakened in the management of people's welfare (Charda S, 2017). Even though

the legal mission is as tool of social engineering (Roscoe Pound), can be understood, yet its rationality remains a question as to whether it can be sustained from the dynamics of change and pressing criticism. Roberto M. Uenger recognizes the importance of being aware of imperfections in the legal system as a source of regulating social needs and interests (Uenger, 2007). After all, as a political product, law is a form of maximum compromise of various interests and aspirations that develop in society. In discussing the Draft Patent Law in the DPR, the aspirations of all political forces also colored the ratification decision. Not everything can be decided by unanimous agreement. There are some regulations that are decided as the results of "oval" agreement. That is, leaving different views and even opposite. With such a background, the 1989 Patent Law was compiled, discussed and finally enacted.

Facing various dynamics of interests along with the potential vortex of conflict, the makers of the Patent Law are required to have the ability, knowledge and drafting skills to make a best legal products. These legal products cannot be sterile from policy norms. In other words, it cannot be based solely on logic. No matter how strong political pressures are and how wide the different levels of inherent interests, they must be compromised to set up rules that are based on the values of expediency, fairness and clear objectives. That's the content of its ratio legis. In this relation, W. Friedmann suggested that legislators form an effort to ensure that the laws drafted can accommodate and follow social dynamics while maintaining stability (Mertokusumo, 2007). How to realize the balance of the two aspects can be seen at the level of implementation, especially in judicial decisions. Judges will certainly use the law as a guideline and basis for formulating decisions. Through its decision, the judge has the role of actualizing the values of justice, expediency and legal certainty proportionally. Thus, there is a close correlation between the duties of lawmakers and the duties of judges in the executing court. In Van Apeldoorn's view (Mertokusumo, 1990), judges and legislators form rules together. The difference is that judges produce individual and concrete decisions that only bind the parties to the case, while the legislators make a general and abstract laws and regulations. Such laws and regulations apply in general and are not directed at specific individuals or people. In practice, the good and bad of judge's decisions in a judicial institution is also influenced by the good and bad of law and legislation. However, it is not uncommon for a decision in a judicial institution to be determined without fully referring to the applicable laws and regulations. This means, the principle of judge-made-the-law applies (Marzuki, 2008). Such decisions play a role in filling the legal vacuum which in turn will be used by lawmakers as one of the considerations in perfecting legislation. With this, series of legal development is carried out from time to time continuesly.

2. Legal Principles, and Legal Rules in Patent Protection Conception

a. Legal Principles: Appropriateness in Patent Protection

Patent is an IPR legal system that covers technological inventions as objects of protection (Bainbridge, 1996). All kinds of new inventions that can be applied in industry are basically patentable. In some developed countries, such as the United States and Europe, the patent system is implemented in a spirit that tends to be liberal (Correa, 2000). In principle, anything under the sun that is made by men is patentable (Burger, 1980). Such principle is clearly not suitable for Indonesia because of the spirit of freedom that seems unlimited. There are restrictions that must be considered, especially those related to the concept of appropriateness or propriety values.

In Indonesia, policies in various fields of life are limited to not lead to the accommodation of liberal values. Likewise, in IPR legal policies, which do not provide room for the adoption of liberal values and unlimited freedom. In addition to moral and propriety constraints, the Indonesian Patent Law rejects technological inventions that are contrary to public order. Norms like this are actually universal and become the principle of general law. As an abstract principle, its values must be conveyed in concrete regulations to confirm legal certainty. The problem is, even though it has been stated in concrete norms of regulations, such regulations often unable to be directly applied in daily realities. It could be admitted that the function of principle as stated by Sudikno Mertokusumo still does not change into technical or operational norms (Mertokusumo, 2007). The principle of law remains the basic thought or foundation in concrete set of regulatory provisions. Moreover, the rule of law is distinct from legal norms. It is the most perfect means to express what is projected by legal norms (Rahardjo, 2006).

The patent system in developed countries also has a pro-and-con debate. Among them, related to the application of technology regarding living things. The genetic engineering of mice, which widely known as Harvard College's Onco-Mouse application, is a relevant example (Cornish, 1990). In terms of necessity, genetic engineering of mice varieties is carried out to support cancer research activities. The problem becomes not simple because there appear various opposing views, especially from the perspective of the benefits and conversely disadvantages. After that problem, the patent application issue was also raised for rat engineering proposed by the cosmetics research institute. The pro-contra discourse repeats itself again and again. However, the debate is not as serious as the Harvard Onco-Mouse because the latter does not have an extraordinary meaning and benefit that is truly significant for the treatment efforts and human life. In Indonesia, all forms of inventions related to living things, except micro-organisms are not entitle to have patents. Patent exemptions for living things are based on propriety in the society. The value of propriety is what Van Eikenna Hommes, and also Sudikno (Mertokusumo, 2007), considered as a legal principle which forms the basis or directions for the making of legal norms. The legal principle should not

be considered as concrete legal norms, but should be deemed as general ground or instructions for operational regulations.

Furthermore, it is important to emphasize that the above concept is in line with Scholten's view which states that legal principle is a mere tendency required by public order and morality values. Therefore, it is correct for Sudikno's opinion (Mertokusumo, 2007) to assess the principles of law, as stipulated in the Patent Law, as general ground of thoughts contained in concrete patent regulations.

b. Legal Rules: Patent Limitation

Legally, the provisions concerning restrictions on patent protection are also directed at inventions whose publication and use or implementation are contrary to prevailing laws, public order and morality. Such restriction or limitation is logical in any sense. As the rule of law, every regulation governing the granting of legal rights must be given limitation and exception.

In Patent Law No. 13 Year 2016, the provisions concerning patent limitation are stipulated in Article 9 under the title of Inventions which Cannot Be Granted a Patent. The provision is clear and firm, that the Patent Law does not grant a patent for an invention in the form of a process or product that is its publication, use, or implementation contrary to law and regulation, religion, public order or morality. Previously, such provision had been stipulated in a concrete provision, namely Article 7 of Patent Law No. 6 Year 1989. As a positive law, such normative rules apply as a legal binding. Namely, norms and regulations that provide the fence as well as guidance for the public activities, for example in choosing research objects, so that the interests of other parties are not affected, and at the same time remain protected (Mertokusumo, 2007). In accordance with its function to protect the interests of human beings and society, legal norms aim to regulate the social life peacefully, which results in orderly, balanced and stability of society.

According to Apeldoorn (Mertokusumo, 2007) an orderly, stable and balanced community life will bring welfare to the people's lives. The rule of law has the task to seek a balance in the society's order by force. Such legal norms originate initially in the religious and moral values, both of which seem more likely to prioritize personal interests. Additionally, also the decency and propriety rules oriented towards mutual interests and complement each other. This means, non-legal rules still need legal rules because many human interests could slip through the reach of such non-legal rules' protection. All of the above perspective have become an underlying consideration and a guideline in the limitation norms of patent protection.

In Patent Law No. 6 Year 1989, limitations at the humanitarian dimensions are contained in the normative provision of Article 7 letter b, namely, the invention of process or product result of food and beverages, including production results in the form of materials made through chemical processes with the purpose of making food and beverages for the consumption of human beings or animals. This

limitation is needed because it is related to food issues, namely to maintain and secure food availability, food security and food resilience. In short, the Patent Law must not be an issue or obstacle in the policy in the field of food, an idea that coincides with the interests and livelihoods of many people. The same reasoning is also behind the restrictions relating to the exemption of granting patents for inventions related to new types or varieties of plants or animals, or concerning any process that can be used for breeding plants or animals and their results.

Furthermore, limitations based on norms of exemption are also applied to the inventions on methods of examination, treatment, management and surgery applied to humans and animals, but do not reach any products used or related to the method. This limitation is normative and is supported by technical reasons too, namely the impossibility of such methods to be industrially applicable.

Methods of treatment and care and surgery are indeed very closely related to human interests, especially health problems and even life. That is why, this restrictive norm also implies deep social human values. However, the main consideration in including this limitation norm is actually more technical. Shortly, it is related to the invention patentability requirements can not be fulfilled. Since it has the potential to cause debate, the Patent Law needs to emphasize it in the norm of exclusion. This last consideration is very appropriate to be the exclusion reason for the discovery of theories and methods in the fields of science and mathematics. The norms formulated in the provision of Article 7 letter e is very clear and decisive!

3. Legal Norms in Patent Law

a. Legal Norm: Patentability Criteria

As a law, the patent system is developed based on norms, criteria and technical provisions. In other words, the patent application system, starting from the application submission procedure to the application examination, is based on administrative terms and conditions and technical criteria. Administrative requirements are applicable in order to filter the validity of the patent applicants, especially regarding the status and relationship with the invention requested for a patent, (Ramli, & Putri, 2018), together with the completeness of documents and fulfillment of determined fee payments. Meanwhile, technical requirements are more substantive requirements to measure whether an invention can be granted a patent or be rejected. However, before all substantive parameters are applied in examining a patent application, the initial criterion that must be tested is whether the "invention" or the invention really falls within the scope of the invention as referred to in the patent law system. For example, whether a computer program is an invention that is included in the invention qualification. Does the technology for making new plant varieties, also qualify as an invention? What about the kumon method or mathematical technique? All of these become the initial filter before entering the stage of testing the criteria and technical requirement of patentability.

In the patent system, especially to test the patentability of the invention, legally there are three technical criteria. In Law No. 13 Year 2016 concerning Patents it is affirmed that the invention must be novel, contains inventive steps and can be applied in industry or industrially applicable. What is meant by novel or new, actually involves technical questions that not only question the status of its inventing date but also the technical quality of its problem solving. The law does have difficulty in spelling out novelty criteria based on the inventing date of the invention. This is then circumvented by evaluating it in terms of its publication record. The direction is to ascertain whether the invention has been previously published, or whether it is part of the prior art or completely the same as the prior art.

Normatively, an invention is considered new if on the filing date of filing a patent application, the invention is not the same as the previously disclosed technology. This means, it has already been published in Indonesia or abroad in a written, oral description or through exhibition, use or other means that allow an expert to use the invention. This norm is clearly defined in the Patent Law No. 13 Year 2016. All of these are juridical technical criteria which form the basis of the drafting of the law. So far, Indonesia has revised the provisions regarding novelty to be able to provide guidance towards understanding of such criteria more accurately and clearly. Of course, what is meant as a prior invention must also be clarified. Technically, this problem will move upon the need for clarity and limitation on what is considered as publication which is then used to assess the status of the novelty. The novelty value of the invention is examined by measuring the progress of the invention by comparing it to the technological prior art.

Furthermore, the inventive steps criteria are not easily described in the law. The formulation that is commonly used for that so far place it more on what the judgment of experts is in their fields or so called non-obvius. In principle, an invention is considered to have inventive steps if in the eyes of an expert in his field, the invention is a "solution" that has never been predicted before. For objectivity, the assessment is based on the actual expertise parameters. That is, it is not measured by outdated expertise in engineering, but must be up to date in accordance with the principles of the state of the art. State of the art is the highest level of technological or scientific achievement at certain given moment of time.

> ”The state of the art is the highest level of development, as of a device, technique, or scientific field, achieved at a particular time. It also applies to the level of development (as of a device, procedure, process, technique, or science) reached at any particular time usually as a result of modern methods”.

Industrially applicability criteria are applied with a simple test, that is, whether the invention can be used in industrial activities that can produce tangible products. The result of this test will distinguish whether the invention is an abstract solution or a vendible solution that can be applied in industrial activities that produce goods or things.

It should be emphasized that the three criteria above become the basis and reference in the decision to grant rights, or the refusal of the patent application. The provisions in the Patent Law are intended to guarantee legal certainty and to establish an orderly arrangement. For this reason, it is necessary to define clear norms. The difficulty is how legal language is able to describe technical aspects that often require vocabulary that is not commonly used in dictionary or daily conversation. Van Apeldoorn (Mertokusumo, 2007), acknowledged that legislators is not an easy profession. This profession must have knowledge in other fields, such as social, economic, historical and others that are relevant to the legal substance to be formulated or compiled. In addition, visionary skills are needed to be able to choose the best setting options from the various alternatives available.

The study of Legal Theory notes Donald Black's views, especially in the jurisprudent model that focuses more on policy making. According to this model, the legal process is regulated and arranged by legal logic. Law is seen as something that is mechanical and regulates itself through human rules and logic. Within the framework of this model, humans will act as participants or actors who play the role of running the system, namely those who play and use the system based on that ratio (Black, 1989). That is the reason why law is often identified with logical concept. To test the validity of law, or community resistance, the question that is always used is whether the rule is logical. In another phrase, does the legal provision have the same logical foundation as the perspective of society.

In terms of timeframe, it has become a uniform norm that patent law provides a protection period of 20 years, with the condition that the technology is truly a new invention, can be applied in the industrial field and has a significant inventive step based on the measurement of the experts in their fields.

Normatively, to obtain a patent, the inventor must submit a request to the state, namely Patent Office. The procedure, can be submitted directly or through the Patent Cooperation Treaty system (Novianti, 2017). Its contents, must be in accordance with the application standards which must clearly state the scope of the invention and the claim for which protection is applied. Patent applications can be submitted for inventions in the form of new products or processes that have never been previously invented.

As elaborated above, the types of new products and techniques that can be granted patents are limited with the norms of decency, ethics and social order. This means, in addition to limitations on technical criteria, in the patent system, legalistic restrictions in the form of exceptions and limitations also apply, as a reflection of the balance of interests as well as protection necessarily for the community. These restrictive norms can secure the balance of the order as Van Apeldoorn referred to as the principle of restitutio in integrum. Namely, an orderly order that is able to provide legal certainty.

b. Limitation Term of Patent

For further discussion, it is relevant to question on the problem concerning the limitation on term of patent protection. Initially, in Law No. 6 Year 1989, the terms of patent protection is only 14 years and can be extended for only 2 years. After the TRIPS Agreement came into force, the period is adjusted to 20 years. In Patent Law No. 13 Year 2016, the protection period of 20 years is determined in Article 22 together with the specification of the start and end date of the patent terms. It is also stressed that the period could not be extended. Specifically for petty patents the terms is defined in Article 23, which is limited to only 10 years.

In the historical minute of the discussion on the Patent Bill, especially regarding norms related to determining the terms of patents protection, there was indeed a debate concerning the length of the protection period. The debate did not reach to the conclusion because there really was no reference. Paris convention is silent. It means the determination is up to each country to decide (Azed, 2006). Meanwhile, countries that already have patent laws set their own decisions differently (Poltorak, & Lerner, 2002). Domestically, representatives of the foreign pharmaceutical industry demanded an optimal period of time, 20 years. On the contrary, the domestic industry requested it to be as short as possible so that they can sooner become public domains. There are no standards and guidelines. Therefore, the public insist to asks for no more than 10 years. The discussion of the 1988 Patent Bill faces dynamics of group interests that are not easily accommodated.

It is common that various interests often lead to disagreements which must be compromised so as not to cause conflict. In this case, the lawmakers must be able to consider with the strength of their analysis, in order to be able to establish norms for fair and minimal resistance. As Gustav Radbruch views, the goal of law is justice. The forms of justice can vary, but the most important is how to manage justice. In the context of patents, justice must be considered both in terms of the interests of the inventor as well as the public as consumers of patented products, for example medicine and other pharmaceutical products.

As stated above, patent system is active in nature. That is, the inventor must submit a request for that to the Patent Office. From the procedural aspect, both which are stipulated in the 1989 Patent Law and Law No. 13 Year 2016, there is relatively no difference. In the new Patent Law, provisions regarding the procedure for patent applications is regulated in Chapter III, from Article 24 to Article 45, including within it the application with priority rights. The implementation of this priority right is based on the Paris Convention and The World Trade Organization rules. If the requirements are met and the patent is granted, the patent holder must actively manage the patent, for the term of the patent, including paying an annual fee. Failure to pay annual fees within a specified period, for example 3 consecutive years, will result in the patent being

revoked as stipulated in Article 116 of Law no. 6 Year 1989 on Patents. Despite of the period of a patent, a patent will also be declared null and void if it is not carried out within a certain period of time determined by law. Both provisions with revocation sanction are legal norms that arise legal obligations as referred to by Kelsen (Asshiddiqie, 2006). This means, legal obligations uprise because legal norms require it.

To receive protection, the inventor must open in logical detail and a description of how to implement the invention. Protection is realized through patent rights which give the inventor the exclusive right to exploit the economic benefits of his invention (Poltorak, & Lerner, 2002). Exclusive rights has the same meaning as monopoly rights. The inventor's decision to open his invention can be interpreted as a final calculation to not choose a trade secret law for protection. It must be admitted that patents do promise stronger protection (Bainbridge, 1996) compared to other IPR regimes. Such protective power makes the patent system more preferable to be legally relied on. However, patent monopoly is not absolute in characteristic (Bainbridge, 1996). According to David I Bainbridge, "The monopoly is not absolute and there is a number of checks and balances to curb its abuse." What is certain, the implementation of patents is still limited by the norm of balancing rights and obligations, including its balance with the interests of society or the nation and state and preventing adverse abuse. This means, if the state requires, then the exclusive rights and monopoly rights are no longer absolute.

The state has the right to force to utilize the patent without prejudicing the reasonable interests of the inventor. This last norm is commonly regulated in the mechanism of compulsory licensing (Sitorus, 2014) and government use. Government Regulation No. 27 Year 2004 regulates, among others, inventions in the field of firearms, ammunition, chemical weapons, biological weapons, nuclear weapons, military explosives, and other military equipments. In addition, pharmaceutical products are needed to overcome contagious disease epidemic (Darusman, 2016).

It must be admitted that among the several policy choices, there is a balancing instrument that has been commonly used. For example, restrictions on the period of protection, patent revocation, government use and freedom of doing reverse engineering. It is important to note that at the beginning of its preparation, such problems were very much concerned and considered. Moreover, considering the attitude of resistance among people who live with their own logic that adopt the patent system will have an impact on rising prices for goods, especially food and medicine. The rejection attitude was also supported by the anti-monopoly philosophy. Although not very clear, such reaction is actually not based on a whole and complete understanding of the importance of patents. Monopoly is even identified with individualistic manner and selfishness that are not in accordance with the values of mutual cooperation that have been maintained as part of the social order of Indonesian society. While amending

the Copyright Act Year 1987 the government was regarded as introducing individualistic values, through the enactment of the 1989 Patent Law the government can be considered to be increasingly promoting such unsuitable values. As in China, it is still questionable whether patent growth is really driven by state policy or because of market force. In other words, driven by policies and regulation or intended impact of market mechanism (Hongsong, 2016).

D. CONCLUSION

As part of the National IPR legal system, the norms of the Patent Law No. 6 Year 1989 are actually very intriguing to be observed. The narrative of these norms illustrates the ratio legis which is not devoid of interests, whether economic, political, social or foreign relations as well as defense and security. History records that, amidst the logic of community resistance and its pro-people propositions, the establishment of the Patent Law in November 1989 was highlighted as a controversial one. It must also be acknowledged, that there is prominent wisdom behind the long heated and tiring debate. The various background issues of the controversy provide its own learning lesson on how to heed aspirations from society.

In general, the law has succeeded in compromising various opposing interests, harmonizing diverse aspirations and policy orientations with each differing basis. The Patent Law has crystallized various aspirations and interests into mutual synergy. From the perspective of politics of law, this law offers a series of smart policies (legal policy), in addition to diplomatic strategies and the ability to narrate norms clearly and measurably. Whatever the outcome and whatever the process, the law has become a political decision that represents the nuance of national interests. This is what is important. The principles, rules and norms of the 1989 Patent Law can show partiality, pro-people spirit and clarity of regulatory direction, as well as targets to be achieved through legal instrument. What is certain, the Patent Law does not merely an administrative instrument or technical rules to regulate procedural aspects of obtaining a patent (how to get a patent). More than that, it is a legal instrument that is directed to maintain balance in the ownership of rights, legal certainty and justice as well as being an economic instrument beneficial for industrial development, especially the development of technological invention and fruitful community innovation.

It must be admitted that the spirit of nationalism in the 1989 Patent Law has to be confronted with norms and regulatory standards in the global landscape. The knots of domestic aspirations become loose due to being pushed by the power of global paradigm. There is no other choice. Trade liberalization has forced Indonesia to liberalize its trade regulations. There must be no more protection for national aspiration. The TRIPS agreement as part of the Agreement of The Establishment of The World Trade Organization /

WTO has narrowed the accentuation space for spirit of such pro-national interest. However this is the price that has to be paid as a consequence of Indonesia's participation in the WTO Agreement.

Furthermore, after the ratification of the WTO Agreement, the 1989 Patent Law has undergone a series of changes through amendments in 1997, then replaced in 2001, and replaced again in 2016. In terms of substance, the latest Patent Law has been completely sterile from a large number of pro- people policies. In short, the 2016 Patent Law has truly displayed Indonesia's strict adherence to WTO hegemony, as well as compliance to WTO norms and standards, an obligation that is not fully aligned and equal with Indonesia's ability to fulfill it.

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