

Legal-Political Study of the Job Creation Law on Revocation of Article 20 of Law Number 13 of 2016 concerning Patents

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Article info

Submitted:
2022-02-17

Reviewed:
2022-04-03

Accepted:
2022-05-04



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Publisher

Universitas Muhammadiyah
Magelang

Keywords: Omnibus Law,
Job Creation Law,
Revocation, Patents

ABSTRAK

Perlindungan paten di Indonesia saat ini masih menimbulkan berbagai permasalahan, baik secara praktis (pelaksanaan) maupun konseptual (penerimaan oleh masyarakat). Sementara itu, pemerintah Indonesia mengambil langkah untuk menyelesaikan permasalahan paten tersebut dengan mencabut ketentuan Undang-Undang Paten dalam Omnibus Law Nomor 11 Tahun 2020 tentang Cipta Kerja. Tujuan penelitian ini adalah menganalisa kajian politik hukum Undang-Undang cipta kerja atas pencabutan Pasal 20 Undang-Undang Nomor 13 Tahun 2016 tentang Paten. Penelitian ini merupakan penelitian dokmatik dengan pendekatan Undang-Undang dan pendekatan konseptual. Penelitian ini menemukan bahwa, hukum memegang peranan yang sangat penting dalam kehidupan bernegara, oleh karena itu idealnya setiap hukum yang ditegakkan harus mencerminkan (*rechtside*) dan cita-cita nasional (*staatside*) bangsa Indonesia. Hal tersebut dalam rangka mewujudkan keadilan sosial, membina masyarakat dengan persatuan, mewujudkan kesejahteraan materi dan spiritual yang adil, serta mencapai keseimbangan yang proporsional. Penghapusan isi Pasal 20 Undang-Undang Paten 2016 dalam Undang-Undang Cipta Kerja mengandung asumsi kepentingan oligarki di dalamnya.

Kata Kunci: Omnibus Law, Cipta Kerja, Pencabutan, Paten

ABSTRACT

Patent protection in Indonesia today still leaves various problems, both practical (implementation) and conceptual (acceptance by the public). While, the Indonesian government took a place to settle the issues on the patent by revoked the provision on the Patent Law into the Omnibus Law Number 11 of 2020 on Job Creation (UU Cipta Kerja). The purpose of this research is to analyse the enactment of Omnibus Law (UU Cipta Kerja) as the revocation of Article 20 of Law Number 13 of 2016 concerning Patents. This research is dogmatic research with a statute approach and a conceptual approach. This research found that, the law plays a very important role in the life of the state, therefore ideally every law enforced must reflect (*rechtside*) and the national ideals (*staatside*) of the Indonesian nation. This is in the context of realizing social justice, fostering a united society, realizing just material and spiritual welfare, and achieving a proportional balance. The abolition of the content of Article 20 of the 2016 Patent Law in the Job Creation Law actually contains the assumption of an oligarchic interest in it.

I. INTRODUCTION

In the end of 2019, the Indonesian president Joko Widodo for the period 2019-2024 brought a new view of changing the concept of statutory law, namely the Job Creation Law No. 11 of 2020 (Omnibus Law or UU Cipta Kerja). The goal of the Omnibus Law is to increase the investor confidence in Indonesia by reducing rules and simplifying the licensing procedure (Azanella, 2019).

Part of the government programs during the Jokowi leadership era focused on increasing investment. Furthermore, President Jokowi said in a forum "conversation with Indonesia" which essentially invites the other countries to invest in Indonesia through collaboration with the Ministry of Investment or Investment Coordinating Board (BKPM). This forum facilitates bilateral discussions (one-on-one discussion) between potential investors in Asia and Europe/United States with senior representatives from BKPM.

As a form of the government's seriousness in increasing investment interest both from home and outside the country, it is the goal of a new breakthrough by simplifying the complexity of regulations as well as revising several laws through the Omnibus Law, namely the Law on Taxation, the Law on Job Creation and the Law on the Empowerment of Medium, Small and Micro Enterprises (MSME). Referring to the constitutional mandate stated in Paragraph IV of the Preamble to the 1945 Constitution, it is stated that the Government of the Republic of Indonesia protects the entire Indonesian nation, promotes public welfare, and educates the nation's life. The embodiment of this paragraph is further described in Article 28C paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that:

"Everyone has the right to develop themselves through the fulfillment of their basic needs, the right to education and to benefit from science and technology, arts and culture, in order to improve the quality of their lives and for the welfare of mankind."

These provisions indicate that the Government is obliged to promote the welfare of the people and provide broad opportunities for the people to acquire and develop themselves according to their abilities. In modern society, appreciation for the results of knowledge, art and culture is accommodated through the granting of exclusive rights for inventors, namely the recognition of intellectual property rights (IPR). Patents as a type of IP in technology have a significant and strategic role in Indonesia's development, especially in stimulating economic growth (Tobing et al., 2022b). Moreover, patent is crucial for a country, especially Indonesia as a developing country, which incidentally needs to accelerate development in all fields so that it does not always follow the developed countries. One of the accelerations carried out by Indonesia is the obligation for patent holders to manufacture products or do the processes in Indonesia. Provisions relating to this matter are regulated in Indonesian Law Number 13 of 2016 concerning Patents.

Indonesia has regulated IPR, through various laws. These various arrangements regarding IPR also function as a complement to Article 5 paragraph (1), Article 20 paragraph (2), and Article 33 of the 1945 Constitution of the Republic of Indonesia (UUD 1945), as well as Law

Number 7 of 1 1994. concerning Ratification of the Agreement Establishing the World Trade Organization.

The draft job creation law, which is currently being discussed by the general public, is expected to be able to bring about major changes in the legal order in Indonesia. One of them is the issue of the abolition of Article 20 Paragraphs 1 and 2 of Law Number 13 of 2016 concerning patents which is presented in Table 1 as follows:

Table 1 Comparison of Article 20 of the Patent Law and the Job Creation Law

Patent Law 2016	Job Creation Law
<p>Article 20</p> <ol style="list-style-type: none"> 1. Patent Holders are required to manufacture products or use processes in Indonesia; 2. Making the product or using the process as referred to in paragraph (1) must support technology transfer, investment absorption and/or job creation. 	<p>Article 20</p> <ol style="list-style-type: none"> 1. Patents must be implemented in Indonesia 2. The implementation of the Patent as referred to in paragraph (1) is as follows: <ol style="list-style-type: none"> 1) Implementation of product patents which includes making, importing, or licensing products that are granted a patent 2) Execution of a process patent which includes making, licensing, or importing products resulting from the process for which the patent is granted. 3. Implementation of method, system, and usage patents which include making, importing, or licensing products resulting from the patented methods, systems, and uses.
<p>Article 124</p> <p>The Minister is obliged to give a decision to approve or reject a simple patent application no later than 12 months from the date of receipt of a simple patent application</p>	<p>Article 124</p> <p>The Minister is obliged to give a decision to approve or reject a simple patent application no later than 6 months from the date of receipt of a simple patent application.</p>

The change in policy has an impact on the concept of legal politics in Indonesia. The legal products in Indonesia means political products. Therefore that the upcoming lawful product does not against the Indonesian people or the state. Padmono Wahojo in his book defines legal politics as a policy of state administrators that is fundamental in determining the direction, form and content of the law to be formed and about what criteria are used to punish something. Thus, legal politics according to Padmo Wahjono is related to the law that applies in the future (*Ius Constituendum*). Teuku Mohammad further defines legal politics as a statement of the will of the state authorities regarding the laws that apply in their territory, and regarding the direction of development of the law that is built (Syaukani & Thohari, 2015).

In essence, the role of legal politics in the formation of laws and regulations in Indonesia is as a means of realizing the goals of the state. Meanwhile, Indonesia emphasized the purpose of the state for the purpose of establishing the Unitary State of the Republic of Indonesia in its constitution, specifically at the Preamble to the 1945 Constitution of the Republic of Indonesia (UUD 1945). In the Preamble to the 1945 Constitution which is the *Staatfundamentanorm* it is stated that the objectives of the establishment of the Unitary State of the Republic are; (1) protect the entire Indonesian nation and the entire homeland of Indonesia, (2) promote public welfare, (3) educate the nation's life, (4) participate in implementing world order based on independence, eternal peace and social justice.

Therefore, as a means of achieving the goals of the state, the legal objectives must be achieved first so that the goals of the state will be realized properly. Therefore, in this paper, the author will discuss in more depth the role of legal politics in the formation of legislation in Indonesia in realizing the goals of the state. Based on this background, this study aims to analyze the study of the legal politics of the copyright law on the revocation of Article 20 of the Patent Law.

II. RESEARCH METHOD

This research is dogmatic research with a statute approach and a conceptual approach. The types of data used in the research are primary data sources consisting of Law Number 13 of 2016, Law Number 12 of 2011 concerning the Establishment of Legislation, Regulation of the Minister of Human Rights Number 15 of 2018 concerning the Implementation of Patents by Patent Holders and Law Number 11 of 2020 concerning Job Creation. Secondary data sources include books, journals, articles and other sources relevant to the topic. The data will be analyzed descriptively qualitatively.

III. RESULTS AND DISCUSSION

3.1. Directions of Indonesian Regulatory Policies in the Perspective of Legal Political to Achieving State Goals

The objectives of Indonesia regulated in the preamble to the 1945 Constitution of the Republic of Indonesia (UUD 1945) in the fourth paragraph. Sociological and juridical problems for a country greatly affect the realization of state goals. The value of the social order, conditions, geography, history of its formation and the political influence of state authorities also affect the goals of the state.

The 1945 Constitution is the source of the entire Indonesian national legal politics. But in practice, the law is often a reflection of the will of the holder of political power so that not a few people view that law is the same as power. The 1945 Constitution recognizes rights (including property rights) and individual freedoms as human rights, but at the same time places common interests above personal interests. Meanwhile, legal politics is a legal policy that has been or will be implemented nationally by the Indonesian government which includes (Sopiani & Mubaraq, 2020):

- a. Legal development with the core of making and updating legal materials so that they are in accordance with needs
- b. The implementation of existing legal provisions includes the affirmation of the function of the institution and the guidance of law enforcers.

In relation between legal politics and state goals, it can be seen in the RPJP (Long-Term Development Plan) and RPJM (Medium-Term Development Plan). This RPJP or RPJM is the policy direction (politics) of the authorities and other administrative bodies to achieve the goals of the state (Masnun & Roszana, 2019). Because in writing, the RPJP and RPJM become the standard of success of the government in managing existing resources in order to achieve state goals. From the description above, it can be concluded that National Legal Politics is the basic policy of state administrators in the field of law that will, is currently and has been in effect, which originates from the values that apply in society to achieve the country's aspired goals.

Legal politics can be interpreted as a means of supporting smoothness, the government has the authority to make a national legal regulation as a tool to control the community. Ali serizawan describes the political objectives of national law, namely (Frenki, 2011):

- a. As a tool or means and steps that can be used by the government to create a desired national legal system,
- b. With this national legal system, the ideals of a larger Indonesian nation will be realized.

Currently, Indonesia does not have a representative legal system, so Arif Sidharta's proposal regarding the national legal order must contain the following characteristics (Shidarta, 2020):

- a. Insight of nationality and the archipelago;
- b. Able to accommodate legal awareness of regional ethnic groups and religious beliefs;
- c. As far as possible in written and unified form;
- d. Rational nature which includes rationality of efficiency, rationality of reasonableness, rationality of rules and rationality of values;
- e. Procedural rules that ensure transparency, which allow a rational review of the government's decision-making process;
- f. Responsive to the development of community aspirations and expectations.

The formulation of the National Legal Politics in Indonesia can be found in various planning documents that have been stipulated, one example of which is the Job Creation Law which was passed in 2020. This Job Creation Law is an implementation of national legal politics for the development of national law. The formal legal politics of this law is determined by the executive and legislative bodies, through each stage in its formation.

The Job Creation Law is also an economic reform carried out by the legislative (DPR RI) together with the executive. This law materially provides convenience performing business and for the purpose of deregulation, so that there will be changes in economic fundamentals through investment, cooperatives, and MSMEs, so it is hoped that it will have implications for increasing the value of investment in Indonesia (Tobing et al., 2022a). Thus, the legal reforms carried out with this regulation are directly proportional to

economic reforms, because regulations that are increasingly restrictive with bureaucratic flows will hamper economic growth and development. Nevertheless, the Job Creation Law was passed in a plenary meeting in the midst of a pandemic when there were rampant protests by the Indonesian people. The ratification of the Job Creation Law took place without a participatory drafting and discussion process and without the disclosure of information about the bill to the public. The government is discriminatory when it only involves groups of entrepreneurs in drafting the bill even before it is submitted to the legislative. The job creation law is intended by the government in order to reduce regulatory barriers and accelerate investment which is claimed to provide justice and public welfare. However, in the absence of participation from the community in planning and drafting which should be an essential process, politically questioning will be directed to where the legal politics of a regulation will lead. The role of the community itself in the process of making laws is emphasized in Article 96 of Law Number 12 of 2011 concerning the Formation of Legislation which reads:

"The public has the right to provide input orally and/or in writing in the Establishment of Legislative Regulations"

According to Mahfud MD, a democratic political configuration must provide opportunities for the community to play the most potential role so as to enable them to participate actively in determining national policies. However, the active participatory policy of the community was not heeded in the formation of the Employment Cipata Law by the government, so it did not reflect it as a responsive legal product. A responsive legal product reflects the satisfaction of individuals and social groups with social needs, so that they are more capable of realizing a sense of social justice. However, the job creation law has actually become a political game that has become a field for the coffers of the oligarchs in reaping the maximum profit from the existing loopholes.

3.2. Analysis of legal political studies of the work copyright law revocation of Article 20 of the 2016 Patent Law

Intellectual Property (IP) as an unlimited resource is a very valuable asset for the state. Furthermore, that its benefits can be felt continuously without fear of running out, just like natural resources (Maskus, 2009). As a result of human intellectual abilities that require sacrifice of energy, time, and money, IP owners can be compensated for their efforts. Therefore, IP can be a sustainable source of income for countries that have succeeded in increasing the IP they produce and provide adequate protection for IP (Darma Pertiwi, 2022).

IP is divided into several types, one of which is a patent. The government accommodates the protection of patent rights by issuing Law no. 13 of 2016 concerning patents (Patent Law 2016) which provides a legal basis for the protection of inventors, patent holders and their interests. A patent is an exclusive right granted by the state to an inventor for his invention in the field of technology for a certain period of time to make his own invention or give approval to a third party to implement it as regulated in Article 1 Number 1 of the

Patent Law. One of the important contents in the patent law is in article 20 as described in the background, which then underwent changes in the job creation law.

The consequences of Article 20 of the 2016 Patent Law indicate that the patent holder in the manufacture of the product or process must be granted a patent in Indonesia. Thus, it can open up job opportunities for the Indonesian people. Then the provisions in paragraph 2 which require the transfer of technology functions will also have an impact on the transfer of knowledge and technology to Indonesian workers which of course will be beneficial for the development of Human Resources in the future. On the other hand, these provisions indirectly play a role in technology development, because Indonesia can learn the technology behind the patent. So it can be concluded that Article 20 of the 2016 Patent Law becomes an important content for the progress of society and the nation, hence it by mens to create job's opportunities for the Indonesian people. Then the provisions in paragraph 2 which require the transfer of technology functions will also have an impact on the transfer of knowledge and technology to Indonesian workers which of course will be beneficial for the development of Human Resources in the future. On the other hand, these provisions indirectly play a role in technology development, because Indonesia can learn the technology behind the patent (Trimble, 2016).

The regulation in Article 20 of the 2016 Patent Law is based on the needs of Indonesia. Patent holders in Indonesia are still dominated by foreign patent holders. The patent holder who is a foreign national does not apply the patent in Indonesia, but uses the patent by producing it outside the country of Indonesia, and exporting the product of the invention to Indonesia, so that Indonesia will only become a consumer market. Indonesia regulates the obligations of patent holders as regulated in Article 20 of the 2016 Patent Law, so that the implementation of patents fosters new business sectors that can provide benefits in the form of technology transfer, investment absorption, and the provision of employment, while patents held outside Indonesia cannot provide these benefits.

Patent holders who exercise patents in Indonesia can contribute to the development of the economy, science and technology in Indonesia. The obligation to implement this patent can increase investment by the patent holder through the development of new business sectors. This new business sector can increase Indonesia's state revenue, because automatically the business sector will become an object of tax, in which taxes are a source of state revenue, so that more and more new business sectors will grow as a result of the implementation of the paten, so that the source of state revenue is will increase. The business sector that grows from the implementation of this patent will absorb a lot of workers. This labor absorption occurs when in the production stage human resources are needed to assist the production process of the patent, so that it can be one solution to reduce the number of unemployed in Indonesia. Indonesian workers who work in companies that apply patents, while working at the company can absorb knowledge from their participation in implementing the patents. Workers after the patent protection period has been completed, can apply it to create new innovations that can create new inventions that can contribute to more useful knowledge. The business sector that implements the patent can also improve the welfare of other parties through business cooperation with local companies in Indonesia.

In November 2020, Article 110 of the Job Creation Law was passed where one of the contents contained in it implies changes to Article 20 of the 2016 Patent Law to:

- a. Patents must be implemented in Indonesia
- b. The implementation of the Patent as referred to in paragraph (1) as follows:
 - 1) Implementation of product patents which includes making, importing, or licensing products that are granted a patent
 - 2) Execution of a process patent which includes making, licensing, or importing products resulting from the process for which the patent is granted.
- c. Implementation of method, system and use patents which include making, importing, or licensing products resulting from the patented methods, systems, and uses

With the enactment of these changes, the definition of the use of a Patent is fragmented. The new Article 20 divides the implementation of Patents into several activities, and uses the word "or" in its formulation, such as "covering the manufacture, importing, or licensing of products that are granted a Patent". Thus, by only doing one of these things, the obligation to apply a patent in Indonesia can already be fulfilled, so that the fulfilment of the provisions of Article 20 paragraph (1) becomes lighter.

The problem with the amendment to Article 20 of the Patent Law is that one of the activities covered by Article 20 paragraph (2) is "importing" activities. This means that by only importing products for which a Patent is granted, the implementation of the Patent is deemed to have been carried out and the obligations under Article 20 paragraph (1) have been fulfilled. Thus, the Patent Holder is no longer required to manufacture products in Indonesia, so he does not build factories or offices in Indonesia, which means that there is no transfer of technology and knowledge, nor absorption of manpower. Whereas the objectives of technology and knowledge transfer, as well as the absorption of manpower are the most important objectives contained in Article 20 of the Patent Law. With the formulation of the new Article 20, it is as if this objective has been removed from the Patent Law.

Removing Article 20 of the Patent Law means eliminating the obligation to use it to make products or use processes that have been patented and protected in Indonesia. Not only Indonesian citizens (WNI) patent holders, foreign nationals (WNA) also have an obligation to implement or use their patents. This raises the question "why did the provisions that were designed to support and provide the basis for technology transfer, investment absorption, and job creation were actually removed?". The background of the creation of the job creation law, it is considered that the abolition of the article will have the potential to make investment difficult. Furthermore, if the difficulty of investment is used as the basis for the assumption of the abolition of Article 20, a healthy business climate will not be created.

So far, controversy occurred in Article 20 of the Patent Law is that the majority of patent holders who are not from Indonesia have not been able to implement their patents in Indonesia. The obstacle is the unpreparedness of patent holders and the government. As a result, the Regulation of the Minister for Law and Human Rights of the Republic of Indonesia Number 15 of 2018 concerning the Implementation of Patents by Patent Holders

was issued. Articles 3 and 4 of this regulation provide tolerance for patent holders. Article 3 stated that:

"In the event that the patent holder has not been able to apply his patent in Indonesia, they can delay the implementation of the manufacture of the product or the use of the patent process in Indonesia for a maximum of 5 (five) years."

Meanwhile, Article 4 states:

"Application for postponement of patent implementation shall be submitted no later than 3 (three) years from the date of granting of the Patent."

Thus, with the promulgation of the regulation, patent holders who have not been able to implement their patents in Indonesia after their patent application has been granted or granted can apply for a postponement of the patent implementation. The five-year time limit is considered sufficient for patent holders to implement their patents in Indonesia. During the postponement period, they can also consider further the procedure for implementing their patents in Indonesia. On the other hand, if the patent is deemed to have unfavorable business prospects, the patent holder can apply for the abolition of his patent to the minister.

Furthermore, a new problem arose considering that not all investors are patent holders and not always patent holders are investors. So, if you compare the abolition of Article 20 of the 2016 Patent Law under the pretext of facilitating investment, it is appropriate to question the truth regarding the assumption that the owner or holder of the patent is an entrepreneur or investor. One of the principles of the Patent Law is the obligation to use patents in Indonesia. Substantially, eliminating the obligation to use patents registered and protected in Indonesia will only make investors act as sales agents in Indonesia. This is if it is true that the patent holder is an investor. If not an investor, it has nothing to do with the ease of doing business provided to patent holders.

Furthermore, the revocation of Article 20 of the Patent Law will eliminate the meaning of a number of policy manipulations regulated in Article 82 of the Patent Law. Article 82 is part of the regulation on the conception of a compulsory license which is specifically developed in Part Three of Chapter VII of the Patent Law. Chapter VII is a forum for regulating the transfer of rights, licenses, and patents as objects of fiduciary guarantees. This Third Part contains 27 articles that specifically regulate compulsory licenses (Articles 81 to 107). Through Article 82, the principle of the balance of rights and obligations is realized as from the beginning which was confirmed in Article 20 which will actually be abolished. In addition to the principle of balance, there are also rules about order, discipline, and honesty. Article 82 is very consciously designed to prevent the abuse of rights that have been obtained by the patent holder. By turning off Article 20 of the Patent Law, Article 82 loses grip. Article 82 of the Patent Law explains that a compulsory license is a license to exercise a patent which is granted based on a ministerial decision on the basis of an application for three reasons. First, the patent holder does not carry out the obligation to manufacture product one using the process in Indonesia as referred to in Article 20 paragraph (1) within a period of 36 (thirty-six) months after being granted a patent. Second,

it has been implemented by the patent holder or licensee in a form and in a manner that is detrimental to the public interest. Third, patents resulting from the development of previously granted patents cannot be implemented without using other parties' patents that are still under protection.

The job creation law seen from a political perspective, the law is attached to the back of interests, so that if you look at the content of article 110 of the job creation law, it will threaten national interests, with political interests in it to protect the interests themselves. Apnila sees the history of intellectual property rights negotiations, especially patents since the early 1980s at the World Intellectual Property Organization (WIPO), the pros and cons of the concept of mandatory government use licenses always surround the forum. Likewise in the Uruguay Round negotiations at the GATT/WTO. It is no secret that this political compromise has not satisfied many advanced industrial countries. Behind the official stance of developed countries lies the interests of multinational corporations. Especially those engaged in the pharmaceutical or drug manufacturing sector.

It is the economic and trade interests in IPR that are patterned and highlight the monopolistic character that they really want to fight for. They hold a lot of patents. For them, registering a patent aims to get protection, it does not always mean that they will try. Therefore, if Article 110 of the Ciker Law makes it an assumption that the patent holder is an investor who will open a business in Indonesia, that is where the error lies.

IV. CONCLUSION

The House of Representatives of the Republic of Indonesia (DPR) as a legislative institution has an important role in creating democracy in the life of the nation and state. In accordance with the mandate of the state constitution, DPR has the authority to make laws. With the revocation of Article 20 of the Patent Law in the Job Creation Law, patent holders no longer require the manufacture of products in Indonesia, so they no longer build factories or offices in Indonesia, which means that there is no transfer of technology and knowledge, nor absorption of labor. Whereas the purpose of knowledge and technology transfer, employment is the most important goal contained in Article 20 of the Patent Law for the progress of the nation and the welfare of the people as mandated by the 1945 Constitution, paragraph 4 which contains the goals of the Republic of Indonesia.

Author Declaration

Author contributions and responsibilities - The authors contributed substantially to the conception and design of the study. The author is responsible for data analysis, interpretation, and discussion of the results. The authors read and approved the final manuscript.

Funding – No funding information from the author

Availability of data and materials - All data are available from the authors.

Conflict of interest - The authors declare no conflict of interest.

Additional information - No additional information from the author.

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