Vol. 13 No.2 | December 2020

P - ISSN : 1907 – 8463
E - ISSN : 2772 – 8568

Indonesian Law Journal

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NATIONAL LAW DEVELOPMENT AGENCY *MINISTRY OF LAW AND HUMAN RIGHTS OF RI*

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NATIONAL LAW DEVELOPMENT AGENCY MINISTRY OF LAW AND HUMAN RIGHTS OF RI

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THE IMPACT OF COVID-19 PANDEMIC ON LEGAL SYSTEM

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Indonesian Law Journal
Volume 13 No.2 | December 2020

COVID-19 has affected the lives of all individuals around the globe.[1] The pandemic has not only caused casualties but also had unprecedented impacts on every aspect of human's life and transformed the way people interact, businesses operate, and institutions function. Since the first case of COVID-19 was confirmed on March 2, 2020, it only took 8 days, i.e. April 10, 2020, for the virus to spread out to 34 provinces in Indonesia[2]. The government has issued various policies to mitigate the impact of the pandemic on society; however, the pandemic and its responses have also raised numerous dilemmas beginning to affect the legal and justice system on all countries, as well as Indonesia

The Indonesian Law Journal (ILJ) is a peer-reviewed journal published in English and devoted primarily to disseminate scientific articles and analysis of issues in Law and legal studies from academicians, researchers, observers, practitioners, and all patrons in Indonesia. For the first time after 13 years, in 2020, ILJ publishes 2 editions in one year with this edition becomes the 2nd issue. This issue is published concurrently with the emerge of Corona Virus Disease 2019 (COVID-19) Pandemic, and hence ILJ invited authors of diverse background to share their analysis on the Impact of COVID-19 on Legal System.

As the opening article, Prof. Dr. H. R. Benny Riyanto, S.H., M. Hum., C.N., the Head of National Law Development Agency – Ministry of Law and Human Rights of Republic Indonesia raises awareness of the readiness of national Law in all aspects to welcome the New Normal era. In his article "National Law Development in New Normal Era", the practice of state administration is described increasingly being carried out in the executive, legislative, and judiciary environments by utilizing digital networks through application facilities that provide virtual meeting services.

The second article, by Purna Cita Nugraha, the Deputy Director II for Middle-Eastern Affairs, Directorate of Middle-Eastern Affairs, Ministry of Foreign Affairs of the Republic of Indonesia, is "The Changing Legal Infrastructure Post COVID-19 and How to Respond It".

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1 National Conference of State Legislatures, COVID-19 and the Criminal Justice System: A Guide for State Lawmakers https://www.ncsl.org/research/civil-and-criminal-justice/COVID-19-and-the-criminal-justice-system-a-guide-for-state-lawmakers.aspx, assessed on 27 November, 2020.

2 CNN Indonesia, Kilas Balik Pandemi COVID-19 di Indonesia, https://www.cnnindonesia.com/nasional/20201110123516-25-568018/kilas-balik-pandemi-COVID-19-di-indonesia, assessed on 26 November, 2020

He argues that legal infrastructure should be prepared and well-adapted to respond to the change of global landscape caused by the COVID-19 Pandemic, to further anticipate these massive shifts. The research conducted is considered to be a legal research focusing on examining existing rules and regulations, as well as a legal futuristic research in nature trying to find which legal instrument should be developed in the future.

In the third article entitled "Changes in Criminal Trial Proceedings during COVID-19: Challenges and Problems", Dewa Gede Giri Santosa, S.H, a Judge at the Gedong Tataan District Court, elaborates the challenges and problems in the implementation of regulations regarding the courts system especially criminal trial proceedings adjusted to government policies of physical interaction limitation due to COVID-19 Pandemic. His research suggests several things that should be addressed for the change in the criminal trial proceedings amid the COVID-19 pandemic in Indonesia to accommodate the principles of expediency, justice, and legal certainty.

Discussing the impact of this pandemic to legal system, Prof. Huala Adolf presents his article The Impact of Pandemic on Legal System: Impact on Arbitration Law. In this article, he stresses that the COVID-19 has forced the closure of the arbitration proceedings. The possible solution for the proceedings dealing with this pandemic is analyzed to argue at the conclusion that future arbitration law should foresee feasible events with a smaller "pandemic", i.e., epidemic and other force-majeure related events as well.

The outbreak of COVID-19 has not affected only human health but also caused major disruption to businesses around the world, especially in Indonesia, with many finding it difficult, or impossible, to fulfil their contractual obligations because of the pandemic and the response to it. Hence, force majeure is increasingly becoming alternative options for parties seeking a legal remedy where, through no fault of their own, they can no longer perform their obligations. Deborah Serepinauli Harahap and Dennis Evan conduct a study to discuss the concept of force majeure under Indonesian law and whether COVID-19 complies this concept in their article entitled "Can COVID-19 Be Construed as a Force Majeure in the Agreement?"

The COVID-19 pandemic represents an unprecedented disruption to the global economy and world trade, as production and consumption are scaled back across the globe[3]. A full response to the COVID-19 crisis requires wide access to an extensive array of medical products and other technologies, ranging from protective equipment to contact tracing software, medicines, and diagnostics, as well as vaccines and treatments that are yet to be developed. The way in which the intellectual property (IP) system is designed – and how effectively it is put to work – can be a significant factor in facilitating access to

3 WTO, COVID-19 and world trade, https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm, assessed on 26 November, 2020

existing technologies and in supporting the creation, manufacturing, and dissemination of new technologies[4]. In this regard, Andriensjah, a former Industrial Design Examiner of the Indonesian IP Office presented problems and issues regarding implementing the flexibilities of TRIPS in facing COVID-19 pandemic in Indonesia in his article "The Impact of COVID-19 on Intellectual Property Legal System Related to Public Health in Connection with TRIPS Flexibilities in Indonesia.

Many experts and institutions have contributed to the development of law and legal system in Indonesia. In the coming year, it is our vision to publish manuscripts from national experts as well international's which may broaden our perspective of legal reform in ILJ. As you read throughout this issue, we would like to remind our readers and future contributors that the success of this Journal depends directly on the number of quality articles submitted for review. Accordingly, we would like to request your participation by submitting quality manuscripts for review and encouraging your colleagues to submit quality manuscripts for review. One of the great benefits we can provide to our prospective authors, regardless of acceptance of their manuscript or not, is the mentoring nature of our review process. ILJ will provide authors with high quality, helpful reviews that are shaped to assist authors in improving their manuscripts.

We would very much like to express our deepest gratitude and appreciation to all the contributors, our Editorial team members, and Reviewers for their progressive and excellence contributions to this edition's issue of the Indonesian Law Journal (ILJ). It is our hope that this fine collection of articles will be a valuable resource for legal practitioners, readers and researchers and will stimulate further research into the vibrant area of law and social sciences.

Editor

4 WTO, The TRIPs Agreement and COVID-19 – Information Note, 15 October, 2020.

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Indonesian Law Journal
P-ISSN: 1907 – 8463; O-ISSN: 2772 – 8568
https://ejournal.bphn.go.id/index.php/ILJ
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NATIONAL LAW DEVELOPMENT IN NEW NORMAL ERA

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ABSTRACT

According to legal perspective, the Government's plan to implement New Normal desires to restore economic life and public health as a manifestation of the fulfillment of citizens' rights. From the description above, this paper will discuss several things, namely how the readiness of national Law to welcome the new normal era; how the constitutional legal system in the new era is normal; how is the urgency of structuring national regulations in the new normal era; and, how the influence of the new normal era for legal politics and public legal awareness. By using the normative juridical method, it can be concluded that the status of COVID-19 pandemic in Law is marked by the issuance of various legislative products to provide legal certainty of the Government's policy to overcome COVID-19 and implement New Normal policy. The practice of state administration is increasingly being carried out in the executive, legislative, and judiciary environments by utilizing digital networks through application facilities that provide virtual meeting services.

Keywords: National Law Development, new normal, restriction, regulation.

A. Introduction

Large-scale Social Restrictions (PSBB) under Government Regulation number 21 of 2020 aims to prevent the spread of Corona Virus Disease 2019 (COVID-I9). It is actually based on Law No. 24 of 2007 on Disaster Management and Law No. 6 of 2018 on Health Care. This government regulation was followed up with the issuance of Regulation of the Minister of Health of the Republic of Indonesia Number 9 of 2020 regarding the Guidelines for Large-Scale Social Restrictions in Accelerating Corona Virus Disease 2019 (COVID-19) Mitigation. Article 13 paragraph (1) specifies the Implementation of Large-Scale Social Restrictions which includes:

1. school and workplace;
2. restrictions on religious activities;
3. restrictions on activities in public places or facilities;
4. restrictions on social and cultural activities;
5. restrictions on modes of transportation; and
6. restrictions on other activities related explicitly to defense and security aspects.

Article 13 paragraph (3) excludes offices or strategic institutions providing services related to defense and security, public order, food needs, oil and gas fuels, and health services as regulated in paragraph (1) letter (a). Achmad Yurianto, as the government spokesperson, revealed that PSBB carries many functions, such as preventing the gathering of people, both in small numbers and large numbers, and suppressing the spread of the corona virus within the community.[1]

The imposition of PSBB is exptected to protect people from the transmission of COVID-19. However, of course, there is no successful policy unless the people are willing to cooperate. Nevertheless, not all people support this policy. Entrepreneurs consider PSBB has caused several industries to fall into a coma. Moreover, many sectors have to face weakening demand since the coronavirus pandemic. The worst affected sectors were tourism, transportation services, events, and property.[2]

The Ministry of Manpower as of 20 April 2020 noted that 2.2 million workers had been fired and laid off, this figure would continue to grow until the pandemic was over. Thousands of companies will also be out of business if the pandemic does not end in three months. The number of poor people is even predicted to increase in the range of 1.1 million to 3.78 million people.[3] As a result of this pandemic, crime is also rife, and the numbers are predicted to continue rising.

Not only in the economic sector, but this pandemic also causes social impact. Many workers who were laid off did not even get severance pay due to this outbreak. Their income had to stop while they still have everyday needs to fullill. Moreover, day laborers who live in big cities, can no longer survive and must return to their hometowns to live on. Thus, an elevated unemployment rate can also have the potential to increase social conflicts such as crime.[4]

The number of COVID-19 casualties has continued to rise since the implementation of PSBB. This implementation also has impacted the economic and social conditions. Moreover, WHO has also stated that the corona virus, for the time being, cannot be eliminated from all aspects of life.[5] This was also confirmed by the statement of President Joko Widodo saying that "Later on the society must make peace and coexist with COVID-19 because the virus will not disappear, and co-existing does not mean we are

1 accessed from https://idcloudhost.com/ menelusuri-dampak-yang-ditimbulkan-psbb-di-seluruh-wilayah-indonesia, "Tracing the Impact of PSBB in All Regions of Indonesia ", 2 June 2020

2 accessed from , https://www.kiostix.com/id/article/503/dampak-penerapan-psbb-dan-tujuan-mulianya, "Impact of PSBB Implementation and Its Original Purpose" 3 June 2020

3 Ayomi Amindoni, The wave of layoffs in the midst of the COVID-19 pandemic is estimated to reach its peak in June, the Pre-employment Card is considered ineffective, accessed from https://www.bbc.com/indonesia/indonesia-52218475.

4 Hana Faiya Fikriyyah, "PSBB, Economic Impacts to Social Impacts", accessed from https: //www.kompasiana.com/hanafaiha/ 5eba5782097f3667e34daa62/psbb-dampak-ekonomi-hingga-dampak-sosial.

5 Farras Fadhilsyah, " New Normal in a Political Perspective", accessed from Suara.Com., 02 June 2020.

giving up, but we are adapting. We fight COVID-19 by prioritizing and requiring strict health protocols".[6]

From the above background, the Government is currently trying to loosen PSBB by applying a "New Normal" policy that might be considered to be more lenient in anticipating the impact of COVID-19 in Indonesia. Proven by observing the readiness to implement new normal health protocols in public facilities in Bekasi City, President wanted to ensure that Indonesian people understand and must immediately prepare for a new rules for the new normal carried out by President Joko Widodo.[7]

The term "New Normal or Normal Baru" was first used by Roger McNamee, "a technology investor," who reviewed in an article by Polly LaBarre entitled "The New Normal" in Fast Company magazine on 30 April 2003. In his writing, Roger McNamee interpretes new normal as a time where one is most likely willing to play with new rules for the long term. In New Normal or Normal Baru, it is more important to do things right than to give in to the tyranny of urgency. Meanwhile, according to Wikipedia, New Normal is a term in business and economy that refers to financial conditions after the 2007-2008 financial crisis and after the 2008-2012 global recession. This term emerged from the context of reminding economists and policymakers that the industrial economy will return to their latest ways after the 2007-2008 financial crisis. The term New Normal has since been used in a variety of other contexts to imply that something that was previously abnormal has become commonplace.[8]

Linguistically, according to linguist Rahayu Surtiati Hidayat from the University of Indonesia, a new normal is the new normality.[9] It is a change in behavior by always applying health protocols in all aspects of life/activities such as physical distancing, wearing masks, having handwashing facilities, and following the etiquette of coughing and sneezing.

Furthermore, according to Psychologist Yuli Budirahayu, it is a change in behavior to continue to carry out normal activities but by implementing health protocols to prevent COVID-19 transmission such as using mask when leaving the house and always washing hands with soap.[10] While the Team Leader of the Expert Team for

6 accessed from Https://www.tribunnews/com/corona/2020/05/26/ pengertian-new-normal-dan-protokol-pencegahan-penularab-COVID-19-di-tempat-kerja,. "Understanding of the New Normal and COVID-19 Transmission Prevention Protocol in the Workplace",02 June 2020.

7 Zaki Fahminanda, "New Normal" accessed from https://www.kompasiana.com/ zakifahmi/5ecfea79d541df3e341380f2/simalakama-new-normal?page=all#sectionall.

8 accessed from https://www.kompasiana.com/hpinstitute/ 5ead17b5d541df3e62051864/ memahami-istilah-new-normal,. "Understanding the Term" New Normal" 02 June 2020.

9 https://news.detik.com/berita/d-5034719/ tentang-new-normal-di-indonesia-arti-fakta-dan-kesiapan-daerah, diakses pada tanggal 2 Juni 2020.

10 accessed from Https://www.tribunnews/com/corona/2020/05/26/ pengertian-new-normal-dan- protokol-pencegahan-penularab- COVID-19-di-tempat-kerja,. "Definition of New Normal and Protocol to Prevent COVID-19 Transmission in the Workplace"02 June 2020

the acceleration of COVID-19 mitigation, Wiku Adisasmita, states that new normal is a change in behavior to continue carrying out normal activities, but by implementing health protocols to prevent transmission of the COVID-19 virus.[11]

The University of Indonesia (UI) epidemiology expert Pandu Riono said, new normal places more emphasis on individual readiness for activities outside the home even though the SARS-CoV-2 coronavirus - the cause of COVID-19 - has not disappeared. New normal is the new behavior of the community when the activities are running as usual. Public spaces such as offices, schools, industries, and malls will open again. However, the most important of these is how we behave when we are in public spaces. Every policymaker from various sectors must implement standards and conditions to abide when starting to open services. These standards and conditions must still follow the COVID-19 transmission prevention protocol. New normal is a way to regulate the behavior of the population, either the community, business people, Government, or various other sectors in order to reduce the risk of the possibility of transmission of COVID-19, because the SARS-CoV-2 coronavirus still exists.[12]

The implementation of New Normal should be based on thorough consideration to keep minimizing the spread of COVID-19. The Task Force for handling Corona Virus in Indonesia has established 3 (three) indicators for the implementation of New Normal, namely:[13]

1. The epidemiological aspect which is related to Corona case data in the field. Each region can impose New Normal when the graph or Corona case curve has decreased by 50 percent. However, the decline cannot be only one or two days but must have been occured for two weeks from the last peak. In addition, the number of people in monitoring (ODP), patients under surveillance (PDP) should also have decreased, including cases of death. And conversely, the number of cured patients must have increased;
2. Aspects of public health surveillance. The surveillance here refers to an active response of the local Government to carry out massive Corona tracking;
3. Health Service Aspects. All health services in the area must have complete facilities for handling COVID-19 patients.

Furthermore, based on data from the Presidential Secretariat there are 4 provinces and 25 districts / cities, which are ready to implement New Normal, including:[14] 4 (four) Provinces, namely: DKI Jakarta, West Sumatra, West Java,

[11] accessed from www.Instagram.com/p/CasGWejHW3b/?gshid=1fnba8c5oavgr-bicarapolitikhukum 1-6-2020.

[12] accessed from "New Normal Is Not Just Opening Public Space, Says Experts", https://www.kompas.com/ sains/read/2020/05/29/110000923/new-normal-bukan-sekadar-membuka-ruang-publik-begini-kata-ahli 3 june 2020.

[13] accessed from *TribunWow.com* and Youtube *KompasTV,* Rabu (27/5/2020)5.

[14] accessed from https://www.liputan6. com/news/read/4263884/ini-4-provinsi-dan-25-kabupatenkota-yang-

and Gorontalo; and 25 (twenty five) Regencies / cities namely: Pekanbaru City, Dumai City, Kampar Regency, Pelalawan Regency, Siak Regency, Bengkalis Regency, Palembang City, Prabumulih City, Tangerang City, South Tangerang City, Tangerang Regency, Tegal City, Kota Surabaya, Malang City, Batu City, Sidoharjo Regency, Gresik Regency, Malang Regency, Palangkaraya City, Tarakan City, Banjarmasin City, Banjar Baru City, Banjar Regency, Barito Kuala Regency, Buol Regency.

The Government's plan to implement New Normal is intended to restore economic life and public health which according to the legal perspective is the manifestation of the fulfillment of the rights of citizens as follows:

1. The Rights to have an occupation and have a proper living for a human being (Article 27 paragraph 2 of the 1945 Constitution of the Republic of Indonesia)
2. The Rights to live and to defend life and existence (Article 28(A) of the 1945 Constitution of the Republic of Indonesia);
3. The right to obtain health services (Article 28 (H) paragraph 1 of the 1945 Constitution of the Republic of Indonesia);
4. The Rights to get facilities and specialized treatment to obtain equal opportunities and benefits in order to achieve equality and justice (Article 28(H) paragraph 2 of the 1945 Constitution of the Republic of Indonesia).

Imposing New Normal policy in a province or district/city must be accompanied by monitoring and evaluation of the implementation of New Normal. Apart from that, it is also requires the participation of all levels of society to comply with the health protocols as a new social order.

From the description above, this paper will discuss several things, namely: 1) how the readiness of national law to welcome the new normal era; 2) how the constitutional legal system in the new normal era; 3) how is the urgency of structuring national regulations in the new normal era; and, 4) how the influence of the new normal era for legal politics and public legal awareness.

B. Research Method

Based on the problems and background above, this research was conducted using a normative juridical approach.[15] As a normative juridical study, this research was based on an analysis of legal norms, both law in the sense of written law as

akan-terapkan-new-normal : "These 4 Provinces and 25 Regencies / Cities Will Apply New Normal."

[15] Normative research is research conducted by examining mere library materials or secondary data. Normative thinking is based on research that includes (1) legal principles, (2) systematic law, (3) vertical and horizontal synchronization levels, (4) comparative law, (5) legal history. More about this see Soerjono Soekanto dan Sri Mamudji, *Role and Use of Libraries in Legal Research,* (Jakarta: Pusat Dokumentasi Hukum Fakultas Hukum Universitas Indonesia, 1979) p.15.

it is written in the books and statutes (in literature and legislation).[16] References were also obtained from other related documents such as the results of previous studies, seminars and workshops, books, and related scientific journals, as well as data from various media, both print and electronic. The research tradition using mass media reports, especially newspapers and the internet, has proliferated over the past few decades, especially in the field of collective action studies and social movements.

C. Discussions

1. National Legal Readiness towards The New Normal Era

The issuance of Presidential Decree No. 11 of 2020 concerning Declaration of COVID-19 as Public Health Emergency signified the status of the Corona Virus Disease 2019 as pandemic (COVID-19) in Indonesia, which was further strengthened by Presidential Decree No. 12 of 2020 concerning Determination of Non-Natural Disaster Spread of Corona Virus Disease 2019 (COVID-19) as a National Disaster. Therefore, it can be categorized as a cause of force majeure in contracts in general. Furthermore, in order to protect the economy, the Government has issued Government Regulation in Lieu of Law Number 1 of 2020 regarding State Financial Policy and Financial System Stability for Handling Corona Virus Disease 2019 (COVID-19) and/or in order to ManageThreats Harming National Economy and/or Stability Financial system.

The Government of Indonesia, after the announcement of first confirmed case of COVID-19 virus on 2 March 2020, continues to increase efforts to reduce the spread of COVID-19, ranging from limiting social relations (social distancing), limiting physical contact (physical distancing) to instructing all state apparatus, employess of State-Owned Enterprises (BUMN) and private employees to restrict activities in the office by encouraging work from home. The Government also issued a policy to make peace with COVID-19 by echoing the New Normal or new lifestyle that cannot be separated from the efforts that have been made in dealing with the spread of COVID-19.

The enactment of health protocols with restrictions on community movements carried out by the Government has a direct impact on the community including the public service sector providing direct services to the public, health services at various levels of health facilities, lease services in the banking services sector and so forth. Based on the results of the Survey on the Mal-administration Perceptions of the Republic of Indonesia (*Inperma*) conducted by the Indonesian Ombudsman in 2019, 70.3% of respondents prefer direct interaction administration to online mechanisms or using intermediary services. The restrictions imposed by the Government have hindered the provision of services.[17]

This condition caused by the

[16] Ronald Dworkin, *Legal Research,* (Daedalus: Spring,1973), p. 250.

[17] Accessed from Andi Anas Chaerul M, https://makassar.tribunnews.com/tag/andi-anas-chaerul 2 June 2020

tendency of the Indonesian people who predominantly prefer to access public services directly, not to mention the supporting infrastructure for online-based public services is not optimal both in terms of state organizers and the socialization of the public to access public services online.

According to Article 1 paragraph (1) Law Number 25 of 2009 on Public Services, ”public services are activities or series of activities in the framework of meeting service needs following statutory regulations for each citizen and population of goods, services, and/or administrative services provided by public service providers.” Article 21 specifies 14 components that each public service provider must fulfill :

a. legal basis, statutory regulations which are the basis of service delivery;
b. requirements, requirements to comply in maintaining services, both technical and administrative requirements;
c. systems, mechanisms, and procedures, standardized service procedures for service providers and users, including complaints;
d. completion period, the time needed to complete the entire service process for each type of service;
e. fees/tariffs, fees charged to the service recipient in managing and/or obtaining services from the organizer whose amount is determined based on an agreement between the organizer and the community;
f. service outputs, the results of services provided and received under the established conditions;
g. facilities, infrastructure, and/or facilities, equipment and facilities needed in the delivery of services, including equipment and facilities for vulnerable groups;
h. competencies of implementer, abilities that must be possessed by implementers consisting of knowledge, expertise, skills, and experience;
i. internal supervision, control carried out by the head of the work unit or the direct supervisor of the executor;
j. complaints, suggestions, and input handling, procedures for handling complaints and their follow-up;
k. number of implementers, availability of executors according to workload;
l. service guarantees that provide certainty of services carried out in accordance with service standards;
m. guarantee the security and safety of services in the form of a commitment to provide a sense of security, free from danger and risk of doubt; and
n. evaluating the performance of implementers, evaluating to find out how far the implementation of activities is according to service standards.

The State, as a public servant, sets a new normal policy and the implementation of health protocols which cause the restriction of access to public services. This policy is an effort of the State to administer public services in order to maximize public services delivery.

2. The Practice of National Law System in The New Normal Era

Currently, the public is familiar with the executives, legislatives, and judiciaries utilizing digital networks in virtual meeting. The cabinet meetings held by the President and the ministers since the COVID-19 outbreak have always used digital facilities. Even though the President and his ministers are physically far apart, they manage to produce many agreements and decisions on strategic policies concerning the lives of many people by means of virtual meetings. Such effort is consistent with the mandate of Presidential Decree No. 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the COVID Pandemic-2019, Government Regulation No. 21 of 2020 concerning Large-Scale Social Restrictions (PSBB) and Presidential Decree No. 11 of 2020 concerning Declaration of the Public Health Emergency of COVID-19 as Public Health Emergency.

Similar situation also takes place in the House of Representatives (DPR). Despite having an extended recess period for up to a week, DPR finally held the opening of plenary meetings at the end of March. Meetings of the Complementary Organs of the House of Representative (AKD) combine face-to-face meetings and virtual meetings (hyrbid). The quorum requirement, which under normal circumstances become an absolute requirement, is changing under the current situation.

Meetings held by the House of Representatives hold the health protocols principles by maintaining physical distancing. And several important decisions have been delivered from this hybrid mechanism. For example, the decision to terminate the National Examination (UN) in 2020, as well as an agreement with the DPR, the Government, and the General Elections Commission (KPU) to postpone the implementation of the Simultaneous Regional Election on 23 September 2020.

Judicial institutions have also taken the same practices. Circular of the Supreme Court No. 1 of 2020, encourages the seekers of justice to make the most of e-court applications for administration proceedings and e-litigation for trials, especially for cases of civil, religious and administrative (TUN). COVID-19 has forced the branches of power to be adaptive to digital environment. Whether realizing it or not, the situation has changed the disruptive perspective of administration. It has changed the pattern and mechanism that once was only an idea. This condition seems to have found the valve in the middle of the euphoria of digitalization, especially around the branches of state power. Even though in reality, there are not many public policies have a digital-disruptive perspective.

Lesson learned from the metamorphosis of branches of state power due to the COVID-19 pandemic can be an essential lesson for the State to innovate in a concrete and tangible manner that does not only have a dimension of the structured state mechanism which emphasizes the technical aspects only. However, a digital-

disruptive perspective in public affairs is needed. Digital disruptive is a condition that occurs due to changes in digital technology and the form of business models in the digital era that can result in ease, speed, clarity, and security of a running business condition. This condition is in line with the 4.0 to 5.0 era that exists today.

The State should have formulated the public policy framework that is digitally adaptable in the public sphere, whether in political, economic, social, and cultural fields, including in the State affairs. Efforts toward that direction has emerged, but is not yet stable and sharp.

Particularly in the state administration, such policies will rise the debureaucratization wave in public sector, transparency that is in line with the aspect of saving state finance. State institutions that have the authority to make public policy should have a digital perspective that is disruptive oriented. As Klaus Scwab (2016) points out, a country will reap economic and financial benefits if it can formulate international norms that are adaptive to the main fields of the new digital economy, including the internet for things.[18]

In addition to these aspects, a digital-disruptive perspective must also target the mechanisms in public policy formulation process. This formula is quite essential, especially in this COVID-19 situation. Room of participation and public involvement need to be expanded. If room of participation has previously been embodied by public hearings (RDPU), seminars, and other similar events, in the future virtual spaces should be able to become a new channel for the public to express their aspirations. Andrzej Kaczmarczky (2010) believes that the existence of digital platform/ the Internet will basically provide higher level of public involvement in the formulation of public-oriented policies. Digital platform can also be an authentic medium for political transformation to avoid media bias (both social media and conventional media).[19] In that context, Indonesia has unwittingly adopted the digital utilization model as a medium to convey public aspirations.

Moreover, the transformation of state administration has eventually taken place in the past month, from conventional models to digital-based models. State institutions are forced to metamorphose to stay ”in motion”, which means the State continues to carry out its constitutional function in providing aspects of the protection and fulfillment of the rights of citizens amid this emergency.

In order to implement this new normal, as a rule of Law, the Indonesian Government must be guided by the existing National Law. Indonesia’s national

[18] Accessed from ”Tantangan Bertata Negara di Tengah Disrupsi Sekaligus Era Pandemi COVID-19” Kompas.com - 23/04/2020, 13:13 WIB.

[19] Accessed from https://nasional.kompas.com/read/2020/04/23/13135641/tantangan-bertata-negara-di-tengah-disrupsi-sekaligus-era-pandemi-COVID-19.

legal system itself is a law or legislation that is formed and implemented to achieve the goals, foundations, and ground norms of a country. In this context, Indonesian national Law is a legal entity or statutory regulation that is built to achieve the goals of the country, which is based on the Pancasila and the 1945 Constitution of the Republic of Indonesia. Thus, the Indonesian national legal system is a legal system that applies throughout Indonesia, which includes all legal elements (such as content, structure, culture, facilities, laws and regulations, and all the sub-elements) that are interdependent.[20] This National Law System forms a unified interrelation between modern legal politics and traditional Law that reflects the communal legal culture based on Pancasila.[21]

National Law must be able to answer problems in undergoing adjustments that need to be done in the new normal era. Changes in behavior in the new normal era are the imposition of obligations to follow the health protocols and certain restrictions in the society. Violations of obligations and prohibition/restrictions may be subject to sanctions because deviations from the Law cannot be justified on the grounds of a COVID-19 pandemic. Law enforcement must continue but it should be adjusted to new normal circumstances because law serves as a tool of social engineering for the interests of the society and must be enforced as a social control in order to achieve the desired changes.

Various behavioral changes such as arrangements related to physical distancing to physical absence, the application of health protocols, and the presence of various restrictions have induced the people to prioritize communication/ digital technology as a bridge between individuals. Physical presence, in various laws and regulations, is mandatory, and this becomes the main problem in the application of new normal. As the new normal being implemented, several behavioral adjustments need to be incorporated in our law.

Article 5 paragraph (1) of Law No. 11 of 2008 concerning Electronic Information and Transactions (ITE) answers the issue concerning the validity of Information Documents and Electronic Signatures in the evidentiary system. In general, it is stated that Electronic Information and/or Electronic Documents and/or the printouts are admissable evidence, which are the extension of admissable evidence under the applicable Procedure Law in Indonesia. Consequently, Electronic Signatures have legal force and legal effect.

Article 5 paragraph (1) to paragraph (3), expressly states that: Electronic Information and/or Electronic Documents and/or the printouts constitute admissable evidence and are the extensions of admissable evidence in accordance with prevailing Procedure Law in Indonesia.

[20] Mahfud MD, Building Legal Politics, Upholding the Constitution, LP3ES, Jakarta, 2006, p. 21.

[21] Accessed from https://www.bphn.go.id/data/ documents/ fgd_dphn_prof._romli_a_ konsep_ reformasi_ sistem_ hukum_ nasional.pdf, on 02 June 2020.

However, under paragraph (4) Electronic Information and/or Electronic Documents are excluded the following: letters that must be made in writing according to the law; and b. letters and the documents that must be made by notary deed or deed drawn up by the deed officer.

Based on these exceptions, it can be seen that not all regulations accommodate this new normal situation, as in the Notary position. It has been widely ackowledged that many Notary works use technology. For this reason, a legal framework is needed to prevent Notaries from being ensnared in legal cases in the future. Even as a public official, a notary must be protected by laws.

Several efforts have been taken with the issuance of various implementing regulations of Law to resolve problems emerged during the pandemic. For example, the Financial Services Authority (OJK) has issued five OJK Regulations (POJK) to respond to the issuance of Government Regulation in Lieu of Law (*Perppu*) No. 1 of 2020 concerning State Financial Policies and Financial System Stability for Handling COVID-19 Pandemics. One of the solutions to legal issues related to physical presence is POJK Number 16 / POJK.04 / 2020 Concerning the Electronic General Meeting of Shareholders. However, it requires other higher instruments or having an effect equivalent to that of laws to guarantee legal protection and certainty.

It should be understood that the new normal situation should not be used as an excuse to deviate/violate applicable Law. Law shall be enforced, but the enforcement/ criminal sanctions should be harmonized with the new normal condition. In criminal law, for example, fines/imprisonement can be replaced by social works while following the health protocols. Similar practice has been enforced to violators of Large-Scale Social Restrictions (PSBB) who do not wear masks. They are charged to carrying out cleaning tasks and in this case, discretion has been displayed. Behavioral changes in the new normal era are the enforcement of legal system that primarily aims to create peace (justice for peace) within the people in accordance with Pancasila.

3. The Urgency of The Arrangement of National Regulations in The New Normal Era

In its implementation, regulations related to Large-Scale Social Restrictions (PSBB) are still overlapping and even counterproductive. Such as Circular of the Minister of Industry No. 7 of 2020 on Guidelines on Filing Business Activity Permist during the Health Emergency of Corova Virus Disease 19 (COVID-19), which contradicts Regulation of Governor of Special Region of Jakarta No. 33 of 2020 concerning Implementation of Large-Scale Social Restrictions for Corona Virus Disease 2019 (COVID-19) Mitigation

[22] Accessed from https://mediaindonesia.com/read/detail/305730-regulasi-tumpang-tindih-dan-bertentangan-persulit-penegakan-hukum 1 June 2020.

in Jakarta.[22] Similarly, the Ministry of Transportation Regulation allows public transportation to return from outside the area. After previously banning all modes of public transportation to operate, except logistics, the Government then allowed the operation of all modes under certain circumstances.[23] The data also revealed that of the 10 (ten) provinces with the most positive cases, there were only 3 (three) provinces that implemented PSBB, namely DKI Jakarta, West Java, and West Sumatra, while the rest do not implement PSBB. Therefore, the President said, it was also necessary to evaluate provinces, regencies, and cities that did not carry out PSBB and implemented physical distancing policy and implemented strict health protocols.[24]

Having disharmonized regulations has caused legal uncertainty for the public as well as government officials at the lowest level to control and educate the public to implement the existing regulations. If there are unclear rules, legal observance will never be achieved. Legislation is an important element under the rule of law in the efforts of achieving national goals. Ineffective regulations will have negative influences on the Rule of Law. In this regard, the effectiveness of a Regulatory Agency/Agenciesis needed in regulating and simplifying regulations and legislation so as not not to ensnare and slow down the Government's move to take policies.[25]

The formation of the National Regulatory Body is actually not a new story. The idea of the formation of the National Regulatory Body in Indonesia was raised when Joko Widodo was elected as President for the second time. The purpose of the formation is relatively simple, that is to create a legitimate and a single window for the management and efforts to increase professionalism on the policy of laws and regulations.

Although creating pros and cons among the public, either experts or state administration practitioners, President Joko Widodo is strongly committed to establish a dedicated body to administer and harmonize all laws and regulations. This effort has been reflected by the enactment of Law No. 15 of 2019 on the Amendments to Law No.12 of 2011 on the Formulation of Laws and Regulations but it has not been manifested in a legitimate institution in the second period of the Working Cabinet era.

Nevertheless, it does not mean that the discussion concerning this issue ends. If the Government wants an Agency or Institution that is integrated, solid, and professional to deal with the legislation sector, the rational will be because the existing regulations are not harmonious

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[23] Accessed from https://www.kompas.tv/article/80195/ada-tumpang-tindih-aturan-pemerintah-saat-pandemi-corona 2 June 2020.

[24] Accessed from https://setneg.go.id/baca/index/pemerintah_evaluasi_pelaksanaan_psbb_secara_menyeluruh 2 June 2020.

[25] Accessed from https://www.setneg.go.id/ baca/index/ menata_regulasi_di_pusat_dan_daerah _demi_kecepa-tan_ merespons_perubahan 3 June 2020.

and tend to be over regulation.

Considering Agencies or Institutions with similar duties to harmonize legislation have been existed under the Ministry of Law and Human Rights, which are, the National Legal Development Agency (BPHN) and the Directorate General of Legislation (DG PP), it is deemed necessary to strengthen the legitimacy of these agencies so as to be more ’powerful’ to reduce and harmonize the dimension of ’ego-sectoral.’

The urgency of forming a National Regulatory Bodies/Institutions is becoming increasingly important in the context of situations where information and technology exchanges is increasingly fast and unpredictable. The State must be able to adapt to the contingency flow of the times, and think to adjust to all its acceleration.

The urgency of establishing a National Regulatory Body must be based on the underlying desire for the State to ’anticipate’ formats desired by the State. The anticipation that can unite the dimensions of calculation, dimensions of preparation, mentality, dimensions of risk, and consequences will be prominent and a defining factor that can save the country from the times of accelerating changes.

The State will not be able to produce exclusive legislation. In contrast, the effects of massive information disclosure and technology have made the exchange of vision, mission, thoughts, and processes of a global phenomenon have spread and intertwined so quickly and inevitably between individuals or among groups of people.

In the future, the National Regulatory Body will potentially be able to detect and minimize the risk for failure of the State administration in the new normal context. In the era of the new normal era, the importance of policy synergy between government institutions, including ministries and ministerial-level agencies, is increasingly apparent in implementing existing provisions while removing sectoral egos. For example, related to restrictions on movement of people and vehicles, from and to the regions implementing PSBB, the Police, the Transportation Office, the Civil Service Police Unit, the Civil Apparatus of Regional Government (Pemda), the National SAR Agency, Indonesian National Armed Forces, Ministry of Health, Fire Fighting Unit, and many more, have been involved.

All institutional policies and institutions must be managed in harmony so that they can go hand in hand. This condition is suitable for the National Regulatory Body to play a strategic role in overseeing the process of forming every existing policy in order to support the new normal policy within the framework of the national legal system.

Constitutionally and administratively, sooner or later the Indonesian Government needs an institution or agency that is dedicated to regulate and manage the laws and regulations from the chaotic context of the current legislation - as if competing each institutions vigorously issue any laws

and regulations to serve their own interests (ego sectoral and hyper-regulation).

4. The Influence of The New Normal Era to Legal Politics And Public Legal Awareness

Every policy taken by the Government in a Country will undoubtedly have its consequences. These policies are a form of State interference in all aspects of the lives of citizens, which also constitute State obligations. As a Rule of Law as stipulated under Article 1 paragraph (3) of the Constitution of the Republic of Indonesia, Indonesia is a rule of Law country, of which one of the goals of the State of Indonesia is to advance general welfare[26], which refers to welfare for the people.

In the implementation of national law development, there are 2 (two) fundamental foundations as the pillars.[27] The first foundation is the Constitutional Foundation, which is the fundamental norm of national and State life, namely the Pancasila-based Law. The second foundation is the Operational Foundation, namely: 1) fair and prosperous law; 2) democracy strengthening law; 3) human rights protecting law; 4) Unity in diversity-based law (*bhineka tunggal ika*); and 5) Indonesia nations and country protecting laws. The fundamental foundation becomes the basis in the implementation of national legal politics because legal politics determines the direction of the overall national development policy to implement in a certain period.

Before the COVID-19 pandemic, globalization was one of the things that had a significant influence on legal politics. Globalization, as a lineage of advances science and technology, will bring up new risks and uncertainties that exceed anticipative abilities. This enormous change has revolutionized tradition and even religion, which has been the basis of many people. It does not stop there; the process transforms values in the family and also the State.[28] In addition to globalization, one thing that was rife and felt urgent was the presence of the industrial era 4.0. One of the biggest things in the Industrial Revolution 4.0 is the Internet of Things (IoT), the ability to connect and facilitate the communication process between machines, devices, sensors, and people through the internet network.[29]

Like globalization and the industrial era 4.0, the COVID-19 pandemic can also affect the politics of Law in Indonesia, for example, in the politics of Law and regulations. The Government is required to respond quickly to the impacts arising from the COVID-19 pandemic, including several policies without ignoring the stages

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[26] Look paragraph 4 Pembukaan Undang-Undang Dasar Negara Republik Indonesia 1945.

[27] National Legal Planning Centre (Pusat Perencanaan Pembangunan Hukum Nasional). 2012. *Perencanaan Pembangunan Hukum Nasional 2015 – 2019,* Jakarta: Badan Pembinaan Hukum Nasional. page 56.

[28] Antony Giddens.. *Runway World, How Globalization Is Reshaping Our Lives.*(Jakarta: Gramedia, 2001). page 54.

[29] Accessed from https://binus.ac.id/knowledge/2019/05/mengenal-lebih-jauh-revolusi-industri-4-0/, 2 June 2020.

of regulation formulation. How the policies compiled remain of high quality even if issued in a short time. In this regard, the legal product made must be following the objectives of laws and regulations formulation with the substance being adjusted to the conditions that existed at the time the laws and regulations were made. The State or Government is forced to make decisions that are not only quick but also careful, not only about wealth but also about health.

It should be understood that the concept of The New Normal or New Normality, which is about to be applied in Indonesia, is not only done with a consideration of the economic approach. Realizing the State's goal as a welfare state as mandated in the constitution is also essential. There are 3 (three) indicators in improving public welfare, namely good health, good economy, and good education;[30] therefore, it fits for legal politics in the concept of The New Normal to prioritize this principle. The 1945 Constitution of the Republic of Indonesia as the source of all national legal politics must remain a foothold by making Pancasila the basis of the State.

The Government strategy against the COVID-19 pandemic is that the Government should be able to produce a way out policies. The Government, through its power, must be able to provide answers to problems and accommodate the public interest through policies that not only stop until the domain of the policy is issued but how these policies can be implemented and sustainable to achieve the State's goals. Until the phase of tested legal compliance and awareness, as a sustainable system, the legal culture is at the same time part of an effort to accelerate the eradication of the COVID-19 pandemic.

Legal awareness is one of the critical elements in addition to the element of legal observance, which determines whether effective or not the implementation of the Law or legislation in society. According to Krabbe, legal awareness is an awareness or values found in human beings, about existing laws or expected laws exist.[31]

Legal awareness has several conceptions, one of which is the conception of legal culture. This conception contains the teachings of legal awareness, which is more concerned with legal awareness, which is considered as a mediator between Law and human behavior, both individually and collectively.[32]

According to Achmad Ali, there are two types of legal awareness, namely:[33]

a. Positive legal awareness is synonymous with legal observance.
b. Negative legal awareness is synony-

[30] Accessed from https://nasional.kompas.com/read/2020/05/31/06381421/mahfud-md-klaim-new-normal-tak-diterapkan-dengan-pendekatan-ekonomi-semata, 3 June 2020.
[31] Theory of Legal Awareness (Teori Tentang Kesadaran Hukum) Accessed from http://ruslanmustari.blogspot.com/2017/09/teori-tentang-kesadaran-hukum.html?m=1 3 june 2020.
[32] ibid
[33] ibid
[34] ibid

mous with legal disobedience.

The indicators of legal awareness, according to Soerjono Soekanto, are as follows:[34]

a. Legal knowledge means one knowing that Law has regulated certain behaviors. The legal regulations referred to here are written and unwritten laws. The behavior refers to behavior that is prohibited or pemitted by Law.
b. Understanding the Law means one who has knowledge and understanding of certain rules; for example, a student having knowledge and correct understanding on the nature and importance of school rules.
c. Legal attitude means one tends to make certain judgments towards the Law.
d. Legal behavior means one or student complying applicable regulations.

The four indicators of legal awareness mentioned above may indicate specific levels of legal awareness in the practice . If a person only knows the law, it shows that he has a low level of legal awareness, but if he behaves in accordance with the law in a society, it displays his high level of legal awareness.

Therefore, legal awareness is none other than the views that live in society about what law is. Views of life in society are not solely a product of reasoning considerations but they are developed under the influence of several factors such as religion, economics, politics, and so on.[35]

The concept of New Normal will lead to the following impacts:[36]

a. Clean lifestyle.
   Handwashing habit, consuming nutritious food, and drinking lots of water can prevent various diseases. It also affects the life expectancy of the people in this era. Because practicing a clean and healthy lifestyle will support immunity system to make it less vulnerable to illnesses and greater longevity.
b. Orderly lifestyle.
   New Normal will force people to adopt a stay at home lifestyle. In the end, mobility will decrease dramatically, and people will also be required to always wear masks when traveling outside the home. Shopping for daily necessities will depend on mobil application or online. People will also be more selective in shopping (needs vs. wants).
c. Natural lifestyle.
   Activities will be more centered at home. The public will also tend to return to traditional ingredients or herbs to maintain body health. Simple activities such as washing hands and basking in the sun will be preferable activities.

[35] Accessed from http://zriefmaronie.blogspot.com/ 2014/05/ kesadaran-kepatuhan-hukum.html?m=1#:~:text=Kesadaran%20hukum%20erat%20kaitannya%20dengan,berarti%20menanamkan%20nilai%2Dnilai%20kebudayaan, Kesadaran & Kepatuhan Hukum 3 june 2020.

[36] Accessed from https://uai.ac.id/ada-apa-dengan-new-normal/diunduh 3 june 2020.

d. Era 4.0. lifestyle
   Virtual optimization that rules working from home to school from home will greatly utilize technology. This lifestyle is expected to give birth to a generation of virtual meetings. As a matter of fact, health consultations will also use technology by relying on telemedicine services.
e. Social Solidarity lifestyle
   The emergence of togetherness and a sense of unity, testing the humanity and togetherness and will be more meaningful amid the COVID-19 pandemic as it is now.

New Normal Life is undoubtedly based on the awareness of the community that the coronavirus will always be around as any other viruses. Inevitably, we all have to adapt to a new lifestyle in the future that is to implement the health protocols in daily life activities. Bustami, a Sociology Observer, said that the condition called New Normal naturally forms when a prolonged condition, namely the exposure of COVID-19, was exceeded optimally.[37]

New Normal will be established through new habits in society as a result of 'habitual learning' that has been done for a long time, usually for years, so that they become a habit and then embedding to the attitudes and behavior of individuals in that society. President Jokowi also asked the public to continue to improve discipline in implementing the health protocols before entering a new normal lifestyle during this pandemic.

D. Closing

In national law, the enactment of Presidential Decree Number 11 of 2020 on Declaration of Pulbic Health Emergency of COVID-19 signifies the pandemic status of the Corona Virus Disease 2019 (COVID-19) in Indonesia, which is further strengthened by Presidential Decree Number 12 of 2020 concerning Determination of Non-Natural Disaster Spread of Corona Virus Disease 2019 (COVID-19) as a National Disaster. Therefore, it can be categorized as a cause of force majeure under any contracts in general. It is then followed with the Government Regulation in Lieu of Law Number 1 of 2020 Regarding State Financial Policy and Financial System Stability for Handling Corona Virus Disease 2019 (COVID-19) and/or in order to Manage Threats Harming National Economy and/or Stability of Financial system. And the latest Government policy by suggesting people to make peace with COVID-19 by echoing what is called the New Normal or new lifestyle, which cannot be separated from the efforts that have been made by the Government inso far in dealing with the spread of COVID-19. The implementation of the health protocols and restrictions on community movements carried out by the Government have direct impacts on the community, including on the public service sector providing direct services to the public, health services at various levels of health facilities, lease services in the banking services sector and others.

[37] Accessed from http://ubb.ac.id/2020/05/27/pengamat-sosiologi-penerapan-new-normal-vs-old-normal-terkait-situasi-COVID-19, 3 june 2020.

The practice of state administration is increasingly being carried out in the executive, legislative, and judiciary environments by utilizing digital networks through application facilities that provide virtual meeting services. The cabinet meeting held by the President and the ministers since the COVID-19 outbreak always used digital facilities. This situation is also the case for the DPR. Despite having an extended recess period of up to a week, the DPR finally held a plenary meeting opening at the end of March. Meetings followed the agenda by the council's equipment (AKD) by combining physical and virtual meetings. Of course, the quorum conditions which under normal circumstances become an absolute requirement, in a situation like this is changing. The same thing is done in a judicial institution. Through the Supreme Court Circular No. 1 of 2020, it is encouraging justice seekers in the matters of trial administration by utilizing e-court applications and relating to the conduct of trials using e-litigation, especially for civil, religious and State administrative matters (TUN). COVID-19 has made the branches of state power metamorphosed to be adaptive to digital. This situation, whether realizing or not, has changed the way of having a disruptive perspective.

In its implementation, regulations related to Large-Scale Social Restrictions (PSBB) are still overlapping and even counterproductive. The existence of regulations that are not in harmony, causing legal uncertainty for the community, and also for government officials from the lowest level to control and educate the public in the application of existing regulations. Legal observance cannot be realized if it is not clear which rules must be obeyed. The legislation is an important element in the rule of law to carry out efforts to achieve national goals. Ineffective regulations will have a negative influence on the rule of law. In this regard, the effectiveness of a Regulatory Agency/Agency is needed in regulating and simplifying regulations and legislation so as not to ensnare and slow down the Government's move to take policies.

COVID-19 pandemic has the same impact as globalization and the industrial era 4.0. COVID-19 pandemic can also influence public legal awareness, such as clean lifestyle, orderly lifestyle, natural lifestyle, 4.0 era lifestyle, and social solidarity pattern. New Normal Life is undoubtedly based on people's awareness that the coronavirus will always be there like other viruses. Inevitably, we all have to adapt, the new lifestyle going forward is implementing health protocols in daily life activities.

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Indonesian Law Journal
P-ISSN: 1907 – 8463; O-ISSN: 2772 – 8568
https://ejournal.bphn.go.id/index.php/ILJ
Volume 13 No.2 | December 2020

THE CHANGING LEGAL INFRASTRUCTURE POST COVID-19 AND HOW TO RESPOND IT

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Abstract

”The COVID-19 pandemic creates political, economic, social, and cultural shifts that change the global landscape. Legal infrastructure should be prepared and well-adapted to respond to it, to further anticipate these massive shifts. The changing in international community behavior requires some adjustment and fine-tuning in the legal department. In this regard, the need of the hour is to ensure that legal infrastructure is well-adapted to the changing global landscape, and in turn, will support global efforts to stop the pandemic and prevent economic collapse. How well countries navigate through these challenges or capture opportunities and strengthen international cooperation will eventually determine success in defeating this common enemy. Thus, the global community must stand under one same norm: cooperation. This research is considered as a legal research focusing on examining existing rules and regulations, as well as a legal futuristic research in nature in trying to find which legal instrument should be developed in the future.”

Keywords: legal infrastructure, COVID-19, security council, settlement of disputes and cooperation

A. Introduction

The unprecedented COVID-19 pandemic is a powerful reminder on how international community is heavily interconnected and vulnerable. No country, no matter how powerful or prosperous, is ready and able to overcome this cross-border pandemic alone. Now, the world faces one common enemy: COVID-19.

Those who championed international law once promised a world of winners, a fairer and more civilized society where international norms would triumph over interests and disputes. However, with the recent geopolitical fragmentations and inward-looking policies sweeping across nations, the COVID-19 pandemic may have shattered this fantasy. The fact is that this global pandemic will create both winners and losers. Those who could not survive would become obsolete.

Thus, a clear consequence of this tragic pandemic is a change in the behavior of the international community. The changing in international community behavior requires some adjustment and

[1] The views expressed does not represent its institution

fine-tuning in the legal department. In this regard, the pandemic has created political, economic, social, and cultural shifts that changed the global landscape and the law or legal infrastructure should be prepared and well-adapted to respond to it. Though these shifts are certainly worrying, they also present opportunities to those who can navigate smartly through these challenges. The followings are some observations of these shifts and how to manage it.

Based on the preliminary introduction above, the research question is as follows: what will be the impacts or shifts caused by the COVID-19 in the international governance procedure, pacific settlement of dispute, democracy, and global goals and how to respond to it?

B. Research Method

As described previously, this research is a normative juridical legal research that focuses on the applicable legal provisions. This normative legal research will examine the law principles, law systems, law synchronization in analyzing the changing in global landscape and its impacts on legal infrastructures post COVID-19 and how to respond to it. In this case, the research applies a legal research method, which is a scientific activity that is based on certain methods, systematics thinking aimed at studying one or several specific legal phenomena by analyzing it.[2]

The research is classified as a legal research which focusses on positive law. Positive law will be interpreted more broadly, both sourced from national and international law.[3]

In library research, primary legal materials will be examined in the form of national legislation and international legislation, secondary legal materials in the form of papers, research, and tertiary legal materials in the form of dictionaries, encyclopedias and articles.

In addition to examining national legislation and related regulations in Indonesia (normative juridical research), a comparative juridical approach is used, namely a comparative study of law conducted by comparing the Indonesian legal system with other countries' legal systems in analyzing the changing or shifts on legal infrastructures post COVID-19.

This research also puts forward an analysis in which a formulation of legal regulation or legal institution can resolve a social or economic problem arising from COVID-19 pandemic.[4]

This research finally aims to examine what laws should be created in the future, by composing new legislation or formulating new policies, especially in responding the changing on legal infrastructures post COVID-19. Hence, a futuristic juridical approach (future law) is also used.[5]

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2 Soerjono Soekanto, Pengantar Penelitian Hukum, (Jakarta: UI Press, 1986). p. 43.
3 *Ibid.*
4 Sunaryati Hartono, Penelitian Hukum di Indonesia pada Akhir Abad ke-20 (Bandung: PT. Alumni, 2006), p. 171
5 *Ibid,* p. 146

C. Discussions

1. Skyrocketing Digital Culture and The Procedural Shift in United Nations Security Council

Nowadays, due to COVID-19 pandemic, digital engagements rises with various online platforms. Recent High-level meetings of the G-20, ASEAN and ASEAN Plus Three, as well as the Non-aligned Movement reflect the increasing of global dependency on online platforms as a means to communicate during the pandemic.

While this has indeed assisted societies to engage with one another, it also poses some salient challenges, at least from an economic and security standpoint. First, it has created a new divide or economic gap, between the haves and haves not with regard to the technology. In other words, countries who are economically more advanced with digital ecosystems already in place, will certainly be at an advantage compared to those who do not have this luxury.

Increasing digital utilization also faces another challenge in the realm of cyber security. With more than half a million Zoom accounts sold in the dark web, digital privacy and consumer protection are definitely at risk.[6] Interpol identifies that there are at least three types of cybercrimes amidst COVID19: malicious domains (creation of fake domains to carry our spams and phishing), malware (embedded in coronavirus maps, websites, and spam emails), and ransomware (infected attachments that attack critical medical and public institutions).

The recent big debate over a US-drafted procedural note to allow members of United Nations Security Council to vote virtually has become the culmination of those standpoints between the benefits of digital engagement and the threats it might pose.[7]

The United Nations (UN) Security Council on 30 May 2020 for the first-time approved resolutions ”remotely” after painstaking negotiations among UN Security Council experts who are teleworking due to the coronavirus pandemic.

The Security Council unanimously voted for four resolutions, including prolonging the UN mission in Somalia until the end of June, and the mission in Darfur until the end of May - two short periods decided due to uncertainty over the spread of the pandemic. The Council also endorsed a fourth resolution aimed at improving the safety and security of peacekeepers.

The resolutions are the first approved by the Security Council since it began to work virtually on March 12 and come

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6 Lee Mathews, ”500,000 Hacked Zoom Accounts Given Away For Free On The Dark Web”, https://www.forbes.com/sites/leemathews/2020/04/13/500000-hacked-zoom-accounts-given-away-for-free-on-the-dark-web/#153291e058c5 (accessed 28 May 2020).

7 Michelle Nichols, ”U.N. council members want option to vote virtually, Russia says 'don't be afraid'”, https://www.reuters.com/article/uk-health-coronavirus-un/u-n-council-members-want-option-to-vote-virtually-russia-says-dont-be-afraid-idUKKBN217320 (accessed 28 May 2020)

Resolutions adopted by the Security Council in 2020

S/RES/2519 (2020)	14 May 2020	Reports of the Secretary-General on the Sudan and South Sudan *Letter from the President of the Council on the voting outcome (S/2020/408) and voting details (S/2020/405)*
S/RES/2518 (2020)	30 March 2020	Safety and security of peacekeepers *Letters from the President of the Council on the voting outcome (S/2020/249) and voting details (S/2020/268)*
S/RES/2517 (2020)	30 March 2020	Reports of the Secretary-General on the Sudan and South Sudan *Letters from the President of the Council on the voting outcome (S/2020/248) and voting details (S/2020/267)*
S/RES/2516 (2020)	30 March 2020	Somalia *Letters from the President of the Council on the voting outcome (S/2020/247) and voting details (S/2020/266)*
S/RES/2515 (2020)	30 March 2020	Non-proliferation/Democratic People's Republic of Korea *Letters from the President of the Council on the voting outcome (S/2020/246) and voting details (S/2020/270)*

as COVID-19 rapidly spreads in New York, which has become the epicenter of the disease in the US. Seeking to abide by quarantine and teleworking recommendations, the Security Council was obliged to create new rules after 75 years as the global guarantor of peace and security.

Following about a dozen days of talks, council members agreed that they would have 24 hours following closed-door negotiations on draft resolutions to send their votes electronically to the UN Secretariat, who will release the results.

The new procedures have been described in a letter from the president of the Security Council (S/2020/252) to permanent representatives of Council members describing temporary measures to be applied during the COVID-19 period, in particular the written voting procedure.[8]

In order to proceed with the adoption

United Nations S/2020/253

Security Council

Distr.: General
31 March 2020

Original: English

Letter dated 27 March 2020 from the President of the Security Council addressed to the Permanent Representatives of the members of the Security Council

[8] Security Council Report, "whats in the blue", https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2020_253.pdf (accessed 28 May 2020)

of resolutions, China, in its capacity as the President of the Council for the month of March 2020, on the basis of agreement among Council members, is taking the initiative to set forth the following procedures.

First, following a request from a Security Council member or members presenting a draft resolution in blue, the President will circulate a letter to members of the Council announcing that the draft resolution, to be included in the letter as an annex, will be put to a vote, and requesting Council members to provide their votes in writing within a non-extendable period of 24 hours. There will be an announcement in the Council's work programme that the process is under way. The draft resolution will be translated into the six official languages of the United Nations before the end of the 24-hour period.

Second, within the 24-hour period, every delegation will send the Director of the Security Council Affairs Division a letter from its permanent representative or chargé d'affaires, submitted electronically to the Division, indicating its vote (in favor, against or abstention) on the draft resolution and, if applicable, an explanation of vote. The Division will acknowledge receipt, will keep votes confidential during that period and will communicate the result to the President of the Security Council upon the expiry of the 24-hour voting period. The Council member or members presenting the resolution will not be able to withdraw or amend the resolution once the voting period has begun. Any delegation that fails to respond within the 24-hour voting period will be considered to have been absent from the vote.

Third, within 12 hours of the conclusion of the voting period, the President will convene a videoconference of the Security Council to announce the outcome of the vote.

Fourth, within three hours of the conclusion of the voting period, the President will circulate a letter, listing every delegation's vote and the outcome of the vote, to all Security Council members, the Member States concerned and the Security Council Affairs Division. If the draft resolution is adopted, the Division will, after receiving the letter from the President, circulate that resolution, with a date and number, to all Council members and the Member States concerned. There will be a six-hour period for members to make an explanation of vote in written form, if they so wish, upon receiving the President's letter on the voting outcome. The Member States concerned will also be able to make a written statement, with the agreement of the Council, in line with rule 37 of the Council's provisional rules of procedure. The voting result and all letters will be sent to the Division for its records and published on the Council website.

Fifth, resolutions adopted through the above written procedure will have the same legal status as those voted on in the Security Council Chamber.

Sixth, in addition to the above procedure, during the same period, the President of the Security Council will

announce to the public and Member States, 24 hours in advance, the intention to schedule videoconferences of members of the Council.

Seventh, the President of the Security Council may invite Member States that are not members of the Council to participate in a videoconference of members of the Council, when the interests of that Member are specially affected and there are no objections from any Council member. This will not apply to videoconferences of the members of the Council that are announced in advance as closed videoconferences.

Eighth, to ensure the transparency of those videoconferences, the President of the Security Council will, within 48 hours, circulate as a document of the Council a compilation document containing the interventions of the briefers and of all those Council members who request the inclusion of their statements in the document. To that end, the members will send their statements to the presidency in a timely manner. This will not apply to videoconferences of members of the Council that are announced in advance as closed videoconferences.

Ninth, these temporary, extraordinary and provisional measures will be in place for the duration of the restrictions on movement in New York owing to the COVID-19 pandemic, to enable the Council to discharge its mandate, and will not be considered as a precedent in the future. The implementation of these measures will be assessed at the end of April, and they may be renewed, adjusted or discontinued, subject to agreement among all members.

Several members of the United Nations Security Council wanted to move sessions entirely to videoconferencing, but Russia objected on both legal and political grounds. Russia believes the 15-member body ”shouldn’t be afraid” to meet in person in the council chamber in New York.

Russia instead accepted only that the Security Council hold ”informal” talks by video. The virtual votes temporarily end the famous spectacle of the Security Council, where diplomats theatrically raise their hands to vote or veto and can take advantage of the cameras to passionately attack other countries.

Several diplomats said that the new procedure made sense for technical votes on the renewal of missions but were not ideal for more controversial matters.

Some pundits believed that the new voting procedure gives extra unnecessarily bureaucratic sense since giving everyone 24 hours to file confidential votes may make sense for routine business, but it will become obstacle if the Council has to respond to an acute crisis fast.

These debates in the UN Security Council should become the trigger for a larger discussion to find solutions on the question of digital and technological divides/gaps and digital security to address recent development on the skyrocketing of digital culture.

International cooperation requires

to create a ”digital trust” and a safer digital ecosystem for information sharing. Increasing ”regulability” is also desirable. Regulability is the capacity of a government to regulate behavior within its proper reach. In the context of the Internet, that means the ability of the government to regulate the behavior of (at least) its citizens while on the Net.[9] Applying Lex Informatica could be one of the ways to improve regulability.

Lex Informatica has a distinct enforcement properties. Legal regulation depends primarily on judicial authorities for rule enforcement. Rule violations are pursued on an ex post basis before the courts. Lex Informatica, however, allows for automated and self-executing rule enforcement. Technological standards may be designed to prevent actions from taking place without the proper permissions or authority.[10]

Furthermore, joint efforts are also required to strengthen cyber risk management measures to effectively counter cyber threats and prevent or mitigate attacks on critical information infrastructure. A legal debate over the much-needed international legal regime and application of international law to cyberspace must also come to the fore.

2. ”Us Versus Them” Mentality and Pacific Settlement of Disputes

There are valid concerns whether the pandemic will give room--and even exacerbate--violent extremisms, xenophobia, and narrow nationalism.

The example of the ”blame game on the origins of the virus” between the two most powerful economies, illustrates how this pandemic is also becoming a dangerously politicized agenda. However, there are also other similar worrying trends in other regions.[11]

In the Middle East region, for example, some countries are blaming others for the increase of coronavirus cases and even for spreading the outbreak. If these tensions are not settled amicably, this region could fall into deeper political sectarian conflicts.[12]

Furthermore, countries in Europe have also closed their borders for the first time in fear of the spread of COVID19. These political skirmishes and distrust issues undermine the much-needed global efforts to combat COVID-19, putting many communities around the world at risk.

In combatting this common enemy, spreading the culture of peace and tolerance is highly needed. There should be no room for divisions when the focus should be on how to manage and mitigate

9 Lawrence Lessig, Code Version 2.0., (New York: Basic Books, 2006), p. 23.
10 Joel R. Reidenberg, Lex Informatica: The Formulation of Information Policy Rules Through Technology, (Tax Law Review, Volume 76, Number 3, 1998), p. 23
11 Wall Street Journal, ”US intelligence agencies say coronavirus originated in China was not man made of genetically modified”, https://www.wsj.com/articles/u-s-intelligence-agencies-say-coronavirus-originated-in-china-wasnt-man-madeor-genetically-modified-11588260228 (accessed 28 May 2020).
12 Reuters, ”Saudi Arabia denounces Iran for accepting Saudi visitors amid coronavirus”, https://www.reuters.com/article/us-health-coronavirus-saudi-iran/saudi-arabia-denounces-iran-for-accepting-saudi-visitors-amid-coronavirus-idUSKBN20S2IT (accessed 28 May 2020).

this virus together.

There are numerous legal documents and soft laws that gave emphasize on the culture of peace.

The Charter of the United Nations, including the purposes and principles contained therein, dedicated its sole purposes to save succeeding generations from the scourge of war. The Constitution of the United Nations Educational, Scientific and Cultural Organization also states that:

> *"since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed".*

In this regard, the international community at large should always observe and be devoted to the prevention of conflicts, the peaceful settlement of disputes, peacekeeping, peacebuilding, mediation, disarmament, sustainable development, the promotion of human dignity and human rights, social inclusion, democracy, the rule of law, good governance and gender equality at the national and international levels. This way, global communities can contribute greatly to a culture of peace, including in addressing and mitigating COVID-19 pandemic.

In this regard, the importance of respect and understanding for religious and cultural diversity throughout the world, of choosing dialogue and negotiations over confrontation and of working together and not against each other, is even more important than ever.

3. Effectiveness of Repressive Vis-à-vis Democratic System during COVID-19 Pandemic

The true trial of leadership is how well you can function and address a crisis. In the face of COVID19, some leaders opt for draconian measures, such as nation-wide lockdowns, to curb the spread of the virus. The actions they embark upon are then views acting in the name of national interest. If the intention is genuinely to address this public health crisis, it is understandable. But if the intention is to deviate and to gain more control of the population than it will become unacceptable.

COVID-19 pandemic will create both repressive and democratic leaders, and those who have missed out want to set things right. For instance, some might argue that Netanyahu's annexation plan to the West Bank during the time of crisis has been used to delay his corruption cases domestically. Some of the countries in the Middle East also use the reasons for this crisis to utilize social media to track down protesters and to strip down foreign journalists.[13]

President Donald Trump for instance, after much reluctance, has used the powers of the Defense Production Act to compel companies to manufacture items in short supply that would aid in the U.S. response to the deadly coronavirus.[14]

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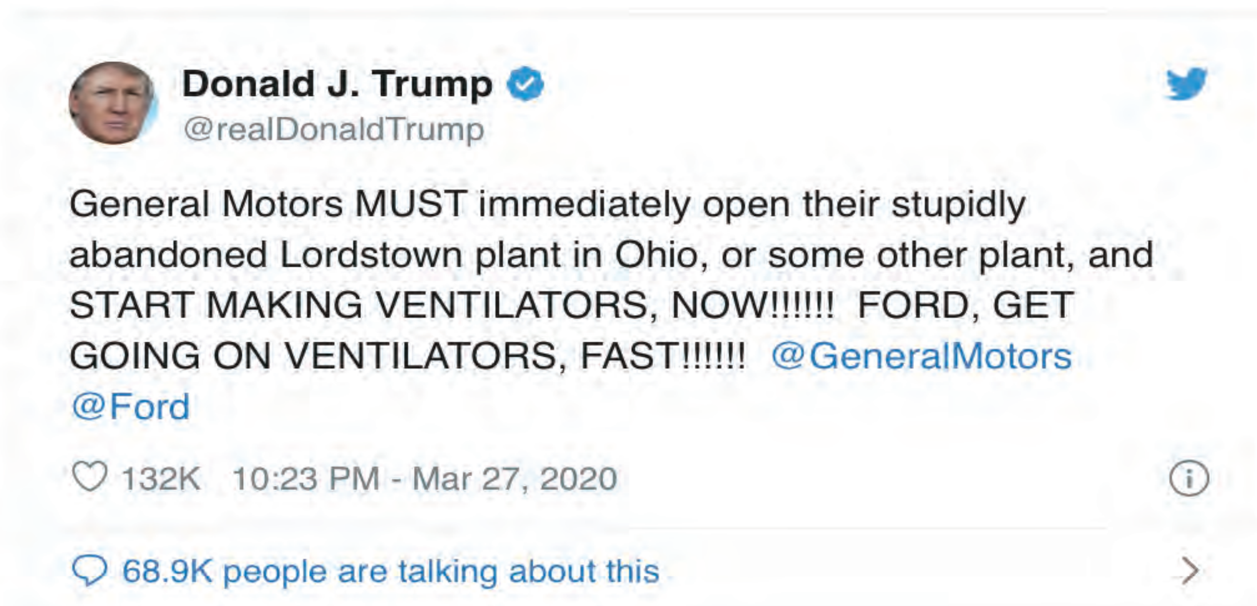
[13] Hussein Solomon, "The Impact of COVID-19 on the Middle East and North Africa", https://jcpa.org/article/the-impact-of-COVID-19-on-the-middle-east-and-north-africa/ (accessed 28 May 2020).

[14] Yelena Dzhanova, "Trump compelled these companies to make critical supplies, but most of them were already doing it", https://www.cnbc.com/2020/04/03/coronavirus-trump-used-defense-production-act-on-these-companies-so-far.html (accessed 28 May 2020).

Under the Act which came from the Korean War-era law, the White House has asked companies to ramp up production of protective gear needed by health professionals on the front lines of the crisis as hospitals, stores and testing centers warn they're experiencing shortages in medical masks, ventilators, gloves, testing swabs and other essential equipment.



In this regard, democratic nations must set examples, become role models, and prove themselves that democracy is not only going to become a powerful tool to resolve the pandemic at home; but it can also contribute to the global efforts in mitigating and addressing the COVID-19 pandemic.

As industries are reorienting and diversifying lines of production, they are also expanding the scope of their cooperation across borders to better adapt to the changing global supply and demand shock.

In this regard, governments are exploring and facilitating innovative ways to strengthen economic cooperation with partner countries, to fulfill needs of priority medical supplies and medicine.

Innovative cooperation between Indonesia with partner countries such as South Korea, Japan, India, and the UAE are a few examples.

Indonesia and South Korea are working together in the joint production of Personal Protection Equipment (PPEs), ventilators, and masks. In this regard, raw materials are imported to Indonesia and then converted into final products.

Cooperation between Indonesian state-owned enterprises with Japanese and Indian companies are also taking place in the procurement of pharmaceutical ingredients for COVID19 medicines.

While the provision of medical supplies assistance from UAE is also directly followed by their purchases of Indonesian agricultural and SMEs products.

Indonesia also proposed the creation of

a forum for cooperation in the exchange of information that can facilitate collaboration between the private sector in producing and distributing the supply of mandatory medical equipment to handle the pandemic. The proposal was mentioned during the virtual biweekly Ministerial Coordination Group on COVID 19 (MCGC) meeting with Australia, Canada, Germany, Italy, Morocco, Peru, Singapore, South Africa, Turkey, and the United Kingdom.

This certainly highlights how international cooperation can go a long way in fulfilling a country's necessities and the greater global population.

Greater political coordination to better manage this crisis and to be collectively prepared for future pandemics at the regional and global level is also critical. The world's democratic nations must show their leadership in taking part to resolve the pandemic through a democratic-led process that promotes multilateral avenues.

Recent G20, ASEAN, and NAM Summits have shown that the spirit is geared to attain this common goal. The ASEAN and ASEAN+3 Summits last month have identified proposals to establish ASEAN COVID-19 Response Fund, ASEAN+3 Task Force on Pandemic, and ASEAN+3 Reserve of Essential Medical Supplies.

While the recent NAM Summit has agreed to establish a Task Force to develop a database of medical and humanitarian needs of the NAM countries. Realization of these joint commitments will become a testament on how strengthening multilateralism will go far and beyond.

4. Impact of COVID-19 to Global Goals

According to a paper published by the United Nations University World Institute for Development Economic Research (UNU-WIDER)[15], the economic impact of COVID-19 could increase global poverty for the first time in three decades, pushing more than half a billion people, or 8 % of all humanity, into poverty.[16]

What is more concerning is the grim possibility of a poverty tsunami that could sweep across developing countries and least developed countries due to COVID-19. Although they are lagging behind Europe and the US in terms of COVID-19 rate of infections and deaths, Sub-Saharan Africa, for example, are already facing devastating impacts. The International Monetary Fund and the World Bank project that, for the first time in 25 years, the said region will go into a recession.

According to the same projection, 80-85% of people "newly living in poverty" during this pandemic – on a less than $1.90 USD a day in the case of a 10% contraction – would be in South Asia and Sub-Saharan Africa region.

This study also shows that the achievement of the 2030 Agenda,

[15] United Nations, "Shared Responsibility, Global Solidarity: Responding to the socio-economic impacts of COVID-19", the research of UNSDG (2020), https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf (accessed 28 May 2020).

[16] *Ibid.*

particularly on ”no poverty and zero hunger”, will be under considerable threat. In essence, COVID-19 could reverse a decade of global progress to reduce poverty.

In addressing the challenges above, the international community needs to be in a united front with a forward-looking and collaborative approach. Several pertinent areas of cooperation at least can be done in two folds.

First, in addressing poverty, while installing the right economic incentives, stimulus packages, and social safety nets have been the alternative to build economic resilience, bolstering bilateral trade and investment ties are also paramount.

Second, in addressing the health crisis in developing countries, international cooperation is needed to help increase their national capacities in the health sector, as well as in attaining medicines and medical supplies. The recent NAM Summit called for the provision of ”healthcare for all”, which calls for unhindered access to affordable medicine for developing countries. This is vital to the COVID-19 mitigation efforts and in also keeping global attainment of SDGs remains on the right track.

D. Closing

The COVID-19 pandemic has created political, economic, social, and cultural shifts to the global landscape.

On the international governance procedure, the big debate over a procedural note to allow members of United Nations Security Council to vote virtually has become the culmination of the digital shifts posed condition due to COVID-19 pandemic.

On the pacific settlement of dispute, there are valid concerns whether the pandemic will not only give room--and even exacerbate—to more conflicts and confrontation, but also open up opportunities for prevention of conflicts and peaceful settlement of disputes.

On democracy, COVID-19 pandemic will create both repressive and democratic leaders. Thus, democratic nations must set examples, become role models, and prove themselves that democracy is not only going to become a powerful tool to resolve the pandemic at home; but it can also contribute to the global efforts in mitigating and addressing the COVID-19 pandemic.

On the attainment of global goals, the economic impact of COVID-19 could increase global poverty for the first time in three decades, pushing more than half a billion people, or 8 % of all humanity, into poverty. In addressing this challenge, the international community needs to be in a united front with a forward-looking and collaborative approach.

The need of the hour is to ensure that legal infrastructure is well-adapted to the changing global landscape, and in turn, will support global efforts to stop the pandemic and prevent economic collapse. How well countries navigate through these challenges will eventually determine success in defeating this common enemy. Thus, the global community must stand under one same norm cooperation.

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Indonesian Law Journal
P-ISSN: 1907 – 8463; O-ISSN: 2772 – 8568
https://ejournal.bphn.go.id/index.php/ILJ
Volume 13 No.2 | December 2020

CHANGES IN CRIMINAL TRIAL PROCEEDINGS DURING COVID-19: CHALLENGES AND PROBLEMS

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Abstract

COVID-19 pandemic forced the Supreme Court of the Republic of Indonesia to make several adjustments to the courts system of all in Indonesia, one of which was the adjustment of criminal procedural law in criminal trial proceedings. Some regulations were made related to the criminal trial proceedings in Indonesia to adjust to government policies that limit physical interaction between people. However, those regulations made by the Supreme Court also comes with challenges and problems in its implementation. This research was made using the normative legal research method, in purpose to find the changes made in the criminal trial proceedings in Indonesia due to the COVID-19 pandemic and also the challenges and problems encountered in its implementation. Through this research, several things that should be addressed for the change in the criminal trial proceedings amid the COVID-19 pandemic in Indonesia will not only accommodate the principle of expediency, but also the principles of justice and legal certainty.

Keywords: COVID-19, criminal trial, criminal procedural law, court.

A. Introduction

At the end of 2019, the world was shocked by the emergence of an outbreak of a new type of dangerous disease equivalent to SARS (Severe Acute Respiratory Syndrome), scientists identified that the outbreak was caused by a new type of coronavirus. Warnings of the danger of this virus were first informed by a doctor at Wuhan Hospital named Dr. Li Wenliang, the virus is believed to have first spread in Wuhan City, Hubei Province, China. In early January 2020, the number of infected increased dramatically, shortly after that Thailand confirmed the first corona patient outside of China, followed by Japan to report their first case. This virus, officially named as COVID-19 (Coronavirus Disease 2019) by WHO (World Health Organization) then spread to various other countries. . The latest updated data from WHO, as of May 24th, 2020, 216 countries were recorded as being infected with COVID-19, with a total confirmed number of 5,206,614 infected people and 337,736 deaths.[1]

[1] Gugus Tugas Percepatan Penanganan COVID-19, "Data Sebaran", https://covid19.go.id/ (accessed 25 May 2020).

This virus has also spread to Indonesia, as the Government of Indonesia reported the first positive case of COVID-19 on March 2nd, 2020, with 2 patients confirmed. Since the report of the first case, number of positive cases of COVID-19 in Indonesia has continued to surge, the latest data as of May 24th, 2020 mentioned a total of positive cases 22.271 people and a death toll of 1.372 people with a total of 5.402 people recovered.[2] Various attempts have been made by the Indonesian government to suppress the spread of COVID-19, such as the issuance of Government Regulation Number 21 of 2020 on Large-Scale Social Restrictions for Acceleration in Handling Corona Virus Disease 2019 (COVID-19), and the issuance of Presidential Decree Number 11 of 2020 on Determination of Community Health Emergency Corona Virus Disease 2019 (COVID-19).

The spread of this virus has impacted every aspects of Indonesian society, including the legal system, one of which is the criminal trial proceedings in court. The criminal trial proceedings in Indonesia requires the presence of parties in the courtroom, trials which are generally open to the public is potential to cause a crowd if many people are watching in the courtroom. This is contrary to the government's efforts to suppress the spread of COVID-19. The government's call for physical distancing must be applied to all aspects of social life. Therefore, to adapt with this issue, the Supreme Court of the Republic of Indonesia then released several policies to change the system of all courts in Indonesia, particularly related to the implementation of criminal trial proceedings.

One of the changes made by the Supreme Court is the adjustment of criminal procedural law in criminal trial proceedings. Criminal procedural law, also called formal criminal law, according to Simons, regulates how the state through the intermediaries of its instruments of power exercise its right to punish and sentence, and thus including the criminal procedure.[3] The change in the criminal trial proceedings was marked by the issuance of the Supreme Court Circular Letter Number 1 of 2020 and the Cooperation Agreement Number 402/DJU/HM.01.1/4/2020 between the Supreme Court of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Ministry of Law and Human Rights of the Republic of Indonesia on the conduct of the trial through teleconference. Cooperation agreement on the implementation of the trial by teleconference was made to change the system of the criminal trial proceedings used to be held conventionally into a teleconference trial. The teleconference trial will be conducted until an official announcement from the government to revoke the emergency conditions of the COVID-19 outbreak. Regarding this matter, the Supreme Court previously issued Supreme Court Regulation No. 1 of

2 Ibid.

3 Simons, Leerboek van het Nederlandse Strafrecht (Groningen – Batavia: P. Noordhof N.V., 1993), p. 3.

2019. However, the regulation was made to regulate electronic trials for civil cases, not criminal cases, and is limited to certain trial stages, namely the stage of submitting lawsuit/application/intervention, objection, replications, duplicates, conclusions, and decision/stipulation.[4] Hence, the criminal trial by teleconference is something new and deserves to be studied.

Long before, the first criminal trial by teleconference was held in 2002. At that time, for the first time the Supreme Court gave permission to former President BJ Habibie to give testimony via teleconference in the case of irregularities in Bulog's non-budgetary funds on behalf of the accused Akbar Tandjung. Since then, the practice of examining witnesses by teleconference in criminal trial proceedings has begun to be used frequently.[5] However, the criminal trial by teleconference during COVID-19 is not only limited to the witness examination stage but also for all stages of the trial.

Apart from the criminal trial by teleconference, the spread of COVID-19 forced the Supreme Court to issue several other policies related to the criminal trial proceedings in Indonesia. However, the policy that was taken promptly as an effort to suppress the spread of COVID-19 also encountered several challenges and problems in its implementation. Hence, this article will explore the challenges and problems faced in the implementation of these policies, and to these challenges and problems, this article will also provide views on solutions or things that can be done so that the implementation of changes to the criminal trial proceedings during COVID-19 will not only accommodate the principle of expediency, but also accommodate the principles of justice and legal certainty.

Based on these backgrounds, it is interesting to discuss on: what changes were made by the Supreme Court to the criminal trial proceedings in Indonesia during COVID-19? And what are the challenges and problems faced in implementing the changes in the criminal trial proceedings during COVID-19?

B. Research Method

The research method is defined as "the way to", however, practically the method is formulated with possibilities, namely: a type of thought used in research and assessment, or a technique that is common to science, or a certain way to carry out a procedure.[6]

This research uses normative legal research methods or also called doctrinal law research, library research, or documentary studies. Called doctrinal legal research, because this research was conducted only on written regulations or other legal material. Also called library

[4] Sonyendah Retnaningsih et al., "Pelaksanaan E-Court menurut Perma Nomor 3 Tahun 2018 tentang Administrasi Perkara di Pengadilan secara Elektronik dan E-Litigation Menurut Perma Nomor 1 Tahun 2019 tentang Administrasi Perkara dan Persidangan di Pengadilan Secara Elektronik (Studi di Pengadilan Negeri di Indonesia)," Jurnal Hukum & Pembangunan, Volume 50, No. 1 (2020): 137.

[5] Dian Erdianto et al., "Kebijakan Hukum Pidana dalam Pemberian Keterangan Saksi melalui Media Teleconference di Indonesia," Jurnal Law Reform, Volume 11, No. 1 (2015): 66.

[6] Soerjono Soekanto, Pengantar Penelitian Hukum (Jakarta: UI-Press, 2006), p. 5.

research or document study because this research is mostly done on secondary data in the library, such as books, and official documents from the government.[7]

C. Discussions

1. Changes in the Criminal Trial Proceedings in Indonesia due to COVID-19

As the COVID-19 pandemic in Indonesia is spreading widely, the Supreme Court supports the government's efforts to suppress the spread of COVID-19 by issuing a Supreme Court Circular Letter Number 1 of 2020 on Guidelines of Work During the Prevention of Corona Virus Disease 2019 (COVID-19) at the Supreme Court and the Lower Judicial Bodies. In the Supreme Court Circular Letter, several policies are taken to adjust to the the spread of COVID-19 circumstances. of.

Based on the Supreme Court Circular Letter, the criminal trial proceedings continue to be conducted specifically towards cases where the defendant is being detained and their detention cannot be extended further during the period of preventing the spread of COVID-19. For the trial that still required to be conducted, the Supreme Court Circular Letter also determined that:

a. Postponement of the trial and limitation of visitors to the trial is the authority of the Panel of Judges to decide;
b. The Panel of Judges can limit the number and safe distance between visitors in the trial;
c. The Panel of Judges may order thermal checking and prohibit physical contact such as shaking hands between parties at the trial;
d. The Panel of Judges and the parties in the trial can use protective equipment in the form of masks and medical gloves following the conditions and situation of the trial.

Furthermore, there are several criminal procedural law that has been changed with the issuance of the Supreme Court Circular Letter Number 1 of 2020 and the Cooperation Agreement Number 402/DJU/HM.01.1/4/2020 between the Supreme Court of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Ministry of Law and Human Rights of the Republic of Indonesia, these changes were made to adjust to the conditions of the spread of COVID-19 in Indonesia.

First, according to the Supreme Court Circular Letter Number 1 of 2020, the criminal trial against the defendant whose legal detention still have grounds to be extended will be postponed until the end of the period of preventing the spread of COVID-19, the postponement of the criminal trial can be conducted by a single judge. Whereas when referring to Article 11 paragraph (1) of Law Number 48 of 2009 on Judicial Ascendancy, a criminal case trial cannot be conducted by a single judge, yet it must be a composition of at least 3 (three) judges. This can only be

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[7] H. Ishaq, Metode Penelitian Hukum dan Penulisan Skripsi, Tesis, serta Disertasi (Bandung: Alfabeta, 2017), p. 26-27.

excluded if there are provisions in the Law specifying otherwise.

Second, in criminal procedural law enforcement, there are time limit in the examination of certain cases, such as pretrial cases must be decided not later than 7 days,[8] election crime cases must be decided not later than 7 days,[9] etc. However, the Supreme Court Circular Letter Number 1 of 2020 regulates that for such cases which have time limit under provisions of the Law, the judge can postpone his examination even if it exceeds the time limit which is specified in the provisions of the Law. These exceeding-deadline trial examinations must be noted by the Trial Registrar in the minutes of the trial due to exceptional circumstances based on the circular letter.

Third, based on Article 153 paragraph (3) of Law Number 8 of 1981 on Criminal Procedural Law, the presiding judge opens the trial and declares it as open to the public except for cases of decency or when the defendants are children. However, in the Supreme Court Circular Letter Number 1 of 2020 it is regulated that the Panel of Judges can limit the number and safe distance between visitors, thus, although the trial is declared as open to the public, based on the Supreme Court Circular Letter, the Panel of Judges may limit the number of visitors by observing the safe distance between them (physical distancing).

Fourth, based on Article 230 paragraph (1) of Law Number 8 of 1981 on Criminal Procedural Law, it is regulated that a trial takes place in a court building in a courtroom. Besides, Law Number 8 of 1981 also regulates that before the trial begins, the trial registrar, public prosecutor, public defender, and visitors are seated in their respective places in the courtroom, then the defendant is called in, and during the evidentiary hearing, the witnesses will be called into the courtroom one by one in the order. However, based on the Cooperation Agreement Number 402/DJU/HM.01.1/4/2020 between the Supreme Court of the Republic of Indonesia, the Attorney General of the Republic of Indonesia and the Ministry of Law and Human Rights of the Republic of Indonesia, the criminal trial is held without requiring the presence of all parties inside the courtroom, because the trial is held via teleconference. Based on the cooperation agreement, the criminal trial is conducted with the conditions in which the parties are seated in their respective domiciles without having to be present in the courtroom. In this case, the court must provide teleconference supporting facilities and infrastructures for Judges at the court office, the prosecutor's office must provide teleconference supporting facilities and infrastructures for prosecutors at the prosecutor's office, and the Ministry of Law and Human Rights must provide teleconference supporting facilities and infrastructures for defendants/witnesses at

[8] Article 82 paragraph (1) letter c of Law Number 8 of 1981 on Criminal Procedure Law.
[9] Article 482 paragraph (1) of Law Number 7 of 2017 on General Elections.

the State Detention House or Penitentiary.

The policies issued related to the implementation of criminal trials, is certainly part of efforts to support government programs in repressing the number of COVID-19 spreads in Indonesia. The most significant adjustment is the change of criminal trials which previously needs the presence of all parties inside a courtroom, into a teleconference trial, where all parties have no obligations to be in the courtroom and instead, join the trial from their respective domiciles using teleconference media.

2. Challenges and Problems of Changes in the Criminal Trial Proceedings in Indonesia due to COVID-19

The Supreme Court of the Republic of Indonesia made adjustments to the criminal trial proceedings with regard to the principle of public safety as the highest law (*Salus Populi Suprema Lex Esto*). However, there are some contrasting arguments to the policy adopted by the Supreme Court as outlined in the Supreme Court Circular Letter Number 1 of 2020 and the Cooperation Agreement between the Supreme Court, the Attorney General, and the Ministry of Law and Human Rights regarding the trial by teleconference. For example, criticism from *Koalisi Pemantau Peradilan* over the ongoing trial, they believe that it would be better if the court trial could be temporarily suspended to minimize the impact of the wider spread of the coronavirus.[10]

However, there are many considerations if the court trial is suspended temporarily, especially with COVID-19 conditions that cannot be predicted when it will be ended. Several considerations related to the suspended trial, among other things:

a. Trial suspension will violate the principle of simple, fast, and low-cost trial, and will damage the defendant's human rights to be tried immediately. Article 2 paragraph (4) of Law Number 48 of 2009 on Judicial Ascendancy regulates that the judiciary is conducted in a simple, fast, and low-cost manner. The definition of "simple" means the examination and settlement of cases carried out efficiently and effectively, while "low cost" means the court fee should be affordable by society.[11] The term "fast" means case settlement should be done immediately. A fast settlement is very necessary especially to avoid longer detention before a judge's decision, it must be unseparated from the protection of human rights.[12] In addition, the court should handle a case as soon as possible, because the defendant has the right to be tried immediately by the court, this is regulated precisely in Article 50 paragraph (1) of Law Number

[10] Kompas.com, "Cegah Penyebaran COVID-19, Koalisi Desak Sidang di Pengadilan Ditunda", https://nasional.kompas.com/read/2020/03/23/09481331/cegah-penyebaran-COVID-19-koalisi-desak-sidang-di-pengadilan-ditunda (accessed 25 May 2020).

[11] M. Bakri, Pengantar Hukum Indonesia (Malang: UB Press, 2011), p. 148.

[12] Andi Hamzah, Hukum Acara Pidana Indonesia (Jakarta: Sapta Artha Jaya, 1996), p. 12-13.

8 of 1981.

b. Based on Article 26 paragraph (4) of Law Number 8 of 1981, after ninety days, although the case has not been decided, the defendant must be released from detention by law. One of the subjective reasons for detention is to avoid the possibility for the suspect or defendant will escape, damage/ eliminate evidence, and/or repeat the crime.[13] In other words, if the criminal trial is suspended until the detention period expires and the defendant is released from detention by law, this will be detrimental for the Public Prosecutor and the Court, because there is a risk that the Defendant will be difficult to be presented in the trial and also the risk that the Defendant will escape, damage/eliminate evidence and/or repeat a crime.

c. Postponement of the criminal trial will also cause a backlog of cases., The more cases that are piled up will make the judicial process constrained and run slowly. Accumulation of cases can also cause an overcapacity in the State Detention House or Penitentiary, as more defendants are delayed on trial, the longer the defendant must stay for detention in the State Detention House or Penitentiary. This situation is not only very contrary to the government instruction to implement physical distancing but also endanger the health of the defendants who are in the State Detention House or Penitentiary.

Based on those considerations, the Supreme Court's policies as outlined in the Supreme Court Circular Letter Number 1 of 2020 and the Cooperation Agreement between the Supreme Court, the Attorney General and the Ministry of Law and Human Rights, are two of the best efforts that can be done. As stated in a proverb often said by legal experts and world leaders that "justice delayed is justice denied". That a slow judicial process is the same as not giving justice to the parties.[14] Nevertheless, the changes made by the Supreme Court related to criminal trial proceedings during the COVID-19 period may not be perfect, since there are some legal issues and obstacles encountered in the field related to their implementation.

First, related to exceptions to the current criminal procedural law, such as postponement of a criminal trial which can be conducted by a single judge, postponement of the criminal trial that can be conducted exceed the time limit specified in the provisions of the Law, and the implementation of the trial by teleconference, raises legal issues. According to Mark Constanzo, criminal procedural law has abstract principles for certain cases.[15] Related to this, Eddy O. S. Hiariej argued, one of the principles

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[13] H. M. A. Kuffal, Penerapan KUHAP dalam Praktik Hukum (Malang: UMM Press, 2007), p. 70.

[14] Asep Nursobah, "Utilization of Information Technology to Boost Acceleration of Settlement Case in Supreme Court," Jurnal Hukum dan Peradilan, Volume 4, No. 2 (2015): 323-324.

[15] Mark Constanzo, Aplikasi Psikologi dalam Sistem Hukum (Yogyakarta: Pustaka Pelajar, 2006), p. 15.

adopted in criminal procedural law is *lex stricta*, which states that the rules in criminal procedural law must be interpreted strictly, the provisions in criminal procedural law cannot be interpreted other than what is written. The existence of this principle can certainly be understood because criminal procedural law is essential to restrain human rights. Therefore, on one hand, the state is given the authority to take all actions in the context of law enforcement, but on the other hand, that authority must be strictly limited by law.[16]

Exceptions to criminal procedural law regarding trials of criminal cases conducted during the COVID-19 period still does not have a strong legal provision. Considering the legal basis for the exceptions to criminal procedural law is only based on the Supreme Court Circular Letter, meanwhile, the Supreme Court Circular Letter itself cannot deviate the higher rules, which is the Law on Criminal Procedural Law. Thus, the government needs to issue legally equivalent regulations regarding the exclusion rules from Law Number 8 of 1981 on Criminal Procedural Law for there won't be any deviation from the principles adhered to in the criminal procedural law and won't cause any arbitrariness by law enforcers.

Second, related to the trial conducted by teleconference, as of this writing, there is still no guideline on terms and procedures for conducting a teleconference trial. The Cooperation Agreement between the Supreme Court of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Ministry of Law and Human Rights only regulates the authorities and responsibilities of each institution in conducting trials through teleconference, but there are no provisions regarding guideline on terms and procedures for conducting a teleconference trial. The absence of guidelines on terms and procedures for conducting trials by teleconference also raises another problem, whether all criminal cases can be conducted by teleconference or not, considering that each case has different level of difficulty, which may affect the evidentiary hearing agenda.

The evidentiary hearing is a process that plays an important role in the trial, in a criminal case, it proves the existence of criminal acts and fault in the defendant.[17] Practically, evidentiary hearing is the prosecution's act to gain judge's confidence which is obtained from minimum evidence proving the existence of crime and guilt of the defendant.[18] Evidence is everything related to an act, in which they can be used as a proving material to build a judge's confidence that a crime has been

[16] Yuristyawan Pambudi Wicaksana, "Implementasi Asas Ius Curia Novit dalam Penafsiran Hukum Putusan Hakim tentang Keabsahan Penetapan Tersangka," Lex Renaissance, Volume 4, No. 1 (2018): 97.

[17] I Made Sukadana et al., "Alat Bukti Keterangan Saksi Mahkota dalam Perkara Pidana Pencurian," Jurnal Law Reform, Volume 14, No. 2 (2018): 264.

[18] Hendar Soetarna, Hukum Pembuktian dalam Acara Pidana (Bandung: Alumni, 2011), p. 9.

committed by the defendant.[19]

As stipulated in Article 181 of Law Number 8 of 1981 on Criminal Procedural Law, the presiding judge shows the defendant all evidence and asks whether the defendant knows the object. Whereas in a criminal trial conducted by teleconference, for difficult cases which have a lot of documents as the evidence – which the documents themselves play an important role – the defendant's or witness' space to examine such evidence is very limited. For example, in complicated cases where important documents exist as evidence to prove the occurrence of a criminal case, these documents must be verified and presented directly to the defendant or witnesses so they can assess the truth of the documents used as evidence in the trial. The teleconference trial eliminates the opportunity for the defendant to examine or directly see the documents or evidence presented at the trial. Subsequently, this will violate the defendant's right to defend himself and reduce the accuracy of the Panel of Judges in seeking material truth in the trial. Therefore, the guideline on terms and procedures regarding the conduct of the teleconference trial is needed, to determine which criminal cases can be carried out through teleconferences and which court agenda is possible to be conducted.

Third, the implementation of criminal trials conducted by teleconference requires good facilities and infrastructures for the trial torun smoothly. The Attorney General of the Republic of Indonesia noted that up to April 3rd, 2020, 10.517 criminal cases were successfully tried through teleconference, the number of such cases being conducted in 334 district attorney offices throughout Indonesia.[20] The teleconference trial was conducted using an application called Zoom, though in its use several obstacles encountered during the teleconference trial. As experienced by the Banda Aceh District Court/Corruption Court, the sound that comes out from Zoom was sometimes interrupted, so the Panel of Judges had to question repeatedly the defendant or witnesses present at the teleconference.[21] The availability of adequate teleconference supporting facilities and infrastructures are very much needed in order to proceed solemn trials without reducing the rights of the defendant in order to the defendant can properly pay attention to the entire proceedings of the trial.

From the explanation above, it is apparent that there are several legal issues and obstacles in the implementation of criminal trials during this COVID-19 period. The readiness of institutions in overcoming

[19] Alfitra, Hukum Pembuktian dalam Beracara Pidana, Perdata dan Korupsi di Indonesia (Jakarta: Raih Asa Sukses, 2011), p. 23.

[20] iNews.id, "10.517 Perkara Disidang Secara Daring oleh Kejari Se-Indonesia", https://www.inews.id/news/nasional/10517-perkara-disidang-secara-daring-oleh-kejari-se-indonesia (accessed 25 May 2020).

[21] Serambinews.com, "PN Tetap Gelar Sidang di Tengah Pendemi COVID-19, Gangguan Suara Sering jadi Kendala", https://aceh.tribunnews.com/2020/05/13/pn-tetap-gelar-sidang-di-tengah-pandemi-COVID-19-gangguan-suara-sering-jadi-kendala (accessed 25 May 2020).

these challenges and problems is very necessary to accommodate not only the principle of expediency but also the principle of justice and legal certainty. Because in upholding the law, as taught by Gustav Radbruch in *idee des recht* (Doctrine of the Law), there are three elements that must always be considered: legal certainty (*rechtsicicheheit*), expediency (*zweckmassigkeit*), and justice (*gerechtigkeit*).[22]

D. Closing

COVID-19 pandemic forced the government to issue policies that were deemed necessary to suppress its spreading in Indonesia. It also made the Supreme Court of the Republic of Indonesia act quickly by making adjustments to the system in the courts below them. This adjustment can be recognized by the issuance of the Supreme Court Circular Letter Number 1 of 2020 and the Cooperation Agreement between the Supreme Court of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Ministry of Law and Human Rights of the Republic of Indonesia. Changes made in terms of criminal procedural law include: postponement of a criminal trial that can be conducted by a single judge, postponement of the criminal trial that can be conducted exceed the time limit specified by the provisions of the Law, ability of the panel of judges to limit the number of visitors in ensuring safe distance between visitors in a criminal trial, and the implementation of a criminal trial conducted by teleconference.

However, these adjustments encounter several legal issues and obstacles in the implementation, such as: exceptions to criminal procedural law regarding criminal trial conducted during the COVID-19 period which do not have a strong legal provision yet, no guideline on terms and procedures for conducting a criminal trial by teleconference, and audio connection disruption in the defendant or witness side during the teleconference, which made the panel of judges had to question repeatedly the defendant or witnesses.

Several things that can be addressed regarding the challenges and problems faced are: First, the government should form a Law or Government Regulation that regulates the adjustment of criminal trial proceedings during the COVID-19 period to guarantee legal certainty. Second, the Supreme Court may establish guidelines on the terms and procedures for conducting criminal trials by teleconference as standard rules to define which case can be conducted by teleconference and exact procedures for conducting the referred trial. Third, the readiness of each institution that involved in conducting a teleconference trial in to provide adequate facilities and infrastructures for the defendant can properly observe the entire proceedings of the trial without reducing the defendants' rights as regulated in Law.

[22] Sudikno Mertokusumo and A. Pitlo, Bab-Bab tentang Penemuan Hukum (Bandung: Citra Aditya Bakti, 1993), p. 1.

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BIOGRAPHY

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Indonesian Law Journal
P-ISSN: 1907 – 8463; O-ISSN: 2772 – 8568
https://ejournal.bphn.go.id/index.php/ILJ
Volume 13 No.2 | December 2020

THE IMPACT OF PANDEMIC ON LEGAL SYSTEM: IMPACT ON ARBITRATION LAW

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Abstract

One of the impacts of the outbreak of COVID-19 is the state legal system. Legal system in a broad sense consists of legislation, the state's legal personnel (executive) and the judicial system. A part of the judicial system is a private settlement of dispute by arbitration. Arbitration is subject to the arbitration law. The COVID-19 has forced the closure of the arbitration proceedings. This is a problem for arbitration. This article tried to analyse the possible solution to the closure of the proceedings. This article used the normative method by analysing the existing arbitration law and arbitration rules. This article argued, although arbitration may not be able to be commenced amid pandemic, that future arbitration law (and amendment of existing arbitration law) should foresee feasible events with a smaller "pandemic", i.e., epidemic and other force-majeure related events. This article recommended firstly, the introduction of provision(s), which recognizes virtual arbitration. Secondly, changes of some procedural issues in the arbitration proceedings.

Keywords: COVID-19, arbitration law, virtual arbitration.

A. Introduction

One of the impacts of the spread of COVID-19 Pandemic on the legal system in Indonesia is arbitration law. Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution, lays down the substantive provisions on arbitration. The Law also provides regulations on the conduct of arbitration proceedings which includes hearings of the parties, hearings of the experts or factual witnesses, if appropriate, and issuance of the award.

When the pandemic hit severely Indonesia in early February 2020, the government announced the imposition of social distancing and the lock down of some major cities. The announcement of lock down first began in Jakarta and later other major cities followed suit. The policy seemed to follow several states in the world. Governments of Japan, United States, European Union, Russia, or even Kingdom of Saudi Arabia have already imposed strict social distancing protocol and locked down their cities to prevent the spread of the pandemic.

Following the government's announcement, the leading arbitration

organization in Indonesia, BANI (Indonesian National Board of Arbitration), released a notice concerning the postponement of all the arbitration proceedings. The announcement is posted on the website as well as the temporary closure of the office.[1]

The postponement of the arbitration without a doubt affects the arbitration proceedings. The halt of arbitration proceedings would also mean the postponement of the hearing of already new registered arbitration request and the postponement of the issuance of awards. This article examined whether Arbitration Law No 30 of 1999 provides certain provision to allow the arbitration proceedings in a non-conventional way or traditional arbitration going in the light of the pandemic? Secondly, whether the arbitration proceedings by means of virtual communication might possibly be commenced given the existing arbitration rules? Since the conduct of arbitration would be subject to the arbitration rules, this article would also try to look at the arbitration rules under BANI Arbitration.

B. Research Method

This article was written based on normative research. It analysed legal norms, including rules, on arbitration. It is a descriptive-analysis article based on systematic interpretation. This article took the analytical and qualitative approach to address the problem. The data used was the Indonesian laws on arbitration, Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution, and UNCITRAL Model Law on International Commercial Arbitration 1985/2006. The article also looked into the arbitration rules of the BANI arbitration.[2]

A number of terms used in this article among others:

1. *Global force majeure*. This term is used to indicate the occurrence of force majeure in a global scale. Force majeure is the condition where one is prevented from doing or not doing something due to severe, unpredicted conditions. These include the outbreak of pandemic or epidemic, war, natural disaster such as tsunami, mass demonstration, etc.
2. *Virtual arbitration*. This term is used to indicate an arbitration conducted without the presence of the parties (in a venue of hearing). It is an arbitration that is conducted through internet platform or other form of internet-based communication.
3. *Platform*. Referring to the term of platform provided by techopedia.com, it means ”… a group of technologies that are used as a base upon which other applications processes or technologies are developed. In personal computing, a platform is the basic hardware (computer) and

[1] See the announcement of BANI concerning the temporary closure of the office at: http://www.baniarbitration.org [accessed at 08 May 2020]

[2] BANI Arbitration Rules as posted at: http:// https://www.baniarbitration.org/ina/procedures.php [accessed at 08 May 2020]

software (operating system) on which software applications can be run".[3]

4. *Pandemic*. The World Health Organization (WHO) defines Pandemic as the "worldwide spread of a new disease".[4] The new virus COVID-19 is the pandemic recently announced by WHO. It initially appeared in Wuhan China and spread globally in a short matter of time.
5. *Epidemic*. WHO describes epidemic as the spread of a new virus within a certain region or area.[5] The SARS (severe acute respiratory syndrome) is a well-known epidemic that emerged in China in 2002. Another example is the outbreaks of *cutaneous leishmaniasis* taking place in the southern part of Sing and Beluchistan Provinces in Pakistan in 2004, and in Ban, a village in the Islamic Republic of Iran in 2003, and in Sudanese refugee camps of Treguine and Koukou, Chad in 2007.[6]

C. Discussion

1. Arbitration in the Time of Pandemic

a. Arbitration as the Traditional System of Dispute

Arbitration under this article is a settlement of a commercial dispute by third party. The basic principle of arbitration is the existing of an agreement between the parties. It is the parties' autonomy and agreement to determine how to settle their disputes. This procedure is the product of the agreement that must be made in writing. The agreement between the parties indicates that arbitration is a private parties' settlement of disputes.

Arbitration is subject to the substantive law of a state. It is also bound by the arbitration rules. Major arbitration institution such as the London Court of Arbitration (LCA), the Indonesian National Board of Arbitration (BANI) or the Thai Arbitration Centre (THAC) has its own arbitration rules. The Rules is also called procedural rules of arbitration. It is the law of the procedure of arbitration to determine how the dispute be submitted, the composition of the tribunal, the parties' hearing and the arbitration award.

The parties in dispute may also agree to settle their dispute by an *ad hoc* arbitration.[7] It is a temporary and one-time arbitration set up by the parties to settle their dispute. The parties shall first agree on the rules of arbitration and the financial matters necessary for the administration of the dispute.

Arbitration, either institutional or *ad hoc* arbitration under the substantive law and rules, is commonly conducted in private. The tribunal and the parties' hearings are

[3] https://www.techopedia.com/definition/3411/platform (accessed at 11 May 2020).
[4] https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/ [accessed at 09 May 2020]
[5] https://www.who.int/leishmaniasis/epidemic/epidemics/en/ [accessed at 09 May 2020]
[6] *Ibid*.
[7] Article 6 para. 9 Arbitration Law No 30 of 1999 provides: "If attempts to reach an amicable settlement, as contemplated in paragraphs (1) to (6), are unsuccessful, the parties, based on a written agreement, may submit the matter to resolution by *an arbitration institution or ad-hoc arbitration*." (Italics added).

held in a private room. Only the parties in dispute may attend the hearings. Physical presence of all the parties as found in the traditional court system, are necessary. The hearings are generally conducted orally. The parties, the applicant and the respondent, must be present in person before the tribunal. [8] Rarely arbitration is conducted via teleconference, or other internet-based communication- (virtual arbitration).[9]

An exceptional arbitration where the presence of the parties are not required and the process is held virtually (through the internet) is the Domain Name Arbitration. It is a special arbitration also called the UDRP or the Uniform Dispute Resolution Policy to settle the domain name ownership dispute. It is a special arbitration established by the cooperation between WIPO (World Intellectual Property Organization) and ICANN (the Internet Corporation for Assigned Names and Numbers). ICANN is the organization concerned with managing the assignment of domain names and internet protocol addresses.

The dispute under UDRP is settled without the presence of the parties. All the 'hearing' conducted through the internet. In addition, the decision of the UDRP arbitration is final and binding. The decision of the UDRP arbitration concerning the rightful ownership of domain name is enforced and executed as soon as the award is rendered.[10]

b. The Emergence of COVID-19 Pandemic

The outbreak of a new virus called COVID-19 emerged at the end of 2019. The deadly virus is the most contagious virus ever known. It spreads rapidly to the whole world within a short period of times. The spread is fast. The rapid development of air transport and the fast movement of person travelling across continents contribute to the spread of the virus.

The pandemic has affected how the governments change their economic and financial policy. The governments in five continents have locked down their territories. They also ordered and closed down the government's and companies' offices, shops and markets, schools and universities, industries and all social and cultural, and sport activities. Public transports including train and interstate buses, stopped operating. They also released the protocol-for people to stay and work at home. The order and protocol have halt the administration of arbitration, including as shown below, BANI and other major arbitration intuitions in the world.

c. International Arbitration Law and Practice

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8 Basic understanding on arbitration see among others, Huala Adolf, *Dasar-dasar, Prinsip dan Filosofi Arbitrase (transl. Basics, Principles and Philosophy of Arbitration)*, Bandung: Keni Media, 2014.

9 However, according to Redfern and Hunter, it is a common practice in international arbitration to have their first or preliminary meeting through teleconference. It is initiated by the chairperson of the tribunal to talk via telephone with the parties discussing the procedural matters of the dispute. (See: Nigel Blackaby et.al., *Redfern and Hunter on International Arbitration*, Oxford: Oxford U.P., 5th.ed., 2009, p. 371).

10 http://www.icann.org/ [Accessed at 30/09/2008].

UNCITRAL Model Law on International Commercial Arbitration of 1985 (amended in 2006) is the most important and incorporated it in legislation on arbitration. About 83 jurisdictions have adopted Model Law into their arbitration law. Most members of ASEAN adopt the Model Law. Indonesia, Laos and Viet Nam are not in the list.[11]

The Model Law however is silent about the conduct of arbitration via teleconference or internet. The major provisions of Model Law deal with the conduct of arbitration: from the registration of the case, the composition of the tribunal, the arbitration proceedings and the awards. They are applicable for arbitration under normal condition. Normal condition means the conduct of arbitration with the actual presence of the parties and the tribunal in a certain designated venue.

In respect to arbitration, no law or rules regulate the conduct of arbitration during the pandemic. Moreover, observation found that amid the pandemic major arbitration institutions in the world; the International Chamber of Commerce (ICC) arbitration and the American Arbitration Association (AAA) are not operating. No arbitration cases have been reported during the pandemic. No hearings were held during the pandemic for a certain period of time.[12]

Obviously, the observation above might be challenged. Since the arbitration proceedings are confidential, the arbitration may be conducted in other countries or regions where these activities are not reported because of its confidential nature of arbitration. Accordingly, presuming that the above observation reflects the actual fact, it is proposed that the absence of arbitration in the world is plausible given the strict enforcement of lock down in major cities in the world, including Paris, London or New York.[13]

d. Indonesian Arbitration Law

1) Status of the Arbitration Law

Indonesian Arbitration Law was made following the financial crisis in South East Asia. The crisis stormed major states in the region. Started with Thailand, later the storm hit the neighbouring states badly, including Indonesia. The crisis pushed the law reform including arbitration law necessary to mitigate the crisis. Financial crisis has triggered financial disputes that would be better resolved by arbitration.

The old law on arbitration applying the Dutch procedural Law, *(Reglement op de Rechtsvordering* or *Rv)* Articles 615 to 651 were removed. The old arbitration law was left behind the progressive development of arbitration law in the world. It was a colonial law on arbitration. Woman for

[11] Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (accessed 8 May 2020).

[12] ICC Issues Guidance on Possible Measures to Mitigate Effects of COVID-19, https://www.morganlewis.com/pubs/icc-issues-guidance-on-possible-measures-to-mitigate-effects-of-COVID-19-cv19-lf (accessed 17 April 2020); The AAA announced that *AAA-ICDR remains active and operational, no hearings will take place in AAA-ICDR hearing facilities until at least June 1, 2020***.** (https://go.adr.org/covid19.html) (accessed 17 April 2020).

[13] *Ibid.*

example was not qualified as arbitrator. The New Law No 30 of 1999 was installed.

The Arbitration Law is understandably made in an urgent speed under the financial crisis condition. It does not follow the *UNCITRAL Model Law on International Commercial Arbitration*. Most of its provisions, crafted under the emergency condition, are made for domestic arbitration. Most of its provisions are devoted for arbitration held within the Indonesian territory. There are however five articles for international arbitration. Nonetheless, these provisions are only for the recognition and enforcement of international arbitration awards.[14]

2) Provisions on Proceedings-based-Internet

The Arbitration Law contains quite surprising provisions. The Arbitration Law envisages the possibility of commencing arbitration in special conditions. The Law provides a possibility of utilising technology or electronic communication for the commencement of arbitration. This includes:

a) Article 4 (3) Arbitration Law on Arbitration Agreement

Article 4 para. (3) Provides, the agreement to arbitration made by among others email or any other form of communication. No explanation what the so called any other form of communication would mean. This provision suggests, firstly, any forms of communication would be accepted as long as the parties agree. This would include any communication indicating the agreement of the parties to submit their dispute to arbitration.

Secondly, since the agreement to arbitration is made by ”email or any other form of communication”, this would imply that the Law does not question the means or mode of communication the parties use for their communication. If this interpretation were correct, the form of communication would be the freedom of the parties. It would be the parties alone to decide to use a certain form or mode of communication available to both of the parties and agreed by them.

The freedom to use the form of communication would also signify the mode of communication would be applicable to the tribunal. The parties may agree that their communication with the tribunal be conducted by using a certain mode of communication, this for example would be internet-based-communication. This construction suggests that the use of mode for communication for example applying teleconference or video-conference is doable. The only requirement is that the parties agree, and the tribunal gives its consent. The limitation for using this communication is that they do not violate the mandatory provisions of the law. These include the secrecy of the proceedings, the adherence to the principle of *audi alteram et partem*, etc. [15]

b) Article 14.4 BANI Rules on Place of Hearing

[14] Articles 65-69 Arbitration Law.

[15] Article 28 (1) Arbitration Law states: ”The parties in dispute shall have the same right and opportunity to put

BANI Arbitration Rules allow the parties and the tribunal to have their hearings made through internet means. BANI Arbitration Rules provides a broader power to arbitration tribunal to give its consent or refusal. Enshrined in Article 14.4 BANI Rules, this provision concerns the place of arbitration. As this article suggests, the place of hearing is closely related with the place of where the communications is conducted. The communication made by the Internet may take place by applying various platforms as agreed by the parties and the arbitration tribunal. Article 14.4 BANI Rules provides:

> *4. Place of Hearings*
> *Hearings shall be conducted at a place determined by BANI and the agreement of the parties but may also be at another place if the Tribunal deems necessary with the agreement of the Parties. The Arbitration Tribunal may request that meetings be held to examine assets, other goods, or documents at any time and at the required place, with notice as required to the parties, to allow them to be able to attend the examination. Internal meetings and sessions of the Tribunal may be held at any time and place, including over the internet, if the Tribunal deems appropriate.*

2. Possibility of Arbitration during Pandemic

Indonesian Arbitration Law and the BANI Rules above advocate the arbitration proceedings conducted through communication by internet. The Law allows the arbitration proceedings to be commenced using internet devices or other form of communication including virtual communication or telecommunication-based technology as long as the parties and the tribunal consent.

The availability of technology for communication is supportive. There are a number of platforms where people may easily communicate virtually. The platforms are supporting the virtual communication among people living in different places, cities, or even continents. People in the world have utilized this instrument during the pandemic to communicate virtually with their families, friends, or colleagues.

The scheme above theoretically and practically may be used by the parties and the arbitration tribunal for arbitration process including the hearings (virtual arbitration). The spirit is, first, technology could support arbitration proceedings where the parties and the tribunal agree to use it.[16] Second, the parties find hardship in attending the place of hearing.

3. Possibility of Problems

The reliance on the existing law and rules and technology may be well served to the possibility of arbitration hearing through virtual communication. However, it is of the opinion that potential legal problems might arise ahead. Arbitration and arbitration proceedings cannot rely fully on virtual communication. There are some provisions that require physical

forward their respective opinions".

16 As comparison, the Indonesian Supreme Court has issued Supreme Court's Regulation No 4 of 2020 on the use of electronic means in the courts' proceedings.

actions during or after arbitration hearing.

In addition, the reliability of communication-based internet might arise another problem. This article suggests that the use of virtual communication might not be appropriate to be applied for arbitration, at least during COVID-19 pandemic. To I will start the argument potential problem of communication-based internet will be elaborated and followed with the discussion on the potential legal problems related to virtual arbitration.

a) Problems of the Secrecy of Proceedings

The popularity of a certain platform for virtual communication has been an unprecedented development in the world. Fear of virus infection and the governments order to stay and work at home, have driven people to use the internet for communication.

There are nonetheless reports stating that certain government or office urged its staff not to use a certain virtual communication platform. They fear this certain platform is not free from intrusion. A possible breach of privacy is imminent. Nonetheless, the reliability of the reports needs to be tested. The reports may be a hoax. Yet, whether they are hoax or not, the issue of breach of privacy is not disputed.[17]

It has been widely reported that once one connects his devices to the internet, other people somewhere might be able to access his computer. Others may know what websites he is surfing, what content saved in the computer, the private number of his personal account, etc. In short, the fear of potential breach of privacy has been a common knowledge. Only when the platform has been safe and free from intrusion, can the virtual arbitration hearings be safely and confidently held.

b) Infrastructure of the Telecommunication Devices

The potential problem of telecommunication infrastructure is worth noting. Big cities like Jakarta, Surabaya or Bandung, enjoy a relatively stable internet connection. The stable connection brings stable communication and conveniences. On the other hand, for small cities, such connection is still a luxury. The internet connection is occasionally poor and poor connection brings poor communication. Hence, it would be unlikely to conduct arbitration hearings in rather poor communication as it may damage the credibility of the hearings.

c) Determination of the Place of Arbitration

Another problem which needs a solution is the determination of the place of arbitration. Place is a relevant matter in arbitration. Law requires the mention of place of arbitration. The award among others shall state the place of arbitration.[18]

[17] The ban of using a certain popular platform has been once widely reported. For comparison concerning the safety of privacy in internet, see for example: Assafa Endeshaw, *E-commerce, Internet Law and E-commerce Law: With a Focus on Asia-Pacific*, Singapore: Prentice Hall, 2001 (discussing among others the consumer protection in cyberspace. As Endeshaw put it, "*Indeed, every indication is that the previously acquired rights of protection and safeguards put in place on behalf of the general consumer in "realspace" are increasingly being eroded to the detriment of the Net consumer (that is, in cyberspace*)) (page. 404).

The place of arbitration is more relevance in international arbitration. The place of arbitration will determine the state where the award is made. The state will determine the status of the award. The state, that is a party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, would get the guarantee that the award will be recognized and enforced in other members' courts.[19]

d) Site Visit to the Object of the Dispute

During the hearings, sometimes the tribunal wants to see the object of dispute directly. The decision is made mainly because the tribunal sometimes want to ensure themselves the status of the object of dispute. Particularly in a dispute involving physical object, such as failed infrastructure as an example. It is critical for the tribunal to see the infrastructure condition since by observing the site, the tribunal would make its own judgment concerning the reasons or status of the failed infrastructure. This would mean the tribunal and the parties should visit the object of the dispute in a location within the province, in other parts of the islands, or even foreign soil.

e) Taking of Oath

Under the Arbitration Law, taking oath of factual witness and experts are mandatory. Article 48 Arbitration Law provides that witnesses or expert witnesses shall testify upon oath. During pandemic, it is not possible for factual witness or expert to visit the venue of arbitration to take oath.

f) Signature of the Award

The arbitration award must be signed by the member of the arbitration tribunal. The award must be printed, made in a hardcopy. Article 54 (1) Arbitration Law requires that the award must contain among others, the signature(s) of the arbitrator or arbitration tribunal.

g) Registration of the Arbitration Award

Another likely problem with the arbitration award during the pandemic is the requirement of registration of arbitration award. Article 59 of Arbitration Law provides, domestic arbitration award shall be registered with the district court. The registration must be made within 30 days since the award is rendered.

The international arbitration award faces the same requirement. Article 67 (1) Arbitration Law provides that application for enforcement of an international arbitration award shall be made after the award is submitted for registration to the Clerk of the District Court of Central Jakarta by the arbitrator(s) or the legal representative thereof.

The different requirement on registration of award between national and international award is as follows. First is the time limit for registration. Under the domestic arbitration award, the arbitrator or its representative must register the award

[18] Article 54 (1) of Arbitration Law requiring the mention of place of arbitration in the arbitration award.

[19] New York Convention of 1958 is the most important convention on arbitration. About 160 countries in the world have ratified the convention. (See, for instance, Huala Adolf, *Arbitrase Komersial International (transl. International Commercial Arbitration*, Jakarta: Rajawali Pers, 2002; Huala Adolf, *Hukum Arbitrase Komersial Internasional (transl.: International Commercial Arbitration Law*), Bandung: Keni Media, 2016)).

within 30 days since the award is rendered. Under BANI Arbitration Rules, when the award is rendered, the parties have 14 days to check the typographical errors of the award. When the check is completed, the arbitrators or its representative has 14 days to register the award to the district court. International arbitration awards do not have the time limit for registration.

Second is the court of registration. The domestic arbitration award shall be registered at the district court where the defendant is domiciled. International arbitration award is to be registered with the Clerk of the District Court of Central Jakarta.

Third is the person registering the award. The party submitting the registration of the domestic arbitration award is the arbitrators or its representatives. In international arbitration awards, the parties seeking the recognition and enforcement of the award are the ones who register the award to the Clerk of the District Court of Central Jakarta.

As the requirement above indicated, the failure of the arbitrators or its representative to submit and register the domestic award is quite considerable. There has not been any reported case where the court refused enforcement of the award because the requirement of this time limit is breached. However, when this occurs, the consequence of the court's refusal of enforcement of arbitration award is a possibility.

Another dilemma with the registration of award and the requirement of signature (above) would be the violation of lockdown order and the protocol to stay at home. The requirement of signature and the registration of award require a person to travel from one place to another.

My propositions in this respect are twofold. *First*, public law principally prevails over private agreement (agreement of parties to arbitrate). Private agreement may not set aside the application of the public law. *Second*, government order including protocol may be classified as rules or bylaws, soft law, or any other applicable terms. Whatever terms used, they are "commands".[20] All subjects, citizens, or persons staying or domiciling in the state territory concerned shall be subject to those rules or bylaws.

4. Future Law Reform on Arbitration

The analysis above indicated the impossibility of arbitration hearings to carry out during the outbreak of pandemic. In terms of theory and practice, the common policy of government in the world to lock down their cities and to enforce the protocol to stay and work from home, make it impossible for arbitration hearing to be commenced.

Nonetheless, COVID-19 pandemic has a strong impact on legal system, including part of its sub-system of settling dispute through arbitration. As arbitration law is

[20] I borrowed this terms from John Austin's. See: H.L.A. Hart, *The Concept of Law*, Oxford: Oxford U.P, 3rd.ed., 2012, pp. 6, 7; Huala Adolf, *Filsafat Hukum Internasional: Perspektif Negara Sedang Berkembang* (transl. *Philosophy of International Law: Developing Countries Perspective*), Bandung: Keni Media, 2020, pp. 41-42.

concerned, it needs to adapt itself to the unpredicted circumstance including the outbreak of viruses or other diseases-related occurrence including force majeure.

Second proposition would be as follows. Arbitration proceedings may not be commenced during the global force majeure; however, arbitration proceedings may be conducted during epidemic or certain force majeures in a certain areas or regions. Since the force majeure takes place in a certain region, and not in other regions, arbitration proceedings should be able to be commenced in areas where the force majeure does not exist. When one or more parties or one or more arbitrators are affected by force majeure, virtual arbitration is the best option for the parties and the tribunal to keep arbitration process moving.

As arbitration is concerned, no law or rules regulate the virtual arbitration for the resolution of commercial disputes during the epidemic. Neither UNCITRAL Model Arbitration Law of 1985, the Arbitration Law No 30 of 1999 nor BANI Arbitration Rules regulates this condition.

Outbreaks and spread of virus causing epidemic in the history of mankind have occurred several times. Epidemic happens more frequently than pandemic. It is fairly plausible then to act vigilantly in response to the future outbreak of epidemic. It is high time to compose law and rules on virtual arbitration during epidemic or other force majeure events or similar emergencies.

Since the nature of epidemic is within regions and its impact might affect other regions, arbitration law regulating virtual arbitration must be made under international arbitration law. It was proposed in the earlier publication that Indonesia should have its international arbitration law.[21] And this law would be a separate law from the existing Arbitration Law No 30 of 1999.

The future international arbitration law should be in parallel with the amendment of Arbitration Law No 30 of 1999. The future legislation, international arbitration law and the amendment of Arbitration Law, should incorporate provisions allowing the practice of virtual arbitration in case of the epidemic or other force majeure events. However, several issues, either technical or legal, should be solved first. They include:

a. Technical Issues

Technical issues concern on the availability of reliable platform for virtual arbitration. To address the issue arbitration institution may consult experts on information and technology regarding the availability and reliability of the platform and the technicians to run the platform. Technology is developing progressively. New inventions on information technology are developing rapidly. It is envisaged, new platforms would emerge in the near future. Thus, it is believed that they would suffice to cater the need for safe and

[21] See: Huala Adolf, "Perlu Dibentuk Undang-Undang Tentang Arbitrase Internasional," (transl.: "International Arbitration Law should be established"), *Majalah Hukum Nasional*, No 1 (2016).

reliable platform of virtual communication.

b. Legal Issues

Legal issues are more complicated. The contemplated legal issues that need to be settled in light of the present Indonesian Arbitration Law includes:

1) Provisions on the Recognition of Virtual Arbitration

Future arbitration law should lay down certain provisions allowing parties to use virtual arbitration to settle their commercial dispute. The provisions should also specify under what circumstances virtual arbitration may be utilized. These provisions are essential. They give guarantee and recognition of the implementation of virtual arbitration. They would also provide legal assurance that the award or the decision of virtual arbitration will be recognized and enforced by law.

2) Arbitration Documents

All documents submitted by parties should no longer be in a physical format. In virtual arbitration, all documents must be made electronically. For example, documents now may be easily converted into pdf format. All these pdf documents should be submitted by email.

3) Site Visit

One of the legal issues most probably arises in virtual arbitration is site visit. Site visit is visiting and seeing the object of dispute. Future arbitration law may no longer be necessary. The future law may require the parties to provide the tribunal complete pictures including recordings of the object of dispute. By doing this, the tribunal will not be necessary to visit the site visit.

4) Requirement of Oath

Under the traditional arbitration and arbitration law (above), taking oath of factual witness and experts are required. In virtual arbitration, two possibilities may be considered. *First*, oath is optional. A written statement signed before public notary shall be sufficient. Alternatively, if the oath is mandatory, it may be taken virtually. Hence, the future law should recognize such oath.

5) Reading the Award

Under traditional arbitration, arbitrator or the arbitration tribunal read the award before the parties. A certain date is set for reading the award. The requirement of reading the award is stated in Arbitration Law.[22] In virtual arbitration, it is no longer necessary to read the arbitration award. UNCITRAL International Arbitration Law and major international arbitration laws and practices do not recognise the reading of the award. The arbitration tribunal only send the award by registered mail to the parties because arbitration is a private procedure of settlement of disputes It is not a public court or domestic court where the reading of award is mandatory.

6) *S*ignature of the Award

The future law should recognize electronic signature as today it has been

[22] Arbitration Law Article 55 states: "When the examination of the dispute is complete the hearing shall be concluded, and a date shall be fixed for *the reading* of the arbitration award." Article 57 reads: "The award shall *be read* not later than thirty (30) days after the conclusion of hearings." (Italics added).

widely used. Electronic signature therefore should be allowed in virtual arbitration.

7) Requirement for Registration of Award

Requirement for registration of award should be made flexible. First, the requirement concerning the time limit of 30 days as required by Arbitration Law should be deleted. Arbitration Law does not require any time limit for its registration. Such distinction should be abolished.

8) Online Submission of Award for Registration

The future law should also allow the registration of award sent by online. Parties who like to register their award may do so by sending the award through email to the district court. This would imply, the district court should also be ready to accept and recognise this scheme.

Lastly, besides the reform of law above, the arbitration rules under arbitration institution should follow suit. They should draft their own rules and expand it to other practical matters to ensure and enable virtual arbitration to be conducted property and orderly.

D. Closing

This article concluded that the present arbitration law needs amendment given the recent development of the pandemic. The amendment should include the possibility of the parties to use electronic means in the proceedings. The arbitration rules need to adopt more rules on electronic means in the arbitration proceedings.

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Indonesian Law Journal
P-ISSN: 1907 – 8463; O-ISSN: 2772 – 8568
https://ejournal.bphn.go.id/index.php/ILJ
Volume 13 No.2 | December 2020

CAN COVID-19 BE CONSTRUED AS A FORCE MAJEURE IN THE AGREEMENT?

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Abstract

The COVID-19 not only affects human health but also spreads to business sectors in Indonesia. The government has issued several regulations in response to COVID-19, for instance, companies are required to operate at a minimum operation level. Furthermore, due to COVID-19 and government requirements, numerous performances in agreement are either delayed or cancelled. Given the above, the issue of COVID-19 as a force majeure is also increasingly discussed. However, before declaring COVID-19 as a force majeure, the parties should consider the governing law of the agreement, the conditions, and the clause of force majeure in the agreement. Recently, the Bengkulu District Court also made a decision on the Case No. 3/Pdt.G.S./2020 in which the defendant argued that its performance could not be held due to COVID-19. Hence, this study will discuss the concept of force majeure under Indonesian law and whether COVID-19 fulfil this concept.

Keywords: COVID-19, force majeure, agreement

A. Introduction

On 11 March 2020, The World Health Organization (WHO) officially announced the COVID-19 ("**COVID-19**") outbreak as a global pandemic.[1] Although there has been numerous debates and discussions about the term pandemic in media and scientific publications. According to WHO, a pandemic is the worldwide spread of a new disease. Global pandemic arises when the disease has spread over multiple countries or continents and COVID-19 is one of the examples.[2]

COVID-19 is an infectious disease caused by a newly discovered corona virus. It affects human health also adversely affects all businesses in the world, including Indonesia. For instance, in the beginning of March, the Indonesia Tour Guide Association (HPI) Regional Head for East Nusa Tenggara (NTT), Agustinus Bataona, stated that there

1 Gloria Setyvani Putri, "WHO Resmi Sebut Virus Corona COVID-19 sebagai Pandemi Global," Kompas, https://www.kompas.com/sains/read/2020/03/12/083129823/who-resmi-sebut-virus-corona-COVID-19-sebagai-pandemi-global (accessed 12 June 2020).

2 World Health Organization, "What is Pandemic?", World Health Organization, https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/ (accessed 12 June 2020).

were approximately 45,000 tourists had cancelled their plans to visit major destinations in the region from January to May.[3]

In response to the occurrence of COVID-19, the government has issued Presidential Decree No. 11 of 2020 on Stipulation of Public Health Emergencies for Corona Virus Disease 2019 (COVID-19) ("**Presidential Decree No. 11/2020**"), Presidential Decree No. 12 of 2020 on the Declaration of a Non-Natural Disaster from the Spread of Corona Virus Disease 2019 as a National Disaster ("**Presidential Decree No. 12/2020")**, and Government Regulation No. 21 of 2020 on Large-Scale Social Limitation to Accelerate the Management of Corona Virus Disease 2019 (COVID-19) ("**GR No. 21/2020**") as an immediate response to the pandemic. Presidential Decree No. 11/2020 states COVID-19 as type of disease that causes Public Health Emergency[4] and Presidential Decree No. 12/2020 states that the spread of corona virus as a national disaster.[5] On the other hand, GR 21/2020 focuses on limitation on large-scale social interactions, particularly as a countermeasure to the spread of COVID-19.[6]

As a follow up to the regulations above, in April and May 2020, cities in Indonesia, such as Jakarta, Bogor, Depok, Tangerang and Bekasi, applied the large-scale social limitation ("**PSBB**"). Furthermore, the government urged all businesses and organizations (excluded 11 sectors) to close their offices. Companies were required to operate at a minimum operation level which caused many employees were required to work at home and others became victims of unemployment. The most affected sectors by this pandemic are transportation, tourism, food, and manufacturing.[7]

The spread of COVID-19 and the PSBB policy causes the performance of a party to be either delayed or cancelled. Regardless of travel and import limitations, supply and demand issues, and/or the absence of human resources, more businesses find

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3 Jakarta Post, "COVID-19 impacts across Indonesia's business sectors: A recap", Jakarta Post, https://www.thejakartapost.com/news/2020/03/30/COVID-19-impacts-across-indonesias-business-sectors-a-recap.html (accessed 12 June 2020).

4 Presidential Decree No. 11 of 2020 on Stipulation of Public Health Emergencies for Corona Virus Disease 2019 (Keputusan Presiden No. 11 Tahun 2020 tentang Penetapan Kedaruratan Kesehatan Masyarakat Corona Virus Desease 2019).

5 Presidential Decree No. 12 of 2020 on The Declaration of a Non-Natural Disaster from The Spread Of Corona Virus Disease 2019 as a National Disaster (Keputusan Presiden No. 12 Tahun 2020 tentang Keputusan Presiden tentang Penetapan Bencana Nonalam Penyebaran Corona Virus Disease 2019 (COVID-19) sebagai Bencana Nasional).

6 Government Regulation No. 21 of 2020 on Large-Scale SocialLimitation to Accelerate the Management of Corona Virus Disease 2019, art. 1. (Peraturan Pemerintah Nomor 21 Tahun 2020 Pembatasan Sosial Berskala Besar Dalam Rangka Percepatan Penanganan Corona Virus Disease 2019).

7 Rakha Fahreza Widyananda, "Dampak Corona, Ini 6 Sektor yang Paling Terpengaruh Jika Terjadi Lockdown", Merdeka, https://www.merdeka.com/jatim/dampak-corona-ini-6-sektor-yang-paling-terdampak-jika-terjadi-lockdown-kln.html (accessed 14 June 2020).

8 Dewi Savitri Reni and Syarifah Reihana Fakhry, "COVID-19 and Indonesia: Force Majeure and Other Considerations", SSEK, https://www.ssek.com/blog/COVID-19-and-indonesia-force-majeure-and-other-considerations (accessed 14 June 2020).

it difficult to continue to operate and meet their contractual obligations.[8] These raise a number of issues regarding COVID-19 and its impact on existing agreements. One of the issues that is currently being discussed is related to the concept and implementation of force majeure clauses, and the ability of defaulting parties to avoid liability.

Force majeure is an event that happens beyond an individual's control. The party who experiences force majeure may be excused from responsibilities arising from the non-fulfilment of contractual performance. The impact of force majeure is that both or one of the parties may be excused from its performance and they may also not be responsible to pay damages for its non-performance. This concept is recognized in the Articles 1244 and 1245 of the Indonesian Civil Code ("**ICC**").[9]

A number of parties said that the Presidential Decree No. 12/2020 could legitimize COVID-19 as a force majeure and could be used as an excuse to cancel an agreement. However, Mahfud MD stated that the presumption of the Presidential Decree No. 12/2020 as the basis for cancelling an agreement, especially business contracts is a mistake. COVID-19 as a non-natural disaster may not be immediately used as an excuse for the cancellation of an agreement by the reason of force majeure.[10]

Based on various issues above, this study will elaborate the following subject: Whether COVID-19 meet the concept of force majeure under Indonesian Law?

B. Research Method

Based on the issues above, this study use the normative jurisdictional approach.[11] Data collected is secondary data, which means that the data were already exists, the form and content of the data has already been compiled by the previous author and it may be obtained without being bound by time and place.[12]

C. Discussions

1. Agreement

a. The Definition and Conditions of an Agreement

1) ICC

Based on the Article 1313 of the ICC, an agreement is an act of pursuant to which one or more individuals bind themselves to one another.[13] Furthermore, under ICC, an agreement must fulfil the following requisites to be valid:[14]

a) Consent of the Parties

Consent means agreement on all the

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9 Indonesian Civil Code, art. 1244-1245. (Kitab Undang-Undang Hukum Perdata)

10 Mochamad Januar Rizki, "Penjelasan Prof Mahfud Soal Force Majeure Akibat Pandemi Corona", Hukumonline, https://www.hukumonline.com/berita/baca/lt5ea11ca6a5956/penjelasan-prof-mahfud-soal-i-forcemajeure-i-akibat-pandemi-corona/ (accessed 17 October 2020).

11 Sri Mamudji et al., *Metode Penelitian dan Penulisan Hukum* (Jakarta: Fakultas Hukum Universitas Indonesia, 2005), p. 9.

12 Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI-Press, 2015), p. 12.

13 Indonesian Civil Code, art. 1313. (Kitab Undang-Undang Hukum Perdata).

14 *Ibid.,* art. 1320.

main content of the agreement between both parties.

b) Have Legal Capacity to Enter an Obligation

The contracting parties required to have legal capacity according to the law. Based on the Article 1329 ICC, every person has the capacity unless the law states otherwise. For example, according to Article 1330 of ICC, minors and those who are under guardianship don't have the capacity to make an agreement.

c) There Must be a Specific Subject Matter

d) There Must be a Permitted Cause

It means that the content of the agreement must contain a permitted cause. There are two conditions, subjective condition, in which such regulation reserved for parties who entered the agreement, the other condition is called objective condition because it refers to the agreement itself.[15]

2) Legal Doctrine

In this regard, Subekti said that an agreement is an event when one person promise to another or when two people promise one another to do something.[16]

b. The Principles of Agreement

1) The Principle of Freedom of Contract

Indonesian Law recognizes the principle of freedom of contract and such agreements are irrevocable unless by mutual consent, or pursuant to reasons stipulated by law. This principle is explicitly stated in Article 1338 of the ICC.[17]

The principle of freedom of contract provides freedom for the parties to arrange the contents in several matters related to the agreement. The parties have the opportunity to determine all the clauses of the agreement, unless it will violate the laws, morality, or public order.[18]

2) The Principle of Pacta Sunt Servanda

This principle relates to the consequences of the agreement and is concluded in the sentence of "applies as a law for those who make it" in Article 1338 ICC. Thus, agreements made legally by the parties bind them as the law. Therefore, it means that an agreement that is duly and validly executed is legally binding.[19]

c. Event of Default

Based on Article 1243 of ICC, default is the debtor's failure to fulfil his obligations in accordance to the agreed agreement.[20] Subekti stated that the event of default may be implemented in four conditions, namely:[21]

1) The promise is broken by the debtor;
2) Debtor performs its promise, but does not correspond to the promised;
3) Debtor performs its promise, but not in timely manner; and
4) Debtor does some action which violates

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[15] Subekti, *Hukum Perjanjian* (Jakarta: Intermesa, 2005), p. 1.
[16] *Ibid.*
[17] Indonesian Civil Code, art. 1338. (Kitab Undang-Undang Hukum Perdata)
[18] Ahmad Budi Cahyono and Surini Ahlan Sjarif, *Mengenal Hukum Perdata* (Depok: Gitama Jaya, 2008), p. 134.
[19] Munir Fuady, *Hukum Kontrak: Buku Kesatu* (Bandung: Citra Aditya Bakti, 2015), p. 30.
[20] Ahmad Budi Cahyono and Surini Ahlan Sjarif, *Mengenal Hukum Perdata* (Depok: Gitama Jaya, 2008), p. 141.
[21] Subekti, *Hukum Perjanjian* (Jakarta: Intermesa, 2005), p. 45.

the agreement.

The legal consequences for the event of default are for the debtor to pay compensation, in the form of costs, damages and interest, that is suffered by counterparty,[22] the cancellation of the agreement,[23] the risk being transferred to the debtor since the default occurred,[24] and paying the court fee.[25]

2. Force Majeure

As a follow up from event of default, debtor may prepare a plea with a variety of legal basis, one of which is to indicate that its performance may be excused due to force majeure.[26]

a. Definition of Force Majeure

1) ICC

Although force majeure mentioned in ICC, it does not provide any details of the definition of force majeure.

2) Law No. 2 of 2017 on Construction Service (”Law No. 2/2017”)

Law No.2/2017 states that force majeure is an event that arises beyond anticipation and control of the parties that cause loss for one party.[27]

3) Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services (”PR No. 16/2018”)

Attachment to PR No. 16/2018 also states force majeure as a condition that occurs beyond anticipation of the parties so that the obligations specified in the agreement may not be fulfilled.[28]

However, the above regulations (Law No. 2/2017 and PR No. 16/2018) only apply to certain sectors (construction and procurement for goods and/or service).

4) Legal Doctrine

Subekti believes that when the debtor use force majeure as its plea, the debtor may prove that the failure to perform was caused by other factors that were completely unpredictable, and the debtor could not do any necessary action to prevent it. In other words, the reasons of the debtor’s non-performance or the delay on its performance was not caused by the debtor’s fault.[29]

b. The Conditions of Force Majeure

Munir Fuady stated his opinion based on articles in the ICC on force majeure and draw conclusion of the conditions of a force majeure are, namely:[30]

1) The event that caused the force majeure must be unexpected by the parties;[31]
2) The party who has to carry out the

[22] Indonesian Civil Code, art. 1234. (Kitab Undang-Undang Hukum Perdata)
[23] *Ibid., art. 1266.*
[24] *Ibid., art. 1237.*
[25] *Herziene Indonesisch Reglement*, art. 181 (1).
[26] Indonesian Civil Code, art. 1244-1245. (Kitab Undang-Undang Hukum Perdata)
[27] Law No. 2 of 2017 on Construction Services, art. 47. (Undang-Undang No. 2 Tahun 2017 tentang Jasa Konstruksi)
[28] Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services, art. 1(52). (*Peraturan Presiden No. 16 Tahun 2018 tentang Pengadaan Barang/Jasa Pemerintah*)
[29] Subekti, *Hukum Perjanjian* (Jakarta: Intermesa, 2005), p. 55.
[30] Munir Fuady, *Hukum Kontrak: Buku Kesatu* (Bandung: Citra Aditya Bakti, 2015), p. 96-97.
[31] Indonesian Civil Code, art. 1244. (Kitab Undang-Undang Hukum Perdata)

obligation (the debtor) may not be given responsibility for the event;[32]

3) The event that caused the force majeure was beyond the debtor's fault;[33]
4) The event that caused the force majeure was not a deliberate event by the debtor;[34] and
5) The debtor is not in a bad faith.[35]

With respect to the fifth condition (The debtor is not in a bad faith), it means that any agreement must be performed by the parties in good faith.[36] In this regard, J. Satrio believes that good faith demands the agreement to respect appropriateness and propriety in the society.[37] Subekti, also believes that good faith demands the agreement to respect appropriateness and propriety.[38] Therefore, under Indonesian law, a contracting party must ensure that they performed in good faith in order to persuade the panel of judges to declare some circumstances as force majeure.

Moreover, Suharnoko also stated that despite the vagueness of the definition of appropriateness and propriety, good faith in agreement may be viewed in the form of notification and request for rescheduling and restructuring.[39] Therefore, before declaring an event as a force majeure, there are several points as mentioned above that needed to be put into consideration.

c. The Scope of Force Majeure

1) Law No. 4 of 2009 on Mineral and Coal Mining (”Law No. 4/2009”)

Law No.4/2009 states that events that may be declared as force majeure are war, civil disorder, rebellion, epidemic, earthquake, flood, fire, and natural disaster beyond human capability.[40]

2) Legal Doctrine

According to Subekti, force majeure considered as an absolute, if there is no other possible way to carry out the agreement, for example the items have been destroyed because of the natural disasters. On the other hand, force majeure considered as a relative, which is in the form of a situation where the agreement may still be able to be implemented, but with a very big sacrifice from one of the parties. For example, prohibition by the government to distribute the items from a place, therefore, it needs a different transportation with a possible increase in cost to distribute the items.[41]

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32 *Ibid.*
33 *Ibid.,* art. 1545.
34 *Ibid.,* art. 1553 jo. art. 1245.
35 *Ibid.,* art. 1244.
36 *Ibid.,* art. 1339.
37 J. Satrio, *Wanprestasi Menurut KUHPerdata, Doktrin, dan Yurisprudensi* (Bandung: Citra Aditya Bakti, 2014), p. 47.
38 Subekti, *Hukum Perjanjian* (Jakarta: Intermasa, 1995), p. 41.
39 Suharnoko, *Hukum Perjanjian Teori dan Analisis Kasus* (Jakarta: Prenadamedia Group, 2004), p. 73-74.
40 Law No. 4 of 2009 on Mineral and Coal Mining, elucidation of art. 113 (1). (Undang-Undang No. 4 Tahun 2009 tentang Pertambangan Mineral dan Batubara)
41 Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermesa, 1982) ,p. 150.

d. The Consequences of Force Majeure

1) Law No. 4/2009

Law No. 4/2009 states that the consequences of force majeure are the suspension of mining activities or agreements.[42]

2) PR No. 16/2018

Under PR No.16/2018, the occurrence of force majeure may result in the cancellation of the agreement or the change in the agreement.[43]

3) Legal Doctrine

Sri Soedewi Masjchoen who cited from Dr. H.F.A Vollmar, distinguishes the consequences of force majeure based on its temporary or permanent nature. If it is temporary, then force majeure may only be delayed and its obligation will arise again as soon as the force majeure no longer exists. However, if the obligation is no longer meaningful to the creditor, the agreement may be cancelled. For example, a taxi was ordered to take a passenger to the station, because there was a traffic accident, the taxi could not arrive on time, and when the traffic conditions were smooth again, the passenger could no longer catch up on the train schedule.[44]

3. COVID-19 as a Force Majeure

As already mentioned above, the Government of Republic of Indonesia has issued Presidential Decree No. 11/2020, Presidential Decree No. 12/2020 and GR No. 21/2020 as its immediate response to the escalation of COVID-19.

Furthermore, in the tax sector, Decree of Director General of Tax Number KEP-156/PJ/2020 on Tax Policies on the Spread of Corona Virus 2019 also explicitly declared the spread of the COVID-19 in Indonesia as a force majeure.[45]

Regardless of the above regulations which declares COVID-19 as a force majeure, below are the necessary consideration of the contracting parties:

1) Governing law of the agreement;
2) The conditions of force majeure; and
3) The force majeure clause under the agreement.

the details of each points are as follow:

a. Governing Law of the Agreement

Pursuant to the freedom of contract principle under Indonesian law, contracting parties must comply with the agreement and the agreement will be regarded as the law as long as the agreement has fulfilled the four basic thresholds set out in Article 1320 of ICC, such as consent, capacity, a specific subject matter and permitted cause.

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42 Law No. 4 of 2009 on Mineral and Coal Mining, art. 113. (Undang-Undang No. 4 Tahun 2009 tentang Pertambangan Mineral dan Batubara).

43 Presidential Regulation No. 16 of 2018 on Procurement of Government Goods/Services, art. 55. (Peraturan Presiden No. 16 Tahun 2018 tentang Pengadaan Barang/Jasa Pemerintah).

44 Sri Soedewi M. Sofwan, *Hukum Perdata, Hukum Perutangan, Bagian A* (Jogjakarta: Seksi Hukum Perdata Fakultas Hukum Universitas Gadjah Mada, 1980), p. 22. as quoted by Rahmat S.S. Soemadipradja, *Penjelasan Hukum Tentang Keadaan Memaksa* (Jakarta: Nasional Legal Reform Program, 2010), p. 11.

45 Decree of Director General of Tax Number Kep-156/Pj/2020 of 2020 on Tax Policies in Correlation with the Spread of Corona Virus 2019, art. 1. (Keputusan Direktur Jenderal Pajak Nomor Kep-156/Pj/2020 Tahun 2020 Tentang Kebijakan Perpajakan Sehubungan dengan Penyebaran Wabah Virus Corona 2019)

Accordingly, under Indonesian law contracting parties are free to choose its governing law, which will affect the law applied to the agreement.

Furthermore, as mentioned above, this study will only discuss force majeure under Indonesia law perspective. Therefore, this explanation only applies to agreements with Indonesia law as its governing law.

b. The Conditions of Force Majeure

First thing first, the party must consider whether COVID-19 fulfilled the force majeure threshold sets out in the ICC (see our explanation on point 2b).

In essence, the conditions of force majeure are as follow:

a) The event that caused the force majeure must be unexpected by the parties;[46]
b) The party who has to carry out the obligation (the debtor) may not be given responsibility for the event;[47]
c) The event that caused the force majeure was beyond the debtor's fault;[48]
d) The event that caused the force majeure was not a deliberate event by the debtor; and[49]
e) The debtor is not in a bad faith.[50]

Given the threshold sets out in ICC on force majeure. Generally, COVID-19 may be categorized as force majeure (subject to terms of the agreement and good faith of the debtor) with the following reasons:

a) COVID-19 is an unprecedented event and no one is able to predict its occurrence or its effect, either to health or business; and
b) The occurrence of COVID-19 may not be placed upon the debtor's responsibility.

In addition, the definition of the fifth condition (The debtor is not in a bad faith) is extremely vague, thus we suggest that the party must review and see if there is any special requirement under the agreement to establish some event as force majeure.

As to the consequences of COVID-19 as force majeure, as mentioned above, one of the consequences of force majeure is cancellation of the agreement. However, we are of the view that COVID-19 not necessarily cancel the agreement as COVID-19 only cause a delay of performance from the debtor.

Alternatively, COVID-19 could be used as a legal basis to request for rescheduling and restructuring. As Suharnoko stated before, rescheduling and restructuring may be considered as the debtor's good faith.[51] The aim of rescheduling is to extend the maturity of the agreement.[52] While restructuring usually gives debtors more relaxation, amongst others: (a) lowered interest rate, (b) nullification of interest rate, (c) nullification owed interest rate.[53]

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46 Indonesian Civil Code, art. 124. (Kitab Undang-Undang Hukum Perdata)
47 *Ibid.*
48 *Ibid.,* art. 1545.
49 *Ibid.,* art. 1553 jo. art. 1245.
50 *Ibid.,* art. 1244.
51 Suharnoko, *Hukum Perjanjian Teori dan Analisis Kasus* (Jakarta: Prenadamedia Group, 2004), p. 73-74.
52 *Ibid.*
53 *Ibid.*

Usually, a party has to send a written notification to the counterparty in order to establish an event as force majeure and further requests for rescheduling and restructuring.

Therefore, in general, COVID-19 may be constituted as force majeure, however, in order to fully assess this matter, we shall refer back to the agreement and analyse it.

c. Force Majeure Clause under the Agreement

Due to freedom of contract principle, in practice there are four possibilities that may arise, amongst others:[54]

a) Agreement includes COVID-19 as a force majeure
b) Agreement has a force majeure clause but does not explain particular events that may be declared as force majeure;
c) The agreement does not stipulate anything related to force majeure; and
d) The party decide to exempt the force majeure in the agreement.

In light of the above, it is necessary to review the relevant agreement before declaring that the contracting parties are able to indicate COVID-19 as force majeure. Further explanation about force majeure will be discussed next.

1) Agreement Includes COVID-19 as a Force Majeure

Agreement explicitly states outbreak or lockdown by government as a force majeure event, then COVID-19 or lockdown by the government may be used as a reason for force majeure.[55] If this is the case, a contracting party has an absolute legal basis to declare COVID-19 as force majeure.

2) Agreement has a Force Majeure Clause but does not Explain Particular Events that may be Declared as Force Majeure

Whether it is stated explicitly or explicitly in the agreement, which must be considered is the obligation, not just the event. Then, the event is also an unexpected event before the agreement is made. For example, if the obligation is a debt service obligation, then an outbreak (COVID-19) or lockdown may not be the reason to delay the payment obligation, because the debtor may still be able to transfer money through an ATM, unless the payment system is interrupted.[56]

3) The Agreement does not Stipulate Anything Related to Force Majeure

In the event where the agreement does not explicitly stipulate regarding force majeure. It is Indonesian law principle that the agreement will be governed by ICC. Therefore, particularly related to force majeure, it will refer to 1244 and 1245 ICC.

4) The Party Decides to Exempt The Force Majeure in the Agreement

The debtor may still be able to argue with legal doctrines and/or Supreme

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[54] Rahmat S.S. Soemadipradja, *Penjelasan Hukum Tentang Keadaan Memaksa* (Jakarta: Nasional Legal Reform Program, 2010), p. 71-99.

[55] Tri Harnowo, ”Wabah Corona sebagai Alasan Force Majeur dalam Perjanjian”, Hukumonline, https://www.hukumonline.com/klinik/detail/ulasan/lt5e81ae9a6fc45/wabah-corona-sebagai-alasan-iforce-majeur-i-dalam-perjanjian/ (accessed 19 June 2020).

[56] *Ibid.*

Court decisions as reference in order to constitute COVID-19 as force majeure, despite the exemption of force majeure clause.

Decision No.409K/Sip/1983 dated 25 October 1984 which essentially held that:[57] (i) a force majeure event must fulfil the elements of a condition that is unforeseen and unpreventable by the party that is obliged to perform obligations under an agreement, and is not attributable to such party; and (ii) the force majeure event is caused by a disaster that could not have been prevented by such party. Therefore, having this in mind it is worth to note that broad events could be constituted as force majeure.

In addition, Rahmat S.S. Soemadipradja also supports the view that policies or regulations set by the government could be used to indicate force majeure, [58] where in this case might be GR 21/2020 which adversely affect the debtor's performance.

In view of the foregoing, the relevant law and regulations could be argued to help a contracting party to constitute these circumstances as force majeure. However, as mentioned in the above, that whether or not such a request is granted by the panel of judges, it is still the panel of judges' discretion.

4. Recent Case of COVID-19 as Force Majeure

Recently, one of Indonesia District Court (Bengkulu District Court) stressed out the importance of good faith in arguing COVID-19 as force majeure.

Panel of Judges in Bengkulu District Court under Decision Case No. 3/Pdt.G.S/2020 ("**Case No. 3**") held an interesting decision.[59] The Background of Case No. 3 are as follow:

a. The plaintiff and defendant conclude a finance agreement on 25 July 2019;
b. As of October 2019, the defendant did not pay its due payment [before the occurrence of COVID-19 in Indonesia];
c. The plaintiff send 3 demand letters to the defendant; and
d. Defendant did not send any respond to any of the plaintiff's demand letter.

Accordingly, the plaintiff submitted a claim against the defendant in Bengkulu District Court.

The defendant argued in its plea that the defendant shall be excused to perform its obligation due to Government Regulation in Lieu of Acts No. 1 of 2020 on State Financial Policy and Financial System Stability for Handling Corona Virus Disease 2019 (COVID-19) Pandemic and/or in The Context of Facing Threats That Harm National Economy and/or The Financial System Stability. ("**GR No. 1/2020**")

Within the consideration of the panel of Judges stated that GR No. 1/2020 is not relevant as the defendant already not paid its due payment from October 2019.

In view of Case No. 3, we are able

[57] Indonesian Supreme Court, "Decision No.409K/Sip/1983."

[58] Rahmat S.S. Soemadipradja, *Penjelasan Hukum Tentang Keadaan Memaksa* (Jakarta: Nasional Legal Reform Program, 2010), p. 88.

[59] Bengkulu District Court, "Decision No. 3/Pdt.G.S/2020."

to identify that COVID-19 is not straight forward constituted as force majeure. Based on the previous explanation, the defendant must consider whether COVID-19 fulfilled the force majeure threshold sets out in the ICC. The conditions of force majeure are as follows:

a. The Event that Caused the Force Majeure Must be Unexpected by the Parties;
   In this case, the defendant or the debtor knew that the instalment loan had due and had not been paid starting on October 25, 2019.
b. The Party Who has to carry out the Obligation (the Debtor) may not be Given Responsibility for the Event;
   In this case, the debtor had an obligation to pay at the agreed time, which is from October 25, 2019.
c. The Event that Caused the Force Majeure was Beyond the Debtor's Fault;
   In this case, the debtor should have calculated the payment obligation he had to do, because the instalment loan had due and had not been paid starting on October 25, 2019, where the impact of COVID-19 had not yet occurred in Indonesia.
d. The Event that Caused the Force Majeure was not a Deliberate Event by the Debtor; and
   In this case, the defendant shall be deemed to deliberately suspend its obligation to pay the plaintiff, as the plaintiff had provided 3 (three) demand letters to the defendant, respectively on 30 October 2019, 8 November 2019 and 13 November 2019. To the above, the defendant must pay its debt to the plaintiffs as of the first demand letter (30 October 2019).
e. The Debtor is not in a Bad Faith.
   In this case, the debtor is not in good faith, namely by using COVID-19 as a force majeure, whereas in this case the instalment loan is due in 25 October 2019.

Therefore, as stated by the panel of judges, there is no relevance between Case No. 3 and COVID-19. In order to declare COVID-19 as force majeure, a contracting party must prove that the cause of its breach of performance is solely by COVID-19. Furthermore, the panel of judges held the solely discretion to reject or grant COVID-19 as a force majeure with its own consideration.

D. Closing

COVID-19 gives a lot of impact around the world, especially in business. In response, the government of Republic of Indonesia issued numerous regulations. Such regulation provides many restrictions which may affect the debtor's performance. When the debtor's performance is affected by COVID-19, the debtor may use force majeure as its legal basis to be excused from performance. Force majeure is an event that happens beyond an individual's control. The party who experiences force majeure may be excused from responsibilities arising from the non-fulfilment of contractual performance.

Furthermore, in order to declare COVID-19 as force majeure, the contracting party must analyze the governing law of

the agreement, the force majeure clause under the agreement, and the conditions of force majeure.

Regardless the force majeure clause under the agreement (whether it is explicitly regulated or silent), a contracting party is still able to argue that all the restriction caused by COVID-19 established by the government as a force majeure.

Therefore, in general, COVID-19 may be constituted as force majeure given its unpredictability. Moreover, as sets out in Case No. 3, all conditions of force majeure and the relevance of COVID-19 to the performance is very important in indicating COVID-19 as force majeure.

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Indonesian Law Journal
P-ISSN: 1907 – 8463; O-ISSN: 2772 – 8568
https://ejournal.bphn.go.id/index.php/ILJ
Volume 13 No.2 | December 2020

THE IMPACT OF COVID-19 ON INTELLECTUAL PROPERTY LEGAL SYSTEM RELATED TO PUBLIC HEALTH IN CONNECTION WITH TRIPS FLEXIBILITIES IN INDONESIA

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Abstract

In early 2020, countries in the world was shocked by a new virus called Coronavirus Disease 2019 (COVID-19) including Indonesia. The COVID-19 pandemic gives impact to the legal system, including intellectual property (IP). Trade Related Aspects of Intellectual Property Rights (TRIPS) flexibilities on public health in developing countries: Transition Periods, Compulsory License, Government Use, Parallel Imports, Exceptions to Patent Rights, Exemptions from Patentability, Limits on Data Protection, and Implementation of the Paragraph 6 of the Doha Declaration. Research problems: (1) what are the conditions for implementing the flexibilities of TRIPS in facing COVID-19 pandemic in Indonesia and (2) what are the issues that should be anticipated for future IP legal system relating to public health as a lesson from this COVID-19 Pandemic. Government Use is most effective to be used for encounter COVID-19 Pandemic, and voluntary license is recommended to be promoted for future approach. The study is using a qualitative literature study.

Keywords: Compulsory License, Government Use, COVID-19, Intellectual Property, Public Health.

A. Introduction

In early 2020, the world was shocked by the outbreak of a new virus; A new type of coronavirus (SARS-CoV-2) that caused a disease called Coronavirus disease 2019 (COVID-19). The origin of this virus is from Wuhan, China, and it was discovered at the end of December 2019. There were more than 65 countries infected with the COVID-19 virus.[1] The WHO responded rapidly by coordinating diagnostics development, issuing guidance on patient monitoring, specimen collection, and treatment as well as providing up-to-date information on the outbreak.[2]

Pandemic COVID-19 hit parts of the

[1] WHO Director-General's remarks at the media briefing on 2019-nCov on 11 February 2020. Cited Feb 13rd 2020.https://www.who.int/dg/speeches/detail/who-director-generalsbriefing-on-2019-ncov-on-11-february-2020. (accessed 11 May, 2020).

[2] Shrikrushna Subhash Unhale et al., "A Review on Corona Virus (COVID-19)", *World Journal of Pharmaceutical and*

world including Indonesia, with thousands declared positive.[3] This pandemic affects physical, mental-economic, socio-cultural and even religious health. In terms of regulation, the Indonesian government issued a package of rules in 2020 to overcome COVID-19.[4] There are Government Regulation in Lieu of Law (Perpu) No. 1 of 2020 on State Financial Policy and Financial System Stability for Handling the COVID-19 Pandemic and/ or in order to Face Threats that Harm National Economy and/or Financial System Stability, Government Regulation (PP) No. 21 of 2020 on Large-Scale Social Limitation in the Framework of Accelerating COVID-19 Handling, and Presidential Decree (Keppres) No. 11 of 2020 on Determination of the COVID-19 Public Health Emergency.The COVID-19 pandemic also affected the intellectual property (IP) legal system. The government should be aware that in responding to the pancemic, they can take measures to rapidly overcome potential patent barriers in order to increase access to patented diagnostics, medicines including biologics, and vaccines, consistently with the Agreement on Trade Related Aspects of Intellectual Property Rights of the World Trade Organization (TRIPS).

IP pertains to any original creation of the human intellect such as artistic, literary, technical, or scientific creation. Intellectual property rights (IPR) refer to the legal rights given to the inventor or creator to protect his invention or creation for a certain period of time.[5] These legal rights confer an exclusive right to the inventor/creator or his assignee to fully utilize his invention/ creation for a given period of time. In Indonesian legal system, IP protection is regulated by (1) Law Number 28 of 2014 on Copyright and Related Rights; (2) Law Number 13 of 2016 on Patent; (3) Law Number 20 of 2016 on Trademark and Geographical Indication; (4) Law Number 31 of 2000 on Industrial Design; (5) Law Number 32 Year 2000 on IC Topography; (6) Law Number 30 Year 2000 on Trade Secret; and (7) Law Number 29 of 2000 on Plant Variety Protection.

The national emergency situation as the COVID-19 Pandemic can give an impact on the IP legal system. Refer to the TRIPS Agreement, there are flexibilities for public health purposes in developing countries. Those flexibilities are Transition Periods, Compulsory License, Government Use, Parallel Imports, Exceptions to Patent Rights, Exemptions from Patentability, Limits on Data Protection, and Implementation of the WTO Decision on the Implementation of Paragraph 6 of the Doha Declaration.[6] As developing

Life Sciences WJPLS, Vol. 6, Issue 4, 109-115 (2020), www.wjpls.org (accessed 11 May, 2020).

3 Indonesia statistics for COVID-19: Confirmed 22.271; Recovered 5.402; Deaths 1.372 (WHO: 24 May 2020).

4 Pakuan University, "The Legal Side of Handling COVID-19", https://bogor-kita.com/sisi-hukum-penanganan-COVID-19/ (Accessed 11 May, 2020).

5 Singh R., *Law Relating to Intellectual Property: A Complete Comprehensive Material on Intellectual Property Covering Acts, Rules, Conventions, Treaties, Agreements, Case-Law and Much More*, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2004).

6 Sisule F. Musungu and Cecilia Oh, *The Use of Flexibilities In TRIPS by Developing Countries: Can They Promote Ac-*

countries, Indonesia has become one of the member of WTO.[7] Accordingly, based on the TRIPS principle, Indonesia is permitted to implement those TRIPS flexibilities in its national IP legal system. TRIPS flexibilities can promote access to medicine in developing countries. Most developing countries have their laws and practices incorporated to one or more of the TRIPS flexibilities and there has been an increase in the usage of these flexibilities such as compulsory licensing for public health purposes. However, there are important loopholes both in terms of incorporation and usage of flexibilities, which need to be addressed if the TRIPS flexibilities are to be used effectively across the developing world.[8]

In this paper, the scope of writing will be limited to the impact of COVID-19 in connection with the IP legal system especially patent for the interest of public health in Indonesia. Furthermore, the research problems will be focused on (1) what are the conditions for implementing the flexibilities of TRIPS in Indonesia, and (2) which issues should be anticipated for IP legal system on public health as a lesson for the future from this COVID-19 Pandemic.

B. Research Method

This study uses a normative legal research method with a sociological approach.[9] This type of research uses normative juridical research, which focused on examining the application of norms in positive law.[10] The purpose of this approach method is to conduct research and study of secondary data in the form of various library materials consis of primary legal materials, secondary legal materials and tertiary legal materials related to issues regarding the impact of COVID-19 on intellectual property legal system related to the public health in connection with TRIPS flexibilities in Indonesia.

The specification or nature of this research is descriptive analytical, which describes the problems regarding the problem of the impact of COVID-19 on intellectual property legal system related to public health in connection with TRIPS flexibilities in Indonesia, and then analyzes these problems so that it can be concluded what are the conditions that must be met in implementing TRIPS flexibility in Indonesia, and the anticipation of the IP legal system to deal with a pandemic similar to COVID-19 in the future. This research is conducted using Library Research supported by library data consist of primary legal materials (for example legislation), secondary legal materials (for example books, journals,

cess to Medicines?, (Geneva: South Centre, 2006).

7 Indonesia has ratified the TRIPS Agreement through the Indonesian Law Number 7 Year 1994.edge - Managing an archipelagic state, Indonesian Update Series, RSPAS Australian National University, ISEAS, Singapore, p.28-48.

8 Sisule F. Musungu and Cecilia Oh, *op. cit*.

9 Lili Rasjidi and Liza Sonia Rasjidi, *Monograf: Pengantar Metode Penelitian dan Penulisan Karya Ilmiah Hukum*, (Bahan Kuliah Fakultas Hukum Universitas Padjadjaran, 2005), p. 4.

10 Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, (Jakarta: Penerbit Bayumedia Advertising, 2006), p. 294-295.

scientific works, magazines), and tertiary legal materials (for example dictionary). After the required data is obtained, then an analysis of the data is carried out using qualitative juridical analysis methods.[11] In this case all information sourced from literature and statutory regulations will be analyzed then will be set out in the form of argumentations or descriptions.

C. Discussions

1. Implementation of TRIPS Flexibilities Related to Public Health Based on Indonesian IP Legal System to Face COVID-19 Pandemic

a. Transition Periods

The TRIPS Agreement provides three transition periods for the implementation of its minimum standards. **Firstly**, the end of the 1995-2000 transition period obliged developing countries to implement the TRIPS Agreement and to put into place patent legislation that complied with the minimum standards of intellectual property protection prescribed by the TRIPS Agreement.[12] In terms of patent protection, the critical requirements included the criteria for patentability, the minimum 20 year protection term and, protection for both products and processes in all fields of technology.[13] **Secondly**, the 2000-2005 transition period could be used by those countries which had not provided patent protection for pharmaceuticals or agrochemical products at the entry into force of the Agreement.[14] They were allowed a further five years to put in place a product patent regime for pharmaceuticals and agro-chemicals. However, the use of this transition period was subject to certain conditions. Developing countries were required to accept patent applications as of 1995, to keep them in a patent queue "mailbox", and to start processing the applications in 2005.[15] **Thirdly**, the 1995-2006 transition period allowed least-developed countries 10 years to implement their obligations under the TRIPS Agreement, in view of their economic, financial and administrative constraints.[16]

Based on aforementioned explanation, therefore for this TRIPS flexibility, Indonesia has already implemented critical requirements including the criteria for patentability, the minimum 20 year protection term and, protection for both products and processes in all fields of technology. The criteria for patentability requirements (novelty, inventive steps, industrial applicable) was provided by the Law Number 6 of 1989 before TRIPS[17] and in the Law Number 14 of 2001 after

[11] Lili Rasjidi dan Liza Sonia Rasjidi (2005), *Op. Cit.,* p. 4.
[12] Article 65.2 of the TRIPS Agreement.
[13] Articles 27 and 33 of the TRIPS Agreement.
[14] Article 65.4 of the TRIPS Agreement.
[15] Article 70.8 and 70.9 of TRIPS Agreement.
[16] Article 66.1 of the TRIPS Agreement.
[17] Article 2 (1) of the Indonesian Law Number 6 of 1989 on Patent as amended by the Indonesian Law Number 13 of 1997.
[18] Article 2 (1) of the Indonesian Law Number 14 of 2001 on Patent.

TRIPS[18], and finally, it is provided in the recent Patent Law Number 13 of 2016.[19] For the minimum 20 years protection term, it was provided after TRIPS in the Law Number 14 of 2001[20] and then it is provided in the recent patent Law Number 13 of 2016[21], whereas before TRIPS, the Law Number 6 of 2016 on Patent provided 14 years protection term and could be extended for 2 years.[22] Next, regarding protection for both products and processes in all fields of technology, it was provided in the Law Number 6 of 1989 before TRIPS[23], in the Law Number 14 of 2001 after TRIPS[24], and recently it is provided in the Patent Law Number 13 of 2016.[25] In conclusion, Indonesia IP legal system has already adopted the transition period flexibility of TRIPS in the recent Patent Law. This provision limits the patent to be used to encounter COVID-19 pandemic. Since there is a monopoly of the right holder, there are other flexibilities that can be used to encounter COVID-19 such as compulsory license and government use.

b. Compulsory License

A compulsory license is an authority granted by the national authority (government) to someone (a party), without permission or without conflict with the rights holder, to exploit patented objects or other IP.[26] ”Compulsory license is a license issued by a state authority to a government agency, a company or other party to use a patent without the patent holder’s consent” (Paris Convention, 1883). In simple words, ”compulsory license is an action of a government forcing an exclusive holder of a right to grant the use of that right to other upon the terms decided by the government”.[28] The government, however, pays a royalty to the patent holder in order to compensate them for the use of their patent without their consent.[28] In other words, ”Compulsory license means a non-voluntary license issued by the state to a third party, without the authorization of the patent holder, on the condition that the licensee pays reasonable remuneration to the right holder in return”.[29]

Developing countries are generally not ready or able to neutralize the impact of

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19 Article 3 (1) of the Indonesian Law Number 13 of 2016 on Patent.

20 Article 8 (1) of the Indonesian Law Number 14 of 2001 on Patent.

21 Article 22 (1) of the Indonesian Law Number 13 of 2016 on Patent.

22 Article 9 (1) and 42 of the Indonesian Law Number 6 of 1989 on Patent as amended by the Indonesian Law Number 13 of 1997.

23 Article 1 point 2 of the Indonesian Law Number 6 of 1989 on Patent as amended by the Indonesian Law Number 13 of 1997.

24 Article 1 point 2 of the Indonesian Law Number 14 of 2001 on Patent.

25 Article 3 (2) of the Indonesian Law Number 13 of 2016 on Patent.

26 Carlos M. Correa, *Intellectual Property Rights and the Use of Compulsory Licenses: Options for Developing Countries*, (Geneva: South Centre, 1999), p. 3.

27 T. Jain, ”Compulsory Licenses Under Trips and Its Obligations for Member Countries”, *Journal of Intellectual Property Rights* (2009).

28 E. Durojaye, ”Compulsory Licensing And Access To Medicines In Post Doha Era: What Hope For Africa?” *Journal of Intellectual Property Law* (2011).

29 J. Kuanpoth, Intellectual Property and Access to Essential Medicines: Options for Developing Countries, *Journal of Generic Medicines* (2004).

price increases caused by the existence or strengthening of IP rights that may affect access to protected products, especially by low-income populations. In this context, the possibility of using compulsory licenses as a tool to reduce the impact of IP rights exclusively. Especially in situation in some countries, where the price of drugs is not affordable for the majority of the population, and opposition by the United States government to compulsory licenses, has revived the debate over the use of compulsory licenses to achieve the public interest goal.[30] In order to ensure the widest possible use of compulsory licensing, developing countries should not only incorporate within their patent laws provisions to enable the granting of compulsory licenses, but they should also specify as many of the possible grounds for the issuing of licenses in order to avoid ambiguity or uncertainty.[31] The TRIPS Agreement does not explicitly mention the term compulsory license in the text, but Article 31 is implied to allow compulsory license and government use without authorization of the right holder.[32] Article 31 of the TRIPS Agreement states: ”Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, there are some following provisions shall be respected”, such as, Article 31 (a), (b), (f) and (j) of the TRIPS Agreement.[33]

There are certain common requirements on compulsory license: (a) the authorization of such use must be considered on its individual merits; (b) such use may be permitted only if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions, which efforts have not been successful within a reasonable time; (c) the scope and duration of such use must be limited to the purpose for which it was authorized, (d) such use must be non-exclusive; (e) such use must be non-assignable, except with that part of the enterprise or goodwill which enjoys such use; (f) any such use must be authorized predominantly for the supply of the domestic market of the Member authorizing such use; (g) authorization for such use must be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority must have the authority to review, upon motivated request, the continued existence of these circumstances; (h)

[30] Carlos M. Correa (1999), *op. cit.*, p. 1.
[31] Sisule F. Musungu and Cecilia Oh, *op. cit.*
[32] Timothy Bazzle, ”Pharmacy of the Developing World: Reconciling Intellectual Property Rights in India with The Right To Health: Trips, India's Patent System and Essential Medicines”, Georgetown Journal of International Law, Vol. 42 (2011), p. 788
[33] Sri Wartini, ”The Legal Implication of Compulsory License Pharmaceutical Products In The TRIPs Agreement to the Protection of the Right to Health in Developing Countries”, Jurnal Dinamika Hukum Vol. 18 No. 1, (January 2018).

the right holder must be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization; (i) the legal validity of any decision relating to the authorization of such use must be subject to judicial review, or other independent review by a distinct higher authority in that Member; and any decision relating to the remuneration provided in respect of such use must be subject to judicial review, or other independent review by a distinct higher authority in that Member.[34]

One of the most important restrictions is adopted in Article 31(f) - the use of commercial license should be "predominantly for the supply of the domestic market." The term "predominantly" in Article 31(f) implies that some exportation under compulsory license from the exporting nation could not be allowed to be exported to other countries which do not have the capacity to produce the medicine. Based on Article 31 (f), It is clearly ignites a problem in the implementation of compulsory license in developing countries which do not have the capability to produce medicine.[35]

Article 31 does not hamper the grounds on which compulsory licensing is allowable, and it becomes the authority of states to determine the balance of the protection of patent holders and the interest of the patients. Article 31(b) provides that this limitation may be waived by a Member in the event of a national emergency. Unfortunately, there is no explanation what constitute "national emergency" in the TRIPs Agreement. The Contracting Parties of the TRIPs Agreement have a freedom to define what national emergency is. For example, the endemic of HIV/AIDs which occur in a developing country can be considered as national emergency.[36]

Most countries provide for the use of patented inventions without the consent of the patent holder in emergency situations, such as war, famine, natural catastrophe, and so on. In the case of compulsory licenses for emergencies, the requirement for prior negotiations for a voluntary license is also waived and it should also be reflected in the domestic law.[37] The COVID-19 pandemic can be also considered as national emergency. In Indonesia, the government issued Presidential Decree No. 11 of 2020 on Determination of the COVID-19 Public Health Emergency. Therefore, based on this Decree, the COVID-19 pandemic can be stated as national emergency situation in connection with public health in Indonesia. In this condition, the compulsory license on patent is possible to be implemented in Indonesia to overcome the COVID-19 pandemic situation.

In Indonesian IP legal system, the compulsory license of patent is provided in article 81 to 108 of the Law Number 13

[34] Coenraad Visser, *Patent Exceptions and Limitations in the Health Context*, (Geneva: WIPO Standing Committee on Patent, SCP/15/3, 2010).
[35] Sri Wartini, ", op. cit.
[36] Sri Wartini, ibid.
[37] Sisule F. Musungu and Cecilia Oh, *op. cit.*.

of 2016 on Patent, and its implementing regulation is regulated by the Minister of Law and Human Rights Regulation Number 30 of 2019. Basically, compulsory license is a non-exclusive[38], and is given through the Minister of Law and Human Rights' decision, based on reasons: (a) The Patent Holder does not carry out the obligation to make products or use the process in Indonesia within 36 (thirty-six) months after being granted a Patent; (b) Patents have been implemented by the Patent Holder or licensee in a form and manner that is detrimental to the interests of the public; or (c) Patents resulting from the development of patents that have been previously granted cannot be carried out without the use of other parties' patents that are still in protection.[39]

Eventually, the situation was difficult for implementing the compulsory license since there was still no vaccine or medicine for COVID-19 has been inventedyet, even in Indonesia. However, there were some efforts from big pharmaceutical company such as Gilead in United States. Gilead was working with regulatory authorities worldwide to map out options to make access to investigational Remdesivir wider available through expedited regulatory processes globally, should it demonstrate the potential to be a safe and effective treatment option based on the results of preliminary clinical trials. In the United States, the Food and Drug Administration (FDA) has authorized the emergency use of Remdesivir to treat hospitalized adult and pediatric patients with suspected or laboratory-confirmed SARS-CoV-2 infection and severe COVID-19. The FDA's Emergency Use Authorization will enable appropriate patients more ready access to Remdesivir at this time, due to the public health emergency. Remdesivir has not been approved by the FDA for any use, and the safety and efficacy of Remdesivir for the treatment of COVID-19 are not yet established.[40] Remdesivir is one of the more promising treatments for COVID-19 selected for the WHO Solidarity trial. It is an experimental antiviral medicine developed by Gilead Sciences with substantial public funding that has not been approved for any indication. Various clinical trials are ongoing to test for safety and efficacy for COVID-19. Clinical trial results from China are expected in mid-April 2020 and from the United States in May 2020. Gilead holds various patents for Remdesivir in multiple countries. This means that no other party would be able to develop or produce the medicine unless authorized through a license by Gilead.[41]

In Indonesia, the government through public R&D organization of the Ministry of Agriculture also has an effort to use Eucalyptus for medicine of COVID-19. Eucalyptus plants are known to have several

38 Article 81 of the Indonesian Law Number 13 of 2016 on Patent.
39 Article 82 (1) a, b, dan c of the Indonesian Law Number 13 of 2016 on Patent.
40 https://www.gilead.com/purpose/advancing-global-health/COVID-19 (accessed 22 May, 2020).
41 Viviana Muñoz Tellez, *The COVID-19 Pandemic: R&D and Intellectual Property Management for Access to Diagnostics, Medicines and Vaccines*, (Geneva: South Centre, POLICY BRIEF, No. 73, April 2020).

benefits including relief of the respiratory tract, eliminating mucus, repelling insects, disinfecting wounds, relieving pain, reducing nausea and preventing mouth disease. The main active ingredient is cineol-1,8 which acts as an antimicrobial and antiviral agent. The R&D organization of the Ministry of Agriculture has already done the research by using this plant. Testing of eucalyptus against influenza viruses, Beta and Gamma Corona viruses shows the ability to kill viruses by 80-100 percent. The invention has been tested on those who exposed to COVID-19 and the results are very good. But at that time, that is still had to wait from the relevant parties to be distributed.[42] This invention has been lodged for patent protection to the Directorate General of Intellectual Property (DGIP). The Indonesian Centre for Veterinary Research, the Centre for Agricultural Postharvest Research, and the Spice and Medicinal Research Institute have applied patents, including: (1) Eucalyptus Oil-Based Aromatic Formula Antivirus with application number P00202003578; (2) Eucalyptus-based Antivirus Inhaler and Manufacturing Process with patent application number P00202003574; and (3) Eucalyptus-based Nano-encapsulate Antibiotic Potion powder with patent application number P00202003580. Aanother invention, that is Eucalyptus citridora essential oil as an antivirus against avian influenza virus subtype H5N1, gamma-corona virus, and beta virus. Based on Indonesian Patent Law, for granting of patent needs maximum 54 months to be processed at the DGIP.[43] Cooperation is carried out for the development of product innovation through a licensing cooperation mechanism, in this case with PT Eagle Indo Pharma as a R&D Organization of Ministry of Agriculture (*Balitbangtan*) licensing partner. Cooperation partners have an obligation to produce technology with supervision from the *Balitbangtan*.[44]

By this situation, the possibility for implementation of compulsory license will take time, while the pandemic keep spreading at that time. Therefore, it will be difficult to process the compulsory licensing in this emergency situation since the process to apply the compulsory license needs a certain procedure and it will take time. The period of time to process compulsory license, excluding the postponement period, is no later than 12 (twelve) months from the date of notification of the postponement by the Minister.[45] This is in line with the limit of compulsory license in practice: (1) the process of issuing such licenses is long, expensive and politically very sensitives; (2) even if significant reductions are obtained for the

[42] https://www.cnnindonesia.com/gaya-hidup/20200511080522-255-501912/pemerintah-kembangkan-eucalyptus-untuk-obat-antivirus-corona (Accessed 23 May, 2020)

[43] The Indonesian Law Number 13 of 2016 on Patent.

[44] https://www.kompas.com/tren/read/2020/05/19/164705565/ini-4-produk-anti-virus-corona-yang-dipatenkan-balitbangtan-kementan?page=all#page3 (Accessed 23 May, 2020).

[45] Article 88 (3) of the Indonesian Law Number 13 of 2016 on Patent.

drugs produced under compulsory license, the impact on the overall cost of treatment remains slight; lastly (3) the process is subject to dispute and legal challenge.[46]

c. Government Use

A Government Use Authorization (or compulsory license for public non-commercial use) can be considered as a special case of compulsory licensing, i.e. it is a compulsory license that the government issues for its own purposes, for instance to ensure the availability of medicines in public health facilities. The TRIPS Agreement allows countries to issue compulsory licenses including government use authorizations, and leaves countries free to decide the grounds, or reasons, for issuing a compulsory license.[47] Government Use is a public or non-commercial use of Patents. The right of the state to use a patent without the consent of the patent holder for public health purposes is recognized to be an important public health safeguard by many countries. Although Article 31 of the TRIPS Agreement sets out the conditions governing both government use of patents and compulsory licenses, one important difference is that government use of patents may be "fast-tracked" because of the waiver of the requirement for prior negotiations with patent holders; in this regard, the establishment of a straightforward and simple administrative system of inter-agency decision-making process, as in the case of compulsory licensing, is also paramount. As for compulsory licenses, it will also be important to formulate open and transparent decision-making processes and procedures, including the formulation of guidelines for determining adequate remuneration so that it is predictable and easy to administer. A single administrative system could serve the purpose of facilitating decision-making in relation to the granting of compulsory licenses and government use authorization.[48]

Indonesia IP legal system provides provisions on the Government Use for patent through the Indonesian Law Number 13 of 2016 on Patent;the Government Use on Patent is provided in Article 109 to 120 of the Law Number 13 of 2016 on Patent. The government can implement patents themselves in Indonesia based on considerations relating to national defense and security or urgent needs for the benefit of the public and be implemented on a limited basis, to meet domestic needs, and are non-commercial in nature.[49] The Government Use on patent including pharmaceutical and/or biotechnology products which are expensive and/or necessary to cope with diseases that can

[46] Benjamin Coriat and Luigi Orsenigo, "IPRs, Public Health and the Pharmaceutical Industry: Issues in the Post-2005 TRIPS Agenda", in book: Mario Cimoli et.al, *Intellectual Property Rights: Legal and Economic Challenges for Development*, (UK: Oxford University Press, 2014), p. 219-241.

[47] UHC Technical Brief, "Public Health Protection in Patent Laws: Selected Provisions", (World Health Organization, 2017).

[48] Sisule F. Musungu and Cecilia Oh, *op. cit*.

[49] Article 109 (1) dan (2) of the Indonesian Law Number 13 of 2016 on Patent.

[50] Article 111 a of the Indonesian Law Number 13 of 2016 on Patent.

cause sudden death in large numbers, significant disabilities, and constitute a World-Worst Public Health Emergency.[50] In the case of the Government Use for urgent needs, it is in the public interest not to reduce the right of the patent holder to exercise his exclusive rights.[51]

In the event that the Government intends to use a Patent that is important to the most urgent needs of the public interest, the Government shall notify the Patent Holder in writing of such matter.[52] A copy of the Presidential Regulation on approval of the use of a Patent by the Government shall be sent by the Minister to the Patent Holder.[53] The Government Use of Patent is recorded in the general register of patents and announced through electronic and/or non-electronic media.[54] The Government's decision that a Patent is implemented solely by the Government is final and binding.[55] In the event that the Government cannot implement the Patents themselves, the Government may appoint a third party to implement.[56] These third parties must fulfil the following requirements: (a) have facilities and are capable of implementing patents; (b) does not transfer the use of the Patent concerned to another party; and (c) have a good method of production, circulation, and supervision in accordance with statutory provisions.[57] The awarding on behalf of the Government is carried out by a designated third party.[58] The procedure for the Government Use of patents by the Government shall be regulated by a Presidential Regulation.[59]

The TRIPs Agreement actually regulates three choices that can be made by the government to get cheap AIDS drugs, namely: collaborative drug research, parallel imports, and the implementation of patents by the government. The Indonesian government ultimately sought to show its concern for the people who needed affordable AIDS medicines. Out of the three choices, the Government of Indonesia finally choses the third option for the administration of patents by the government; without Government Use procedures, patents of a drug product can only be accessed if it has been 15-20 years. Regarding the policy of implementing patents by the government for the production of antiretroviral (ARV) drugs, the Government of Indonesia has issued three Presidential Regulations. First Presidential Decree of the Republic of Indonesia Number 83 of 2004 on the Implementation of Patents by the Government on Anti-Retroviral

[51] Article 112 (2) of the Indonesian Law Number 13 of 2016 on Patent.
[52] Article 114 (1) of the Indonesian Law Number 13 of 2016 on Patent.
[53] Article 114 (2) of the Indonesian Law Number 13 of 2016 on Patent.
[54] Article 114 (3) of the Indonesian Law Number 13 of 2016 on Patent.
[55] Article 114 (4) of the Indonesian Law Number 13 of 2016 on Patent.
[56] Article 116 (1) of the Indonesian Law Number 13 of 2016 on Patent.
[57] Article 116 (2) of the Indonesian Law Number 13 of 2016 on Patent.
[58] Article 116 (3) of the Indonesian Law Number 13 of 2016 on Patent.
[59] Article 116 (3) of the Indonesian Law Number 13 of 2016 on Patent.

Medicines, Presidential Decree of the Republic of Indonesia Number 6 of 2007, and Regarding Amendments to the Presidential Decree Number 83 of 2004 on the Implementation of Patents by the Government on Anti-Medicines Retroviral, and most recently on 3 September 2012, issued Presidential Regulation of the Republic of Indonesia Number 76 of 2012 on the Use of Patents by the Government on Antiviral and Antiretroviral Drugs.[60]

In 2004, the Minister of Health also issued a Decree, Decree of the Minister of Health of the Republic of Indonesia Number 1190/MENKES/SK/X/2004 on Provision of Anti-Tuberculosis Drugs and Anti-Retroviral Drugs for HIV/AIDS. In addition, the Minister of Health also gave Decree to Kimia Farma with Decree of the Minister of Health of the Republic of Indonesia Number 1237/Menkes/SK/VI/2004 on the Appointment of PT. Kimia Farma (PERSERO) TBK to carry out patents of ARV drugs on behalf of the Government. Since the decree been issued, PT. Kimia Farma began producing local ARV drugs, AZT, 3TC and nevirapine. The three products have been tested for bioavailability and bioequivalent at the Faculty of Pharmacy ITB. With the results of BA & BE both products have been registered at the BPOM. The government finally issued a presidential decree (Keppres) which said that Indonesian people needed more affordable ARV drugs. Therefore, the Indonesian government has officially implemented government use. The 2004 Presidential Decree also stated that the Indonesian government would pay 0.5% of the royalty to the patent owner.[61]

If the drug, vaccine or medical device fulfills the patent criteria, which is new, contains inventive steps and can be applied in the industry then the product can be granted a patent, even though the drug is generally needed by the world community in dealing with this pandemic. Furthermore, in order for the drug to be massively available in an emergency, the solution available in the patent system is through a compulsory licensing mechanism and/or the use of patents by the government (government use). Based on the provisions of the Article 31 TRIPS, it is possible for a State to apply for a compulsory license or government use, especially in emergency situations. In this situation, it is possible to implement a patent without permission from the patent owner. In Patent Law No. 13 of 2016, the compulsory license and implementation of patents by the Government, as mentioned in the regulation, provided that the Government can carry out patents without permission from the patent holder in urgent situations including producing expensive products and/or needed to cope with diseases that can result in sudden death

60 https://www.kebijakanaidsindonesia.net/id/artikel/artikel-kontribusi/470-kebijakan-pelaksanaan-paten-obat-arv-oleh-pemerintah-indonesia (accessed 24 May, 2020)

61 https://www.kebijakanaidsindonesia.net/id/artikel/artikel-kontribusi/470-kebijakan-pelaksanaan-paten-obat-arv-oleh-pemerintah-indonesia (accessed 24 May, 2020)

in large quantities. Thus, the inventor of drugs can get economic rights and their creations protected. Basically, the COVID-19 pandemic situation meets the requirements for the Government to take steps to provide the drugs needed for the treatment needed through the government use mechanism.[62]

Therefore, for Indonesia, the most effective and faster procedure to overcome the COVID-19 pandemic is by implementing the Government Use. In this approach, the Government has initiative to implement the patent based on the presidential regulation with the principle of non-voluntary and non-exclusive license. The possibility to implement this Government Use in Indonesia is to use patent for Remdisivir and other medicine or vaccine which have already invented for being used in COVID-19 pandemic.

d. Parallel Imports

Parallel importation refers to importation, without the consent of the patent holder, of a patented product that is marketed in any other country. In other words, parallel importation allows for importation of the patented product from a third country where it is sold at a lower price. Parallel importation works most effectively when countries adopt an ”international exhaustion” regime, thus allowing the imports of patented products marketed anywhere in the world. Like a ”Bolar” provision, parallel importation is usually incorporated in the section of the law that deals with exceptions to the rights conferred by a patent.[63]

Parallel import is the import and resale in a country, without the consent of the patent holder, of a patented product that has been legitimately put on the market of the exporting country under a parallel patent. A patent holder may have the exclusive right to manufacture his product and to put it on the market. However, once the product is placed on the market, the principle of exhaustion means that the patent holder has no further right over the product. Thus, a patent holder cannot prevent the subsequent resale of that product since their rights over the product have been exhausted by the act of selling it.[64]

Parallel importation is allowed under the TRIPS Agreement. Article 6 of the TRIPS Agreement provides that matters relating to exhaustion of rights shall not be subject to dispute settlement. They have three main options:[65] (1) Members may adopt the principle of international exhaustion of patent rights. Adoption of this principle in the national patent law would allow any party to import into the

[62] https://ekonomi.bisnis.com/read/20200419/257/1229318/obat-COVID-19-dibutuhkan-masyarakat-peneliti-bisa-daftarkan-paten (accessed 24 May, 2020)

[63] UHC Technical Brief, ”Public Health Protection in Patent Laws: Selected Provisions”, (World Health Organization, 2017).

[64] Velasquez G. and P. Boulet, *Globalisation and Access to Drugs: Perspectives on the WTO/TRIPS Agreement*, (Geneva: Health Economics and Drugs Series, EDM Series No. 7, WHO, 1999)

[65] Sisule F. Musungu and Cecilia Oh, *The Use of Flexibilities In TRIPS by Developing Countries: Can They Promote Access to Medicines?*, (Geneva: South Centre, 2006).

national territory a patented product from any other country in which the product was placed on the market by the patent holder or any authorized party; (2) Members may adopt regional exhaustion of rights, where adoption of this principle would allow the possibility of importing into the national territory a patented product originating from any other member state of a regional trade agreement; and (3) The third option is that of national exhaustion of rights. This principle limits the circulation of products covered by patents in one country to only those put on the market by the patent owner or its authorized agents in that same country. In this case, there can be no parallel importation.

Developing countries should therefore avail themselves of the widest scope in terms of parallel imports and incorporate explicit provisions to put into effect the international exhaustion regime. It is important to note in this context that while this "flexibility", allowed in the TRIPS Agreement and confirmed by the Doha Declaration, does not automatically translate into the national regimes, it will be necessary for specific legal provisions to be enacted in national laws.[66]

In Indonesian Patent Law, the parallel import for especially pharmaceutical products is regulated in the Article 167 a of the Indonesian Law Number 13 of 2016 on Paten, stated that the import of a pharmaceutical product that is protected by a patent in Indonesia and the said pharmaceutical product has been legally marketed in a country provided that the pharmaceutical product is imported in accordance with statutory provisions cannot be declared as patent infringement. Discussions about access to drugs for the prevention and treatment of COVID-19 are becoming increasingly important. The increasing number of positive sufferers of COVID-19 has encouraged the government to provide several drugs that are suspected of being potential in treating diseases caused by the Corona Virus. If later the most effective COVID-19 drug is found, the challenges will increase because all countries will compete with each other over the drug. Based on the International Clinical Trials Registry Platform of the WHO, until now there have been at least 536 clinical studies of potential drugs for COVID-19. WHO also developed the Solidarity Trial. The drugs being tested are almost all patents originating from abroad.[67] Therefore, the use of parallel import to get vaccines and medicines for COVID-19 is needed for the Government of Indonesia to overcome the COVID-19 outbreak in Indonesia. This approach can be used if there is no capability of pharmaceutical industries in Indonesia to produce vaccines and medicines for preventing and healing COVID-19.

[66] Carlos Correa, *Protection of Data Submitted for the Registration of Pharmaceuticals: Implementing the Standards of the TRIPS Agreement*, (Geneva: South Centre and WHO, 2002).

[67] https://kumparan.com/erik-mangajaya-simatupang/akses-pada-obat-COVID-19-1tJqe1Xgqwt/full (accessed 24 May, 2020)

[68] Carlos Correa, *Integrating Public Health Concerns into Patent Legislation in Developing Countries*, (Geneva: South

e. Exceptions to Patent Rights

Virtually all patent laws provide for exceptions to the exclusive rights granted by a patent, although the scope and content of these provisions vary from country to country.[68] Exceptions to Patents Rights are based on the premise that the rights conferred by patents are not absolute and, in certain circumstances use of a patented invention by third parties is justified, in order to achieve public policy objectives of facilitating the dissemination of knowledge, encouraging innovation, promoting education and protecting other public interests.[69]

The TRIPS Agreement allows for ”limited exceptions” to the exclusive rights conferred by a patent. The Agreement does not define the nature and extent of these exceptions but, it provides a general test to be used to determine their admissibility. Article 30 of the TRIPS Agreement requires a three-fold test to be satisfied; that the exception does 1) not unreasonably conflict with the normal exploitation of the patent; 2) not unreasonably prejudice the legitimate interests of the patent owner, and 3) take into account the legitimate interests of third parties. Each condition must be satisfied as a separate and independent condition. In addition, the conditions must also be interpreted in relation to each other.[70]

While it is obvious that Article 30 does not permit unreasonable interference with the patent rights, its wording suggests that some impact on patent rights is envisaged.[71] The early working exception for example, has a significant impact on patent rights by speeding up the approval of generic competition by as much as three years. This exception also generally known as the ”Bolar exception” after the United States case on the use of this exception was introduced in the United States Drug Price Competition and Patent Term Restoration Act (1984), to permit the testing of a medicine for establishing the bio-equivalency of generic products before the expiration of the relevant patent. The TRIPS-compliant nature of this exception was confirmed by a WTO panel decision in 2000, which addressed the legality of the Canadian provision on early working.[72]

The patent law review indicated that most countries incorporated either one of two exceptions to patent rights. The first is the research exception or the exception for experimental use of patents. In nearly all of the country legislation reviewed, an explicit exception has been provided for use of patents for research purposes or the

Centre, 2000)

69 Sisule F. Musungu and Cecilia Oh, *op. cit.*

70 The WTO Panel in the Canada-Patent Protection of Pharmaceutical Products, WT/DS114/R (17 March 2000).

71 UNCTAD and ICTSD, *Resource Book on TRIPS and Development*, (Cambridge: Cambridge University Press, 2005)

72 Ibid. The complaint was brought by the EU against Canada under the WTO dispute settlement mechanism, in which the EU questioned the legality of a Canadian provision allowing not only the testing of medicines prior to patent expiry, but also production and stock-piling of the generic product for immediate release upon patent expiry. The Panel confirmed the early working provision was TRIPS-consistent but, the production and stockpiling was not.

experimental use of patents. National laws reviewed in Latin American and Caribbean countries all contained provisions relating to the research or experimental use exception; in Asia, 85% of the national laws reviewed provided for this exception, although the figure is lower in Africa at 59%.[73]

Indonesia provides the provisions on exceptions to patent rights, in Article 167 of the Indonesian Patent Law Number 13 of 2016 on Patent. In this article, it is regulated that the exceptions to patent rights in connection with Bolar Provision, which says that the production of the pharmaceutical products whereby it is protected by patent in Indonesia, in the period time 5 (five) years before the end of patent protection, with the objective to process marketing authorization, then it can be marketed after the patent has been expired.

f. Exemptions from Patentability

The TRIPS Agreement only requires that patents be granted to products and processes which are new, involve an inventive step and are industrially applicable. The Agreement does not require the patenting of new uses of known products including pharmaceuticals, and permits countries to deny protection for such uses for lack of novelty, inventive step or industrial applicability. Protection of new uses, particularly second medical indications, is often used for anti-competitive purposes mainly for extending patent protection periods and blocking generic entry. Therefore, it is prudent for developing countries to exclude new uses of known products or processes from patentability, in order to promote access to medicines. This is the approach recommended by the IPR Commission, which stated that ”most developing countries, particularly those without research capabilities, should strictly exclude diagnostic, therapeutic and surgical methods from patentability, including new uses of known products”.[74]

Prior to the TRIPS Agreement, under the Paris Convention for the Protection of Industrial Property (1883), countries were able to exclude certain areas from patentability and to make special rules for certain types of invention. There are numerous examples of how domestic laws defined and applied the patentability criteria, according to the prevailing technology levels and public policy priorities.[75] At the start of negotiations on the TRIPS Agreement, some 50 countries did not provide patent protection for pharmaceutical products at all, and some also excluded pharmaceutical processes from protection.[76] These general exclusions from patentability of pharmaceutical products, once common in national patent laws, will no longer be permitted when countries are obliged to

[73] Sisule F. Musungu and Cecilia Oh, *op. cit*.
[74] *Ibid*.
[75] *Ibid*. Such as the exclusion of pharmaceutical and food products, chemical processes, and agricultural methods.
[76] UNCTAD, *The TRIPS Agreement and Developing Countries*, (New York and Geneva: UNCTAD, 1996)
[77] Sisule F. Musungu and Cecilia Oh, *op. cit.*.

implement the TRIPS Agreement in full.[77] Article 27.1 of the TRIPS Agreement now makes it obligatory for WTO Members to make available patent protection to all inventions, in all fields of technology. The Article also sets out the criteria of novelty, inventive step and industrial applicability, which an invention must meet to qualify for a patent. Although there appears to be a general principle of eligibility to be patented where these criteria are satisfied, there is still some degree of flexibility for countries in their national implementation. Since the TRIPS Agreement does not define the terms ”novelty, inventiveness and industrial applicability”, WTO Members may determine how these criteria should be interpreted and applied, and hence, the scope of patentability of pharmaceutical inventions.[78]

From a public health perspective, where patentability standards are too lax, the terms ”novelty” and ”inventive step” are too loosely defined then too many secondary patents may be granted on the various forms of the new chemical entity, such as the formulation, and new combinations and uses, which will have implications for access to medicines. The innovation claimed in pharmaceutical patents range from major ”discoveries” to minor modifications of existing medications. New molecules or new innovative medicines are now rare, yet pharmaceutical patents number in the thousands each year. This raises a number of questions as to the number of patents that may be granted for minor modifications.[79] A related concern is that of the quality of patents granted, given that a number of studies have given rise to a general opinion that the patent offices have been lax in granting certain types of patents, including pharmaceutical patents.[80]

In the Indonesian Patent Law, there are several inventions cannot be protected by the patent, namely aesthetics creations, schemes, rules and methods to do something (involve mental activities, games, business), rules and methods which only contain computer programs, presentation on information, and discovery (new use of existing or known products and/or new forms of existing compounds which do not result in a significant increase in efficacy and known chemical structure differences are known from the compounds).[81] Therefore, Indonesia does not protect a ”secondary patents” refer to the provision regarding discovery which not includes subject to be protected by the patent as it is provided in Article 4 f of the Law Number 13 of 2016 on Patent.

78 Ibid.

79 The National Institute of Health Care Management Research and Educational Foundation (NIHCM) showed that during the 12 year period 1988-2000, only 35% of the 1,035 drugs approved by the FDA contained a new active ingredient (NIHCM 2002). Highly innovative drugs are increasingly rare.

80 Carlos Correa, *Trends in Drug Patenting: Case Studies*, (Buenos Aires: Corregidor, 2001).

81 Article 4 of the Indonesian Law Number 13 of 2016 on Patent.

82 High-Level Panel on Access to Health Technologies, Report of the United Nations Secretary-General’s High-Level Panel on Access to Medicine: Promoting Innovation and Access to Health Technologies (Sept. 2016)

”Secondary patents” as an example of the type of patent rights that WTO Members can freely choose to accept or reject, making use of the ”flexibilities” in Article 27.1 TRIPS Agreement.[82] The term ”secondary patents” to refer broadly to patents that in effect extend the original patent based on varying methods of use, formulations, dosages and forms of constituent chemicals.[83] Others, such as the 2016 Correa Guidelines, refer to these as ”improvement inventions,” and similarly argue against their patentability along similar lines.[84] The HLP Report encourages governments to ”adopt legislation to limit excessive patenting that stifles health technology R&D and access.”[85] While asserting that such patents can ”prolong exclusivity (commonly known as ‘evergreening’)” and thereby limit ”patient access to health technologies.[86]

In connection with COVID-19 pandemic situation, the flexibility on the exemptions from patentability will help government to have easier access to medicine that is needed for healing of COVID-19, if the improvement of the previous invention only caused by varying methods of use, formulations, dosages and forms of constituent chemicals. However, this flexibility can only be effective after the Patent of the medicine has already expired.

g. Limits on Data Protection

As a condition for permitting the sale or marketing of a pharmaceutical product, drug regulatory authorities usually require pharmaceutical companies to submit test or registration data demonstrating the safety, quality and efficacy of the product as well as information relating to the products’ physical and chemical characteristics. Such information is generally collectively referred to as test data.[87] Once the required test data is submitted by the originator company, some drug regulatory authorities may rely on this data to approve subsequent applications for similar products or, to rely on proof of prior approval of a similar product in another country. Generic manufacturers need only to prove that their product is chemically identical to the brand name, the original product and, in some countries, that it is bio-equivalent. This approach was adopted in most countries prior to the TRIPS Agreement and enables swift introduction of generics into the market without extra registration data-related costs.[88] However, there are different opinions on the scope of the obligation that the TRIPS Agreement

[83] *Ibid*.
[84] Carlos Correa, Guidelines for the Examination of Pharmaceutical Patents: Developing a public health perspective (ICTSD, WHO, UNCTAD, Working Paper 2006) [hereinafter ”Correa Guidelines I”]; Carlos M. Correa, Guidelines for Pharmaceutical Patent Examination: Examining Pharmaceutical Patents from a Public Health Perspective (UNDP 2016).
[85] High-Level Panel on Access to Health Technologies, op. cit.
[86] Eric M. Solovy and Pavan S. Krishnamurthy, *TRIPS Agreement Flexibilities and Their Limitations: A Response to the UN Secretary-General’s High-Level Panel Report on Access to Medicines*, (US: George Washington International L. REV. 1, Forthcoming 2017).
[87] Sisule F. Musungu and Cecilia Oh, *op. cit.*
[88] Carlos Correa (2002), *op. cit.*

places on countries with respect to the protection of test data. Article 39.3 of the TRIPS Agreement requires Members to provide protection for undisclosed test or other data submitted for the purposes of obtaining marketing approval against ”unfair commercial use”. Proponents of higher standards of protection argue for an interpretation of Article 39.3 that grants exclusive rights over the test data. The argument is that the originator of the data deserves a return on the often-significant investment in conducting tests. This approach of granting data exclusivity has been adopted in the United States and the European Union. In the United States, the exclusivity period is five years (for new chemical entities),[89] while the EU Directive has been recently amended to increase the exclusivity period from six years to ten.[90] Thus, drug regulatory authorities are not permitted to rely on an originator’s test data to approve other registration application during this period of exclusivity.

Test data need only be protected against ”unfair commercial use” when three conditions are met; that is: 1) where national authorities require the data to be submitted; 2) if the data is undisclosed (and not already public data); and 3) if ”considerable effort” was involved in generating the data. In addition, protection is required only for new chemical entities, which means that applications for second indications, formulations and dosage forms may be excluded from protection.[91]

There is an obvious public health interest in limiting data protection, so that the timely entry of generic competition is not unnecessarily hindered or prevented. Generic manufacturers may not enter the market until they are able to rely on the use of the originators’ test data, as it is too time-consuming and expensive for the generic industry to repeat the safety and efficacy testing. There are also significant ethical questions regarding conducting human clinical trials in particular, when data already exists on quality and efficacy. Exclusive rights over test data can provide patent-like protection even where pharmaceuticals are not covered by patents or, do not meet the standards of patentability in a country or, prevent the registration of a product produced under a compulsory license. In either case, access to the generic medicine is affected.[92] For developing countries it will be important to clarify the extent to which test data is protected within the domestic law. As with other provisions of the TRIPS Agreement, flexibility is provided in terms of countries’ ability to determine the appropriate means of protecting test data.[93] It is clear that the

89 *Ibid*.

90 EU Directive 2001/83/EC on the Community Code Relating to Medicinal Products for Human Use (Official Journal of the European Communities No. L. 311/67) as amended by Directive 2004/27/EC in 2004 (Official Journal of the European Union No. L. 136/34.

91 Sisule F. Musungu and Cecilia Oh, *op. cit.*

92 *Ibid*.

93 Carlos Correa (2002), *op. cit.*

94 Commission on Intellectual Property Rights (IPR Commission), *Integrating Intellectual Property Rights and De-*

TRIPS Agreement does not require data exclusivity; the obligation is to protect against unfair commercial use. Developing countries should allow drug regulatory authorities to approve equivalent generic substitutes on the basis of reliance on the originator data.[94]

Indonesia does not implement the data protection approach like in the United States and the European Union. This condition will give positive impact to the access of medicine, mainly for the easiness of the production of generic medicines in Indonesia. This limits on data protection can help the Government in facing the COVID-19, since there is no second layer for pharmaceutical product protection as it is based on data protection or data exclusivity.

h. Implementation of the WTO Decision on the Implementation of Paragraph 6 of the Doha Declaration 2001

The WTO addressed the problem of countries with insufficient or no manufacturing capacity and their inability to make effective use of compulsory licensing in the so-called Paragraph 6 negotiations. Paragraph 6 of the Doha Declaration 2001 instructed WTO Members to find ”an expeditious solution” to address this problem, which they eventually did in August 2003.[95] In the exporting country, patent status of the medicine is also relevant if the medicine is patent-protected; the generic manufacturer would need a compulsory license to produce and export. It is recommended that whenever possible, countries should consider using measures less cumbersome than the system in the WTO Decision. The Decision does not preclude other options available under the TRIPS Agreement and the Doha Declaration, as is clearly stated in Paragraph 9 of the Decision. Thus, where no relevant patent is in force in the exporting country, production and export of the generic version of a medicine patented elsewhere can take place without the need of a compulsory license.[96] Paragraph 6 ”recognizes that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.” Compulsory licensing, formally referred to as ”other use without authorization of the right holder” in Article 31 of the TRIPS Agreement, occurs when ”the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government.” Paragraph 6 of the Declaration instructs the TRIPS Council to find ”an expeditious solution to this problem” of WTO Members

velopment Policy, (London: IPR Commission, 2002).

[95] Sisule F. Musungu and Cecilia Oh, *op. cit.*. Although they missed the deadline of December 2002 as set out in the Doha Declaration, WTO Members finally adopted a solution to the Paragraph 6 problem, after intensive negotiations, on August 30, 2003 in Geneva.

[96] *Ibid.*

[97] Eric M. Solovy and Pavan S. Krishnamurthy, *op. cit.*

that are unable to make effective use of compulsory licensing due to insufficient manufacturing capacity, a direction which ultimately led to the amendment of the TRIPS Agreement.[97]

In Indonesia, Paragraph 6 Doha Declaration 2001 has been implemented by three decrees namely (1) Presidential Decree of the Republic of Indonesia Number 83 of 2004 on the Implementation of Patents by the Government on Anti-Retroviral Medicines; (2) Presidential Decree of the Republic of Indonesia Number 6 of 2007, and Regarding Amendments to the Presidential Decree Number 83 of 2004 on the Implementation of Patents by the Government on Anti-Medicines Retroviral; and (3) Presidential Regulation of the Republic of Indonesia Number 76 of 2012 on the Use of Patents by the Government on Antiviral and Antiretroviral Drugs.[98]

2. Future of IP Legal System Relating to Public Health Post COVID-19 Pandemic

One may argue that the patent system should not be used to make access to drugs more difficult, especially during a pandemic. Can we really justify IP laws that are used in a way that limits the availability of medicines and aims at increasing profits in times of health emergency? This moment of crisis is teaching us a clear lesson in matters of the philosophical justifications of IP, whereby egoistic theories are in capable of offering convincing arguments grounding IP Protection.[99] In effect, theories that consider personal gain both in terms of existential self-realization[100] or economic gain[101] as the only legitimate source of an ethical defense of IP and as an overarching reason in cases of conflicts between individual and societal well-being appear untenable. The COVID-19 pandemic shows the essential interconnectedness of human beings as a community of unity, where individual happiness becomes possible only in cases where a certain level of welfare is collectively shared.[102]

A global mechanism is needed to drive open and collaborative R&D and sustain production and supply for essential diagnostics, vaccines and therapeutics.[103] In order to address the COVID-19 challenges, global collaboration is needed to support developing and least developed

98 https://www.kebijakanaidsindonesia.net/id/artikel/artikel-kontribusi/470-kebijakan-pelaksanaan-paten-obat-arv-oleh-pemerintah-indonesia (accessed 24 May, 2020)

99 A. Moore and K Himma, *Intellectual Property*, in EN Zalta (ed.), The Stanford Encyclopedia of Philosophy, (Stanford, CA: Metaphysics Research Lab, Stanford University, 2018). <https://plato.stanford.edu/archives/win2018/entries/intellectual-property>.

100 GWF Hegel, *Elements of the Philosophy of Right*, A Wood (ed.) (Cambridge: Cambridge University Press, 1991).

101 John Locke, *The Second Treatise of Government*, P Leslett (ed.) (Cambridge: Cambridge University Press, 1988).

102 Enrico BONADIO and Andrea BALDINI," COVID-19, Patents and the Never-Ending Tension between Proprietary Rights and the Protection of Public Health", European Journal of Risk Regulation, Vol. 00:00, (2020).

103 COVID-19 Pandemic: Access to Prevention and Treatment is a matter of national and international security, Open Letter from Carlos Correa, to the Director Generals of the WHO, WTO and World Intellectual Property Organization (WIPO), (4 April 2020), https://www.southcentre.int/wp- content/uploads/2020/04/COVID-19-Open-Letter-REV.pdf.

countries to scale up testing capacity and to enable equitable and affordable access to approved treatments and vaccines.[104] The international health community, with WHO lead, should reassert the right of governments to use TRIPS flexibilities to protect public health. Governments can act swiftly to take policy and legislative measures to ensure that patents and other intellectual property rights do not erect barriers to access to medicines, diagnostics, vaccines and medical supplies and devices.[105] There is a need to review national and regional regulations to assess the extent to which they provide for the above-described TRIPS flexibilities. In particular, whether they permit the effective compulsory licensing or government use of products that are protected by patents. If not, the necessary reforms should be promptly introduced in order to streamline procedures and facilitate the implementation of such measures.[106]

Importantly, governments should include and operationalize in their laws and regulations provisions to allow the effective use of compulsory licenses and government non-commercial use to address patent barriers to access. To facilitate their implementation, the requirements under national laws and procedures for the grant of these licenses should be simplified to the extent possible, in accordance with international legal obligations. Most countries include in their national patent laws provisions for compulsory licensing and government non-commercial use.[107] Although there are many examples of instances when compulsory licensing and government non-commercial use have been used, procedures for the speedy grant of such licenses may need to be implemented. These licenses do not preclude the patent holder from continuing to exploit the invention.[108] Voluntary licensing has many advantages. First, good relations with investors will remain established because it is not a coercive mechanism. Second, the brand image and reputation of the investor company will also be built. Third, pharmaceutical companies feel valued because they have spent research costs that are not cheap and take a long time to produce a drug. Fourth, we can work together to develop the national pharmaceutical industry going forward.[109]

D. Closing

Indonesia has implemented the TRIPS flexibilities in its IP legal system but there are still impediment on its implementation in facing the COVID-19 pandemic. There

[104] Viviana Muñoz Tellez, *op. cit.*
[105] *Ibid*.
[106] *Ibid*.
[107] Carlos Correa, *Guide for the issuance of compulsory licenses and government use of patented pharmaceuticals*, (Geneva: South Centre, Forthcoming 2020). See WIPO compilation of provisions on compulsory licenses and government use by country https://www.wipo.int/edocs/mdocs/scp/en/scp_30/scp_30_3 -appendix1.pdf.
[108] Viviana Muñoz Tellez, *op. cit.*.
[109] https://kumparan.com/erik-mangajaya-simatupang/akses-pada-obat-COVID-19-1tJqe1Xgqwt/full (accessed 24 May, 2020)

are two conditions for implemention of TRIPS flexibilities, the first is a condition where the flexibility will be automatically implemented once Indonesia become WTO member, and the second is a condition when the TRIPS flexibility is possible to be implemented with a certain criteria and procedures. The first condition includes TRIPS flexibilities on (1) transition period, (2) exception to patent rights and (3) exemptions from patentability. The second condition includes TRIPS flexibilities on (1) compulsory license, (2) government use, (3) parallel import, (4) limitation of data protection and (5) implementation of paragraph 6 of Doha Declaration. The Government Use is the most effective flexibility to be used in encountering the COVID-19 pandemic. Since the government is a party which has the initiative and the executor to implement the flexibility, the procedure and time can be determined by government itself.

The issue of voluntary license which is a pro-active initiative from the right holder should be anticipated for IP legal system on public health as a lesson from this COVID-19 Pandemic for the future. Therefore, the provision on voluntary license should be provided in the future domestic patent law. The government should also start to promote and introduce the voluntary license approach to the right holders. This effort will achieve the objective of IP to balance the interest of the right holder and obligations to the public as provided in Article 7 of TRIPS Agreement.

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P-ISSN: 1907–8463
E-ISSN: 2772–8568