

# *The Problem of Norm on The Retroactive Patent Certificate*

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**Abstract--***This study aims to analyze the meaning of "retroactive" in Article 60 of the Patent Law which has multiple interpretations. This legal research is normative with a grammatical interpretation approach. The result of the research is that there is a vague interpretation of a norm on the phrase "retroactive" in the Explanation in Article 60 of Patents Law. There is no authentic interpretation on the explanation of article 60. Supposedly, must be explain the phrase specifically for the phrase "retroactive" so as no confusion about what are they meant by "retroactive" in the regulation of article 60. The conclusion is that the meaning of the phrase "retroactive" can lead to obscure (vague) norms resulting in legal ambiguity over the regulation of Article 60. The implication of this research is that the government must immediately make a clear explanation on the phrase "retroactive" so that patent protection can be maximized.*

**Keywords-** *legal protection; retroactive; obscure (vague) norm.*

## I. INTRODUCTION

Patents or *oktroi* have existed since the 14th and 15th centuries, for example in Italy and England. [1] [2]. In this case the nature of granting patents at that time was not aimed at inventions (*uitvinding*), but mainly to attract experts from abroad.[3][4] This means that experts from abroad stay in the countries that invite them so that they can develop their respective expertise in the inviting country to advance the population of the country concerned.[5] [6]The patent or *octroy* was in the form of a permanent residence permit.[7] [8]However, the inventor's presence in the new country was based on expertise in a particular field. So, there are similarities with the use of the term patent today.[9] In addition, the royalty at that time took the form of a permit to stay in the country with special treatment because it could make a positive contribution to the development of the people in that country.[10][11]

The Indonesian government has revoked and declared that the Act No. 14 of 2001 on Patents null and void. This is based on the promulgation of Patents Law as revoked and declared the invalidity of Law Number 14 of 2001 concerning Patents in the transitional article in the formulation of the article at the end of the chapter in Patents Law (13/2016).

A patent is a right granted by a government, in this case a country, to one or several people acting together implementing an idea poured into an activity that results in an idea poured into an activity in the field of technology in the form of a product or process.[12]

Patents covering the ideas of property rights (intellectual), attached to the owners,[13] permanent and exclusive and acquired rights of others with the permission of the owner, and temporary.[14] The result of human thinking ability is an idea which is then manifested in the form of a creation or invention.[15] [16]In this idea, an abstract intellectual predicate is attached, the consequence is that IPR is separated from material objects in its form, for example a patent is an idea in the field of technology called Intellectual Property Rights.[17][18]

Patents, which are a form of intellectual property rights (IPR) which are private (civil) rights [19], in the sense that someone has the freedom to apply for registration of their intellectual property rights in the form of a patent and protection of their IPR or not [20][21].

Patent is an exclusive right received by an inventor from the state for the results of his invention in the field of technology for a certain period of time to carry out the invention himself or to give approval to other parties to implement it (Article 1 paragraph 1 of Law 13/2016).

The subject of law patent, namely the inventor, is a person or several people who jointly carry out the ideas poured into activities that produce the invention. The revocation of Law 14/2001 concerning Patents due to the issuance of a new patent law, namely Law 13/2016, will automatically bring about fundamental changes to copyright arrangements in the Indonesian state.[22] One of them is the provision in Article 60 of the Patent Law regulates that patent protection is proven in the form of a patent certificate which is retroactively valid from the filing date.

A review of the provisions of Article 60 of Law 13/2016, which regulates heteronomo principles related to the application of the retroactive patent principle from the date of receipt, can cause legal problems in society. The existence of misinterpretation results in legal ambiguity regarding the provisions of the article.

That can be called contains interpretations of a norm that is obscure in this case is reinforced by the absence of

an explanation of significant or an explanation that is simple and effective to explain the meaning of 'retroactive' 'in explanatory Chapter in Article 60 of Law No. 13 of 2016 about Patents.

Description in explanatory Chapter to Article 60 of Patents Law at the end of the law only mentions Article 60 Self-explanatory, without explaining the meaning of "protection patent evidenced by the issuance of the certificate of patent retroactively from the filing date ", should be specifically explained in particular the phrase 'retroactive' 'so as not to cause confusion what is meant by' retroactive " on article 60 of the regulation.[23]

Meaning to the phrase 'retroactive' 'can cause blurring of norms (vague norm)[24], which resulted in the emergence of legal ambiguity over the setting of Article 60 of the., Hence the need for a revision of the regulation of article 60 of Law No. 13 of 2016 on Patents, especially in elucidation Chapter of article 60. Based on the background description of the problem above, the author in this study seeks to analyse the title Vague Norm in the provisions of Article 60 of Law Number 13 of 2016 on Patents. This vague norm results in the ineffectiveness of providing legal protection to investors

## II. PROBLEM

From the description above, the problem that arises is how the existence of Article 60 of the Patent Law on the performance of Patent protection?

## III. RESEARCH METHOD

This study uses the type of normative legal research including reviewing and analyzing materials and legal issues-based legislation.[0][26] This study was done to solve the legal issues that arise while the results that will be achieved is a prescription of what should be done.[27]. In this case study vague norm in the provisions of Article 60 of Patents Law.

The approach used is grammatical interpretation. Grammatical Interpretation (Taatkundige Interpretatie) is an interpretation based on terms that exist in law. The terms contained in legislation are in accordance with the rules of the prevailing language, therefore the judge must understand a text in statutory regulations, by referring to the meaning of the text to the meaning that has been standardized in the rules of the language. "In this case, what is used as a guideline is the meaning of words, phrases, or per sentence according to grammar or habit. In this context, a grammatical interpretation is made of the retroactive provisions from the date of receipt of the patent application from the patent certificate.

## IV. DISCUSSION

A patent is a right granted by a government in this country to one or several persons acting together implementing an idea poured in an activity that will

generate ideas poured in any activity in the field of technology in the form of a product or process.

Patents that are part of the intellectual property rights (IPRs). The study of intellectual property rights is part of the study in the civil field. Registering a patent is a right that contains options. There is no obligation for someone to apply for a patent registration. There is legal protection for people who have patent certificates.[28] If not done, he will not be charged anything, but he will lose if other people take advantage of or even acknowledge her or his creations.[29] "Patents are exclusive rights granted by the state to inventors for the results of their inventions in the field of technology for a certain period of time to implement the inventions themselves or give approval to other parties to implement them" (Article 1 number 1 of Law 13/2016).

Intellectual property rights which are abbreviated as IPR are in English it is called Intellectual Property Rights, namely "a right that arises for the results of ideas that produce a product that is beneficial to humans".[30] Intellectual Property Rights is closely related to patents, this is because a patent is something that arises from the results of thoughts and / or ideas.[31]

The law has determined certain patterns of behavior, so each person should behave according to that predetermined pattern.[32] In line with Hans Kelsen, Gustav Radbruch has the view that law must contain 3 (three) identity values, namely the principle of legal certainty (rechtmatigheid), the principle of legal justice (gerechtigheid), and the principle of legal benefit (zwechtigheid).[33]

Retroactive in Latin is referred to as: *ex post fact* which means "from something that is done afterwards". The principle of retroactivity is the opposite of the principle of legality, namely the principle of the time limit of the validity of criminal law. According to the legality principle there is no criminal act, and also no crime, except on the basis of the strength of the regulations that govern it, before the act is committed (*nullum delictum nulla poena sine praevia lege poenali*).

The provisions of the legality principle are contained in the Criminal Code Article 1 paragraph (1) which reads: "An act cannot be punished unless based on the provisions of the existing criminal legislation." This means that an act of a person that is not listed in the law as a criminal act cannot be charged by the law. So with this principle, unwritten law has no power to apply.

The grammatical interpretation of the provisions of Article 60 of Law 13/2016, shows that legal protection for patents is manifested in the form of patent certificates. With its retroactive effect from the date of receipt of the patent application. Legal protection does not begin when the patent certificate is issued.

Particularly in the provisions of Article 60 UU 13/2016, the phrase "retroactive", in this case it says "retroactively effective from the filing date". The meaning of the phrase "retroactive" creates a vague norm which results in legal ambiguity over the regulation of the article. That can be called contains interpretations of a norm that is blurred in this case is reinforced by the absence of an explanation of significant or an explanation that is simple and effective to

explain the meaning of 'retroactive' 'in explanatory Chapter in Article 60 of Patents Law

Description in Explanatory Chapter to Article 60 of Patents Law at the end of the law only mentions Article 60 Self-explanatory, without explaining the meaning of "protection Patent evidenced by the promulgation of the certificate of patent retroactively from the filing date ", should be specifically explained in particular the phrase 'retroactive' 'so as not to cause confusion what is meant by' retroactive " on article 60 of the regulation.

That of the explanation is the need for a revised opinion of the author in particular phrase in Explanatory Chapter of Article 60 of Law 13/2016. The author's reasoning is based on the method of interpretation or juridical hermeneutic interpretation, namely the method of interpreting unclear statutory texts, so that these laws can be applied to certain concrete events in this context the need for interpretation is required to interpret the text of the legislation listed in Explanatory Chapter of article 60 of Patents Law that were previously in Explanatory Chapter is called Self-explanatory should be changed into: "The purpose of retroactive means the right not to be prosecuted under the law that before a law was enacted or promulgated "

This is based on the principle of *Ex post facto*, which means that something that is done afterwards is a law that changes the legal consequences of the action taken or the legal status of the facts and relationships that existed before a law was enacted or promulgated.[34] For example, referring to the provisions of Article 28I of the 1945 Constitution of the Unitary State of the Republic of Indonesia: ..... the right not to be prosecuted on the basis of a retroactive law is a human right that cannot be reduced under any circumstances. "Apart from that, a legal exposition or construction method is needed, namely a method that explains words or forms a meaning (law), the legal definition in question is legal construction (*rechts constructie*) which is the tools used to compile legal materials which are carried out systematically in the form of good terms.[35]

Patents must be given legal protection because they are part of intellectual property rights, in this case IPR as a set of rights granted by law to be protected. With the existence of phrases that create norms of obscurity in an article arrangement related to Patents, it will result in the intellectual property rights in Patents not receiving maximum legal protection and legal certainty, so a revision is needed to provide legal certainty.[36]

The role of technology is a major concern in developed countries in responding to national development problems and increasing economic growth. In many developed countries, economic and technology policies are increasingly integrated and aligned to improve national competitiveness. Thus, one of the policies directed to increase the utilization of technology in the production sector to national economic development and an appreciation of the domestic technology.[37] Indonesia is a country that has a wealth of genetic resources and traditional knowledge which are often utilized by domestic and foreign inventors to produce new inventions.[38] Therefore, in Act No. 13 of 2016 on Patents shall be

enhanced toward better to give legal protection to all aspects relating to the patent in the State Indonesia.

The impact of vague norm, in this case, shows that the blurred norm affects the performance of Patent protection in the context of evidence by issuing a Patent certificate which is retroactive from the date of receipt, in this case there is confusion over the patent actor who received protection from the retroactive meaning that is retroactive, as well as obscurity. norms resulting in legal ambiguity[39] over the regulation of the article in its implementation.

The application of the retroactive principle in the Indonesian legal system is a form of deviation from the non-retroactive principle and the legality principle. The principle of retention is the main legal principle in law enforcement which is the basis for a person to be prosecuted on a retroactive legal basis. So that the development of science and technology also seems to have an impact on the application of legal principles in Indonesia. The role of technology is a major concern in a country in responding to national development problems and increasing economic growth.[40] Indonesia is a country that has a wealth of genetic data sources and traditional knowledge[41] that are often used by domestic and foreign inventors to produce new inventions.

Patents must be granted legal protection because they are part of intellectual property rights, in this case intellectual property rights as a group of rights granted by law to be protected. With the existence of phrases that cause the obscurity of norms in a regulation of articles related to Patents, it will result in intellectual property rights in Patents not receiving maximum legal protection and legal certainty[42].

The existence of Article 60 of Law 13/2016 on patent performance depends on whether or not other parties are suing for patent cancellation. The meaning of *surt* in Article 60 of Law 13/2016 is a form of pending petition. A pending patent aims to provide information to the public, if the patent in question has been filed for registration at the Directorate General of Intellectual Property but has not been registered (even though the owner has not received monopoly rights over the invention because the application has not been granted and registered / certified) If after the patent pending is made, then there are other parties who use the technology / invention and it turns out that the patent application is granted by the Directorate General of Intellectual Property and obtaining a certificate, the patent owner can file a civil suit or criminal suit as of the date of receipt (retroactive). Patent protection is granted from the date of receipt of the application, not from the date of issuing the patent.

## V. CONCLUSION

The explanation in the Explanatory Chapter in Article 60 of Law 13/2016 at the end of the law only states Article 60 Self-explanatory, without explaining the meaning of " Patent protection is proven by the promulgation of a Patent certificate which is retroactive from the Filing Date ". is obliged to specifically explain in particular the phrase " retroactively applied " so as not to cause confusion as to

what is meant by "retroactive" in the regulation of article 60. Whereas from the explanation, according to the author's opinion, it is necessary to revise the phrase, especially in the Explanatory Chapter of article 60 of Patents Law.

The author's reason is based on the method of interpretation or juridical hermeneutic interpretation, namely the method for interpreting unclear statutory texts, so that these laws can be applied to certain concrete events, in this context the need for interpretation or interpretation is needed to interpret the statutory text. The invitation stated in the Explanatory Chapter of article 60 of Law 13/2016, that previously in the Explanatory Chapter is called Self-explanatory, should be changed to "the meaning of retroactive means the right not to be prosecuted on a legal basis prior to enactment of a law or promulgated " This is based on the *Ex post facto* principle which means that something that is done afterwards is a law that changes the legal consequences of the action taken or the legal status of the facts and relationships that existed before a law was enacted or promulgated. For example, referring to the provisions of Article 28I of the 1945 Constitution of the Unitary State of the Republic of Indonesia: ..... the right not to be prosecuted on the basis of a retroactive law is a human right that cannot be reduced under any circumstances.

The recommendation of this research is that there is a need for a revision of the regulation of article 60 of Law 13/2016, especially in the Explanatory Chapter of article 60, in this case the revised meaning of the phrase "retroactive" is explained in the explanatory chapter.

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