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Denationalisation of Indonesian National Law: An Implementation of EU Cyber Conventions and Accession

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Indonesia is a country with one of the biggest number of social media users in the world. The use of electronic applications has become a part of everyday life. It ranges from online shopping to using online motorcycle taxis. Although Indonesia has a Law of Electronic Information and Transaction, it is evident that the electronic application users' personal data has not been protected appropriately. A Cyber Convention which can be applicable for the Indonesian situation is that of the European Union. Although it is an interesting choice, for some geographical reasons naturally Indonesia cannot join this convention; besides, the dualism law tradition in international agreements rather complicates the issue. A possible solution which can bridge this issue is denationalisation of law. The denationalisation approach can be used in applying European Union Cyber Convention without need to do an accession, as well as denationalisation which has been done by Indonesia using the Rome Statute. Indonesia has not ratified the Rome Statute, it is not even a signatory, but its national law – that is the Law of the Human Rights Court – has adopted the Human Rights Court and acknowledged crimes against Humanity and Genocide into Indonesian Law. Indonesia has become the only country in the world which has a Human Rights Court. Some direction from the application of some parts of the Rome Statute, with the denationalisation principle and without accession, can be also used for the European Union Cyber Convention. This denationalisation will make Indonesian National Law more complete and more contemporary whereas it will create national law with an international flavour.

Key words: *Denationalisation, Implementation, EU Cyber Conventions, Accession, Indonesia.*

Introduction

Based on the result of an Indonesian polling study, conducted in collaboration with *Asosiasi Penyelenggara Jasa Internet Indonesia/APJII* (Indonesian Association of Internet Service Providers): in 2018 the number of Internet users in Indonesia has reached 171.17 million subscribers (Franedya, 2019). Although patchy in terms of distribution percentage and low international population penetration, Indonesia is the country with the biggest number of Internet users in Southeast Asia (Indonesia Media Defense Litigation Network and Institute for Criminal Justice Reform, 2011): with all the conveniences that brings (Pujiyono and Ahmad, 2019). From the data above, it can be seen that nowadays Internet has become a part of everyday life which would be difficult to remove. Through Internet, a user from a certain location is easily able to explore and obtain various information from individuals and organisations all around the world (Dufy, 2000). The implication of the high usage of Internet in Indonesia directly relates to the high usage of electronic applications, otherwise known as software (Marhiyanto 2007). Software is one of the technologies which have many benefits for human beings. However, this software requires its users to input their personal data as a requirement before using the application. Many bureaucrats who begin to use e-office, for example, should input their personal data previously, before using this application.

In 2008, the Indonesian Government has ratified Law Number 11 Date 2008 on Electronic Information and Transaction (*UU ITE*): (Law No. 11 Year 2008 concerning Electronic Transactions, LN No. 58 Year 2008, TLN No. 4843) to regulate the management of Indonesian electronic information and transactions. This law is then changed with Law Number 19 Date 2016 (Law No. 19 Year 2016 concerning Amendments to the Law 11 Year 2008 concerning Information and Electronic Transactions, LN No. 251 Year 2016, TLN. No. 5952) in order to provide counterbalance for Indonesian people's development, which becomes more dynamic. However, the law is not able to solve all problems. This *UU ITE* has still not had any provision that regulates personal data protection. This personal data protection, besides closely relating to personal protection (Claes et al., 2006): it also covers the rights of the individual, group or institution to determine whether some information on them is going to be communicated or not to other parties (Westin, 2015). Its ownership should be processed equally, for a certain purpose and only based on the approval of the related person (McDermott, 2017). With many electronic applications which require the users to input their personal data, it is not uncommon that much personal data violation is then done by the owner of electronic application. Thus, it needs a reference to make legislation that protects the electronic application users' personal data more extensively (Kord et al., 2017).

The European Union Cyber Convention is the right choice for the needs of Indonesia. The European Union is a federation which oversees European countries which are united together.

Its members consist of many countries using the Continental European law tradition (Nijboer, 1993): Anglo Saxon (Pollock, 1893) and the Ex-Socialist Law System (Ward, 1900). The European Union establishes some regulation and policy for the member countries which are fundamental and binding in nature, or in other words, the European Union also has a role as the highest coordinator, which monitors the course of rules and provision which have been agreed together during remaining in the European Union scope (Fathony, 2018). Indonesia has joined ASEAN, which is also surrounded by other countries which adhere to the Continental Europe, Anglo Saxon and Socialist law system (Yasuda, 1993). Thus, this European Union Cyber Convention is the right choice for Indonesia in order to handle cyber issues which are increasingly complex as time goes by. This European Union Cyber Convention is established in order to resolve jurisdiction problems which are caused by Internet evolution (Weber, 2003). The resolution is to support successful official cyber prosecution.

Indonesia is a country which adheres to the dualism doctrine in looking at the enforcibility of International Law. Based on the Law Number 12 Year 2000 on International Agreement (Law No. 24 Year 2000 concerning International Treaties, TL No. 185 Year 2000, TLN No. 4012): in order that an International Convention is able to be implemented, it needs a ratification or accession to the intended convention. Therefore, international law cannot be automatically applicable in Indonesia. If Indonesia wants to apply the European Union Cyber Convention, accession is a way that can be done. However, from a legislative point of view, it is difficult for Indonesia to do that. Based on the Critical Legal Studies approach from Robert Unger (Kelman, 1987): the needs in the cyber world cannot then be shackled by a very rigid legislative provision. However, what is needed is a provision which is adaptable to the cyber world, which is global and cross country in nature (Diener & Hagen, 2009).

Related to this matter, the national law (Silving, 1956) denationalisation principle is the only way that Indonesia can apply the European Union Cyber Convention after ratification and accession cannot be performed. As a historical background, in the next part it will be discussed why Indonesia, which is formerly a Dutch East Indies colony, adheres to dualism not monism as well as the Dutch tradition, and whether Indonesia has any experience in applying the denationalisation principle.

Method

This study recites statutory rules, therefore the method used in this study is normative/doctrinal with two approaches, including: statute and conceptual approaches. Primary legal materials are in the form of regulations, including: European Union Cyber Convention, *UU ITE* (Law of Electronic Information and Transaction): *Indische Staatsregerering (IS):* Law Number 26 Year 2000 on the Court of Human Rights, and some

other related regulations which are applicable in Indonesia. Secondary legal materials are more in journals and supporting references. Data analysis is carried out by analysis content on the whole provided legal materials.

Results and Discussion

The Urgency of Personal Data Protection in Indonesia

Rapidly developing information and communication and technology have changed the way society is running their business and/or doing interaction and communication (Cole & Griffiths, 2007). This creates an increase of complaint, even dispute as the result of cyber fraud (Sumenge, 2013). There are many cases of rampant occurence of fraud while using e-commerce sites. It results in a decreased level of public trust in online transaction sites. People who are aware of this issue will be reluctant to use some cards which involve personal data (Zyskind & Nathan, 2015). Not only e-commerce, but also other cyber platforms are susceptible to personal data theft, including social media platforms. The increase of cyber use as a means of transaction and communication has a potential to increase the abuse of personal data of other parties, therefore the public trust (Wikinson, 1980) in cyber usage will again be reduced. Of course, this state of affairs does not have any positive impact on the improvement in economy and communication.

It is not a few Indonesian people who complain about telemarketing activities – which belong to the direct marketing category – offering directly some financial products such as insurance and loans without collateral, even some fraudulent offerings which present through sms media, or other electronic media. One of the existing problems at this kind of practice is personal data transfer of the customer or society, which is not commensurate with ethical principles (Rosadi & Pratama, 2018). The personal data which is input by the customer/society is then shared among the companies. Not only in the direct marketing case, controversy also happens in requests for family card data in prepaid card registration; the alleged leak of Citizen Identification Card, etc. A serious problem appears when this kind of practice is confronted with privacy issue and customers' personal data protection. This matter signifies the presence of insufficiently strong regulation and less effective law enforcement.

Indonesia is a law state (Asshiddiqie, 2011) which always gives priority to law as the foundation in all state and society's activities: Indonesia's commitment as a law state is always and only stated in writing in Article 1 (3) the Constitution of the Republic of Indonesia 1945 of the amendment result. One of the indicators of a law state is the success in its law enforcement (Syamsuddin, 2008). It is said to be successful because of the law it has regulated; it should be and it is time to be run and obeyed by all elements of society. The absence and less than maximum law enforcement can have some implications to the

credibility of rules formers, rules executors and society, which is influenced by the rule itself, therefore the whole elements will be affected. However, the upstream problem has also to be resolved, that is weaker normative rules which regulate personal data protection.

Legal provision related to the protection for personal data in Indonesia until now has not been complete yet and is still partial (Greenleaf, 2017) (Kurnia & Husain, 2014). Indonesia has a regulation of personal data protection which is spread out across various regulations, for example Law Number 36 Year 2009 on Health regulates on the patient's confidential personal condition, whereas Law Number 10 Year 1998 on Banking regulates depositor's personal data and his deposit. The regulation regarding to personal data protection also presents in Law Number 36 Year 1999 on Telecommunication, Law Number 39 Year 1999 on Human Rights, Law Number 23 Year 2006 on Population Administration (it has been changed with Law Number 24 Year 2013) and Law Number 1 Year 2008 on Electronic Information and Transaction (it has been changed with Law Number 19 Year 2016): and also Government Regulation Number 82 Year 2012 on Implementation of electronic System and Transaction. However, all the above regulations are weak on their sanction application. There is yet other hope that is the *Rancangan Undang Undang/RUU* (Law Draft) of Personal Data Protection, which is still under preparation at the People's Representatives Council. However, by seeing the performance of this legislative institution, it seems that it still needs a very long process. The fastest idea is denationalisation of EU Cyber Conventions (Watkins, 2014).

Apartheid System and the Adhering of Dualism in Indonesia

Netherland adheres to the monism doctrine in looking at the enforceability of International law in this country. The monism doctrine (Maniruzzaman, 2001) that has rooted very strongly in this law state, makes all national laws, including the constitution, hierarchically are seen as lower than international law (Burkens, 2001). This monism doctrine is regulated in Article 93 and 94 of the Constitution of the Netherlands (*Grondwet*). In article 93 it is stated that the provision of international organisation's agreement and decision can bind all people after its publication. Whereas in Article 94 it is stated that every law is stated inapplicable when the laws are contradictory with the binding international law. It is very different with Indonesia, as its former colony, which uses the dualism doctrine (Maniruzzaman, 2001) in looking at the enforceability of International Law.

A difference in point of view between Indonesia and The Netherlands in looking at the enforceability of International Law is caused by the existing application of apartheid or racial differences system during the colonial period. The Constitution of The Dutch East Indies has applied apartheid or racial differences system for the Dutch East Indies population in *Indische Staatsregerering* (IS). Article 131 of IS, which is "a Guideline of Legal Politic" of the Netherlands Government, states that the Dutch East Indies is divided into three levels that

is: European Legal Class, *Timur Asing* (East Stranger/Not European Foreigners) Class and Indigenous Indonesian. The racial differentiation in Dutch East Indies law gives some implications on the enforceability of its law to each class. As well as regulated in Article 163 which states that:

a. European Legal Class, that is all Dutch, European, Japanese, people from other countries whose kinship law is the same as the Dutch's kinship law, especially the monogamy principle, their descendants which are mentioned above. In this class, based on Article 131 Paragraph 1 Sub a, it has been appointed that for material civil law for Europeans enacts the concordance principle, that is for Europeans who are in Indonesia is enacted with its civil law of origin, that is civil law which is applicable in Netherlands (Soejendro, 2005);
b. *Timur Asing* (East Stranger) Class. This class consists of *Tionghoa Timur Asing* class (China) and *Not Tionghoa Timur Asing* (Arabian, Indian, Pakistan, Egyptian, etc.). For this class, it is applicable Civil Code and Commercial Code. Specifically for *Not Tionghoa Timur Asing Class*; for hereditary law and family law they use their own laws.
c. Indigenous Indonesian, that is Indonesian native people and people who belong to other groups, then immerse themselves into Indonesian native class. For indigenous Indonesia, common law applies since old times in the society.

This apartheid policy has resulted in the fact that Indonesia does not adhere to monism as well as The Netherlands does. The dualism tradition since this Dutch East Indies era is reflected in the Law of International Agreement in Indonesia, which declares that the enforceability of an international agreement should go through a ratification or accession. Based on the above provision, therefore International Law cannot be applied automatically in Indonesia.

The Implementation of European Union Cyber Convention through Denationalisation

European Union Cyber Convention binds the European Union as a regional organisation. Indonesia, which is located in Southeast Asia, of course cannot join into the European Union. However, technically there is still a possibility that Indonesia can adopt this European Union Cyber Convention by carrying out an accession (Knill & Tosun, 2009). Accession itself is not an easy way. There are many provisions and requirements which Indonesia should fulfil. It is not easy for Indonesia to follow the requirements for carrying out an accession. In this matter, denationalisation gives a possibility to Indonesia to use the provision in European Union Cyber Convention in Indonesian national law.

The use of denationalisation actually also occurs in the member countries of the European Union. The European Union is not a supranational form, but European Union law can be

enacted to the member countries of the European Union as if it is a supranational country. Some provision which regulate the obligation of applying EU law into the National Law of its member countries is regulated in Article 288, *the Treaty on the functioning of the European Union,* which can be in the form of regulation (Miller, 2010). Through the mechanism of European Union regulation, which can be tested through *European Court of Justice* (ECJ): the member countries will implement European Union law and change its national law, because factually the member countries of European Union are sovereign countries, its content becomes international law. The way of applying international law like this is called denationalisation. By denationalisation, then the content of an international law becomes a national content without needing either ratification or accession. Certainly, this method is deemed natural for the member countries of European Union, because they have become the member of European Union. How is this denationalisation principle also applicable for other countries which have other legal system other than the member countries of European Union? Indonesia actually has an experience on the application of denationalisation.

After the opinion poll in Timor Timur in 1998, it has left a trace of serious human rights violation in Indonesia. Indonesia from 1998 until now has not ratified the Rome Statute; Indonesia is not even included as a signatory. Notwithstanding, it needs a court which is capable of resolving the serious violation cases after the opinion poll in Timor Timur. The seriousness factor has Caused Indonesia to make the Government Regulation in Lieu of Laws (*Perpu*) Number 1 year 1999 on Court (Perpu No. 1 Year 1999 concerning the Court, LN No. 191 Year 1999, TLN No. 3911). An interesting thing in this Law is that Indonesia has absorbed two criminal acts in the Rome Statute – that is, Crimes against Humanity and Genocide. This Government Regulation in Lieu of Laws is then replaced with Law Number 26 year 2000 on the Court of Human Rights (Law No. 26 Year 2000, LN No. 208 Year 2000): which also absorbs Crime against Humanity and Genocide as crimes in the jurisdiction of human rights court.

The absorption of Crime against Humanity and Genocide which is the substance of the Rome Statute, without previously doing ratification and accession, is an application of Denationalisation. Therefore, Indonesian national law finally has the same content as international law. This use of denationalisation precisely indicates Indonesia has made a new innovation. Indonesia has become the only country in the world whose national law regulates the Court of Human Rights and recognises the crime against humanity and genocide.

Conclusion

The experience and learning from the absorption of the Rome Statute in the Court of Human Rights has become an example of denationalisation. Actually, despite the dualism provision

as reflected in the law, International Agreement can be carried in Indonesia. Indirectly, In actual fact Indonesia has performed denationalisation on its national law. This success has even already been recognised internationally: Indonesia is the only country which has a Court of Human Rights in its national law.

This use of denationalisation is also applicable for applying the European Union Cyber Convention. Indonesia, as a user country of Internet services and electronic applications with one of the highest number of users in the world, needs a qualified referral as well as the European Union Cyber Convention. It needs a reconstruction of thinking in Indonesia's legislation. It does not need to be glued on and become legally solely in the Law of International Agreement, which uses the dualism approach in applying a foreign convention. Denationalisation can be a reference. Currently, Indonesia needs a national law which has the content of international law, so that Indonesia is able to survive law globalisation scouring.

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