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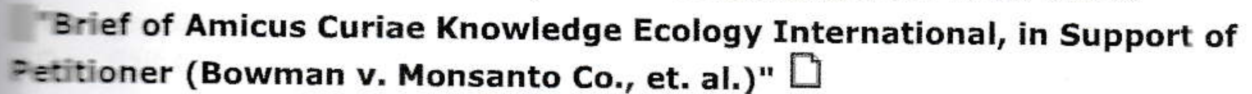
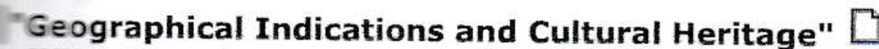


"Brief of Amicus Curiae Knowledge Ecology International, in Support of Petitioner (Bowman v. Monsanto Co., et. al.)"

KRISTA L. COX, Association of Research Libraries, Notre Dame Law School
Email: kristay@gmail.com

KEI's amicus brief provides a brief overview of the history of the Supreme Court's history of applying a robust patent exhaustion doctrine to ensure that a patent holder can receive a single reward for his efforts, but cannot control downstream sales. It also notes that a judicially created exception from patent exhaustion for self-replicating technology is an inappropriate solution. The second section notes that contract law provides a more appropriate mechanism to protect investments in self-replication technology. Notably, contract law, unlike patent law, may be scrutinized for anticompetitive or unconscionable behavior and can be voided for these reasons, thus providing protections both for the patent holder as well as the user. In its long line of patent exhaustion cases, the Supreme Court has repeatedly noted that the application of patent exhaustion does not negate a patent holder's ability to attempt to enforce post-sale limitations through contracts. Finally, KEi's amicus details the non-patent mechanisms that exist that can and should encourage progress wehre patents are an inappropriate or burdensome reward.



"Geographical Indications and Cultural Heritage"

WIPO Journal, Vol. 4, pp. 92-102, 2012

DEV SAIF GANGJEE, Faculty of Law, University of Oxford
Email: dev.gangjee@law.ox.ac.uk

The emergence of claims that geographical indications (GIs) protection furthers cultural heritage goals is a relatively recent development. GIs such as Parmigiano Reggiano, Darjeeling and Bordeaux have historically been protected for reasons similar to those grounding trade mark protection. Granting exclusive rights over such signs prevents cluttered or misleading signalling in the marketplace, which benefits both consumers and legitimate producers. With the informational efficiency foundation established, there is some uncertainty as to where the heritage argument fits in and whether it is necessary at all. However the heritage dimension of regional specialities is increasingly emphasized in policy documents and academic scholarship. This article therefore sets out to: identify the conditions under which the heritage argument was made possible; and evaluate the different forms this argument takes and the types of work expected of it. While cultural heritage is a contested analytic category, as a resource its social, political and economic resonances are undeniable. Its contemporary prominence within the GI discourse has been associated with the potential for GIs to act as a bulwark against the neoliberal excesses of globalization, as well as the continuing significance of place-based communities.

"Equity, Unjust Enrichment and PPSA Priorities: KBA Canada, Inc. v. 3S Printers Inc."

RODERICK J. WOOD, University of Alberta - Faculty of Law
Email: rwood@law.ualberta.ca

The PPSA provides that principles of common law and equity continue to apply insofar as they are inconsistent with the provisions of the Act. In a recent decision,

Geographical Indications and Cultural Heritage
Dev Saif Gangjee, Faculty of Law, University of Oxford

Equity, Unjust Enrichment and PPSA Priorities: KBA Canada, Inc. v. 3S Printers Inc.
Roderick J. Wood, University of Alberta - Faculty of Law

The United States' Demands for Intellectual Property Enforcement in the Trans-Pacific Partnership Agreement and Impacts for Developing Countries
Krista L. Cox, Association of Research Libraries, Notre Dame Law School

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"Remarks on the GJIL Symposium on Corporate Responsibility and the Alien Tort Statute"

Georgetown Journal of International Law, Vol. 43, p. 1019, 2012
U. of Pittsburgh Legal Studies Research Paper No. 2012-33

VIVIAN GROSSWALD CURRAN, University of Pittsburgh - School of Law
Email: VivianeCurran@pitt.edu

The following essay is a summary of remarks I delivered at the symposium on corporate responsibility and the Alien Tort Statute held at Georgetown Law School after the first *Kiobel v. Royal Dutch Petroleum Co.* Supreme Court oral argument. My remarks addressed the importance of considering foreign national law when judging the meaning of universal civil jurisdiction, and, implicitly, the inextricability of domestic from international law matters.

"Critical Analysis of the Right to Establish Trade Unions in Indonesia"

ASRI WIJAYANTI, University Muhammadiyah Surabaya
Email: asri1wj@yahoo.com

Critics to the rule of law on the right to establish trade unions in Indonesia is a criticism toward the rule of law about the guarantee of the right to association of labours in Indonesia. There are inconsistencies in the horizontal and vertical settings, both among the rule of laws (the national), or between national legislation with the universal law that covers the basic principles and basic philosophical rights for labor to association. The problem in this study is the existence of conflicts of law in regulating the right to establish the trade union and their legal effects. This research is a normative legal research that uses the statute, historical and comparative approach. The results of this study is a conflict of national law (Act no. 21/2000) with a universal legal principle that artifacts in the ILO Convention. No. 87 jo. 98 jo. Universal Declaration of Human Rights jo. ICCPR jo. ICSECR. Critics toward the rule of law the right to establish trade unions in Indonesia are very important as setting repair material provision of guarantees of the right to association of workers in Indonesia, given that Indonesia has ratified the ILO Core Convention of the Declaration on Fundamental Principles and Rights at Workplace.

the British Columbia Supreme Court dealt with a mistaken discharge of a registration. Although the priority provisions of the PPSA provide that the security interest loses its priority if it is not re-registered within 30 days, the court imported principles of equity and unjust enrichment to alter this outcome. This commentary takes the position that this approach cannot be supported in law, and that if unchecked it will undermine the underlying objectives of the priority rules: it will lead to more commercial litigation and it will mean that parties will be less able to predict the priority ranking of their security interests.

"The United States' Demands for Intellectual Property Enforcement in the Trans-Pacific Partnership Agreement and Impacts for Developing Countries"

KRISTA L. COX, Association of Research Libraries, Notre Dame Law School
Email: kristay@gmail.com

The United States proposal for the Trans-Pacific Partnership Agreement (TPP) includes many demands that will increase intellectual property rights for rightholders. The leaked text reveals that the United States seeks to introduce numerous measures that go well beyond the requirements of the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property (TRIPS), known as TRIPS-plus provisions. Some of the areas of concern include the provisions on intellectual property enforcement.

The TPP currently includes eleven negotiating parties of vastly different economic backgrounds: the United States, Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. Other countries, like Thailand and Japan have been rumored to be the next to join, and the agreement is intended to eventually cover the entire Asia-Pacific region, including least developed countries like Laos or Myanmar.

Intellectual property systems must provide appropriate balance and important development concerns are affected by intellectual property rules. The high levels of intellectual property protection and enforcement proposed by the United States can create unnecessary barriers to progress and development. Leaks of the United States proposal reveal not only efforts to increase the rights of rightholders without sufficient safeguards to protect the public interest through substantive copyright or patent provisions, but also through increases in the minimum levels of enforcement. The enforcement provisions work in tandem with substantive copyright and patent provisions to tilt the balance of the intellectual property system in favor of rightholders, at the expense of users and consumers. Among other issues, the proposed enforcement provisions would impact access to medicines and access to medical technologies. The provisions could require countries to use scarce resources to investigate and prosecute intellectual property infringement despite the fact that intellectual property rights are private rights. Such use of government resources is costly not only for developing countries, but also for developed countries.

This examines the five articles comprising the United States proposals for enforcement of intellectual property rights in the TPP and potential implications for developing countries. Many of the proposals by the United States in the TPP intrude on the policy space reserved for states to pursue balanced intellectual property systems and determine the most efficient methods for enforcement in light of their

domestic situation. As a WTO panel recognized, "differences among Members' respective legal systems and practices tend to be more important in the area of enforcement" and the TRIPS-plus measures proposed by the United States with respect to enforcement could create particular problems for developing countries. The areas of enforcement that are discussed include: 1) civil and administrative procedures and remedies, 2) provisional measures, 3) special requirements related to border enforcement, 4) criminal enforcement, and 5) special measures relating to enforcement in the digital environment.

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*Editors: **Jayanth K. Krishnan**, Indiana University, and **Michael Mattioli**, Indiana University*

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Critical Analysis of the right to establish trade unions in Indonesia

Dr. Asri Wijayanti, S.H.,MH[1 2]

ABSTRACT

Critics to the rule of law on the right to establish trade unions in Indonesia is a criticism toward the rule of law about the guarantee of the right to association of labours in Indonesia. There are inconsistencies in the horizontal and vertical settings, both among the rule of laws (the national), or between national legislation with the universal law that covers the basic principles and basic philosophical rights for labor to association. The problem in this study is the existence of conflicts of law in regulating the right to establish the trade union and their legal effects. This research is a normative legal research that uses the statute, historical and comparative approach. The results of this study is a conflict of national law (Act no. 21/2000) with a universal legal principle that artifacts in the ILO Convention. No. 87 jo. 98 jo. Universal Declaration of Human Rights jo. ICCPR jo. ICSECR. Critics toward the rule of law the right to establish trade unions in Indonesia are very important as setting repair material provision of guarantees of the right to association of workers in Indonesia, given that Indonesia has ratified the ILO Core Convention of the Declaration on Fundamental Principles and Rights at Workplace.

Key words: discrimination, labour, the association of labour right, right to establish trade unions.

INTRODUCTION

The right to association is a part of human rights, owned by every person, including labor. Right to establish trade union is part of the right to association. Protection of the rights of association depends on the settings of each country, which is reflected in the regulatory legislation. The basic concept of the right to association comes from the tendency of everyone to get together or form a group as a zoon politicon (social beings).[3] Significance of association and assembly are inherent (inseparable). The right to association contained the activity of expression orally and in writing within the organization. It's called freedom of expression in public.[4] The term of *association* means associated[5] (Latin : associate). Meaning

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[1] Lecturer in Faculty of Law University of Muhammadiyah Surabaya

[2] Acknowledgment to Prof. Dr. Aloysius Uwiyono, S.H.,MH.

[3] Mochtar Kusumaatmadja and B Arief Sidharta, Introduction to Law, A First Introduction Scope of Applicability of Law, Alumni, Bandung, 2000, p. 12.

[4] Eko Sugitario, "Freedom of Association and Gathered Through Political Parties in Indonesia", Dissertation, University of Airlangga, 2001, p. 22

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of union for workers said Muchtar Pakpahan is as: a broom, public transportation, Wren, playing chess, fishing, solidarity, courage to die.[6] Indispensable intellectual role as a supporting actor of the labor movement that can be done by NGO workers (labor NGOs).[7]

Within the association, labor becomes more powerful. The right to association/ assembly as a force for labors in resolving labor issues. United workers in trade union is a tool that can be used to fight for the interests of labors. For example, merging of Korean Confederation of Labor unionwith the Federation of Korean Labor unionare able to pressure President Kim Young Sam to repeal the Act of Labour dated January 7, 1997,[8] and the Jinzai Service General Union/JSGU make agreements with eight employment service providers in determining the boundary Minimum wage workers must be received by outsourcing in Japan.[9]

The regulation to associate, especially the right to establish the trade union should be based on fundamental philosophical and legal principle of universal right to association. State can limit the right to establish trade union through the mechanism of protective legislation and does not reduce or eliminate the right to association. Restriction through national legislation sometimes contains a legal conflict with universal regulations, such as a limitation of requirement and the minimum number of workers, to be able to establish a trade union. It can be formulated from the above description whether there is conflict in the rights of regulation of to establish a labor union and its legal effect.

RESEARCH OF METHODS

This is a normative legal research with the Statute approach (vertical -horizontal study based on stuffen theorie),[10] historical and comparative approach.

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[5] Butterworths, ***Concise Australian Legal Dictionary, third edition,*** LexisNexis Butterworths, Australia, 2004, p. 32.

[6] Muchtar Pakpahan, Five Years of Lead SBSI, Options Or Call, For Prosperity, Democracy, Human Rights, The resilience of Law and Social Justice, Library Prosperous Justice Forum, 1997, p. 209-213

[7] Michele Ford, *Workers and intellectuals, NGOs, Trade Union and the Indonesian Labour Movement,* Asian Studies Association of Australia (ASAA) Shouteast Asia Publication Series, NUS Press, National University of Singapore, 2009, p. 205.

[8] Turc, 2005, Manual Series No.2: Right to Strike, Manual Workers Union, Turc, p. 19.

[9] Indah Saptorini and Jafar Suryomenggolo, 2007, Social Power Workers' Union, New In Struggle Refuse Round Outsourcing, Turc, Jakarta, p. 27.

[10] Hans Kelsen, 1992, ***Introduction To The Problems Of Legal Theory,*** translated by Bonnie Litschewski Paulson and Stanley L. Paulson, Clarendon Press, Oxford, p. xxxii-xxxiii.

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DISCUSSION

There should be an appropriateness between the right of regulating the establishment of trade union in the country by regulating the right to establish trade union universally. Protection of the right to establish a trade union through the mechanism of regulation. Regulation must not contain limitations that are reducing or eliminating the right to establish trade union.

Regulating the Right to Establish a Universal Trade Union

Universally, the importance of the right to association is expressed in the Declaration of Philadelphia related to the intent and purpose of the ILO (1944). Formulation and discussion of the right to association continued until now. Basic principles of universal rights of association defined in Article 20 of the Universal Declaration of Human Rights (UD of HR); Article 21 jo 22 International Covenant on Civil and Political Rights (ICCPR), Article 8 of the International Covenant on Social, economic and cultural Rights (ICSECR); Convention of Freedom of Association and Protection of the Right to Organise in 1948 No. 87 (C. 87) and the Right to Organise Convention of Collective Bargaining in 1949 and No. 98 (C. 98). C. 87 and C. 98 as a fundamental principle of the right to association.

Universal right to association is the right owned by the labor as part of human rights either individually or collectively, which consists of the right to establish a trade union and the right to negotiate which the implementation is based on freedom and equality. There are two conventions of ILO which become fundamental rights, namely the Freedom of Association and Protection of the Right to Organise Convention, 1948 (C. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (C. 98). C. 87 and C. 98 are core conventions which regulate the right to establish the labor association based on the ILO Declaration on Fundamental Principles and Rights at Work. This declaration aims to maintain the relationship between social progress and economic growth, the guarantee of fundamental principles and rights at work place. Declaration dated June 19, 1998 stated that all members including those who have not ratified these conventions yet, have an obligation arising from the fact of membership in the Organization to respect, promote and realize, in good faith, the principles of fundamental rights as the subject of the Convention (= core convention), namely:

1. Freedom of Association and Protection of the Right to Organise (C. 87) and Right to Organise and Collective Bargaining Convention (C. 98);
2. Force labour (C.29), Abolotion of force labour (C.105);
3. Effective abolition of child labour (included C. 138); and

4. Equal Remuneration (C.100) and Discrimination employment and occupation (C.111).

C. 87 and C. 98 are core conventions regulate the right to association. There are 7 conventions and 10 recommendations which regulate the rights to association, namely:

1. *Right of Association (Agriculture) Convention, 1921 (C. 11)*
2. *Right of Association (Non-Metropolitan Territories) Convention, 1947 (C. 84)*
3. *Rural Workers' Organisations Convention, 1975 (C. 141)*
4. *Rural Workers' Organisations Recommendation, 1975 (R. 149)*
5. *Collective Agreements Recommendation, 1951 (R. 91)*
6. *Voluntary Conciliation and Arbitration Recommendation, 1951 (R. 92)*
7. *Co-operation at the Level of the Undertaking Recommendation, 1952 (R. 94).*
8. *Consultation (Industrial and National Levels) Recommendation, 1960 (R. 113).*
9. *Communications within the Undertaking Recommendation, 1967 (R. 129)*
10. *Examination of Grievances Recommendation, 1967 (R. 130)*
11. *Workers' Representatives Convention, 1971 (C. 135)*
12. *Workers' Representatives Recommendation, 1971 (R. 143)*
13. *Labour Relations (Public Service) Convention, 1978 (C. 151)*
14. *Labour Relations (Public Service) Recommendation, 1978 (R. 159)*
15. *Collective Bargaining Convention, 1981 (C. 154)*
16. *Collective Bargaining Recommendation, 1981 (R. 163)*
17. *Abolition of Forced Labour Convention,* 1957 (*C.* 105)

C. 87 regulate the freedom of association and protection of the right to organise. The right of association defined by the C 87 as the right of individual and collective rights. Rights of individuals (workers and employers) include the right to:

1. establishing workers '/ employers' organizations (Article 2 C. 87);
2. subject only to the rules of the organization concerned (Article 2 C. 87);
3. join organizations of their own choice (Article 2 C. 87).

Collective rights (workers 'and employers' organizations) include the right to:

1. constitution and its own rules (Article 3 paragraph (1) C. 87);
2. elect their representatives freely (Article 3 paragraph (1) C. 87);
3. the administration (Article 3 paragraph (1) C. 87);
4. regulate its activities (Article 3 paragraph (1) C. 87);
5. formulate programs (Article 3 paragraph (1) C. 87);
6. can not be dissolved by administrative authorities (Article 4 C. 87);
7. can not be suspended by the administrative authorities (Article 4 C. 87);
8. establishing a federation (Article 5 C. 87);
9. join the federation (Article 5 C. 87);
10. confederation established (Article 5 C. 87);
11. join the confederation (Article 5 C. 87);

12. affiliated with international organizations of workers and employers (Art. 5 C.87).

In the formulation of the right of association contained obligations. Obligations of individuals (workers, employers) and organizations (unions, employers) is to respect the law does not restrict / obstruct guarantees the right of association (Article 8 C. 87). Obligation of the state are:

1. Refrain from interference with lawful to restrict or inhibit the exercise of the right to draw up their own constitutions and rules, elect their representatives freely, the administration, organize activities and formulate programs of work organization (Article 3 (2) C. 87).
2. Not limiting conditions obtaining legal workers 'and employers' organizations (Article 7 C. 87).
3. Creating a national law that does not prevent or hinder such that enforced the guarantees provided for in this Convention (Article 8, paragraph (2) C 87).
4. Take such measures as may be necessary and appropriate to ensure that workers and employers may exercise freely the right to organize (Article 11 C. 87).

The meaning of freedom of association is the protection of labor who want to establish a trade unions. The main point contains protection against the formation of trade union or the right to establish a trade union. C. 98 is a step up (in action) of C. 98, regulating the right to organise and collective bargaining. C. 98 is an application of the principle of organization and the rights to bargaining. In the right of bargaining there to negotiate the right to strike. The right to bargain is inherent with the right to strike. Between the two are inseparable. Arrangements contained in C. 98 is about right to negotiate, which consists of the right to organize, the right to negotiate and the right to strike. The right to negotiate collectively is part of a three-dimensional concept that includes rights to organize, rights to bargain, and rights to strike.[11]

How the right to establish labor union is formulated and implemented into the independency of organization itself. Procedures relating to the right to establish trade union is related to the organization's legal status.[12] A state must not restrict (through legislation) the acquisition of legal status (Article 7, C.87). The state also must provide protection against

[11] A.F.Utz, 1987,"***Is the right to strike a Human Right ?",*** Washington University Law Quaterly, p. 744. See, Aloysius Uwiyono, ***op. cit.***, p. 20.

[12] Article 7 C. 87.

discrimination and anti-union action in employment[13] and intervention.[14] All are devoted to the successful realization of collective bargaining (Article 3 C. 98).

Reasons of state security and efforts to improve the State's economy is often used to narrow down the right to association. Anti-union and discrimination become a barrier to realize the right toassociation. Therefore, the ILO to establishulate the right to association as a right to establish a labor union without the permission of the authorities and must provide a guarantee of protection from discrimination and anti-union measures for the successful realization of collective bargaining. ILO is struggling the right to establish Labor union since the formation of Labor union means a recognition of the principle of freedom to association. The right to association becomes a tool to improve labor conditions and create peacefulness. (Konsiderans C.87). The logical consequence of the improved condition of labor is the realization of prosperity as at the root of peace.

Right To Establish Trade Union Arrangements In Indonesia

The basic rule of the right to association in Indonesia, contained in Article 28 UUD 1945, namely the freedom to association and assembly, express the opinion in spoken and written ways. This provision has the addition of Article 28 E Paragraph 3 of UUD 1945, stated that every person has the right to association, assembly, and express the opinion. Under the provisions of Article 28 E Paragraph 3 of UUD 1945, the freedom to association is the right for every person. The right to association is concepted by UUD 1945 as a right.

In the reign of the Dutch colonialization, to establish the union is not requested, required permission from the Gouvernur General (Article 1 Stbl. No. 1919. 27 jo. 561). Practically it is still needed for a license as a legal entity since the unions which are not recognized as legal entities, can not take action in the field of civil law (Article 8 paragraph (1) Stbl. 1870 No.64). The condition to establish a labor union was very difficult at that time. Labor’s efforts were just how to break away from the arbitrary actions and wanted to gain the

[13] Anti-union actions are formulated as: (1). create conditions that can lead to: a. workers will not join the union, or b. workers must relinquish trade union membership; (2). worker layoffs related to membership / trade union activities (outside office hours or by permit employers in labor hours); (3) detrimental to workers related to membership / trade union activities (outside office hours or by permit employers in labor hours) of Article 1, paragraph (2) C 98

[14] Acts of interference is defined as: (1). interference in carrying out its functions (Article 2 paragraph (1), or (2). intervene in the administration (Article 2 paragraph (1), or (3). financial aid (Article 2 paragraph (2), or (4). Another way that aims to put the organization under the control of employers or employers' organizations (Article 2 paragraph (2) C 98)

independence. There were only two unions that had received a legal entity that is the Student Organization of the Dutch in Indonesia (NIOG) and the Indonesians Labor Congress (KBSI).

At the beginning of the reign of Soekarno, there are no restrictions to establish trade union (Minister of Labour Regulation No. 90 Year 1955 on the Registration of Trade Unions). Restrictions occurred in 1960. Parties who did not accept the teachings of NASAKOM, considered as a rebel. To achieve social and economic revolution through the application of the doctrine of NASAKOM, the all tools of the revolution were overhauled. Retooling happened, including the retooling of the parties and the Labor Unions. Parties (including trade unions) which were endangering the country and opposed NASAKOM were dissolved by the president after hearing the opinion of the Supreme Court (Presidential Determination. 7, 1959 jo. Presidential Regulation. 13 of 1960). The president has run a judicial function. This policy is contrary to Article 27, 28 4 (1), 24 of the UUD 1945.

During Soeharto reign, restrictions on the right to establish trade unions happened. The establizing of the single union namely SPSI. The provisions of Article 11 of Law 14/1969 on Basic Provisions of Labor states that every labor has the right to establish and become members of trade unions had limited by regulation of labor ministers (Minister of Manpower No.. 1/MEN/1975 jo. PER-6 / MEN/1987 jo. PER-3/MEN/1993 jo. PER-1/MEN/1994. The final limitation is a minimal requirement to be able to establish trade union is 25 people and supported by 50% of workers, and after one year must join the SPSI.

The impact of restrictions of establizing trade union was the execution of Muchtar Pakpahan as stated by legally and convincingly proven guilty of a criminal act. Continuous inciting and unstopable are set and punishable under Article 160 paragraph (1) of the Criminal Code, spreading written expression which contents to incite, is regulated and punished under Article 160 paragraph (1) of the Criminal Code; therefore punish the defendant to prison for 3 years. (Medan District Court Decision No. 966/Pid/B/195/PN MDN, dated 7 November 1994 jo. Medan High Court Decision No. 188/Pid/1994/PT-Mdn., Dated January 16, 1995). Based on an appeal court made by Muchtar, then he released and found not proven legally and convincingly guilty of committing a crime (Supreme Court of Republic of. 395.K/Pid/1995 dated 29 September 1995).

At a reformation era, the implementation of Article 28 E Paragraph (3) of the 1945 Constitution, so far regulated in Law Number 21 Year 2000 on Labor union (State Gazette Year 2000 Number 131, Supplement to Statute Book No. 3898). At considerans Law 21/2000, stated that the rights of all citizens including the freedom to association. To realize the freedom of union for workers or labor are entitled to establish and develop the trade

Union. Considerans Law 21/2000 divides the right to association for labor to establish and develop labor union. The body of the Law 21/2000 divides the right to association in two dimensions, namely the right to association as a right in the sense of individual and collective. Individual rights include the right to establish and join trade union[15], as well as the right to organize. The collective right to association includes the right to carry out its activities.[16]

Labour can establish a union if they meet the formal requirements of Law 21/2000, namely:

1. amount of at least 10 people in a company (Article 5 paragraph (1)).
2. accept Pancasila as the basis of the state and UUD 1945 as the Constitution (Article 2 paragraph (1))
3. has a principle that is not contrary to Pancasila and UUD 1945 (Article 2 paragraph (2))
4. has the goals that are appropriate to formulation (Article 4 paragraph (1))
5. has a record number of notification of the establishment to a local government agency which is responsible for laboring. (Article 18 paragraph (1)).
6. attach a list of founding members; constitutions and laws; arrangement and the name of the board as the completeness of the notification (Article 18 paragraph (1)).

How about the guarantee of the right to establish trade union in Australia and Philippine? The requirement to establish a trade union in Australia is at least 50 people. Other requirement is to have a constitution, the union aims to protect the interests of its members and is free from interference by employers / employers' organizations, as well as filling out the form F. Appendix 56 of the Fair Work Australia Rules 2009 which effect from June 1, 2010, signed by at least two people. There is an obligation to fill in a form that contains a decent labor conditions.

In Philippine, the established labor must be registered with the Bureau of Labor Relations in the Department of Labor and Employment (Dole). Enrollment requirements for established union based on Article 234 Labor Code of the Phillipines are:

1. pay a registration fee of fifty pesos (P 50.00);
2. caretaker's name, address (of labor union), minutes of meetings organisation and a list of workers who participated in the meeting;
3. behalf of all members supported by at least twenty percent (20%) of all workers;
4. copies of annual financial statements (if the union has been established for at least 1 year;
5. copy of the constitution and its participating members

[15] Article 5 (1) jo Article 6 (1) jo. Article 7 (1) Law 21/2000
[16] Article 25 Law 21/2000.

The minimum amount to establish a labor union in Indonesia seems less than in Philippine and Australia. State interference to the presence of trade union rights restrictions appear to establish a union. If the condition is not met during registration, then the Union will never get a record number. As a result of legal, illegal establishment of Trade Unions. If the Union is invalid, then the rights (paragraph 25 (1)) and obligations (Article 27) of the Trade union have never owned.

Setting the right to establish Labor union is under Law 21/2000, which stated that every worker / labor has the right to establish and join trade unions.[17] A trade union[18] established by at least 10 (ten) workers / labor[19] and can be shaped by the business sector, job type, or other forms in accordance with the will of the workers / labor (Art. 10 of Law 21/2000).

Conflicts of law in regulating the right to establish Labor Unions

Sometimes the rules of law contain conflict of law. There is a legal principle of *lex superiori derogat legi inferiori*. A higher law means covers the basic philosophical principles of law and the right to establish Trade Union.

Principles law of the right to association is the soul, foundation or guidelines which become the base of making the right of unions. Principle of law is the soul or a guideline for the rule of law. Legal principle to association is the basis of any rules of law regarding to the right to association. Evaluation to the legal principle of the rights to association for labor include legal principles that must exist in the regulation of the right to establish Trade union and the rights to bargain. The discovery of the legal principle of the right to association in this study are traced from the formulation of labor's rights to association based on universal formulation in the Conventions and the Recommendations of ILO and the UN Charter, the ICCPR and ICSECR.

Legal Principles Of The Right To Establish The Trade Unions.

The right to establish Labor union basically covers four rights, namely the right to establish or set up the unions, the right to become members of the unions, the right to be subject of the rules of the organization itself and the right to join. Those rights must be guaranteed a legal protection. Anyone who works has the right to establish and become a

[17] Article 5 (1) Law 21/2000
[18] Article 1 (1) Law 21/2000.
[19] Article 5 (2) Law 21/2000.

member of trade union. No permission is required to establish a union. There are four principles of law that can be traced from the four rights which become a part of the right to establish unions, namely non-discrimination principle, the principle of non interference, non double-membership principle and the principle of accountability.

Non-discrimination principle emphasises on no difference between workers and employers in the protection of the rights to association. The basic principle of non-discrimination can be traced on the UN Charter, C 87 and the International Covenant on Civil and Political Rights, namely:

> "Everyone is entitled to all the rights and Freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status . Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to the which a person belongs, whether it be independent, trust, non-self-governing or under any other Limitation of Sovereignty " (Article 2 of the UN Charter).
>
> Workers and Employers, without distinction whatsoever, shall have the right to Establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation (Article 2 C. 87). Each State Party to the present Covenant undertakes to respect and to Ensure to all individuals within its territory and subject to its jurisdiction the rights Recognized in the present covenant, without distinction of any kind, Such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2 paragraph (1) ICCPR).

Definition of discrimination is an action that implies distinction. Action is not allowed in order to distinguish the establishing and development of trade union. Act of discrimination includes discrimination based on religion, ethnicity, race, skin color, language, group (majority-minority), class, social status, national origin, indigenous origin, economic status, gender, belief or political opinion , disability, age, pregnancy, marital status, ownership, birth status or other status which resulted in the reduction, distortion, or removal of rights, equality of wages and other opportunities for equal work, establish the labor unions, receive a member, join, become the subject to the the constitution itself, and or struggle on the interests of labor. Principle of non-discrimination becomes the basis of legal principle of the right to association. Creating a conducive atmosphere is the responsibility of states to implement the right to association.

Assestment toward the rule of law based on the type and hierarchy Legislation in Indonesia based on the provisions of Article 7 of UU no. 10 Year 2004 jo. UU no. 12 year 2011, namely: the Basic Constitution of Indonesia Republic 1945: TAP MPR; Legislative Act; Constitution/Government Regulation as the substitution of Constitution, Government Regulation, Regulation of the President; and Provincial Regulations and Rules of Regency or City. Binding force of the rules based on these provisions when ordered by the higher legislation and in accordance with the hierarchy.

Limitation of the right to establish labor union happened to security and the minimum number to be able to establish a union. Restrictions on security based on a Head of Indonesian National Police Telegram No. Pol STR/227/2001 dated May 31, 2001 to strengthen the letter of Head of Metro Jaya Police No. Pol: B/6741/VIII/1997 Datro dated August 5, 1997 which prohibits members of the security guards to association. Security Guards personnel as a form of self guard, as a Bearer of Police Functions that do not apply the provisions on freedom to association (Article 4 of Law 28 1997 of the Indonesian National Police). Security guard personnels can be a member of the AMSI (Indonesia Security Manager Association).

Considering that the security guards had no right to association, only emphasized on the reason of national security. There is a fear of police officers as security control toward the giving of the right to association for the security guards. A fear that they would stand on the side of workers or labor that is one union with them. Limitations of the right to establish labor union by security guards equate the state interests with individual interests. Those restrictions were violation of human rights outlined in Article 3 of the UN Charter, that a person has the right to life, liberty and security of person. Limitation of the right to establish trade union for the implementation of the right to personal security, because it tends to prioritize the interests of employers. Personal security rights should be put under or after the right of freedom.

Restrictions on the minimal numbers of establishing trade union based on Act 21/2000 is 10 people. This philosophical basis consideration of this is to make an ease of establishing trade union which was originally very difficult (during the reign of President Soeharto). The Government expects the company will be able to stand more unions than one union.[20] Determination of the minimum amount for the establishment of Trade Unions which is not in

[20] The results of interviews with Payaman Simanjutak, dated March 1, 2011 in Jakarta

the bill of Trade union proposed by Indonesia President (Abdurrahman Wahid) on January 13, 2000. Article 8 of Bill stated:

1. Every worker has the right to establish and join trade unions
2. Trade union may establish and join trade union federations
3. Federation of trade union may establish and join trade union confederation.[21]

Limitation of the minimum amount questioned by the military-police fraction at the first time in a general view of the fraction of the TNI / police on the draft law on trade union on February 24, 2000.[22] Based on those view, the government stated that guarantee to implement freedom to association for labor reflected in terms of easy formation of a trade union that only require 10 (ten) workers.[23]

This amount is too little, and too loose. Will negatively affect the possibility of emerging 100 trade unions in a company that had 1000 labor. trade unions, federations and confederations of trade union are established based on the freedom of labor without any pressure or interference from employers, governments, political parties, and any party (Article 9 of Law 21/2000). The logical consequence of the rules that make it easier to establish labor unions, is the fact that there will be more trade unions in one company. It allows a large number of disputes between labor union in a company. To anticipate the dispute between the unions, the government formulated that the disputes between trade unions in one company is the absolute competence of the industrial relations court. Industrial Relations Court has a duty and an authority to examine and decide on the first and last of the disputes between labor unions in one company (Article 56 (d) UU 2/2004).

The provisions of Article 56 d UU 2/2004, is not appropriate. Industrial relations court is a special court set up in an environment that court authorized to investigate, prosecute, and gave the verdict against industrial disputes (Passal 1 point 17 of UU 2/2004). Nature of industrial dispute is between parties in industrial relations, namely between employers and workers. There are two sides facing each other, namely employers and workers. This

[21] Manuscripts Unions Draft in the discussion of the bill on Union / Trade Union.

[22] Feedback / questions to get clarity from the government "how the minimum percentage of the total number of a company can set up trade unions and how much maximum financial support from other parties especially from abroad are allowed; company can request that workers with a certain level to not enter the union / management in order to avoid conflicts of interest; union can take a strategic decision to interfere in the wisdom business entrepreneurs such as expansion, diversification, alliances, mergers and acquisitions "

[23] Speech of government decision making at the plenary session on the Draft Law on Trade Unions, dated July 10, 2000, p. 4

provision distort the meaning of law subject to a labor dispute. There is an exhange subject of law which are facing each other between labor union to other.

Determination of the amount of at least 10 people to set up a labor union is another form of limiting the right to association. Workers who comprise less than 10 people can not establish a union. The loss of the right to establish trade union for the amount of which is less than 10 people is a form of restrictions to the right to association which is set forth in Law 21/2000. This shows that the restriction againts with C.87 which does not limit the minimum amount to establish a trade union. Indonesia has ratified C. 87 into the Presidential Decree No 83/1998. When the provisions of Article 5 paragraph (1) of UU 21/2000 on the ratification of C.87 test will cause legal problems. When testing the consistency of the rule of law based on hierarchy of legislation, in this case are the provisions of Article 7 paragraph (1) of Law 10/2004, will be difficult. Article 7 paragraph (1) of Law 10/2004 does not include the presidential decree as in the Statement of MPR-RI No. III/MPR-RI/2000. It can be make analogy, it would be identical to Presidential Regulation as both are legal products of the President. Based on Stufenbrau theory, if the Presidential Decree equated with Presidential Regulation, the validity of a rule of law can not be tested by the rule of law that is lower than the tested rules. UU 21/2000 can not be tested by the Presidential Decree 83/1998.

The position of Law 21/200 is higher than the Presidential Decree 83/1998, when testing was conducted pursuant to Article 7 paragraph (1) UU 10/2004. The logical consequence is if there is a formulation of the rule of law in UU 21/2000 as opposed to the Presidential Decree 83/1998 it is difficult to mention that the formulation of UU 21/2000 is not valid. Unlike the case where the validity of Presidential Decree 83/1998 in light of the shape of international agreements. The form of Presidential Decree is appropriate, knowing that it has been made in accordance with the constitution, thereby its substance is bound as a source of law. Another State in prima facie and is legally able to ensure that what is stated by the President of Indonesia which means another country should not have to relate to other state to determine the intent or the will of the state in making a deal with its institutions. International agreements as treaties generally rests upon the principle of 'good faith and mutual trust' between their parties, thus 'pacta sunt servanda' becomes the basis why the parties bound to their agreement. International treaties have the binding force and become legally the source of law in national regulation since they have been made in accordance with the provisions of the constitution not as set in the Act, so that international treaties are a source of law outside the legal sources of law. Since it has been made in accordance with the

provisions of the constitution, the substance of international agreements that is creating rights and self-executing it is also a source of law for the court decision.

Arrangements concerning to the ratification of international agreements in Indonesia bases itself on the Letter of the President of Indonesia No. 2826/HK/1960 dated August 22, 1960 addressed to the Chairman of the House of Representatives. That letter became the guidelines in the process of ratification of international treaties, namely the ratification by the Act or through a presidential decree depends on the material being regulated.[24] The constitutional basis of the treaty is Article 11 UUD 1945, namely:

1. President with the approval of Parliament declare a war, make peace and agreement with other countries;
2. President in making other international agreements which will produce an extensive and fundamental impact on the lives of the people associated with the financial burden of the state, and or require modification or creating the acts should have the approval of the House of Representatives.
3. Further provisions of international agreements are regulated with an acts.

Based on the provisions of Article 11 UUD 1945, ratification of the treaty can be made through the Acts or Presidential Decree. Material restrictions contained in Article 10-11 Law 24/2000 on International Agreements, (LNRI of 2000 No.. No. 185 and TLNRI. 4012). Ratification of a treaty with the Acts in such related situations:

a. politics, peace, defense, and security;
b. change of the setting boundaries or territory of the Republic of Indonesia;
c. sovereignty or sovereign rights;
d. human rights and the environment;
e. establishment of new legal rules;
f. loans and or foreign grants. (Article 10)

Ratification of international treaties which are not in accordance with the materials in Article 10 will be conducted by the Presidential Decree (Article 11). Looking at ILO Convention No. 87 about the freedom to association and the protection of the rights to organize, the ratification should be by an Acts, because its subtances related to human rights. In conclusion, the ratification of ILO Convention 87 about the Freedom to association and to get pprotections to Organize through Presidential Decree. 83 of 1998 are inconsistent or

[24] Harjono, "Law Politics International Agreements', Dissertation, Bina Ilmu, Surabaya, 1999, in Basuki Rekso Wibowo," Arbitration as an Alternative Dispute Resolution Trafficking in Indonesia ", Dissertation, Univ Airlangga, 2004, p. 87

againts with the provisions of Article 11 UUD 1945 Jo. Article 10 of Act 24/2000. About international agreements that occurred before the enactment of Act no. 24 of 2000 are still valid and enforceable, because the Act no. 24 of 2000 does not apply retroactively (non-retroactivity). C. Ratification 87 in the form of law of Presidential Decree indicates that the government still has not fully supported the development of Trade Unions from single union to plural ones and can not be made as Konsiderans in Act 21/2000.

In addition, the formulation of a minimum amount to establish Union is tested with C. 87 that is still a part of the Core Conventions, based on the ILO Declaration on Fundamental Principles and Fundamental Rights in the workplace. ILO in the international labor conference in June 1998 had approved that Declaration. As the logical consequencies, the countries member (including Indonesia) are obliged to respect, appreciate, promote and realize in good faith, the principles contained in the Core Convention, regardless of whether they have ratified or not.

Conclusion

Legal conflict of regulating the right to establish unions because legal principles of the right to association with the different emphasis on the philosophical basis of the right to association have not been applied. One of conflict of laws in the regulation of the rights to establish trade unions is a limitation of the minimum amount for the establishing trade unions, federations and confederations. The legal consequence of the restrictions is that workers whose numbers are less than 10 workers in firms employing fewer than 10 people lost their right to establish unions. The sources of conflict of laws in establishing the right to association because C.87 is not become the juridical basis in konsiderans Act 21/2000. If the stems on the substance of C.87 and the ILO Declaration on Fundamental Principles and Rights at Work (ILO Declaration on Fundamental Principles and Rights at Work), dated June 19, 1998, C.87, it should be the basis of konsiderans in the Act 21/2000 . The logical consequence of the Declaration, Indonesia is bound, even it has ratified the core conventions.

Revisions are needed in the limitation of regulation on how to establish trade union which is hopefully more protective rather than reducing or eliminating the right to establish trade unions.

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