

TOWARD A LIBERALIZATION OF TRADE IN SERVICE: THE CASE OF THE HIGHER EDUCATION INDUSTRY IN INDONESIA

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ABSTRACT

As individual country becomes more politically and economically integrated with the global economy, it is increasingly problematic for them to exclude themselves from the process. In fact, as firmly established as one of the economics orthodoxies, the developing countries that adjusted to this reality have significantly profited from their rapid integration in forms of the sustained economic growth. From the legal standpoint, it raises a number of very pertinent questions that require immediate attention from both policy makers and legislators alike. As such, this paper uses Indonesia as its case study as it conservative stance has framed the national debate on international law in general and higher national education in particular. More specifically, in the context of the worldwide populist backlash against globalization, this paper offers some prescriptive insights that can be employed for developing a sensible respond to emotionally charged questions such as how to successfully liberalize while at the same time closely attuned to the national ideology. In addition, I am also hopeful that this paper is pragmatically designed to be able to propose some practical solutions in support of the introduction of a further and thus successful institutional reform as it has initiated by the 2012 Law on Higher Education.

Keywords: Globalization, Law and Policy, Legal Reform, International Economic Law, Law and Development, Trade in Services.

INTRODUCTION

It is undeniable that the notion of opening up to global economy has become almost necessary for achieving the domestic economic growth as in the case of the four Asian tigers (Panagariya, 2002). This means it include the not-so-popular dimension of free trade in services in spite of its profound beneficial impact compare to the more traditional trade in goods (Pritchett, 2006). More importantly, the trade in services is potentially more explosive in nature due to its sociologically and culturally challenging in nature. The on-going backlash against migration across Europe and United States has been depicted as a paranoia that has something to do with the intangible cultural threats (Inglehart & Norris, 2016). That said, it may be argued that it is high time to proffer a proposal that may help in fostering a rational debate to one of the emotionally charged subject in the development discourse in the developing world in particular.

With the above objective in mind, this paper is modestly using Indonesia as its case study as it perfectly captures the necessary dynamics of an anxious developmental state that is trapped in an on and off fascination with economic nationalism (Patunru & Rahardja, 2015). More to the point, Indonesia's overall stance toward trade in services might be described as disinterested at

best and unfavourable at worst. As an observer summed up, Indonesia's cautious approach can best be described as a widespread antagonism toward the regime (Iskandar, 2011). Moreover, it appears that there has never been any non-state support for the adoption of a more positive recognition of the potentials of trade in services in support of national development (Iskandar, 2011). For what's worth, this reality doesn't sit well with the fact that Indonesia has submitted itself to a myriad of international legal obligations that commit it to liberalize its market.

Given the above situation, it is necessary for Indonesia to introduce some progressive measures that help "progressively liberalized trade" in services while at the same time balance out the fervour of economic nationalism. This delicate situation is by no mean exclusive to Indonesia's case, I believe, many other developing countries face the same dilemma in their quest of finding a right balance in search of a healthy dose of rational policy while at the same time reflecting the political calculus. In other words, I am convinced that the relevance of this paper is beyond the boundaries of Indonesian studies. Thus, this paper is aimed to contribute the growing body of scholarship, especially in the area of policy-making and development studies in addition to the obvious law and development studies. To this end, this paper proposes a host of proposals that can be implemented at the practical level.

The argument of this paper unfolds as follow. In the next section, I will address the opposing point of views that have been advanced by the opponents of liberalization, mainly from civil society, which are largely employed some populist rhetoric have significant presence in the public discourse that may put at risk the above limited achievement in the liberalization. The following section is setting out the international legal obligation of Indonesia as a state party to a host of multilateral treaties that provides the legal framework for Indonesia to liberalize its domestic market. In the penultimate section, the discussion delineates my proposal in terms of what kind of legal response that may not only be able to conform to the Indonesia's legal obligations as a member state of the WTO but also taking into account all the factors that traditionally been considered as national interests. The last section concludes.

BACKGROUND

The most widely rehearsed argument against the liberalization of higher education is that liberalization is designed in such a conspiratorial manner to eliminate the role of state in providing financial support for the educational sectors (Umar, 2014). According to this logic, it would lead to further commercialization of higher education that eventually increase the cost for attending university (Putri, 2016). More specifically, in this scenario, liberalization is the ultimate threat to the current subsidy schemes for higher education which is empirically proven that for the most part is misleadingly consumed by the middle class (OECD, 2015). Importantly, this criticism failed to recognize that state's involvement in higher education industry has legitimized its co-optation by the political power that paralyzed its role as part of the civil society (Hadiz & Dhakidae, 2005).

Another argument that also has a strong populist tone is that liberalization of services in higher education would lead to "ideological infiltration," through which Indonesian students would be "brainwashed" so that they would lose their local values, religiosity, identities and wisdom (Hizbut, 2012). In other words, education is just another regular trading commodity like any other commodities, such as garments, cars, tableware, shoes and corns. Education would mainly be designed is solely in terms of reaping the material economic benefits, instead of

pursuing something which is far more ideal and abstract, such as character building. This ideology based argument is equally problematic, in addition to its highly unquantifiable nature, as the idea of Indonesia itself embodies the accumulation of a wide array of diverse yet sometimes conflicting ideas that are foreign origin in the first place (Taylor, 2003).

The above argument appears to ignore the fact that the global interaction of the Indonesian minds has played an indispensable role in the construction of the idea of modern Indonesia itself since the formative stage of the independence struggle. Most prominent nationalist figures, such as Dr. Mohammad Hatta and Dr. Supomo, not just received their higher education in the metro pole, but, more importantly, developed their nationalist senses that eventually formed the bedrock of Indonesian statehood through their above-average precocious mind in “Western” academic discourse. For instance, it is unsurprising that Dr. Hatta has written a classic treatise on the State of [the Ancient] Greece’s Mind” (Hatta, 1980). Meanwhile, prior to his influential in the drafting process of the 1945 Constitution, Dr. Supomo is a protégé of the great Dutch jurist Cornelis van Vollenhoven through whom he introduces the conception of the integralistic state with an enduring impacts in the theoretical discourse of the Indonesian model of statehood (Simandjuntak, 2003; Bourchier, 2016). No less important is that it ignores the empirical evidence which shows that there are an increasing number of Indonesian students who studying abroad (Purba, 2016).

Liberalizing higher education was also viewed, especially by higher education administrators, as a threat against the existence of local universities and colleges. Some local universities and colleges would seemingly be driven out of market due to their weaknesses *vis a vis* the strong branded foreign-western universities. Economically speaking, the opponents believe that the liberalization is a zero-sum game in which no “wealth” is created for the local players. It should be recognized that globalization that is prominently intertwined with the ever increasingly powerful information technology has introduced many unprecedented that previously unthinkable models of education that is beyond the brick and mortal traditional business, think of Coursera platform for online courses (Coursera, 2017). Simply put, the disruptive nature of globalization is unavoidable that renders the argument for protectionism as a mean to preserve domestic players is utterly untenable.

Needless to say, Indonesia’s today practical reality suggests that the current state of higher education is much more complex than the bleak account that the nationalists suggest above and thus it is highly unrealistic, if not dangerous, to pursue their isolationist solution. Importantly, it may hamper Indonesia to tap into the global pool of talents that eventually hurt its competitiveness. The current quality of higher education is relatively low, even when it compares to war-torn countries such as Pakistan. It should be no surprise that “No Indonesian universities made the top 700 in the research citations sub-ranking” (Globe n.d.).

Some takeaways may be learned from the most recent survey that results in QS World University Ranking 2018 (Top Universities, 2017). The European situation has showcased the importance of the liberalization in sustaining the competitiveness of its higher education system. Meanwhile, the much more aggressively liberalized East Asian universities have surged to a record high.

The Legal Case for the Liberalization of Higher Education

As a widely celebrated as a “landmark achievement” of the Uruguay Round, it is worth noting that the General Agreement on Trade in Services (hereinafter GATS), similar to its sister treaty GATT, is aimed to: “Create a credible and reliable system of international trade rules; ensure fair and equitable treatment of all participants (principle of non-discrimination); stimulate economic activity through guaranteed policy bindings; and promote trade and development through progressive liberalization” (World Trade Organization n.d.). Thus, one of the legal consequences of being a member of the World Trade Organization (hereinafter WTO), Indonesia has committed itself to one of the WTO’s underlying principles, i.e., to “progressively liberalized trade,” in this respect, in services (Baggaley, 1998). Meaning, progressive liberalization is aimed “to reduce or phase out limitations, terms, conditions and qualifications impeding market access and national treatment” (Delimatsis, 2008).

While it is worth noting that the legal nature of the above legal consequences as a result of WTO membership does not pose a strong legal obligation that one can be inferred from the *erga omnes* obligation that has been developed in human rights law, for what is worth, it is clear that any violation of the obligations in trade in services legitimizes “all Members [to] consider [themselves as] ipso facto injured states and each of them would be entitled to refer the dispute to the DSB, even if the measure concerned had no actual or potential adverse impact upon it” (Gazzini, 2006). Moreover, under the principle of National Treatment, both foreign and domestic services shall be treated equally irrespective of their national origins. Suffice it to say, the WTO membership is implied a further obligation to their member state to educate their “trade officials to be familiar with this Agreement and its implications for trade and development” disregarding their policy stances (Organization, 2004).

Since its ratification of the WTO Agreement by Law No. 7 of 1995, Indonesia has legal obligation to “progressively liberalized trade” in services, including its higher education industry. In fact, in 1995, Indonesia has specified in its Initial Offer (IO), *inter alia*, to liberalize its services in higher education under the auspices of the World Trade Organization (WTO). It was further corroborated in the Law 25 Of 2007 on Investment that defines “capital” as “monetary or non-monetary assets with monetary values that are owned by the investors” which by definition serves as the umbrella act that aimed to take advantage of the foreign resources in an effort “to accelerate the national economic development” (The Republic of Indonesia, 2007, Art. 1(7)). In line with Indonesia’s international legal obligation, Article 4(2) explicitly confirms Indonesia’s commitment to the principle of National Treatment, legal certainty and equality.

It is important to note that the Annex I of the Presidential Decree No.77 of 2007 on the Lists of Business Fields that Are Closed to Investments and Business Fields that Are Conditionally Open for Investments categorizes higher education as a business that opens for foreign investment with maximum foreign ownership at 45 percent. Going further, the Article 65 of the Law No 20 of 2003 on National Education has also stipulated that any foreign educational entities that have been accredited or recognized in their home countries are eligible to deliver education in Indonesia in collaboration with the local partners (The Republic of Indonesia, 2003). Additionally, the Constitutional Court has also confirmed the “constitutionality” of foreign higher education institutions under the Indonesian legal system (The Constitutional Court of Indonesia, 2012).

Needless to say, the explanatory note on the preamble of Indonesia's Law No. 37 of 1999 on Foreign Affairs has unequivocally acknowledged the legally binding nature of international law through which explicitly states: "In conducting [its] foreign affairs and international politics, Indonesia is bound by the norms of international law and customary international law which are the bedrock of the interaction and practice of inter-states relations. Thus, it is safe to conclude that from legal point of view the introduction of foreign higher education is not as problematic as the populists claimed.

A Way Forward

As the previous sections have shown, while it appears that it is unproblematic from the legal stand point, it is my contention that the major hurdle in the liberalization of higher education is mostly related with non-legal matters. On the other hand, it is apparent that the failure of providing some clear and specific technical guidelines has been the main culprit in Indonesia's progression toward the liberalization. In fact, from a series of interview during the fieldwork for this paper, it seems that the general thrust of the legal regime on higher education encouraged the process into a more open and accountable system. Should Indonesia be serious in reforming its dismal higher education industry, it should start providing some clear and specific technical guidelines that at the same time should be seen as a mean to respond to the critics' scepticism. Thus, it is my objective in this section to delineate a policy proposal to goad a further interest in addressing this shortcoming.

It is worth keeping in my mind, as the Directorate General of Higher Education elaborated in its vision for Indonesian Higher Education in 2010: (1) Reflecting the students' needs and develops students' intellectual capacity to become responsible citizens and contributing to the nation's competitiveness; (2) providing opportunities for all citizens to develop to their highest potential levels throughout life; and (3) introducing autonomy for the tertiary education institutions coupled with accountability and supported by a legal, finance and management structure, that encourages innovation, efficiency and excellence. These three broad goals in mind should guide the governmental efforts in detailing what kind of policy that it may entail.

For starters, the government of Indonesia must start introducing a series of governmental regulations that directly answer the concerns of the critics. These governmental regulations should be specifically dealt with answering how they alleviate the side effects that might be caused by the liberalization. For instance, one regulation is addressing the technical aspect that specifically deals with the concern that foreign education operators may weaken the Indonesian indigenous morality, i.e., Pancasila. In this regard, it might be easily answered with the introduction of a compulsory course on the subject with the State approved lecturer. Meaning the failure to do so it would incur the legal penalty.

Another regulation can also be designed in such a way to harness the opportunity to enrich the cultural dimension of the Indonesian model on higher education. Education is a process through which cultural assimilation takes place, there is the opportunity of fusion of culture through increasing mobility and yet there is also the risk of homogenization of culture. In fact, the Higher Education Law concurs that developing Indonesian research and local cultural centres within domestic and foreign Tertiary Education Institutions is to be included in the international cooperation framework (The Republic of Indonesia, 2012). That said, as long as

there is a proper regulation that balances the fundamental values of Indonesia in governing the liberalization of higher education services, the homogenization of culture shall not be an imminent threat.

Arguably, the ideal model can be found in the Singaporean experience where effective regulatory measures are designed not only to control but also to support the development of the domestic private education sector. The importance of providing state assistance to the domestic players is not only a political gesture that appeases the political pressures but also aimed to support their transition to a more independence status. In Indonesian context, it may be translated as “a limited preference” that directs the government to provide financial assistance for the promising local players in their transition to the fully-functioning research universities. That said, this assistance is not only being a translation of a stick and carrot approach, more importantly, this is part of a broader effort in the fulfilment of constitutional mandate that requires the allocation of 20% of the total national spending.

It is worth reminding that the governmental hands-on supports that I propose should not be viewed as another knee-jerk model of paternalism. The New Order’s experiment with top-down approach that puts the bureaucracies in charge has failed us miserably. In light of this historical lesson, the governmental hands-on support should be nothing more than a collection of efforts that encourage the creativities of the administration of the higher education institutions. Meaning this approach puts a premium on the original ingenuity of a particular institution in its progression toward an independent and relevance model of an indigenous higher education institution. Specifically, the government in this role must envisage encouraging a bottom-up process that lead to individual creativity of each institution based on their differing specificities.

The incentives for those who show sign of promises can take forms as a variety of block grants that allow its recipients to manage them independently that entail strong accountability mechanisms. Meaning a consistent and regular reviewing process must be introduced as part of the effort of ensuring a healthy competition that aimed to provide an equal opportunity, especially for the new entrances. At the same time, a rigorous and periodical reviewing process is also meant to keep the grantees maintain their performances. Naturally, this approach must feature a sort of punitive measures should the grantees failed to live up to the expectation.

CONCLUDING REMARKS

As the above discussion confirms, the Indonesia’s current regulatory framework for higher education has failed to provide a clear and detailed substantiation in terms of the translation of how to achieve the laudable goals that have been set out in the 2010 Indonesian Higher Education Vision. While it is clear that the liberalization is one of a few formally recognized means that may help to achieve the goals, unfortunately, the current regulatory regime reflects the failure of appropriating the opportunities that the liberalization has to offer. Instead of devising a series of technical legal responses that augment its benign impacts and introducing the necessary safeguards in response to its unpleasant side, the long list of existing laws and regulations have so far introduced a series of some ad hoc responses that lacking a clear and systematic treatment. That said, the prevailing responses should be reconsidered in the light of achieving the identified objectives, i.e., the creation of a regulatory framework that enables the domestic higher education institutions to be competitively independent.

To achieve the above, it is necessary to take advantage of some lessons from other countries that have successfully transition to the market-based model, this will most likely mean a broader approach to policy which involves licensing, regulating, monitoring, both private and foreign service suppliers be it the profit-seeking or non-profit seeking, in order to ensure that the objectives of the national policy are met and public interests are protected. These comparative insights, as a result, may complement the overall Indonesian national legal strategy in terms of its international legal obligation fulfilment with respect to the aspect of the liberalization of higher education sector. Specifically, the reformed law on higher education must be able to address these specific issues: The principle of equality, funding sustainability, quality control, free movements, cultural enrichment and free competition and strong collaborative spirit.

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