PalArch's Journal of Archaeology of Egypt / Egyptology

HARMONIZATION OF NATIONAL LAWSWITH THEVIENNA CONVENTION 1961 ON DIPLOMATIC RELATIONS

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R. Adi Prasetyo, Lina Hastuti. Harmonization Of National LawswithThevienna Convention 1961 On Diplomatic Relations--Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(4), 2594-2603. ISSN 1567-214x

Keywords: Diplomatic Protection, Citizen, Embassy, Worker, Indonesian Citizen.

ABSTRACT:
Diplomatic mission has the immunity and privilege. But, international law distinguishes the public and private actions of a state. When the state takes a private action or a *jurigestionis*, then the state no longer has the immunity. As an example, the caseof the Brazilian Embassy in Indonesia which terminates a sudden employment contract with Indonesian employee without compensation. The act of providing employment or termination of employment is a private action. This study aims to answer the legal issues that arise about the immunity of diplomatic missionrelated to the state practices, and as a contribution to solving the problems that occur in society, especially for worker who works at foreign embassy. The type of the study was normative legal research or legal research. Arising ofthe legal issueagainst the immunity of diplomatic mission was related to the state practices, especially for worker who works at foreign embassy.

Keywords: Diplomatic Protection, Citizen, Embassy, Worker, Indonesian Citizen.

INTRODUCTION

Diplomatic relationsis a relation between one state and another which aims to reach mutual agreement or negotiation(Tohari et al., 2019). A perspective shows that the relationamongstates is a relation to achieve certain goal or protect certain thing (Wicaksana, 2018). Existing diplomatic relationwas initially regulated by customary law, namely through bilateral

agreementwhich was followed by states in the world, at present this practice cannot accommodate the interests of many states especially the newly independent state.

In 1954, the International Law Commission (ILC) began to discuss the problemsregardingthe relations and diplomatic immunity, and before the end of 1959 the General Assembly through Resolution 1450 (XIV) decided to hold an international conference to discuss diplomatic immunities and issues(Mauna 2005). Until finally the conference ratified the international legal instrument namely the Vienna Convention on Diplomatic Relations1961 which was ratified through the Law No. 1 of 1982 concerning the Ratification of the Vienna Convention1961.

One of which is regulated in the Vienna Convention1961 is the immunity and privilege, diplomatic immunities includes two definition, namely inviolability and immunity (Zabyelina, 2013). Inviolability has the meaning that cannot be contested, it means that it is immune to the instruments of receivingstate power and is immune to any harmful interference. It is containingan understanding that there isthe rights to obtain protectionfrom the instruments of receivingstate power. Furthermore, the immunity is divided into two categories. The first is immune to property such as building or representative building called the embassy (Puspitasari & Firdauzy, 2019). The implementation of state doctrine and diplomatic immunity in embassy and employment problem remains a very controversial issue (Garnett, 2015).

Every state has the legal immunity. For example, the legal immunity of European caseabout the enforcement, is an evidence of a rather high trans-judicial dialogue (Reinisch, 2006). Relating to the immunity in its current implementation, it shows something new from before, namely the foreign state' embassy become the defendant subject in the court of a state. On the other hand, a sovereign state cannotimpose its jurisdiction on other sovereign states (*par in parem non habet imperium*) and the foreign state' embassy also has the immunity as described in the previous paragraph (Van Schaack, 2012). But in certain case, a state can conductthe jurisdiction over other sovereign states, private actions such as using state's electricity facility, state's water facility and banking facilityif not separated (from public action)and is considered as having the absolute immunity, then this is not appropriate with the basis granted immunity by the Vienna Convention 1961. This convention provides immunity so that the diplomatic mission can carry out their duties perfectly and not to provide personal benefit.

There isa case relating to the embassy' problem as a defendant. This case occurred when the Brazilian Embassy in Jakarta as the Defendant terminated the employment relations with his employee named Luis F.S.S Pereira, SH as the Plaintiff of an Indonesian Citizen (WNI). The chronology of this case began with a Contract-Working Agreement dated on February 1, 2006 and was replaced with a Work Agreement dated on December 1, 2009. On August

26, 2011, when the plaintiff was summoned by the defendant and received an offer from the defendant for the Termination of Employment without any reason, the defendant partygavethe details of the payment calculation due to the termination of employment that was deemed very small by the plaintiff. Then, the plaintiff demanded several things namely Severance Pay, Work Tenure Award, Right Reimbursement Money to the defendant in the Industrial Relations Court at the Central Jakarta District Court. Against to the lawsuit, the Industrial Relations Court at the Central Jakarta Court has issued a decision Number 196/PHI.G/2012/PN.JKT.PST whose one of the contents includesto punish the defendant to pay the compensation for termination of employment and the wages during the dispute settlement process to the plaintiff with the total number ofRp 485,263,703.00 (four hundred eighty-five million two hundred sixty-three thousand seven hundred and three rupiah) (Matos et al., 2003).

Based on that decision, the defendant submits an appeal for cassation, because the defendant is the cassation applicant now(Matos et al., 2003). The cassation applicant is a foreign state representative cq. Brazilian Embassy.This is become a problem because the embassy has the legal immunity against criminal and civil law in the receiving state, againstthe Embassy cannot be carried out the execution and the legal immunity for the embassy can only be withdrawn by the origin state of the embassy.

The Supreme Court argues in its decision No. 376K/Pdt.Sus-PHI/2013, that *JudexFacti* is not wrong in implementing the law and not contradicts with the law or theLaw. The Supreme Court also argues that the former cassation applicant was the employer to the plaintiff and the defendant has terminated the employment relations of the plaintiff without any faults, therefore,the cassation respondent was reasonable to receive compensation for termination of employment from the cassation applicant as considered by *JudexFacti*(Nuswardani, 2007).This study aims to answer the legal issues that arise regarding the immunity of diplomatic missionrelated to the state practices, and as a contribution to solving the problems that occur in the society, especially for workers who works at foreign embassy.

RESEARCH METHODS

The method of the studywas a normative legal research or legal research. The type of this studywas a research that provided systematic exposure to the regulation, explainedthe area that experiencing obstacles, and even predicted the future development(Abdulkadir, 2004). The approach in this study was first through the statute approach, which analyze the material content based on the philosophical foundation and *ratio legis*from the provision of the Law. The approach was based on the legal aspect of the laws provision relating to the employment and diplomatic institution.

Second, the case approach which required an understanding of the *ratio decidendi*, namely the legal reasons used by the judge to takea decision that

could be found by observing at the material facts. This approach was taken because there was a Supreme Court Decision related to the industrial relations disputes that could become the material for this study approach.

The third was the conceptual approach, this approach derived from the views, as well as the doctrines that developedwithin the legal study, here the author would find ideas that emergethe legal understandings, and legal principles which relevant to the legal issues encountered(Raymer, 2018). Legal Sources: The 1945 Constitution of the Republic of Indonesia, theLaw of theRepublic of Indonesia No. 37 of 1999 concerning Foreign Relations, the Law No. 1 of 1982 concerning the Ratification of the Vienna Convention1961, the Law No. 13 of 2003 concerning Employment and other regulations.

RESULT AND DISCUSSIONS

International Regulation on Immunity of a State

The first multilateral agreement which specifically regulatedthe state's immunity problem in a comprehensive manner was The European Convention on State Immunity Denza, (2018) which was adopted in 1972 and began entry into force on June 11, 1976. This convention was initiated by the Council of Europe and although it only consisted of 8 states (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom), but the convention was considered as the early codification of the international law principles concerning the immunity of the state that developed in the 1970s.

Although, it only had 8 member states, the European Convention on State Immunity has become one of the legal instruments which used as a guideline by the court in European states in applying the doctrine of limited immunity and *actaiuregestionis* in employment disputes and employment contracts with the foreign diplomatic representative(Denza, 2018).

The Theoretical Foundation and Immunity ConceptOwned by Diplomatic Representative

There were several theories regarding the immunity of diplomatic representativeSiahaan, Sutiarnoto and Arif, (2014):

a) Extra Territoriality Theory: This theory asserted that not only ambassador, family and their staffsthat were considered outsidethe jurisdiction ofreceiving state but also by some fiction, they were considered to be actually outside the territory of a state.

b) Representative Theory: Diplomatic representativewasarepresentative of sovereign state, bound by an oath of loyalty to the state that appointed them.

c) Functional Theory / Functional Necessity: Functional theory was a theory adopted by states at this time, it was said by Sir Gerald Fitzmaurice (ILC special reporter), functional theory was not only the most satisfying but also the most correct theory, because of the immunity and privilege granted

wereappropriate withthe function of diplomatic representativein order to carry out their duties perfectly.

The last theory was very relevant to the current condition of diplomatic relations, in whichthe immunity and privilege were no longer adhered absolutely, because the granting of immunity and privilege was not for the personal benefit of a diplomat but to support the implementation of the diplomatic mission function. In the opening of the Vienna Convention1961, the privilege and diplomatic immunitywas asserted "the purpose of granting privilege and immunity was not to give benefit forthe individual but to ensure the efficient implementation of the diplomatic mission function in the represented state" andimplementation and recognition against the rights of immunity and privilege on the basis of this theory was a goal that should be achieved.

Classification of Employee in Diplomatic Representation According to the Vienna Convention 1961 on Diplomatic Relations

In the Vienna Convention on Diplomatic Relations1961 Article 37 paragraph (2) Dammen, (2004) wasasserted that immunity and privilege in some cases could be given to the members of administrative and technical staff and service member who carried out domestic services from foreign representative including to the personal assistant, that was, someone who carried out domestic services to the representative member but was not an employee of the receiving country.

The immunity which given to the technical and administrative staff, service staff and personal assistant was depended on whether they were citizens of the sending state or receiving state. If they were the citizen of the receivingstate, then their immunity was severely limited.

Shifting Concept of Immunity in Diplomatic Representative

In the context of international law, immunity itself needed to be distinguished between "immunity from jurisdiction" and "immunity from enforcement measures". This distinction became prominent when in the mid-XX century when the states throughout the world, especially in the Western European region (Italy, France, the Netherlands, Belgium, Germany) began to shift from absolute immunity to limited immunity in the context of immunity from jurisdiction,but it has not yet fully shifted in the context of immunity fromenforcement measures, the inconsistency in mainstream shifting was referred to as "the last bastion of state immunity" (Reinisch, 2006).

Termination of Employment by the Brazilian Embassy in Jakarta againsttheirEmployee

Luis F.S.S Pereira, SH worked at the Brazilian Embassy in Jakarta on February 1, 2006. The work agreement between Luis and the Brazilian Embassy was stated in a Contract-Working Agreement with the position of Technical Assistant (Ariadi et al., 2019). On December 1, 2009 it was replaced

with a Work Agreement which intended to renew the old Contract-Working Agreement. In the new work agreement it explicitly determined that an employment relations between the two parties was subject to the Employment Law in Indonesia.

Termination of employment began on August 29, 2011, Luis was summoned and received an offer from the Brazilian Embassy for the termination of employment relations without any reason, by giving a payment of Rp. 197,653,715.00. Considering for that offer and unreasonable termination of employment, Luis stated rejection against it because it was not appropriate with the applicable regulation and the calculation of the payment was very small.

Finally on September 9, 2011 Luis submitted a response in the form of an offer for the payment due to thetermination of employment relations, in which Luis wanted his wage adjustment based on inflation since 2007. Industrialrelations disputes between Luis and the embassy were resolved in the Industrial Relations Court at the Central Jakarta District Court, with the plaintiff was Luis and the Defendant was the Brazilian Embassy.

Termination of Employment in the Perspective of National Laws

The Law Number 13 of 2003 concerning the Employment did not regulate the termination of employment carried out by public body which included executive, judicative and legislative institutions as well as subject of international law. In the case of employment relations involving the embassy of foreign state in Indonesia,became a problem because the foreign embassywasgranted immunity and privilege by international law in carrying out their duties and functions. It could be interpreted that the subject of the embassy was not subject to the Law No. 13 of 2003 concerning the Employment Article 150, although in the work agreement between the plaintiff and the defendant in Article 3 was stated: "This agreement was made based on the employment law of the Republic of Indonesia and hence is valid for an indefinite period of time and comes into force on the date as stated in paragraph 1 of thisintroduction agreement".

M. HadiSubhan also said that if the agreement was not subject to Law No. 13 of 2003 concerning the Employment, then it was not the authority of the Industrial Relations Court that resolved but became the realm of the District Court with a lawsuit against the law or breach of contract (wanprestasi).

The legal standing of an embassy cannotbe comparable completely to a company or a social body. The Labor law did not include civil servants, although injuridical-technic civil servants could be said to be laborer because they work for other party (the State) by receiving wages (salaries) but in juridical-politicthe labor regulations were not treated to them, butseparate regulations were held such as the Law Number 8 of 1974 concerning Personnel54 Principal which has been perfected by the Law Number 5 of 2014

concerning State Civil Apparatus, in Article 105 of Law No. 5 of 2014 concerning State Civil Apparatus stated that the employment relationship between the government and the state civil apparatus usedwork agreement.

1. Work Agreement According to BurgerlijkWetboek
The work agreement in Book III, Chapter 7A, BW which regulated the Law of Property, showed that the work assessment was still viewed from the material point of view or in other words the view of workers was still materialistic. The International Labor Organization (ILO) stated that work was not genuine commodity. This statement was only amended on October 9, 1946 which stated: *Labour is not commodity*.

Work agreementwhichmade by workers with the employer could be in oral and written. In the case of an oral agreement, to prove the existence of the agreement in front of the court, at least 2 witnesses were needed at the time the oral agreement was made (Article 1905 BW). This was because in BW itself did not require awork agreement that must be made in writing.

2. Work Agreement According to the Law No. 13 of 2003 concerning the Employment
Another regulation concerning work agreement according to the Law No. 13 of 2003, in the explanation of article 51 "In the principle, work agreementis made in writing, but looking to the diverse conditions of the society, it is possible to make an oral work agreement". Work agreement which made in writing must comply with the applicable laws and regulations, including certain time work agreement, inter-regional work, inter-state work, and sea work agreement".

In terms of the format of agreement, it was better if a work agreement was made in writing and stated in a specific and clear formulation. The more assertive and clear the content and formulation of the will statement of both parties, the more doubt arises and this could also function as evidence.

Termination of Employment in the Perspective of International Law
International law had two legal principles concerning foreign souvereign immunity, namely *actaiureimperii* and *actaiuregestionis*. *Actaiureimperii* was a public activity carried out by a state and was public in nature, while *Actaiuregestionis* was a legal action within the scope of management such as hiring employees. In the case of diplomatic representative employing the employee who came from the receiving state, it could be classified into an*actaiuregestionis*, in whichthe state no longer had the immunity. Thus, the court had the authority to resolve the dispute.

Employment Relations in Diplomatic Institution
Nowadays, the employment relations and diplomatic representative entered the private realm. Meanwhile, to fill the legal vacuum in the employment relations was used a civil agreement or private to private agreement. In this

case, the embassy of foreign state performed its civil function. The law that applicable to the agreement might apply Indonesian law or with a choice of law effort that provided legal choices for both parties. Soul in the Vienna convention of 1961 and 1963, although the representative of foreign state was not subject to local jurisdiction, but the representative of foreign state must remain to respect the national laws or the laws and regulations of the receiving state.

Indonesian law specifically regarding the execution of foreign representative has not been clearly regulated, although the court has implemented the limited immunity on the subject of the embassy but was still constrained if it wanted to carry out the embassy execution. This was proven from the 4 cases between the foreign embassy and its employee in Indonesia which were resolved in the industrial relations court, namely the United States Consulate in Medan, the Brazilian Embassy in Jakarta, the Indian Embassy in Jakarta and the Suriname Embassy in Jakarta. It was only the case at the Brazilian Embassy which carried out the Indonesian Court's decision voluntarily.

State Immunity in Local Courts

In the Law Number 37 of 1999 concerning the Foreign Relations, Article 16 in Rumengan, (2008) stated that "Granting immunity, privilegeisconducted in accordance with the national laws and regulations,as well as the international law and customs". The starting point for granting immunity and privilege was based on two rules, namely the national laws and regulations,as well as the international law and customsthat must be obeyed, because the existence of word and mean that there was a necessity to see the provision in international law and customs. Deriving from that explanation in understanding the doctrine of diplomatic representative immunity, it is necessary to understand that the immunity of a diplomatic representative came from the concept of immunity of a sovereign state.

CONCLUSION

There were legal issues that aroseagainst the immunity of diplomatic mission related to the state practices. The termination of employment case that occurred between Indonesian citizen (WNI) against the embassy in the industrial relations court, there was no legal certainty because the industrial relations court was not authorized to settle the disputes between the embassy and employee who was theIndonesian citizen because the subject of a foreign embassy was not included in the Law Number 13 of 2003 concerning the Employment.The foreign embassy could not be executed or forced efforts if they did not fulfill the content of the decision because there has been no rules yetregulating the subject of the embassy in Indonesian law, legal protection for Indonesian workers who worked at foreign embassywere still not fully protected.

The applicable law in a work agreement between the embassy and its employeewas not subject to the Law Number 13 of 2003 concerning the Employmentand alsothe Law Number 5 of 2014 concerning the State Civil

Apparatus, because the embassy was not a legal subject according to the Law, thus the work agreementwas subject to the regulation in BurgerlijkWetboek (BW) Book III CHAPTER 7A. Thus, the legal remedy that could be conducted was in the lawsuit of a breach of contract (wanprestasi) in the District Court.

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