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# TWO IDEAS OF ECONOMIC DEMOCRACY: A CONTEXTUAL ANALYSIS ON THE ROLE OF THE INDONESIAN CONSTITUTIONAL COURT AS A GUARDIAN OF DEMOCRACY

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## Abstract

*This study analyzes the role of the Indonesian Constitutional Court as a guardian of democracy in reinterpreting the ideas of economic democracy. Although economic democracy is well derived from the mind's eye of social justice established in Pancasila in the 1945 Constitution, some economic legislations tend to ignore the idea of economic democracy. Therefore, the Constitutional Court examined the disputed norms through a constitutional review to maintain constitutional economic order. Moreover, the "ratio decidendi" served as a basis for some of the Constitutional Court's verdicts to maintain the two fundamentals of democracy. Apparently, as the guardian of democracy and not merely the protector of human rights, the Constitutional Court considers the conceptions of freedom and equality consecutively in its judicial verdicts. In this context, if liberty and equality are embodied in proportional measures in Indonesian democracy, the general welfare idealized in the Preamble of the 1945 Constitution will be promoted in Indonesian national life.*

*Keywords: constitutional court, economic democracy, Pancasila, the 1945 Constitution*

## Abstrak

*Tulisan ini dibuat untuk mengkaji peran pelindung demokrasi yang dijalankan oleh Mahkamah Konstitusi Republik Indonesia dalam menafsirkan gagasan demokrasi ekonomi. Meskipun gagasan demokrasi ekonomi diturunkan secara konsisten dari sila keadilan sosial sebagaimana tercakup dalam Pancasila ke dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD 1945), beberapa Undang-Undang di bidang ekonomi cenderung mengabaikan gagasan ini. Oleh karena itu, Mahkamah Konstitusi melakukan pengujian konstiusionalitas norma-norma Undang-Undang tersebut untuk memastikan konstiusionalitas tata ekonomi Indonesia. Di samping itu, sebagaimana dielaborasi oleh Penulis, "ratio decidendi" (pertimbangan hakim) dalam beberapa putusan Mahkamah Konstitusi menunjukkan digunakannya dua dasar bagi demokrasi ekonomi. Jelas kiranya, Mahkamah Konstitusi berperan sebagai penjaga demokrasi, bukan hanya sebagai pelindung hak asasi manusia. Dalam hal ini, Mahkamah Konstitusi menjadikan gagasan kebebasan dan kesetaraan secara bersamaan sebagai pertimbangan dalam putusannya. Demikian, apabila kedua gagasan tersebut mengejwantah secara proporsional pada demokrasi Indonesia, kesejahteraan umum sebagaimana dicita-citakan dalam Pembukaan UUD 1945 akan dapat dimajukan dalam kehidupan berbangsa dan bernegara di Indonesia.*

*Kata kunci: demokrasi ekonomi, mahkamah konstitusi, Pancasila, UUD 1945*

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## I. INTRODUCTION

*Pancasila*, as well as its existence as the all-encompassing source of law in the Indonesian legal system, is the Indonesian national ideology. Ideology, as defined by Merriam-Webster Dictionary, contains three meanings: “a systematic body of concepts especially about human life or culture; a manner or the content of thinking characteristic of an individual, group, or culture; the integrated assertions, theories, and aims that constitute a socio-political program.”<sup>2</sup>

*Pancasila* contains five values in which national beliefs and conceptions are situated to institutionalize a great civilization. Furthermore, as quoted by Yudi Latief, Soekarno stated that *Pancasila* could not be viewed as a dogma that is derived from two major ideologies in the world.<sup>3</sup> Soekarno, one of Indonesia’s founding fathers, argued

*Tidak ada dua bangsa yang cara berjoangnya sama. Tiap-tiap bangsa mempunyai cara berjoang sendiri, mempunyai karakteristik sendiri. Oleh karena itu pada hakekatnya bangsa sebagai individu mempunyai keperibadian sendiri. Keperibadian yang terwujud dalam pelbagai hal, dalam kebudayaannya, dalam perekonomiannya, dalam wataknya dan lain-lain sebagainya.*<sup>4</sup> [Two nations would never have the same struggle. Each nation has its own struggle, its own characteristics. Thus, as an individual, a nation has its own personalities. These personalities are institutionalized into several matters, in its culture, its economy, its character, and so forth.]

The above notion indicates that Soekarno absolutely disagreed with Bertrand Russell who divided all nations in the world into two ideologies: the Declaration of American Independence and the Communist Manifesto. With regard to this point, Soekarno mentioned that the historical background of the Indonesian people brought them into a particular situation in which the particular ideology, *Pancasila*, grew.<sup>5</sup>

One of the five values involved in *Pancasila* is social justice, which has been acknowledged as the fifth value of Indonesian ideology. It has become the spirit for all efforts related to social and economic development in Indonesia. This value set its orientation on a fairly organized economic system to achieve the so-called social welfare. Normatively, the value is extrapolated into at least two aspects in the 1945 Constitution as the Indonesian economic constitution.

First, in the 1945 Constitution, the value mentioned above is derived into economic democracy in which some principles mentioned in Article 33, paragraph (4) are involved.<sup>6</sup> Those principles, established in the 1945 Constitution after the enactment of the fourth amendment, complement the single principle mentioned in the original version of the constitution, “principle of brotherhood.”<sup>7</sup> Although the discussion of the amended article in economic constitution involves some controversies, the socialistic principle mentioned in Article 33, paragraph (1) of the 1945 Constitution remains.

In addition, the 1945 Constitution *qua* Indonesian economic constitution requires the state to control the strategic production sectors. Here, Article 33, paragraph (2) directs the government to control the production sectors that are important for the

<sup>2</sup> Merriam Webster Dictionary, “Ideology,” <https://www.merriam-webster.com/dictionary/ideology>, accessed 31 July 2017.

<sup>3</sup> Yudi Latief, *Revolusi Pancasila*, 1<sup>st</sup> ed., (Bandung: Mizan Publisher, 2015), p.28.

<sup>4</sup> *Ibid.*

<sup>5</sup> Latief, *op. cit.*, p.29.

<sup>6</sup> Indonesia (a), *The 1945 Constitution of Republic of Indonesia*, Art. 33 paragraph (4).

<sup>7</sup> *Ibid.*, Art. 33 paragraph (1).

government and for the livelihood of people at large.<sup>8</sup> Likewise, the authority of the state also works on agrarian elements, as written in Article 33, paragraph (3) of the 1945 Constitution. In this point, as a *bezitter*, the state rules on the use of land, waters, and natural resources.<sup>9</sup>

Another aspect derived from social justice is related to economic rights—a set of citizen rights to satisfy their economic needs. Unlike the original version, the amended 1945 Constitution recognized human rights after the second amendment of the constitution. Ideally, economic rights aim to promote livelihood for all citizens.

At a glance, the 1945 Constitution generally integrates two poles in constitutional life: (i) the authority attributed to the states and its organs and (ii) human rights granted to every citizen. In the national economy, this economic constitution has become an important basis on how the economy should be organized. The pendulum should be positioned in a proportional angle to maintain economic growth driven by the government and the citizens. In the end, general welfare was institutionalized into our national economy.

By contrast, normative approaches cannot be fully implemented in the Indonesian national life. One major problem in organizing the national economy is in the legislative products, which can refer to the considerable number of constitutional reviews conducted by the Constitutional Court of the Republic of Indonesia. According to its official website, the Constitutional Court has examined 1,033 lawsuits regarding constitutional review since the Court was established in 2003.<sup>10</sup>

Harold Crouch provided the *raison d'être* of the Constitutional Court. Prior to the existence of the Constitutional Court, the constitution-makers realized that “the lack of authoritative interpretation of the constitution had on several occasions given rise to political tension.”<sup>11</sup> Therefore, the Constitutional Court, besides its other constitutional authorities, holds the main function in conducting judicial reviews of the constitutionality of laws. They, of course, cover legislations by which the national economy is ordered.

Although a constitutional instrument is available to solve problems surrounding the national economy through a tribunal organized by the Constitutional Court, studying how the Constitutional Court settled these constitutional conflicts is important. The writer also raises his scientific opinion on the approach of the Court to conduct a constitutional review.

## II. THE FIFTH VALUE OF PANCASILA: SOCIAL JUSTICE

### A. Social Justice as a Part of Ideology

As an ideology, *Pancasila*, which includes the concept of social justice concept, can be approached from two main theories: interest theory and strain theory.<sup>12</sup> The

<sup>8</sup> *Ibid.*, Art. 33 paragraph (2).

<sup>9</sup> *Ibid.*, Art. 33 paragraph (3).

<sup>10</sup> Constitutional Court of Republic of Indonesia, “Rekapitulasi Perkara Pengujian Undang-Undang”, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPUU&menu=5>, accessed 22 August 2017.

<sup>11</sup> Harold Crouch, *Political Reform in Indonesia after Soeharto*, (Singapore: ISEAS Publishing, 2010), p. 61.

<sup>12</sup> Clifford Geertz, *The Interpretation of Cultures: Selected Essays*, (New York: Basic Books Inc., 1973), p.201.

former says that an ideology is regarded as a mask or weapon, while the second one acknowledges it as a symptom and a remedy. In this context, *Pancasila* can be viewed from both points of view.

First, *Pancasila*, with its social justice, is a weapon to overcome handicaps, such as poverty among Indonesians caused by Dutch imperialism. To describe the situation before Indonesian independence, Tan Malaka confirmed that a chronic conflict existed between the Dutch-Indies administration and the Indonesian people.<sup>13</sup> Similarly, as mentioned by Crouch, some Indonesian political elites “emotionally identified the 1945 Constitution with the Indonesian revolution against colonialism.”<sup>14</sup> Therefore, in harmony with the revolutionary paradigm, *Pancasila* with its social justice could be an effective trigger to provoke the people to fight against imperialism and raise their national dream to have an independent state.

On the other hand, Geertz stated that ideology-making departed from the situation in which social strains occurred. The social strains originated from insoluble antinomies. Take the paradox between liberties and political orders as an example.<sup>15</sup> To overcome frictions, an ideology would form. Geertz, in other words, confirmed that “ideology is a patterned reaction to the patterned strains of social role.”<sup>16</sup>

In this point, the social strains mentioned in the previous paragraph could refer to the circumstances prior to the ideology-making process. In the Dutch-Indies legal system society was divided into three classes: the European, the Far Eastern, and the *inlander*. In this system, the European was the first class, the Far Eastern was in second, and the native was at the bottom. The stratification, written in Articles 131 and 163 of *Indische Staatsregeling*, determined the role of each citizen.<sup>17</sup>

In the Dutch-Indies epoch, the second and the third groups often became involved in social conflict driven by economic matters, such as their economic gap.<sup>18</sup> From a different point of view, Boediono described that the unfair distribution of wealth in Dutch-Indies embodied nationalism among the citizens to bring their motherland into independence instead.<sup>19</sup> Regardless of the points of view, as written in Indonesian history, the social friction in this era was taken into account by the founding fathers while the ideology-making process was organized to prepare for the independence of Indonesia.

## B. Social Justice: Debates in Indonesian Ideology-making

Ideology-making is one step in preparation for Indonesian independence. The debates appeared in formal meetings of *Dokuritsu Junbi Choosakai* (Investigating Committee of Preparation for Indonesian Independence) established by the Japanese military administration in Indonesia. The investigating committee was tasked to draft the Indonesian constitution.

The main issue in ideology-making was related to the ideology itself, a concept of the state or a *staatsidee*. Some founding fathers, namely, Mohammad Yamin, Soepomo,

<sup>13</sup> Tan Malaka, *Naar de Republiek Indonesia*, 5<sup>th</sup> ed., (Jakarta: LPPM Tan Malaka, 2015), p.15.

<sup>14</sup> Crouch, *op. cit.*, p.52.

<sup>15</sup> Geertz, *op. cit.*, p. 203.

<sup>16</sup> *Ibid.*, p.204.

<sup>17</sup> See Netherland-Indies, *Indische Staatsregeling*, Art. 131 and Art. 163.

<sup>18</sup> Gie and Madjid, *op. cit.*, p.35.

<sup>19</sup> Boediono, *Ekonomi Indonesia: dalam Lintasan Sejarah*, 3<sup>rd</sup> ed., (Bandung: Penerbit Mizan, 2016), p.58.

and Ir Soekarno, were given the opportunity to state their notions concerning the proper ideology on which the new state should be founded.

In his speech, Mohammad Yamin initiated five basic principles for Indonesian fundamentals in organizing the state: nationalism, humanity, divinity, democracy, and social welfare. After the speech, Yamin gave the assembly his written draft in which social justice (*keadilan sosial*) replaced social welfare (*kesejahteraan rakyat*).<sup>20</sup>

One of Yamin's renowned ideas was human rights. Yamin suggested that the constitution maker adopt the idea in which human rights is guaranteed. Moreover, Yamin proposed to the committee that the Declaration of Human Rights and Independence should be integrated in the Indonesian constitution.<sup>21</sup>

Soepomo was the second speaker. He cited constitutive aspects of a state, as determined by the 1933 Montevideo Convention on the Rights and Duties of States: (i) a permanent population, (ii) a defined territory, (iii) government, and (iv) capacity to enter into relations with the other states.<sup>22</sup> With respect to the third aspect, the government, Soepomo reminded that the system on which the government worked should be based on a *staatsidee*. In short, in acknowledgment of the early Indonesian cultural system, Soepomo, as described by Marsillam Simanjuntak, proposed an integral state in which a benevolent father would lead the people.<sup>23</sup> Soepomo did not include any detail about social justice and any acknowledgment of human rights, given that the state designed in his normative mind is in unity with its people. In this point, he assumed that the state is not a *Leviathan* that exists outside the individual's personal freedom.<sup>24</sup> Thus, no human rights-related conflict would occur between the state and its people.

From another perspective, Benyamin Fleming Intan stated that "Soepomo's idea of integralism maintained that in state and society are inseparable as an organic unity with the primary emphasis on social obligations rather than individual rights and liberties."<sup>25</sup> Consequently, no people sovereignty would exist; rather, state sovereignty would be in place.

As the third speaker, Soekarno introduced five basic principles: nationalism, internationalism or humanity, consensus or democracy, social welfare, and divinity. Soekarno suggested to the assembly a predicate for the five basic principles, *Pancasila*.<sup>26</sup>

It is interesting to elaborate Soekarno's perspectives on his proposal of national ideology, as he was an outstanding activist who fought for Indonesian independence. Even though he articulated a number of human rights in his brilliant defense plea at the Dutch Colonial Criminal Court in Bandung in 1930, he is one of the founding fathers who refused to recognize human rights<sup>27</sup> given that he, similar to Soepomo,

<sup>20</sup> Darji Darmodihardjo, *Santiaji Pancasila*, 10<sup>th</sup> ed., (Surabaya: Usaha Nasional, 1991), p.26.

<sup>21</sup> Tempo, *Muhammad Yamin: Penggagas Indonesia yang Dihujat dan Dipuja*, (Jakarta: Kepustakaan Populer Gramedia, 2015), p.98.

<sup>22</sup> *The 1933 Montevideo Convention on the Rights and Duties of States*, 26 December 1933. <https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf>, accessed 3 August 2017, Art. 1.

<sup>23</sup> Marsillam Simanjuntak, *Pandangan Negara Integralistik: Sumber, Unsur, dan Riwayatnya dalam Persepsi UUD 1945*, (Jakarta: Pustaka Grafiti, 1994), p.92.

<sup>24</sup> *Ibid.*, p.93.

<sup>25</sup> A. Ahsin Thohari, *Hak Konstitusional dalam Hukum Tata Negara Indonesia*, (Jakarta: Penerbit Erlangga, 2016), p.141.

<sup>26</sup> Darmodihardjo, *op. cit.*, p. 27.

<sup>27</sup> Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order*,

obviously expected that the state that would be established was an embodiment of the whole people and that the state and its people would always be united. Thus, political rights do not need to be granted to the citizens. Moreover, in this context, he assumed that granting people a set of political rights would negate the essence of the state itself.<sup>28</sup>

Despite his notorious proposal regarding human rights, especially political rights, Soekarno's larger concern was to build economic democracy and social justice. Todung Mulya Lubis, who detailed Soekarno's thoughts, described that "Soekarno's constant argument was that the issues of economic democracy and welfare of the people deserved more attention than the issues of political democracy."<sup>29</sup> However, Soekarno's view on human rights did not invite any contradictory position from his counterparts in the investigating committee. Lubis argued that the absence of serious debates on human rights could be addressed to the Indonesian independence effort on which the founding fathers focused.<sup>30</sup> In addition, the belief at the time was that a new state should be a strong entity in which individual freedom liberty could, if necessary, be temporarily sacrificed.

Although Soekarno's view was accepted by the committee without any reservation, Mohammad Hatta expressed anxiety about the minimal substance of the constitution regarding human rights. Several decades later, Hatta's note, as presented by Satya Arinanto, was proven, while the government, with its unlimited and repressive power, violated the rights of citizens.<sup>31</sup>

In sum, the above details clearly show why the 1945 Constitution, which was approved by *Dokuritsu Junbi Inkai* (Committee of Preparation for Indonesian Independence) on August 18, 1945, determined social and economic matters relating to social justice on a larger scale.

### III. THE 1945 CONSTITUTION QUA INDONESIAN ECONOMIC CONSTITUTION

#### A. Economic Constitution and Democracy

##### 1. Economic Constitution in Conception

An economic constitution, as defined by the European Union, is "a part (or set of parts) in the constitution, which contain(s) the stipulation regarding fundamental economic rights and pertaining principles of constitution as well as other regulations on market economy."<sup>32</sup> According to the definition given by EU in its Policy Papers, an economic constitution contains, at least, economic rights, economic principles determined by the constitution, and constitutional regulations on market economy.

Economic rights, the first element of an economic constitution, are based on the state's obligation to provide people basic needs. The state, therefore, must work actively to fulfill these rights. From another perspective, Knut D. Asplund et al. showed

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1966-1990, (Jakarta: PT Gramedia Pustaka Utama, 1993), p.59.

<sup>28</sup> *Ibid.*, p.58.

<sup>29</sup> *Ibid.*, p.57.

<sup>30</sup> *Ibid.*, p.59.

<sup>31</sup> Satya Arinanto, *Hak Asasi Manusia dalam Transisi Politik di Indonesia*, 3<sup>rd</sup> ed., (Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 2008), p.9.

<sup>32</sup> Jimly Asshiddiqie (a), *Konstitusi Ekonomi*, (Jakarta: Penerbit Buku Kompas, 2010), p.64.

that economic rights should be satisfied to maintain social equality.<sup>33</sup>

Another element, economic principle, which is constitutionally determined by the economic constitution, would be derived into economic policies.<sup>34</sup> In this point, whether it is implicitly or explicitly written in the constitution, Sjahrir elaborated (macro) economic policies into four aspects: fiscal policy, financial policy, balance of payment policy, and macro price policy.<sup>35</sup>

How can the constitution constitutionally determine the market economy? To answer the question, the author should provide two positions as to the role of the government in intervening in the market. First, the government, idealized by the supporters of *nachtwachterstaat* concept, intervenes in the market as a regulator and a referee. In this context, the government acts passively. Here, the government works while a problem in the market mechanism exists. This notion is in harmony with the maxim "the least government is the best government."<sup>36</sup>

By contrast, another group proposed the concept of the welfare state in which the state has a broader area to intervene. Richard E. Wagner (1983, p.4) stated that, in the welfare state, the government participates actively in the national economy, as depicted below.

Government acts as a participant in market economy ... to produce in addition to maintaining the framework of order in which those choices are made. There are numerous ways in which government makes such choices: it offers educational opportunities to the members of society; it provides insurance coverage against unemployment, illness, and flooding; it maintains a system of park for outdoor recreation, and so on.<sup>37</sup>

In this part, the economic constitution-makers are given two forms of state intervention in the market. They can choose one of two options to maintain their paradigm on economic development. They can also combine the two options into an integrated economic instrument to run their national economy.

## 2. Two Bedrocks of Democracy: Equality and Liberty

Prior to an analysis on the conception of equality and liberty conception is given here, Carl Schmitt's definition of constitution needs to be given. One of his set of definitions of constitution is *forma-formarum*, which gives an absolute meaning of constitution (*absoluter verfassungsbegriff*).<sup>38</sup>

In this term, Schmitt depicted that a state is established by its constitution. Again, he, as cited by Jimly Asshiddiqie, stated that constitution contains three principles: (i) *principe van de staatsvorm*; (ii) *principe van en uit de staatsvorm*; and (iii) *regeringsprincipe*.<sup>39</sup> In this paper, the writer elaborates the first and second principles.

<sup>33</sup> Knut D. Asplund, Suparman Marzuki, and Eko Riyanto, *Hukum Hak Asasi Manusia*, 1<sup>st</sup> ed., (Yogyakarta: Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia Yogyakarta, 2008), p.16.

<sup>34</sup> Asshiddiqie (a), *op. cit.*, p.68-69.

<sup>35</sup> Sjahrir, *Kebijaksanaan Negara: Konsistensi dan Implementasi*, (Jakarta: LP3ES, 1987), p.11.

<sup>36</sup> Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*, Revised ed., (Jakarta: PT Gramedia Pustaka Utama, 2010), p.114.

<sup>37</sup> Richard E. Wagner, *Public Finance: Revenues and Expenditures in a Democratic Society*, (Toronto: Little, Brown & Company, 1983), p.4.

<sup>38</sup> Moh. Kusnardi and Harmaily Ibrahim, *Hukum Tata Negara Indonesia*, Revised ed., (Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 1985), p.68.

<sup>39</sup> Jimly Asshiddiqie (b), *Pengantar Ilmu Hukum Tata Negara*, (Jakarta: Rajawali Pers, 2009), p.102-103.



First, Schmitt divided constitution according to the form of the state into *identiteit* and *representatie*. The former, which is similar to democracy, is given for a state in which no distinction exists between the ruler and the people because the people are the ruler. The latter, which is related to monarchy, is headed by a representative of the people, not the people at whole.<sup>40</sup> Given that the division is just in a formal sense, Djokosoetono mentioned that the two forms originated from the idea of *volkssoevereiniteit* (people sovereignty).<sup>41</sup> In concordance with Djokosoetono, Kusnardi and Ibrahim proposed that in a democracy, people directly rule themselves, whereas in a monarchy, people give a mandate to a leader to govern them.<sup>42</sup>

F. Isjwara provided his views from another perspective. He grouped states into three concepts: (i) state that originated from an abstract idea; (ii) state that originated from an empirical idea; and (iii) state in which both ideas mentioned before are synthesized. The first concept is based upon divinity. In this concept, the state is created by God. This concept gave birth to a theocratic state.<sup>43</sup>

Then, Isjwara explored the empirical idea mentioned in the second concept of state and determined that people is an empirical aspect. Therefore, he stated that the democratic state originated from this concept.<sup>44</sup>

Third, outside both groups, the state can also be established by synthesizing the two concepts. In this term, this type institutionalizes the abstract and the empirical notions into one integrated concept. Isjwara mentioned that the corporative state, which is established through this synthesis, is based on an immanent idea (*Godelijke orde*). Evidently, this type of state has two fundamentals: divinity and democracy.<sup>45</sup>

The latter aspect is derived into the substance of the 1945 Constitution. In Article 1, paragraph (2), sovereignty is handed by the people. In other words, the Republic of Indonesia is established on the people's sovereignty or democracy.

Then, after being formed upon either *identiteit* or *representatie*, the entity would organize itself through material principles of state. Djokosoetono clarified that this kind of principle contains *vrijheid* (freedom, liberty) and *gelijkheid* (equality, egality), which determine the material aspect of a state.<sup>46</sup> In other words, both of them exist in all aspects of a state.

Furthermore, Hans Kelsen stated that "the idea of democracy is a synthesis of the ideas of freedom and equality."<sup>47</sup> Kelsen determined that freedom would be more important than equality if there was a disharmony between them, arguing that "this metamorphosis of the idea of freedom is of the greatest importance for all our political thinking."<sup>48</sup> By contrast, Aristotle proposed that equality is more essential than its counterpart. Aristotle, as cited from Djokosoetono, obviously based his position on the argument that democracy, in implementation, requires equality in liberty, not liberty in equality.<sup>49</sup>

<sup>40</sup> *Ibid.*, p.103

<sup>41</sup> Djokosoetono (a), *op. cit.*, p.216.

<sup>42</sup> Kusnardi and Ibrahim, *op. cit.*, p.68.

<sup>43</sup> F. Isjwara, *Pengantar Ilmu Politik*, Fifth ed., (sl: Penerbit Binacipta, 1974), p.81.

<sup>44</sup> *Ibid.*, p.82.

<sup>45</sup> *Ibid.*

<sup>46</sup> Djokosoetono (a), *op. cit.*, p.219-220.

<sup>47</sup> Hans Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1945), p.287

<sup>48</sup> Djokosoetono (a), *op. cit.*, p.220.

<sup>49</sup> *Ibid.*, p.221.

Although those criteria should be institutionalized into a democratic life, the author strongly agrees with Aristotle and his idea of the supremacy of equality because of a few reasons. First, as cited from Mubyarto, equality can be an essential approach to solve the in-time economic issue in Indonesia, which is economic gap among citizens.<sup>50</sup> Second, as a further explanation, the government should institutionalize equality prior to liberty because, without any equalized adjustment, not every citizen can enjoy economic liberty.

## B. Economic Constitution in Indonesia

An important detail to notice is that the constitution that is being analyzed is the 1945 Constitution after the amendment in 2002. Although the Indonesian founding fathers' notion about Indonesian ideology still exists, Pancasila was reinterpreted to properly respond to the current circumstances in national life.

To identify the Indonesian economic constitution, Jimly Ashiddiqie provided two approaches. On the one hand, as stated by Asshiddiqie, if the economic constitution was merely identified by the existence of constitutional economic policy, the 1945 Constitution would be defined as an economic constitution in a narrower sense. On the other hand, with its determination on constitutional economic policy, economic rights, property rights, public finance, and Central Bank taken into consideration, the 1945 Constitution could also be defined as an economic constitution in a broader sense.<sup>51</sup> Obviously, both approaches defined the 1945 Constitution as an economic constitution.

However, in this paper, the writer analyzes at least two substances regarding constitutionally economic policy and economic rights to specifically focus on equality and liberty ideas as the two fundamentals of economic democracy. The first substance, of course, refers to Article 33 of the 1945 Constitution.

According to the Article, two constitutionally important things exist in conducting national economy. First, economic development is based on the principles of economic democracy. The principles, as set out by Sri Edi Swasono in Asshiddiqie (2013, p. 140), was originally laid on the "brotherhood" value and integrated with amended principles after the fourth amendment of the 1945 Constitution. In the context of those added principles, Asshiddiqie stated that the economic democracy principles contained in Article 33, paragraph (4) refine the principle of "brotherhood," which was originally established in August 18, 1945.<sup>52</sup> In addition, to ensure the collectivism in Article 33, paragraphs (1) and (4), the government has the authority to control the strategic production process and agrarian elements.

Second, from another side, the concept of liberty bears a set of economic rights given to all citizens. In this context, as an economic constitution, the 1945 Constitution attributes people with economic rights protection. Denny Indrayana said that the economic rights were added to the constitution after Majelis Permusyawaratan Rakyat (MPR – the *erstee kamer*) established the second amendment of the 1945 Constitution.<sup>53</sup>

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<sup>50</sup> Mubyarto, "Keadilan Sosial dalam Ekonomi Pancasila", dalam Mubyarto (ed), *Ekonomi Pancasila*, 1<sup>st</sup> ed., (Yogyakarta: BPF- Yogyakarta, 1997), p.142.

<sup>51</sup> Asshiddiqie (a), *op. cit.*, p.214.

<sup>52</sup> *Ibid.*, p.282.

<sup>53</sup> Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: an Evaluation of Constitution Making*

However, the rights detailed by the constitution are not absolute rights. Constitutionally, these rights are regulated by Article, 28J paragraph (2), in which limitations for the fulfillment of human rights are determined. In detail, the limitations are deemed by laws for the purpose of protection and respect for others' rights and freedoms. This article also takes into account some aspects: morality, religious values, public security, and public order in a democratic society.<sup>54</sup>

Theoretically, the limitation does not mean violence against human rights. It is applied as to ensure that other citizens' rights are well protected. Again, the limitation that appears in law enforcement regarding human rights is still in line with academic accounts. Conceptually, Friedrich A. Hayek described that freedom of economic activity, on which economic rights are contextually based, means freedom under the law.<sup>55</sup> In this point, he also sharpened his analysis by arguing that government action is allowed to participate in the economic field.<sup>56</sup>

In the Indonesian context, as determined by Article 33, paragraph (2) of the 1945 Constitution, the government participates by occupying the strategic production sectors that are important for the livelihood of the people at large.<sup>57</sup> State-owned enterprises are given legal apparel to produce and distribute some public goods to all citizens to meet their basic economic needs. Consequently, welfare idealized by *Pancasila* and the 1945 Constitution is not merely individual welfare, but social welfare.

### C. Economic Democracy a la Indonesia

Djokosoetono proposed two concepts of democracy: (i) as a form of a state and (ii) as an ideal. The dichotomies between two concepts are related to *tempus* required to institutionalize the concept. If democracy is merely a form of state, then it will be captured in the short term. For instance, general election is directed.<sup>58</sup>

However, as an ideal, democracy seems like a never-ending process. To simply describe this perspective, Djokosoetono referred to the embodiment of economic and social democracy. Unlike the political one, economic democracy has not been institutionalized in time.<sup>59</sup> Asshiddiqie reminded us that democracy can be seen from several concrete aspects: political, economic, social, and (maybe) cultural.<sup>60</sup>

In economic democracy, Hatta delivered his statesman's perspective that the Indonesian economic basis is collectivism. Further, he associated collectivism with the Indonesian concept of *tolong-menolong* (*gotong royong*).<sup>61</sup> To provide a basis for Hatta's conception, Djokosoetono supplied a conceptual distinction between

*in Transition*, (Jakarta: Kompas Book Publisher, 2008), p.217.

<sup>54</sup> See Indonesia (a), *loc.cit.*, Article 28J paragraph (2).

<sup>55</sup> Friedrich August Hayek, *The Constitution of Liberty: the Definitive Edition*, (Chicago: The University of Chicago Press, 2011), p.329.

<sup>56</sup> *Ibid.*

<sup>57</sup> Indonesia (a), *loc. cit.*, Art. 33 paragraph (2).

<sup>58</sup> Djokosoetono (b), *Ilmu Negara*, Revised ed., (Jakarta: Penerbit In-Hill-Co., 2006), p.41.

<sup>59</sup> *Ibid.*

<sup>60</sup> Jimly Asshiddiqie (c), *Gagasan Kedaulatan Rakyat dalam Konstitusi dan Pelaksanaannya di Indonesia: Pergeseran Keseimbangan antara Individualisme dan Kolektivisme dalam Kebijakan Demokrasi Politik dan Demokrasi Ekonomi selama Tiga Masa Demokrasi, 1945-1980an*, (Jakarta: Ichtiar Baru van Hoeve, 1994), p.91.

<sup>61</sup> Sri-Edi Swasono and Fauzie Ridjal, ed., *Satu Abad Bung Hatta: Demokrasi Kita, Bebas Aktif, Ekonomi Masa Depan*, 2<sup>nd</sup> ed., (Jakarta: Penerbit Universitas Indonesia, 2002), p.5.

*solidarismus* (*gotong royong*) and *mutualismus* (*tolong-menolong*). Although both concepts are related to working together for one specific purpose, they can differ from each other through this approach.<sup>62</sup>

1. Public or private interest. Djokosoetono determined that *solidarismus* is performed in the public interest area, while *mutualismus* is in the private interest scope. For instance, *solidarismus* is depicted by people working together to build a bridge. In the other side, *mutualismus* depicts people who are working together to build a neighbor's house.
2. Expected returns. No returns are expected by everyone who are involved in *solidarismus*. Everyone realizes that his contributions in this pattern are to fulfill collective needs in which his personal needs are contained. By contrast, in *mutualismus*, everyone expects social returns from other members of his society who are receiving help.

Since Hatta laid down both conceptions, *solidarismus* and *mutualismus* in the concept of Indonesian-characterized collectivism, economic democracy has a clear approach in which they are applied at the same time. However, from another angle, democracy is built from the notions of equality and liberty. In the Indonesian context, equality originates from the fifth value of *Pancasila*, while liberty is based on the second value.

Finally, what objective should be achieved by performing the approach? The objective is social justice. Regardless of word choice to concretize social justice in the 1945 Constitution, such as general welfare (*kesejahteraan umum*) and wealth of people (*kemakmuran rakyat*), the 1945 Constitution still determines that social justice is the objective.

#### IV. CONSTITUTIONAL COURT: MAINTAINING CONSTITUTIONALLY ECONOMIC CIRCUMSTANCES

##### A. The Roles of the Constitutional Court

As the background of the establishment of Constitutional Court, the writer should adopt Saldi Isra's conviction. Isra laid down his assumption on the lawmaking process in parliament. Although the checks and balances mechanism in legislative bodies has been internally developed through the implementation of bicameralism, Jeremy Waldron, as cited by Saldi Isra, still acknowledged that legislatures' political interests bring them into some handicap relating to their established legislations.<sup>63</sup>

To maintain the legitimacy of the laws produced by the legislative bodies, judicial review, as well as constitutional review, had been introduced.<sup>64</sup> Therefore, Laica Marzuki, as quoted by Isra, raised his view that the legislative body is no longer the only state organ performing a legislative function given the existence of the Constitutional Court.<sup>65</sup>

The Constitutional Court is a state organ that was established by Article 24C of the 1945 Constitution of the Republic of Indonesia. Constitutionally, the Court

<sup>62</sup> Djokosoetono (a), *op. cit.* p.141-142.

<sup>63</sup> Saldi Isra, *Pergeseran Fungsi Legislasi: Menguatnya Model Legislasi Parlemen dalam Sistem Presidensial Indonesia*, 3<sup>rd</sup> ed., (Jakarta: Rajawali Pers, 2013), p.293.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, p.295.

conducts dispute settlements regarding (i) constitutional review on legislations, (ii) constitutional authority dispute between state institutions, (iii) the dissolution of political party, (iv) dispute regarding the result of general election, and (v) constitutional violation committed by the president and/or vice president.<sup>66</sup>

From a theoretical basis, the Constitutional Court performs four essential functions. First, the Constitutional Court is the guardian of constitution. It, of course, can be referred to its constitutional authority in conducting constitutional review on legislations. This function originates from the legal—especially constitutional—construction conducted by the U.S. Supreme Court to resolve *Marbury vs. Madison* in 1803.<sup>67</sup> S.B. Prakash and John C. Yoo also confirmed that the landmark decision was the precedent of judicial review practice.<sup>68</sup>

Hans Kelsen argued that, unlike law-applying organs, which are able to investigate the constitutionality of a law only for a concrete case and refuse its application when recognized as unconstitutional, the constitutional review performed by the Constitutional Court may be attributed to invalidate the unconstitutional law.<sup>69</sup> In other words, the Constitutional Court runs the legislative function as a negative legislator.

Consequently, the first function served by the Constitutional Court gives birth to the second function: the final interpreter of the constitution. Asshiddiqie argued that judges are allowed to interpret constitutional norms. The interpretation served by the judges is an approach to amend the substance of the constitution.<sup>70</sup> This function strengthens the Court's performance in guiding the constitution in every part of national life.

The Constitutional Court serves as the guardian of the process of democratization, which is its third function.<sup>71</sup> This function is performed on both political and economic democracy. According to the two bases of democracy, the Constitutional Court maintains the balance between equality and liberty.

Lastly, Asshiddiqie noted that the Court also protects human rights. This function is served by the Court since the human rights became a section in the 1945 Constitution.<sup>72</sup> It means that human rights, or constitutional rights, are a substance guarded by the Court.

## B. Constitutional Court's Vital Role in Maintaining Economic Democracy

Asshiddiqie stated that many legislations have been enacted on economic matters. However, he also admitted that the material aspect of some legislation does not reflect the substance of Article 33 of the 1945 Constitution in which economic democracy is alive.<sup>73</sup> This idea means that constitutional norms are only formally considered by the

<sup>66</sup> See Indonesia (a), *loc. cit.*, Art. 24C paragraph (1).

<sup>67</sup> Jimly Asshiddiqie (d), *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta, Sinar Grafika, 2010), p.16.

<sup>68</sup> Saikrisna B. Prakash and John C. Yoo, "The Origins of Judicial Review", *The University of Chicago Law Review*, Vol. 70, No. 3, p. 887.

<sup>69</sup> Kelsen, *op. cit.*, p.272.

<sup>70</sup> Asshiddiqie (b), *op. cit.*, p. 219.

<sup>71</sup> Jimly Asshiddiqie (e), *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, 2<sup>nd</sup> ed., (Jakarta: Sinar Grafika, 2010), p.132.

<sup>72</sup> *Ibid.*

<sup>73</sup> Jimly Asshiddiqie (f), *Komentar atas Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*,

legislators in the lawmaking process.

In the Indonesian legal system, constitutional norms are derived into general norms enacted by the legislative body. In this context, with respect to its function as a guardian of constitution, the Constitutional Court has the authority to ensure that the constitutional norms are formally and materially deduced in legislations. Therefore, the Court is given the authority to determine whether the legislation is constitutional or unconstitutional.

The Court has nine constitutional court justices who are constitutionally appointed by three institutions: the president, the House, and the Supreme Court. Each of these state organs independently appoints three justices.<sup>74</sup> Thus, the Constitutional Court reflects the whole spirit of each branch of power.

Asshiddiqie delineated that the Court has convicted a great number of constitutional reviews in which the Court decided whether a certain piece of legislation was constitutional or unconstitutional. If it was unconstitutional, then the Court would declare that the legislation is no longer valid.<sup>75</sup> From a narrow perspective, Asshiddiqie provided information that most constitutional reviews are conducted to settle material aspects of legislations.<sup>76</sup> This situation indicates that the major problem in lawmaking is not in the lawmaking procedure, but in deriving constitutional norms into legislative products.

Scientifically, the constitutional adjudication conducted by the Court does not merely change or invalidate the investigated law, but also the substance of the current constitution. Mohammad Fajrul Falaakh proposed that, in some constitutional cases, the Court should interpret the constitution to have a fundamentally legal reasoning in resolving the constitutional dispute. In this sense, the judges should use their knowledge and wisdom learned in jurisprudence, which are not syncretized with other perspectives and interests.<sup>77</sup>

From another reference, Brown and Waller postulated their view on the experience of judicial interpretation on the constitution. They confirmed that the existence of the constitutional court is a state organ that makes a judgment in which legal dissension rests in part on how the constitution should be interpreted and implemented.<sup>78</sup>

For instance, in Decision Number 036/PUU-X/2012, the Constitutional Court intervened in the regulatory domain in the oil and gas sector, which was previously determined by the House and the president through Laws Number 22 of 2001 on Oil and Gas. At the end of the adjudication process, the Court invalidated some articles that were deemed unconstitutional given that they did not institutionalize economic democracy.<sup>79</sup> This 2012 Judicial Judgment is one of the outstanding decisions made by the Court because it introduced a comprehensive understanding on how to organize the national economy without ignoring the establishment of social justice. As an

2<sup>nd</sup> ed., (Jakarta: Sinar Grafika, 2013) p.143.

<sup>74</sup> See Indonesia (a), *loc. cit.*, Art. 24C paragraph (3).

<sup>75</sup> Asshiddiqie (a), *op. cit.* p.320-321.

<sup>76</sup> *Ibid.*

<sup>77</sup> Mohammad Fajrul Falaakh, *Pertumbuhan dan Model Konstitusi serta Perubahan UUD oleh Presiden, DPR, dan Mahkamah Konstitusi*, (Yogyakarta: Gadjah Mada University Press, 2014), p.72.

<sup>78</sup> Nathan J. Brown and Julian G. Waller, "Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges", *International Journal of Constitutional Law*, Volume 14 Issue 4, 1 October 2016, p.819, <https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mow060>, accessed 30 August 2017.

<sup>79</sup> Constitutional Court of Republic of Indonesia (a), "Decision Number: 036/PUU-X/2012", p.115-116.

important resource, oil and gas should bring benefits—commercial gains included—for people as a whole.

Consistently, in their considerations (*ratio decidendi*), the constitutional judges used the definition that were previously introduced through Judgment Number 002/PUU-I/2003 regarding the scope of so-called *hak menguasai negara*, a domain of economics in which the government can intervene. In this point, to provide a strong basis on which the economic democracy stands, the Court defined that *hak menguasai negara* comprises (i) policymaking (*beleid*); (ii) lawmaking (*regelendaad*); (iii) administration (*bestuursdaad*), which includes an authority to issue a license to exploit natural resources included; (iv) management (*beheersdaad*); and (v) supervision (*toezichthoudensdaad*).<sup>80</sup> This part states that the function of the Constitutional Court is not only to examine the legislative norms, but also to interpret or reinterpret the material contents of the Constitution.

Furthermore, in Decision Number 85/PUU-XI/2013, the Constitutional Court annulled Law Number 7 in 2004 on Water Resources due to its unconstitutionality. In its legal reasoning, the Court introduced the new approach to understand the Indonesian economic democracy as a democracy that is in accordance with collectivism, not individualistic and liberal thought. Explicitly, the Court ascertained that the rise of private ownership of water resources could harm the national economy, which is established based on economic democracy.<sup>81</sup>

In my opinion, this rationale described how the Court realizes that Indonesian economic constitution is based on collectivism. At the same time, a number of laws introduce and adopt individualistic values of public goods, i.e., this Law on Water Resources. These individualistic legislations tend to intrude on the effort to constitute social justice for all people.

To clarify the issue between collectivism and individualism, Hatta's proposal in the constitution-making process needs to be mentioned:

*Proses individualisasi akan berjalan terus sebagai antitesis terhadap kolektivisme. Tetapi cita-cita sosialisme Indonesia mau mempertahankan jiwa kolektifitu sebagai sendi bangunannya. Jalan kesitu ialah membelokkan individualisme yang mulai berkembang itu dengan organisasi dan pendidikan sosial. Bukan kembali kepada kolektivisme yang tua masyarakat diajak, melainkan mendudukkan cita-cita kolektivisme itu pada tingkat yang lebih tinggi dan modern, yang lebih efektif dari individualisme.*<sup>82</sup> [As an antithesis of collectivism, individualization will never halt the process. However, Indonesian socialist ideals would defend its collective character as its basis. This effort should be performed by introducing social organization and education. It is not proper to ask people to institutionalize the old collectivism, but we have to bring Indonesians to a higher and more modernized collectivism, which is much more effective than its rival, individualism.]

Hatta's proposal could be a stepping stone for the Indonesian Constitutional Court to renew the paradigm of collectivism itself. This idea means that Indonesian collectivism should be reinterpreted. Here, this reinterpretation maintains people's access to water resources.

<sup>80</sup> Constitutional Court of Republic of Indonesia (b), "Decision Number: 002.PUU-I/2003", p.208.

<sup>81</sup> Constitutional Court of Republic of Indonesia (c), "Decision Number: 085/PUU-XI/2013", p. 134-135.

<sup>82</sup> Swasono, Sri-Edi, and Fauzie Ridjal. Ed. *Satu Abad Bung Hatta: Demokrasi Kita, Bebas Aktif, Ekonomi Masa Depan*. 2<sup>nd</sup> Ed. (Jakarta: Penerbit Universitas Indonesia, 2002).

On the one hand, to give private parties space to participate in the national economy, the Constitutional Court stated that private parties can still organize their business in production sectors determined by Article 33, paragraph (2) of the 1945 Constitution inasmuch as the so-called *hak menguasai negara* is well implemented to establish social justice for all citizens.<sup>83</sup> Apparently, according to the exposition relating to the content of the 2012 judgment, aside from the issue of economic rights, which contextually stands on liberty constitution, the Constitutional Court takes equality into consideration. All in all, this approach is conducted to achieve the so-called social justice.

On the other hand, the Indonesian Constitutional Court did not ignore the embodiment of the liberty principle at all. First, the Court determined the protection of citizen's rights to property. In Decision Number 34/PUU-IX/2011, the constitutional justices stated that Article 4, paragraph (3) of Law Number 41 in 1999 on Forestry was conditionally constitutional due to its restriction of the rights on land possessed by citizens prior to the establishment of this decision. Here, the judges extended the meaning of the rights of land protection in accordance with constitutional norms, especially the rights to property as recognized by Article 28H, paragraph (4). As a result, the scope of protection covers not only the *adat* communities' rights of land, but also particular ones.<sup>84</sup> Thus, the government cannot issue land use rights arbitrarily. From this exposition, the author could take into account that the Constitutional Court also institutionalizes another bedrock of democracy, namely, freedom.

However, the author should also provide another constitutional review of that forestry law. In the following year, the Court issued Decision Number 35/PUU-X/2012. In this decision, the Court attached the consideration on equality to protect *adat* communities' rights to take advantage of forest management.<sup>85</sup> Generally, the Court addressed their consideration that freedom ought to be restricted by the laws<sup>86</sup> to maintain equality among people. Therefore, despite the embodiment of freedom, according to those five decisions, the Indonesian Constitutional Court also contextually makes the interrelation between liberty and equality in national economic democracy.

Furthermore, to examine the social justice maintained by the Court through the constitutional review, it is important to mainly provide John Rawls' proposal on theory of justice. Rawls assumed the original position; in his conception, everyone's original position can be different—unequal—from that of others.<sup>87</sup>

In respect of the recognition of so-called inequality, Jean Jacques Rousseau determined the origin of the inequality of mankind. As written in his masterpiece, Rousseau propounded an idea in which two kinds of inequality were classified. First, he referred to natural or physical inequality, such as difference of age and distinction of rational thinking.<sup>88</sup> Second, he pointed out moral or political inequality. For example, inequality appears in political life in which men who possess several privileges enjoy the prejudice of others, such as being more honored.<sup>89</sup>

Further, in his principles of justice, Rawls once noted that "social and economic

<sup>83</sup> *Ibid.*, p.211.

<sup>84</sup> Constitutional Court of Republic of Indonesia (d), "Decision Number: 34/PUU-IX/2011", p. 44.

<sup>85</sup> Constitutional Court of Republic of Indonesia (e), "Decision Number: 35/PUU-X/2012", p. 169.

<sup>86</sup> *Ibid.*, p. 178.

<sup>87</sup> John Rawls, *Theory of Justice*, revised ed., (Cambridge: Harvard University Press, 1999), p.15.

<sup>88</sup> Jean Jacques Rosseau, *The Social Contract, a Discourse on the Origin of Equality, and a Discourse of Political Economy*, (Stilwell: Digireads.com Publishing, 2005), p.81.

<sup>89</sup> *Ibid.*, p.82.



inequalities are to be arranged so that they are both (a) reasonably expected to everyone's advantage and (b) attached to positions and offices open to all." It has an institutional relation with the first statement that in social and economic life, inequalities exist. Thus, to obtain justice, inequalities should be addressed.<sup>90</sup>

Franz Magnis-Suseno delivered a contextual view in which conflict between freedom and equality occurred.<sup>91</sup> In this point, Magnis-Suseno stated that absolute liberty would bring about inequality. It is obviously clear to supply a response on why liberalism causes economic gap among the social classes. However, if equality was fully forced, then liberty would consequently disappear because, especially in social and economic circumstances, individuals are born in inequality. In this way, the state should intervene in the natural aspect of people with regard to their distinct original position with each other.

In the pluralistic Indonesian society in which imbalanced wealth distributions take place, an important detail to keep in mind is that freedom and equality should be in a balanced system to not only maintain the constitutionality of laws produced by lawmakers, but also to minimize the drawbacks of economic inequality related to further social conflicts. In other words, the fulfillment of everyone's rights should be considered with respect to others' rights and addressed to equality enable to ensure proper wealth distribution.

The fourth function of the Constitutional Court—that is, as a protector of human rights—means that the Court should protect citizens' economic rights. The Indonesian Constitutional Court should protect civil and political rights as well, as a set of human rights in a wider sense. As determined by Pan Mohamad Faiz, the Constitutional Court has contributed to the protection of human rights significantly.<sup>92</sup>

Nevertheless, the Court should also think of its second function as a guardian of democracy. As elaborated above, democracy has two bedrocks: liberty and equality. Thus, the Court must focus on both ideas. However, in Indonesia, due to economic gaps between the poor and rich social groups, the Court should prioritize the embodiment of equality instead of the institutionalization of liberty to prevent the "overuse" of citizens' rights, which brings about inequality among citizens.

Finally, the Constitutional Court should pay attention to those bedrocks to give birth to a good economic democracy. The involvement of the two fundamentals of democracy would catalyze the integrative thought of democracy into the Court's *ratio decidendi* by which horizontal conflict could be prevented. This approach helps achieve general welfare as idealized by the Indonesian people.

## V. CONCLUSION

On the basis of the above discussion, I would like to provide the following three conclusions:

1. The discussion on ideology-making began in preparation for Indonesia's independence. This session was held by an investigating committee whose task was to explore *filosofische grondslag* on which Indonesia stands, established by

<sup>90</sup> Rawls, *op. cit.*, p.53.

<sup>91</sup> Franz. Magnis-Suseno, *Etika Politik: Prinsip-prinsip Moral Kenegaraan Modern*, 7<sup>th</sup> ed., (Jakarta: PT Gramedia Pustaka Utama, 2003), p.131.

<sup>92</sup> Pan Mohamad Faiz, "The Protection of Civil and Political Rights by the Constitutional Court of Indonesia". *Indonesia Law Review*, Volume 6 Number 2, May-August 2016, p.176.

the Japanese military administration. In the discussion, Soepomo, Mohammad Yamin, and Soekarno gave their speeches in front of the committee members.

In the discussion, most members, whether they were integral state supporters or not, ignored the urgency of adding the recognition of human rights to the 1945 Constitution. The absence of debate regarding human rights opened a large boulevard to construct the Indonesian ideology, *Pancasila*, regarding its fifth value, social justice.

2. The 1945 Constitution of the Republic of Indonesia is an economic constitution, as it contains some substances regarding constitutional economic policy, economic rights, property rights, public finance, and the Central Bank. All spheres determined by the constitution aim to achieve Indonesia's national desire: to promote the general welfare.

The spirit of economic democracy is present in the 1945 Constitution. Like political economy, the economic democracy stands upon two fundamentals: liberty and equality. The former attributes human rights to citizens, and the latter authorizes the government to intervene in the economic sphere to establish equality and institutionalize social justice. Both fundamentals should be internalized into all aspects of national economic life to maintain the balance of the Indonesian national economy.

3. According to the previously mentioned explanation, the Constitutional Court has made judgments regarding the Indonesian national economy. On this point, the Court has taken the social justice aspect into account as constructed in the *ratio decidendi*.

Given that the Constitutional Court serves as a guardian of democracy, in this context, it should consider the application of two contents in economic democracy: liberty and equality. It can be said that if the Court involved only the first content in its judges' arguments in decision-making, then only partial democracy is implemented in Indonesia. However, due to the Indonesian economic democracy mentioned in the 1945 Constitution, the Constitutional Court has confirmed that equality is more important than freedom. The equality in economic circumstances here is in line with the notion of collectivism.

Therefore, the Court should proportionally apply both concepts to institutionalize the fully democratic state of the Republic of Indonesia. In the long run, all constitutional disputes can be canalized into a credible constitutional tribunal to prevent a complicated horizontal conflict in which some social classes become involved. This idea means that the Constitutional Court's role is an integral part in institutionalizing general welfare for all people.



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