

## NEOLIBERALISM-CAPITALISM IDEOLOGY IN ECONOMIC LAW FOLLOWING THE AMENDMENT TO REPUBLIC OF INDONESIA'S STATE CONSTITUTION OF 1945

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### Abstract

The objective of research is to analyze the effect of neoliberalism-capitalism in economic law following the amendment to the 1945 Constitution. This study was a normative law research with statute and conceptual approaches. The data used was secondary data with deductive analysis. The result of research showed that the implication of the amendment to Article of 33 of 1945 Constitution is the inception of liberal capitalistic law. It can be seen from, among others, some law prosecuted in Constitution Court and even revoked totally by Constitution Court as they are considered as liberal capitalistic and in contradiction with Article 33 of 1945 Constitution. The Laws are, among others, Law No.7 of 2004 about Water Resource and Law No.17 of 2012 about Cooperatives.

**Keywords:** Neoliberalism-Capitalism, Economic Law, Republic of Indonesia's 1945 Constitution

### INTRODUCTION

The amendment to 1945 Constitution is the beginning of constitution crisis, in which amendment was conducted without ideological consistency. The constitution is split contradictorily between Pancasila and neoliberalism capitalism ideologies. The amended constitution brings liberal capitalistic spirit leading to the overridden Pancasila, while liberalism-capitalism is maintained and left to develop sustainably. People sovereignty is replaced with market sovereignty.

Public collective interest is overridden by the demand for human rights ala western thought prioritizing individual interest. Just and civilized humanity as an obligation to respect others' human rights in living within society is overturned by individual's demand against others or public to respect the individual's human right. People's social right to get social welfare from the state overturned by the people's obligation to deal with their social welfare themselves through business mechanism; consequently, social welfare becomes a commodity.<sup>5</sup>

It is believed that amendment to Article 33 of RI's 1945 Constitution has provided an ambiguous constitutional foundation. This ambiguity can be seen from the contradiction between clauses in Article 33 of 1945 Constitution, in which clause (1) builds on kinship principle, while clause (4) emphasizes more on liberal-capitalistic principle, as indicated with the presence of competition. The appearance of (neo) liberalism-capitalism ideas particularly in Article 33 clauses (4) and (5) leads the state's role in economic activity to be more

marginalized. It represents the shift from collectivism mindset to capitalization, individualization, liberalization, and even new individualism.<sup>6</sup>

It is, by Daniel Dhakidae, called a shift from state decision to individual decision supported with free market. Justice as decision changes into justice in game and gimmick governed by the invisible hand of the market. As a result, the gap between small economic oligarchic and political groups will be wider. This fight will be more imbalanced when the oligarchic group enters into the sector they have never attempted to enter into, political, and democratic sectors, and using game and gimmicks, democracy becomes a very profitable part of its game.<sup>7</sup>

Consequently, in such process, there is also a shift in the meaning or definition of words welfare or welfare state<sup>8</sup>. Concepts of welfare and welfare state emphasizing on the state's responsibility for giving aid to the people, including social health, education, poverty aids, and etc, shifting to the direction of people's obligation and responsibility. It is called workfare to substitute for the concept of welfare, in which the role of state begins to be questioned, whether or not the state should be responsible for the people who can help themselves.<sup>9</sup>

As aforementioned, there is inconclusiveness in the process of amending Article 33 of 1945 Constitution bringing an implication to a number of problems. The material included into Article 33 of 1945 Constitution is not clear cut and less operational, thereby will always generates varying interpretations and doubt in policy makers.<sup>10</sup> The spirit of Article 33 of 1945 Constitution has not understood correctly entirely in each legislating process. Parliament itself often misunderstands the basic spirit of Article 33 of 1945 Constitution.<sup>11</sup>

The appearance of varying interpretations and doubt leads to the birth of Law in national economic scope tending to adhere to liberal capitalistic ideology and be in contradiction with the spirit of Article 33 of 1945 Constitution. In its development, for the economic policy as included into Article 33 of 1945 Constitution to be applied and its substance to be imposed in order to bind the policy's stakeholders, it should be included in to the law. It is as governed in Article 33 clause (5) of RI's 1945 Constitution governing that: further convention on this Article implementation is governed in the law.

Considering the formulation of Article 33 clause (5) of RI's 1945 Constitution, all provisions contained in Article 33 of RI's 1945 Constitution contains constitutional policies concerning national economic, the operational detail of which still needs more concrete elaboration and is made the guidelines binding the public legally. It means that, DPR (Legislative Assembly) along with President (Government) still needs to elaborate constitutional policy in national economic sector in the form of law as legislative product. The amendment to Article 33 of RI's 1945 Constitution, in fact, has an implication to economic law with liberal-capitalistic ideology compared with Pancasila ideology.

## **PROBLEM STATEMENT**

Considering the explanation above, the problems to be studied is how is the effect of neoliberalism-capitalism ideology on economic law, following the amendment to 1945 Constitution?

## METHOD

The type of research used was a normative law research. A normative law research is the one studying in-depth the legal problem from legal science perspective in relation to the legal norms created<sup>12</sup> using state approach and conceptual approaches. The data used was secondary data with deductive data analysis.

## DISCUSSION

### 1. Neoliberalism-Capitalism Ideology

The term ideology is the one often used in social sciences. It is in line with David McLellan stating that ideology is the most exclusive concept in the whole of the social sciences.<sup>13</sup> Oxford Dictionary defines ideology as a system of ideas or a way of thinking that form the basis for some political, economic, or constitutional theory that justifies actions and may be maintained irrespective of events and costs.<sup>14</sup> The ideology affecting economic system in the world is neoliberalism-capitalism ideology.

Neoliberalism ideology is the expansion of classical liberalism one. Basically, neo-liberalism does not shift from liberalism taught by Adam Smith in his book entitled *The Wealth of Nation* in 1776. However, in 1930s, economic depression occurs due to a prolonged crisis befalling capitalism in early 19<sup>th</sup> century. As a result, liberalism was sunk and a shift occurs in the size of government's role since Roosevelt's New Deal policy in 1935.<sup>15</sup>

Neoliberalism is an economic political though unified by a big idea, restoring the trust in market as the most efficient instrument in resource allocation. Neoliberal proponents believe that market sovereignty is not only efficient in governing economic relation, but can also be extended to political, governance, and other social relation. The thought is composed of various advanced disciplines such as neo-classical economist, bureaucratic reformist, and libertarian political theory.<sup>16</sup>

Neoliberalism, as packaged by ordoliberalism, is an economic system building on three principles: (1) the main objective of neoliberal economy is to develop individual freedom to compete fully freely in the market; (2) the recognition of personal ownership over production factors; and (3) the establishment of market price is not natural, but a result of market disciplining conducted by the state through publishing the law. Considering the three principles, the role of state in neoliberalism is limited only to be the organizer or the guard of market mechanism functioning.

Meanwhile, capitalism is a part of liberalism, liberalism in economic sector. Philosophically, capitalism is defined as a business activity using capital including production machines and tools in private hands to provide profit. The ownership of capital goods including production machines and tools is believed to be main element in addition to labor that will drive a state's economic wheel.<sup>17</sup>

Capitalism system is born and develops along with personal concept in which personal concept is personal proprietary constituting production tools used to cultivate wealth. Arief Budiman

stated that before the appearance and the strengthened capitalism, personal proprietary is used not as wealth production tool. If it is used to be wealth production tool, it will function to fulfill life needs only, rather than to multiply wealth. The concept of personal proprietary developing today, in which the proprietary is used as a production tool to multiply wealth, is a new one born from an elaborate and long historical process. The concept seems to be developed and born along with the birth and development of capitalism.<sup>18</sup>

In capitalism concept, personal proprietary creates a space for individual to be free of the state. Personal proprietary limits the government's moving space. Personal proprietary underlies any activity free of state's intervention replete with violence. Personal proprietary is the area in which the seeds of freedom is maintained, and from which an individual's independency and intellectual advance and material stem. Even in this definition, personal proprietary is defined as the basic requirement to individual development.<sup>19</sup>

## **2. Neoliberalism-Capitalism Ideology in Economic Law following the Amendment to 1945 Constitution**

As time goes by, it can be seen that legal policy and politics of the development of economic law are often not harmonious with each other, in contradiction with Article 33 of 1945 Law and Pancasila ideology. Empirically, many economic laws and regulations, the content or substance of which is still based on neoliberalism and capitalism ideology values emphasizing on individual and capital, which is in contradiction with and disharmonious with Pancasila ideology emphasizing on collectivism and kinship.

It occurs due to constitution crisis; constitution crisis itself occurs because the state's supreme leadership (government and Legislative Assembly) leave the rebellion and deviation of nationality and populace schools of thought still remained in the amended constitution. As a result, many important laws in economic sector should be revoked by Constitution Court, in either some or all articles of it.

It can be seen from several economic laws prosecuted in Constitution Court as they are considered as in contradiction with Article 33 of 1945 Law. Even the Constitution Court repeatedly revoke the enactment of a number of economic laws as they are liberal capitalistic and incompatible to Article 33 of Constitution. The Laws revoked are Water Resource and Cooperatives Laws.

The characteristics of neoliberalism-capitalism ideology in Economic Law (Act) following the amendment to Article 33 of RI's 1945 Constitution will be elaborated as follows:

### **1. Republic of Indonesia's Law Number 19 of 2003 about State-Owned Enterprise (BUMN)**

Historically, the original growth of BUMN in Indonesia started with the nationalization of Dutch-owned companies conducted by Old Order government under President Soekarno's leadership. At that time, to nationalize Dutch-Owned Companies, the government issued Law Number 86 of 1958.

Through the nationalization, all Dutch-Owned Companies operating in Indonesia were taken over and managed by Indonesian government. Number and type of Dutch-owned companies nationalized are very varying and diverse and encompass nearly entire economic life. The nationalization is followed with compensation specified by the committee established based on Government Regulation Number 9 of 1959.<sup>20</sup>

State-Owned Company is an enterprise, entire or most capital of which belongs to the state through direct investment coming from the separated state wealth. The purpose and objective State-Owned Company establishment as governed in Article 2 clause (1) of Law Number 19 of 2003 about State-Owned Enterprise (thereafter called Law No. 19.of 2003) is as follows:

- a. Contributing to national economic development in general and state revenue in particular;
- b. Profit oriented;
- c. Organizing public utilities such as providing high quality and adequate product and/or service to fulfill the people's life needs.
- d. Pioneering business activities that have not been conducted in private and cooperative sector;
- e. Contributing actively to facilitating and helping low-economic class business employer, cooperative, and community.

Although in consideration section, Law No.19 of 2003 builds on economic democracy, its body or articles are replete with neoliberalism-capitalism ideology. It is indicated with the presence of Article concerning the privatization of State-Owned Enterprise. It can be seen from the formulation of Article concerning the privatization of State-Owned Enterprises as governed in Articles 74 to Articles 86 of Law No.19/2003.

Privatization, according to Peacock, is a transfer of industrial ownership from government to private sector having implication to the domination of stock ownership by the private. In other words, privatization is a change of ownership of state company into private one.<sup>21</sup> Privatization itself, according to the formulation of Article 1 number 12 of Law No.19/2003, is defined as the selling of incorporation's share (stock), either some or entire of it, to others in the attempt of improving company performance and value, increasing the benefit to state and community, and expanding the stock ownership by community (public). Considering the formulation, the objectives of privatization are:

- a. To be an instrument to increase state/government's income;
- b. To distribute the share of asset ownership in a state;
- c. Expectedly to have implication to the improvement of income and people welfare distribution;
- d. To reduce problem resulting from payment;
- e. To cope with poor performance in industry in the state national company.

Article 74 clause (1) of Law No,19/2003 governed the purpose of privatization: firstly, to expand public (community) ownership over limited incorporation (persero); secondly, to improve company's efficiency and productivity; thirdly, to create good/strong financial

structure and management; fourthly, to create healthy and competitive industrial structure; fourthly, to create competitive, and global oriented limited incorporation; and sixthly, to grow business climate, macroeconomics and market capacity. Meanwhile, the objectives of privatization as governed in Article 74 clause (2) of Law No.19/2003 is to improve company performance and added value and to improve public participation in the ownership of incorporation share.

The regulation as mentioned in Article 74 clause (1) of Law No. 19/2003 concerning the purpose of privatization leads to (neo) liberalism-capitalism ideology prioritizing the principles of efficiency, competition, and market. Even firmly, Revrisond Baswir states that privatization is the direct derivation of neoliberalism, a school of thought requiring the limitation of state's role and to improve the state's market in organizing economy. Privatization is the sibling of subsidy elimination, financial liberalization, and trading liberalization.<sup>23</sup>

Neoliberal economic perspective driven by Chicago school of thought<sup>24</sup> recommends the review on the state's intervention with economic wheel. All interventions tending to harm the market dynamic must be revoked. The state's role in economic life should be minimized. The state's main duty is to keep the market working optimally. Neoliberal school of thought highly believes that market freedom is an important requirement to the growth of capitalism. In the frame, state's policy should be directed to protect market freedom. Considering the argument, the state designs and introduces a number of policies, such as privatization.<sup>25</sup>

## **2. Law Number 7 of 2004 about Water Source**

Law Number 7 of 2004 about Water Resource (thereafter called Law No.7/2004) is the law substituting for Law Number 11 of 1974 about Irrigation. General explanation of Law No.7/2004 explains that water resource is God's gift beneficial to bring wellbeing into reality for all Indonesian people in all sectors. Thus, water resource should be mastered by the state and used as much as possible for people's prosperity justly. It is in line with the Article 33 clause (3) of 1945 Constitution.

In relation to the mastery of water resource by the state, the state guarantees each of individuals' right to get water to fulfill their daily basic needs and to govern the right to water. The state's mastery of water source is held by government and/or local government by keeping recognizing and respecting the customary law community units along with their traditional rights as the ulayat right of local customary law community and the similar right in lifetime and corresponding to community development and NKRI (Republic of Indonesia Unitary State) principle.

UU (Law) No. 7/2004 is one of Laws revoked entirely by Constitution Court. UU No. 7/2004 is one of laws revoked entirely by Constitution Court. UU No. 7/2004 is revoked by Constitution Court through Verdict Number 85/PUU-XI/2013 about the Judicial Review of Law Number 7 of 2004 about Water Resource (thereafter called Verdict No. 85/PUU-XI/2013) as it is in contradiction with the 1945 Constitution.

Law No. 7/2004 is the one considered as having (neo) liberal-capitalism. Although Article 6 clause (1) of Law No.7/2004 mentions that water source mastered by the state and used for people's prosperity as much as possible. The provision, according to Absori, despite building on Article 33 clause (3) of 1945 Constitution, the interpretation on Article 6 clause (1) is varying, thereby is multi-interpretative in nature.<sup>26</sup>

Neoliberal ideology is indicated, for example, in Article 9 clause (1) of Law No.7/2004 governing that the right to use water can be given to individual or corporate with government or local government's permission, according to their authority. The phrase implies the meaning of privatization in water source management. Capitalism in Law No.7/2004 can be seen from the regulation of Article 40 clause (4) governing the participation of cooperative, private-owned enterprise or community group. Aidul Fitriadi Azhari, the provision of Article 40 clause (4) of Law No. 7/2004 is not in line with Articles 27 and 33 of clause (3) of 1945 Constitution, because the norm involving corporation or other institutions than BUMN and/or BUMD (Local Government-owned enterprise) indicates a paradigm that water source serve only as economic commodity, the management of which is transferred to the more profit-oriented private.<sup>27</sup>

To Article Article 9 clause (1) of Law No. 7/2004, Constitution Court argues that: the concept of the right to use water in Water Resource Law should be interpreted as the derivative of the right to living guaranteed by the 1945 Constitution. Therefore, the utilization of water beyond the right to use water, in this case the right to use water for business purpose should get the government's permit, the publication of which should be based on a pattern arranged by involving public participation as widely as possible. Therefore, the right to use water for business purpose cannot be intended to be the giving of right to master water source, river, lake, or swamp. The right to use water is an instrument in licensing system used by government to limit water volume that can be obtained or cultivated by those deserving in this context, the permit (license) should be controlling instrument, rather than mastering instrument. Thus, the private may not master certain amount or allocation corresponding to the allocation specified in the license given by the state tightly.

### **3. Law Number 25 of 2007 about Investment**

Law Number 25 of 2007 about Investment (thereafter called Law No.25/2007) also called Investment Law.<sup>28</sup> Constitutional foundation of the birth of Law Number 25 of 2007 about Investment (thereafter called Law No.25/2007) is the Article 33 of RI's 1945 Constitution.

Article 1 of Law No. 25/2007 defined investment as an activity of investing to business operation in Republic of Indonesia territory conducted by foreign investor, either entirely or through joining domestic investors.

Investment Law contains neoliberalism ideology; it can be seen from the principles underlying Law No. 25/2007, equal treatment and no discrimination regardless the origin state. The principle is then elaborated into basic policy of investment as included in the formulation of Article 4 clause (2) letter a of Law No.25/2007 formulating that in making basic policy as mentioned in clause (1), the Government treats both domestic and foreign investors equally,

by keeping taking the national interest into account. Article 4 clause (2) letter a is then elaborated further in Article 6 of Law No.25/2007 mentioning that government treats all investors coming from any states making investment in Indonesia corresponding to the provision of legislation. The treatment intended is not applied to the investors coming from a state with privilege based on an agreement with Indonesia.

The formulation of Article 4 clause (2) letter a jo Article 6 of Law No.25/2007 is in line with The Neoliberal Washington Consensus.<sup>29</sup> One of formulas in consensus mentions that foreign investment should not be discriminated. Foreign investment should be treated just like the domestic investment is treated, because both of them is needed to encourage economy and to open job opportunity.

#### **6. Law Number 17 of 2012 about Cooperatives;**

The birth of Law Number 17 of 2012 about Cooperatives (thereafter called Law No. 17 of 2012) based on Article 33 clause (1) and clause (4) RI's 1945 State. Law No.17 of 2012 is born to replace Law Number 25 of 1992 about Cooperatives.

In consideration section, Law No.17/2012 mentions that: National economic development aims to bring Indonesian political and economic sovereignty through economic resource management in development climate and cooperative empowerment playing a strategic role in national economic order based on kinship and economic principle in the attempt of creating advanced, just, and prosperous community based on Pancasila and RI's 1945 Constitution.

Law No. 17/2012 is one of Law revoked entirely by Constitution Court. Constitution Court's Verdict No. 28/PUU-XI/2013 about the Judicial Review on Law No.17 of 2012 about Cooperatives (thereafter called MK's Verdict No. 28/PUU-XI/2013) states that Law No.17/2012 is in contradiction with RI's 1945 Constitution and Law No.17/2012 is considered as having no binding legal power.

One reason of the revocation of Law No.17/2012 is because this law has capitalism ideology and is in contradiction with the basic idea of cooperatives. It can be seen from the following reason: that philosophical foundation of Law No.17/2012 is the capitalism, the main characteristic of which is the prioritization of individualism capital. It is in contradiction with the main characteristic of cooperatives prioritizing people association and collectivism.<sup>30</sup> The characteristics of capitalism ideology in Law No. 17/2012 can be seen from the followings:

- a. Law No. 17/2012 positions capital to be determinant. It is as governed in Article 66 to Article 77 of Law No.17/2012.
- b. Law No. 17/2012 is profit oriented. It can be seen from the formulation of Article 78 clause (2) of Law No.17/2012 formulating that cooperative is prohibited from distributing to the members the business profit surplus coming from transaction with non-members. It indicates that Law No. 17/2012 is profit oriented. Thus, the members of cooperatives cannot enjoy the profit of cooperative business they build so that the benefit of cooperatives is enjoyed directly by non-members of cooperatives.

- c. Law No. 17/2012 builds on individual interest. It is as formulated in Article 1 number (1) of Law No. 17/2012 mentioning that cooperative is a corporation established by individual or cooperative corporation, with the separation of its members' wealth as the capital to run business, accommodating collective aspiration and needs in economic, social, and cultural fields corresponding to the value and principle of cooperative. The formulation is in contradiction with the self-esteem of cooperative, as the joint venture based on kinship principle established with collectivism thought.
- d. Law No. 17/2012 has made others the competitor. It is as governed in Article 55 clause (1) of Law No. 17/2012 mentioning that the administrators are selected from individuals, as either members or non members. As such, Law No. 17/2012 has made others, in this case non-members, the competitor to the members to be the administrators of cooperatives. Meanwhile, in cooperative value, others should be made brothers/sisters.<sup>31</sup>

## CONCLUSION

The amendment to Article 33 of RI's 1945 Constitution has provided an ambiguous constitutional foundation. This ambiguity can be seen from the contradiction between clauses in the Article 33 of RI's 1945 Constitution. Clause (1) builds on kinship principle, while clause (4) emphasizes more on liberal-capitalistic principle, as indicated with the presence of competition. The appearance of (neo) liberalism-capitalism ideas particularly in Article 33 clauses (4) and (5) leads the state's role in economic activity to be more marginalized. It represents the shift from collectivism mindset to capitalization, individualization, liberalization, and even new individualism. The implication of the amendment to Article of 33 of 1945 Constitution is the inception of liberal capitalistic law. It can be seen from, among others, some law prosecuted in Constitution Court and even revoked totally by Constitution Court as they are considered as liberal capitalistic and in contradiction with Article 33 of 1945 Constitution. The Laws are, among others, Law No.7 of 2004 about Water Resource and Law No.17 of 2012 about Cooperatives.

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